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13 FOR THE EASTERN DISTRICT OF CALIFORNIA
14 SACRAMENTO DIVISION
15

16 PEOPLE OF THE STATE OF CALIFORNIA,)
ex rel. BILL LOCKYER, Attorney General,)

17 Plaintiff,)

18 v.)

19 UNITED STATES DEPARTMENT OF)
20 AGRICULTURE, *et al.*,)

21 Federal Defendants,)

22 and)

23 TULOLUMNE COUNTY ALLIANCE FOR)
24 RESOURCES & ENVIRONMENT, *et al.*,)

25 Defendant- Intervenors,)

26 and)

27 ///

28 ///

No. CIV-S-05-0211 MCE/GGH

**FEDERAL DEFENDANTS'
MEMORANDUM IN SUPPORT OF
CROSS-MOTION FOR
SUMMARY JUDGMENT**

1 CALIFORNIA SKI INDUSTRY)
ASSOCIATION,)
2)
3 Defendant- Intervenor,)
and)
4 QUINCY LIBRARY GROUP, *et al.*,)
5)
6 Defendant- Intervenors,)
and)
7 CALIFORNIA CATTLEMEN’S)
ASSOCIATION,)
8)
9 Defendant- Intervenor.)

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Fed. Defs.' Exhibit A

Memorandum of Understanding among United States Department of Agriculture, Forest Service Pacific Southwest Region and Research Station, U.S. Department of the Interior Fish and Wildlife Service, and State of California Resources Agency

ACRONYMS AND ABBREVIATIONS

| | | |
|----|-------|---|
| 1 | | |
| 2 | APA | Administrative Procedure Act |
| 3 | BA/BE | Biological Assessment/Biological Evaluation |
| 4 | dbh | Diameter at Breast Height |
| 5 | DFPZ | Defensible Fuel Profile Zone |
| 6 | EA | Environmental Assessment |
| 7 | EIS | Environmental Impact Statement |
| 8 | EPA | United States Environmental Protection Agency |
| 9 | FWS | United States Fish and Wildlife Service |
| 10 | FSEIS | Final Supplemental Environmental Impact Statement |
| 11 | HFQLG | Herger-Feinstein Quincy Library Group Forest Recovery Act |
| 12 | MOU | Memorandum of Understanding |
| 13 | MRR | Management Review and Recommendations |
| 14 | NEPA | National Environmental Policy Act of 1969 |
| 15 | NFMA | National Forest Management Act |
| 16 | NFS | National Forest System |
| 17 | NRDC | Natural Resources Defense Council, Inc. |
| 18 | PAC | Protected Activity Center |
| 19 | ROD | Record of Decision |
| 20 | SCR | Science Consistency Review |
| 21 | SEIS | Supplemental Environmental Impact Statement |
| 22 | SNFPA | Sierra Nevada Forest Plan Amendment |
| 23 | SOHA | Spotted Owl Habitat Areas |

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1 **PREFACE REGARDING ADMINISTRATIVE RECORD CITATIONS**

2 The following citation conventions are used when referring to administrative record materials:

3 1. Citations to the eight-volume administrative record for the 2004 and 2001 Sierra Nevada
4 Framework are referenced as “SNFPA xxxx,” where “xxxx” is the bates-stamped number at the
5 bottom of the page in that record.

6 a. The final environmental impact statement (“EIS”) for the 2001 Sierra Nevada
7 Forest Plan Amendment (“2001 Framework”) is on a compact disc (“CD”)
8 found at SNFPA 957, and is referenced by volume, chapter, part, and page
9 (e.g., 2001 EIS, Vol. 3, Ch. 3, Part 4.4 at 79).

10 b. The EIS for the Herger-Feinstein Quincy Library Group Recovery Act Pilot
11 Project is on a CD found at SNFPA 986, and is referenced by volume and
12 page (e.g., HFQLG EIS Glossary -12).

13 2. The eight volume SNFPA record also contains material on CDs, which were originally found
14 at SNFPA 4338-4360. Following the original lodging of these materials, some errors were
15 discovered in the numbering and organization of the material on some of these CDs. Amended
16 copies of these CDs were provided to the parties and are also being lodged with the Court. The
17 material on these amended CDs is referenced by the bates-stamped number at the bottom of the
18 appropriate page, typically: “SEIS_aa_xxxxxx,” where “aa” is the CD volume, and “xxxxxx” is the
19 page number.

20 3. Citations to the ten-volume administrative record for the Basin Project Decision, which is
21 challenged in Sierra Nevada Forest Protection Campaign v. Rey, No. CIV-S-05-205 MCE GGH, are
22 referenced as “BASIN xxxx,” where “xxxx” is the bates-stamped number at the bottom of the page
23 in that record.

24 4. Also included in the ten-volume administrative record for the Basin Project Decision is a CD
25 found at BASIN 2917, which contains the forest plan (also known as the land and resources
26 management plan (“LRMP”)) for the Plumas National Forest. Citations to that document are
27
28

1 referenced as “BASIN 2917 (LRMP at x-xx)”, where “x-xx” represents the chapter and page number
2 of the forest plan.

3 5. Several additional volumes of administrative record materials are also associated with three
4 of the cases. Those materials are referenced as follows:

5 a. One additional binder is associated with California ex rel. Lockyer v. U.S.
6 Department of Agriculture, No. CIV-S-05-211 MCE GGH. Any pages cited
7 in that volume are referenced as “CA xxxx,” where “xxxx” is the bates-
8 stamped number at the bottom of the page in that record.

9 b. Two additional binders are associated with California Forestry Association
10 v. Bosworth, No. CIV-S-05-905 MCE GGH. Any pages cited in those
11 volumes are referenced as “CFA xxxx,” where “xxxx” is the bates-stamped
12 number at the bottom of the page in that record.

13 c. One additional binder is associated with Pacific Rivers Council v. U.S. Forest
14 Service, No. CIV-S-05-953 MCE GGH. Any pages cited in that volume are
15 referenced as “PRC xxxx,” where “xxxx” is the bates-stamped number at the
16 bottom of the page in that record.

17 5. An index to the materials identified in paragraphs 3 and 4 above is included at the
18 beginning of the first volume of each set of materials. An index to the materials in paragraphs 1 and
19 2 was originally included at the front of the first volume of the eight-volume SNFPA record set.
20 After errors were discovered in the numbering on the CDs mentioned above, an amended index was
21 prepared and provided to the parties. That amended index is also being lodged with the Court.

1 **INTRODUCTION**

2 This is one of four related cases challenging an amendment by the United States Forest
3 Service to the forest plans for eleven national forests in the Sierra Nevada region. The challenged
4 2004 Sierra Nevada forest plan amendment (“SNFPA”), commonly known as the 2004 Framework,
5 replaces a prior 2001 amendment, and provides a new balance of natural resource uses. The 2004
6 Framework remains protective of wildlife, but emphasizes a more effective reduction of hazardous
7 fuels, in order to decrease the risk of stand-replacing wildfire. See SNFPA 2995. As these four cases
8 demonstrate, the agency faces a difficult task balancing conflicting resource uses of National Forest
9 System (“NFS”) lands when adopting a new plan amendment. The 2004 Framework is a reasoned
10 choice that is well within the agency’s discretion to manage for multiple use of surface resources.
11 See Seattle Audubon Soc’y v. Moseley, 80 F.3d 1401, 1404-05 (9th Cir. 1996) (upholding regional
12 plan amendment in part because of the “inherent flexibility of the NFMA”); Perkins v. Bergland, 608
13 F.2d 803, 806 (9th Cir. 1979) (the mandate to manage for multiple use ‘breathes discretion at every
14 pore.’”) (citation omitted)).

15 In this case, the California Attorney General (“Plaintiff”) alleges that the 2004 Framework,
16 violates the Administrative Procedure Act (“APA”) and the National Environmental Policy Act of
17 1969 (“NEPA”). As a threshold matter, Plaintiff has failed to demonstrate standing. While Plaintiff
18 claims to bring this action to remedy damages to the state’s natural resources, it has not submitted
19 any evidence from any of the numerous state agencies with responsibility for managing the state’s
20 natural resources.

21 Even if Plaintiff could demonstrate standing, the administrative record shows that Plaintiff’s
22 claims lack merit. First, Plaintiff’s claim under the APA that the Forest Service did not provide a
23 reasoned basis for changing prior management direction is unsupported. The caselaw makes clear
24 that a change in policy is a “perfectly reasonable basis for an executive agency’s reappraisal of the
25 costs and benefits of its programs and regulations.” Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State
26 Farm Mut. Auto. Ins. Co., 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting
27 in part). The Agency’s decision is supported by its detailed management review and
28 recommendations (“MRR”), which found among other things that the 2001 Framework relied upon

1 a flawed analysis of effects to owls and did not fully implement the pilot project required by the
2 Herger-Feinstein Quincy Library Group Forest Recovery Act, Pub. L. No. 105-277, 112 Stat. 2681-
3 231 (codified as 16 U.S.C. § 2104 note) (1998) (“HFQLG Act”).

4 The 2004 Framework also complies with NEPA. The final supplemental environmental
5 impact statement (“SEIS”) for the 2004 Framework was undertaken in good faith and consists of an
6 adequately objective analysis. The SEIS took a hard look at impacts from timber harvest on old
7 forest species such as the California spotted owl, changes in grazing management, and it adequately
8 disclosed the risk and uncertainty regarding the change in management direction.

9 Finally, the SEIS considered a reasonable range of alternatives and they were adequately
10 analyzed as the record demonstrates. Because the 2004 Framework complies with NEPA and the
11 APA, summary judgment should be granted in favor of Federal Defendants.

12 **FACTUAL BACKGROUND**

13 Together with the Modoc Plateau, the Sierra Nevada includes 11.5 million acres of NFS land
14 and encompasses “dozens of complex ecosystems each with numerous, inter-connected social,
15 economic and ecological components.” SNFPA 1920. In the late 1980s, the Forest Service began
16 developing a comprehensive strategy for managing the various resources and complex systems in this
17 region. This strategy has included the development of two significant forest plan amendments which
18 amended the forest plans for eleven National Forests, supplemented by legislatively mandated forest
19 management direction in the HFQLG Act. The background for this comprehensive approach to
20 managing National Forests in the Sierra is described below.

21 **I. THE 2001 SIERRA NEVADA FOREST PLAN AMENDMENT**

22 In 1995, the Regional Forester for the Pacific Southwest Region of the Forest Service issued
23 a draft EIS on a proposal for comprehensive regional management direction covering the national
24 forests in the Sierra. See SNFPA 229. After extensive public participation and a final EIS, the
25 Regional Forester issued a decision in January 2001 to amend the forest plans for eleven national
26 forests. That decision, the 2001 ROD, adopted management direction related to five major topics:
27 old forest ecosystems; aquatic, riparian, and meadow ecosystems; fire and fuels; noxious weeds; and
28 hardwood ecosystems on the lower westside of the Sierra. See id. at 231-235. Among other things,

1 the 2001 ROD attempted to “balance the treatment of excessive fuels buildups, with the need to
2 conserve key habitats for species at risk associated with old forest ecosystems” Id.

3 **II. MANAGEMENT REVIEW OF THE 2001 FRAMEWORK**

4 After the issuance of the 2001 ROD, the Forest Service received about 200 administrative
5 appeals. The Chief of the Forest Service (“Chief”) affirmed the ROD but directed the Regional
6 Forester to review it in light of several concerns, including increased levels of wildfires, the
7 relationship between the 2001 ROD and national firefighting efforts, and the relationship between
8 the ROD and the Forest Service’s responsibilities under the HFQLG Act. SNFPA 1918.

9 The Regional Forester assembled a management review team (“Team”) which conducted a
10 year-long public review that culminated in the issuance of management recommendations in March
11 2003. SNFPA 1913-2081. The public review included open community meetings, workshops and
12 field trips held with Forest Service employees, interest groups, scientists, other government agencies,
13 journalists and others. Id. The Team concluded that the 2001 ROD’s “cautious approach” to fuels
14 reduction had limited the effectiveness in many areas.^{1/} In response, the Team found that a revised
15 set of vegetation management rules would increase the effective uses of the fuels strategy while still
16 protecting wildlife habitat. SNFPA 1918. The Team also evaluated the owl analysis upon which
17 the 2001 ROD relied and found that a new analysis was warranted. First, the 2001 ROD has
18 inappropriately relied upon the analysis in the HFQLG biological assessment/biological evaluation
19 (“BA/BE”), which “took a worst case approach to estimating effects” on the owl and was
20 unnecessarily conservative. SNFPA 1968. The Team further found that “the assessment of owl home
21 range condition in the 2001 EIS is not consistent with the research findings upon which it is based
22
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26 ^{1/} For example, the Team found that under the 2001 ROD, the dense forest stands that were “key
27 components to sensitive wildlife species habitat and most vulnerable to wildfire loss – will be
28 treated either lightly (ineffectively) or not at all.” SNFPA 1927. This led the Team to conclude
that the “area treatments” necessary for effective reduction of wildfire spread and intensity at the
landscape level would not be conducted in the appropriate place or at the proper intensity under
the 2001 ROD. Id.

1 and may not be representative of the current status of owl habitat.” SNFPA 1951; See also SNFPA
2 1951-52 (citing 2001 EIS, Vol. 3, Ch. 3, Part 4.4 at 79, 83, 92, and 95).^{2/} SNFPA 1924.

3 **III. ADDRESSING ISSUES RAISED IN THE REVIEW OF THE 2001 FRAMEWORK**

4 In response to the Team’s findings, the Regional Forester developed alternative management
5 strategies to the 2001 ROD. A draft SEIS was released for public comment in April 2003. The
6 purpose of the SEIS was to address the management of the same five identified problem areas
7 addressed by the 2001 Framework FEIS: old forest ecosystem and their associated species; aquatic,
8 riparian and meadow ecosystems; fire and fuels management; noxious weeds; and lower westside
9 hardwood ecosystems.” SNFPA 3583. The SEIS analyzed nine alternatives in detail,^{3/} including the
10 no action alternative (S1) (which would continue management under the 2001 ROD), the proposed
11 action (S2), and seven alternatives which had been previously considered in the 2001 EIS
12 (alternatives F2-F8). In addition to describing the alternatives, the SEIS discussed the affected
13 environment and analyzed the potential environmental effects of each alternative on a wide range of
14 resources, including: old forest ecosystems, (SNFPA 3264-3268), forest and vegetation health (id.
15 at 3269-3276), aquatic, riparian and meadow ecosystems (id. at 3277-3284), fire and fuels (id. at
16 3285-3296), wildlife (id. at 3304-3385), socioeconomic effects and effects related to commercial
17 forest products (id. at 3386-3392), and recreation (id. at 3396-3397).

18 The SEIS further contained a comprehensive response to comments addressing concerns
19 raised by interested parties during the comment period, including the U.S. Fish and Wildlife Service
20 (“FWS”), U.S. Environmental Protection Agency (“EPA”), California resources protection agencies,
21
22

23 ^{2/} Numerous practical difficulties in implementing the standards and guidelines for owl
24 protection were also identified. For example, the 2001 Framework’s extensive reliance on
25 canopy cover at the stand level was determined to be another technical difficulty preventing
26 consistent and effective implementation. SNFPA 1947-48; see also SEIS_04_000426. The
Team also found that the 2001 ROD management direction would adversely affect permitted
grazing operations. SNFPA 2006-07.

27 ^{3/} Seven additional alternatives, in addition to the nine alternative considered in detail, were also
28 considered but eliminated from detailed consideration because they were found inconsistent with
the purpose and need of the SEIS. SNFPA 3163-65.

1 and the Science Consistency Review (“SCR”) team.^{4/} SNFPA 3563-3933. For example, the Forest
2 Service responded to specific questions regarding: the National Fire Plan, as raised by EPA (SNFPA
3 3662-63); California spotted owl nesting habitat and Yosemite toad, as raised by the FWS (SNFPA
4 3607-08, 3619 respectively); willow flycatcher population as raised by the California Department
5 of Fish and Game (SNFPA 3619-21); and, water quality as raised by the California Regional Water
6 Quality Control Board (SNFPA 35933595). In addition, the Forest Service responded in detail to
7 those issues identified by the SCR. SNFPA 3503-3524. As a result, discussions with the SCR team
8 improvements were made to the SEIS. Id. at 3503. A final SEIS was released to the public in
9 January 2004. See 69 Fed. Reg. 4512 (Jan. 30, 2004).

10 On January 21, 2004, the Regional Forester issued a decision adopting the proposed action
11 from the SEIS. SNFPA 2987-3061. The 2004 ROD replaces the direction in the 2001 ROD and
12 amends the forest plans for National Forests in the Sierra. SNFPA 2995. The rationale for the
13 decision is that the 2001 Framework “prescribed technical solutions that do not produce needed
14 results, or offered methods we often dare not attempt in the current Sierra Nevada” due to the risk
15 of causing catastrophic wildfires. Id. The 2001 Framework’s standards “cannot reverse the damage,
16 and growing threat, of catastrophic fires quickly enough.” Id. The selected alternative seeks to
17 improve the effectiveness of the 2001 ROD’s fuels strategy while protecting habitat components
18 important to sensitive wildlife species. Id.

19 On November 18, 2004, the Chief affirmed the 2004 ROD with the direction to submit to him
20 within six months further details of the 2004 ROD’s adaptive management strategy. SNFPA 3997-
21 4305. The Regional Forester submitted that further information to the Chief on March 31, 2005. See
22 SNFPA 4319-4332. Pursuant to 36 C.F.R. § 217.7(d)(2) (2000), the Under Secretary for Natural
23

24
25 ^{4/} The SCR Team consisted of eleven scientists convened by the Pacific Southwest Research
26 Station in Davis, California, and included experts in fire and fuels management, forest ecology,
27 and species viability. SNFPA 3503. The SCR Team reviewed the draft SEIS according to a
28 standardized set of criteria to determine whether relevant scientific information had been
considered and accurately interpreted. See SNFPA 3503-04. The final SEIS includes, in an
appendix, the Forest Service’s response to comments raised by the SCR Team. See SNFPA
3504-3524.

1 Resources and Environment, Department of Agriculture, took discretionary review of the Chief’s
2 decision on December 23, 2004 and affirmed the decision on March 21, 2005. SNFPA 4316-4317.

3 **LEGAL BACKGROUND**

4 **I. NATIONAL ENVIRONMENTAL POLICY ACT**

5 In 1970, Congress enacted NEPA, 42 U.S.C. 4321 *et seq.* to establish a consistent process for
6 federal agencies to consider the environmental impacts of proposed major federal actions. Vt.
7 Yankee Nuclear Power v. Natural Resources Def. Council, Inc. (“NRDC”), 435 U.S. 519, 558
8 (1978). That goal is “realized through a set of ‘action-forcing’ procedures that require that agencies
9 take a ‘hard look’ at environmental consequences.” Robertson v. Methow Valley Citizens Council,
10 490 U.S. 332, 350 (1989) (citations omitted). The statute imposes procedural rather than substantive
11 requirements. So long as “the adverse environmental effects of the proposed action are adequately
12 identified and evaluated, the agency is not constrained by NEPA from deciding that other values
13 outweigh the environmental costs.” Id.

14 **II. NATIONAL FOREST MANAGEMENT ACT**

15 The Forest Service’s management of the NFS is governed by NFMA. NFMA directs the
16 Forest Service to develop a land and resource management plan (“LRMP” or “Forest Plan”) for each
17 unit of the system to provide for multiple uses and sustained yield of the various forest resources,
18 including timber and wildlife. See 16 U.S.C. 1604(a), (e); Forest Guardians v. Dombeck, 131 F.3d
19 1309, 1312 (9th Cir. 1997). Forest planning and management occurs at two levels: National Forest
20 and project. Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 729-30 (1998). The Forest Service
21 develops a Forest Plan, which is a broad, long-term programmatic planning document for an entire
22 National Forest. Forest Plans establish goals and objectives for units of the National Forest System
23 and provide standards and guidelines for management of forest resources, ensuring consideration of
24 both economic and environmental factors. 16 U.S.C. 1604(g)(1)-(3); 36 C.F.R. 219.1, 36 C.F.R.
25 219.4(b). Implementation of the Forest Plan occurs through site-specific projects. Each proposed
26 site-specific project may proceed only if it is consistent with the Forest Plan. Inland Empire Public
27 Lands Council v. Forest Service, 88 F.3d 754, 757 (9th Cir. 1996).

1 **STANDARD OF REVIEW**

2 The Ninth Circuit has endorsed the use of motions for summary judgment in reviewing
3 agency decisions under the limitations imposed by the APA. See, e.g., Northwest Motorcycle Assn.
4 v. U.S. Dept. of Agric., 18 F.3d 1468, 1471-72 (9th Cir. 1994) (discussing standard of review under
5 the APA and Fed. R. Civ. P. 56(c)). Pursuant to Rule 56, “[t]he moving party is entitled to summary
6 judgment . . . where, viewing the evidence and the inferences arising therefrom in favor of the
7 nonmovant, there are no genuine issues of material fact in dispute.” Id. at 1472.

8 The court’s role in cases involving agency action, such as this one, “is not to resolve
9 contested fact questions which may exist in the underlying administrative record,” but to determine
10 whether the decision was arbitrary and capricious. Gilbert Equipment Co., Inc. v. Higgins, 709 F.
11 Supp. 1071, 1077 (S.D. Ala. 1989), aff’d, 894 F.2d 412 (11th Cir. 1990); see Occidental Eng’g Co.
12 v. INS, 753 F.2d 766, 769 (9th Cir. 1985); Lead Indus. Ass’n, Inc. v. EPA, 647 F.2d 1130, 1160
13 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980); Krichbaum v. Kelly, 844 F. Supp. 1107, 1110 (W.D.
14 Va. 1994). In such a case, the burden is always upon the party challenging the agency action to prove
15 a violation of law, even when the agency defendants are seeking judgment in their favor. See Seattle
16 Audubon Soc’y v. Lyons, 871 F. Supp. 1291, 1308 (“The burden of showing illegality remains on
17 [plaintiffs]”), aff’d sub nom. Moseley, 80 F.3d 1401 (9th Cir. 1996).

18 Because NEPA does not create a private right of action, the standard of review is provided
19 by the APA. See Marsh v. ONRC, 490 U.S. 360, 377 n.23 (1989); Ecology Ctr., Inc. v. U.S. Forest
20 Serv., 192 F.3d 922 (9th Cir. 1999). The APA imposes a narrow and highly deferential standard of
21 review limited to determining whether the agency acted in a manner that was “arbitrary, capricious,
22 an abuse of discretion or otherwise not in accordance with law.” 5 U.S.C. §706(2)(A); see Citizens
23 to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971); Friends of the Earth v. Hintz, 800
24 F.2d 822, 830-31 (9th Cir. 1986). This standard is a narrow one whereby “[t]he court is not
25 empowered to substitute its judgment for that of the agency.” Overton Park, 401 U.S. at 416. The
26 Court is not to determine whether it would make an administrative decision differently; instead, it
27 is to determine whether “the decision was based on a consideration of the relevant factors and
28 whether there has been a clear error of judgment.” Id. Furthermore, the APA directs the court to

1 “review the whole record or those parts of it cited by a party.” 5 U.S.C. § 706. Thus, the court’s
2 review is limited to the administrative record before the agency at the time of its decision. Florida
3 Power & Light Co. v. Lorion, 470 U.S. 729, 743 (1985); Camp v. Pitts, 411 U.S. 138, 143 (1973).^{5/}

4 ARGUMENT^{6/}

5 **I. PLAINTIFF HAS FAILED TO DEMONSTRATE STANDING**

6 A critical threshold inquiry in every federal case is whether the plaintiff has stated a “case or
7 controversy” between himself and the defendant within the meaning of Article III of the United
8 States Constitution. Warth v. Seldin, 422 U.S. 490, 498 (1975). A core component of the case-or-
9 controversy inquiry is the doctrine of standing. Allen v. Wright, 468 U.S. 737, 751 (1984). To
10 establish standing, the plaintiff must demonstrate, at an “irreducible constitutional minimum,” that:
11 (1) he or she has suffered a “concrete and particularized” injury which is “actual or imminent” rather
12 than “conjectural or hypothetical”; (2) the injury was caused by or is “fairly . . . trace[able] to” the
13 action of the defendant; and (3) a favorable decision by the court is likely to redress the injury. Lujan

14 _____
15 ^{5/} In the event that the Court finds that Federal Defendant violated any of the statutes involved in
16 this case, further proceedings are necessary to determine the proper remedy. See Amoco
17 Production Co. v. Village of Gambell, 480 U.S. 531, 542 (1987) (noting courts must balance the
18 equities before entering injunctive relief); Forest Conservation Council v. U.S. Forest Service, 66
19 F.3d 1489, 1496 (9th Cir.1995) (injunction for violation of NEPA or NFMA “will not
20 automatically issue”). Federal Defendants “should be allowed to present evidence to the court
21 that ‘unusual circumstances’ weigh against the injunction sought, and to present evidence to
22 assist the court in fashioning the appropriate scope of whatever injunctive relief is granted.”
23 Forest Conservation Council, 66 F.3d at 1496. Given the factual complexity of the four cases
24 challenging to the Framework--including the potentially broad implications for projects that may
25 be in various stages of planning and implementation on eleven national forests--further
26 proceedings would be especially appropriate here. See Northwestern Ecosystem Alliance v. Rey,
27 380 F.Supp.2d 1175, 1197 (W.D. Wash. 2005) (finding in the context of a challenge to a region-
28 wide forest plan amendment that “the Court cannot engage in this traditional balancing of harms
analysis based on the parties’ summary judgment briefs.”).

23 ^{6/} Plaintiff filed its motion for summary judgment on September 8, 2005, but failed to argue in
24 the supporting memorandum its fifth cause of action, which alleges that the SEIS failed to
25 address incomplete or unavailable information. Pl.’s Am. Compl. ¶¶ 53-57. Plaintiff also failed
26 to argue all of the components of its third cause of action. Id. ¶ 47 (alleging failure to evaluate
27 cumulative effects). Those claims are deemed abandoned by Plaintiff and should be dismissed
28 with prejudice. See Ohio Valley Coalition v. Horinko, 279 F. Supp. 2d 732, 746 n.17 (S.D.
W.Va. 2003) (“Claims raised in a complaint but not argued to the court are deemed to be
waived.”) (citations omitted); Am. Lands Alliance v. Kenops, No. 99-80-KI, 1999 WL 672213, at
*2 (D. Or. Aug. 24, 1999); Mountain States Legal Found. v. Espy, 833 F. Supp. 808, 813 n.5 (D.
Idaho 1993) (deeming claims not raised in summary judgment motion abandoned and granting
judgment for defendants). To the extent that Plaintiff has incorporated those allegations into its
other arguments, the Court should consider Federal Defendants to have done the same here.

1 v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). “Since they are not mere pleading
2 requirements but rather an indispensable part of the plaintiff’s case, each element must be supported
3 in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the
4 manner and degree of evidence required at the successive stages of the litigation.” Id. at 561
5 (citations omitted).

6 Because Plaintiff’s case is currently before this Court for a decision on the merits, Plaintiff
7 may no longer rest on allegations in its Complaint to show standing. Plaintiff must establish standing
8 through “affidavits or other evidence of specific facts.” Id. Despite this clear requirement, Plaintiff
9 has failed to produce any evidence to establish its standing to challenge the 2004 Framework.

10 Furthermore, any allegation by Plaintiff that it suffered concrete and particularized harm is
11 belied by the 2005 memorandum of understanding (“MOU”) that the California Resources Agency
12 signed with the Forest Service to foster cooperation among multiple agencies in implementing the
13 2004 Framework. See Fed. Defs.’ Ex. A. The MOU specifically states that its purpose is to develop
14 a framework of cooperation in order “to develop and apply a refined and active multiparty adaptive
15 management and monitoring system consistent with the Sierra Nevada Forest Plan Amendment
16 (“SNFPA”). Id. at 1. This MOU demonstrates a commitment by California to support the 2004
17 Framework. Because Plaintiff has failed to demonstrate that it has standing to pursue its claims,
18 Plaintiff’s amended complaint must be dismissed for lack of jurisdiction. See Lujan, 504 U.S. at 561.

19 **II. THE DECISION IN THE 2004 FRAMEWORK TO AMEND EXISTING**
20 **STANDARDS AND GUIDELINES IS SUPPORTED BY A REASONED ANALYSIS**
21 **THAT SATISFIES THE APA**

22 **A. The Court Must Consider Plaintiff’s APA Claim In Light of Other Substantive**
23 **Statutes Which Give the Agency Broad Discretion in Managing NFS Lands**

24 Even if Plaintiff eventually puts forth evidence demonstrating that it has standing, its claims
25 must still fail on the merits. As the agency responsible for managing NFS lands, the Forest Service
26 has broad discretion to balance the multiple uses of surface resources in a combination that best
27 meets the public interest. See 16 U.S.C. § 529 (directing Secretary of Agriculture to administer the
28 NFS for multiple uses and sustained yield); Perkins, 608 F.2d at 806 (the mandate to manage for
multiple uses “breathe[s] discretion at every pore.”) (citation omitted)). The concept of multiple

1 use confers very broad discretion upon the Forest Service to decide upon the appropriate mix of uses
2 of various renewable surface resources. See Perkins, 608 F.2d at 806; Intermtn. Forest Ass'n v.
3 Lyng, 683 F. Supp. 1330, 1337-38 (D. Wyo. 1988). This highly discretionary concept of managing
4 for multiple use is at the heart of the forest management statutes and is also incorporated into the
5 forest planning process. See 16 U.S.C. § 1604(e)(1) (incorporating multiple use mandate into forest
6 planning); Sierra Club v. Espy, 38 F.3d 792, 795 (5th Cir. 1994) (forest planning statute incorporates
7 multiple use); Citizens for Env'tl. Quality v. United States, 731 F. Supp. 970, 976 (D. Colo. 1989).

8 Plaintiff's first cause of action alleges--without reference to any substantive statute--that the
9 decision to replace the 2001 Framework with the 2004 Framework violates the APA because it is not
10 supported by the administrative record. Pl.'s Am. Compl. ¶¶ 34-39. Claims under the APA must
11 be considered in light of the substantive statutes at issue. See ONRC v. Thomas, 92 F.3d 792, 798
12 (9th Cir. 1996) (factor for determining whether an action violates the APA "turns on what a relevant
13 substantive statute makes 'important'"); Preferred Risk Mut. Ins. Co. v. United States, 86 F.3d 789,
14 792 (8th Cir. 1996) (plaintiff "must identify a substantive statute or regulation that the agency action
15 had transgressed and establish that the statute or regulation applies to the United States."); Nat'l
16 Wildlife Fed'n v. U.S. Army Corps of Eng'rs, 132 F. Supp.2d 876, 889 (D. Or. 2001) ("Review
17 under the [APA] requires references to the legal duty set forth in the governing substantive statute.").
18 Plaintiff's claim must therefore be viewed against the background of the Forest Service's very broad
19 discretion to amend its forest plans and to manage for the combination of multiple uses that best
20 meets the public interest. See 16 U.S.C. § 1604(f)(4).

21 In this case, the substantive law grants the Forest Service broad discretion to consider the
22 balance of multiple uses that best meets the needs of the public. See 16 U.S.C. §§ 529, 531(a)
23 (requiring management of surface resources in the combination that "will best meet the needs of the
24 American people"); Perkins, 608 F.2d at 806; Intermtn Forest Ass'n, 683 F. Supp. at 1337-38 (Forest
25 Service need only consider the various uses, multiple use mandate does not direct how to allocate
26 those uses).

27 Additionally, the HFQLG Act imposes a substantive duty for the Forest Service to implement
28 a Pilot Project, which consists of various timber harvest activities. See Herger-Feinstein Quincy

1 Library Group Forest Recovery Act, Pub. L. No. 105-277, 112 Stat. 2681-231 (codified as 16 U.S.C.
2 § 2104 note), sec. 401(b). Finally, NEPA requires an evaluation of environmental effects, although
3 it imposes no substantive constraints on the Agency’s decision making. Methow Valley, 490 U.S.
4 at 350 (So long as “the adverse environmental effects of the proposed action are adequately identified
5 and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the
6 environmental costs”); Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1356 (9th Cir.
7 1994) (NEPA “does not dictate a substantive environmental result”). Plaintiff’s first cause of action
8 must therefore be considered against this statutory background. See Thomas, 92 F.3d at 798.

9 **B. The Decision in the 2004 Framework to Amend the Standards and Guidelines**
10 **for Management of NFS Lands in the Sierra is Adequately Supported by the**
11 **Record and Satisfies the APA**

12 The 2004 Framework is an amendment to forest plans that is well within the agency’s
13 discretion. The 2004 ROD was issued after a thorough review of the 2001 Framework. Moreover,
14 the Forest Service’s discretion to change its management direction despite having previously chosen
15 to emphasize a different balance of uses is supported by the caselaw. See Nat’l Cable & Telecom.
16 Ass’n v. Brand X Internet Servs., 125 S.Ct. 2688, 2700 (2005) (agency “must consider varying
17 interpretations and the wisdom of its policy on a continuing basis, (citations omitted) for example,
18 in response to changed factual circumstances, or a change in administrations”); State Farm, 463 U.S.
19 at 59 (“A change in administration brought about by the people casting their votes is a perfectly
20 reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and
21 regulations.”). Any implication that the agency is prohibited from striking a different multiple use
22 balance simply because of its past practice must therefore be rejected. See id.; see also Seldovia
23 Native Ass’n, Inc. v. Lujan, 904 F.2d 1335, 1346 (9th Cir. 1990) (“[A] reversal of prior policy or
24 statutory interpretation does not wholly vitiate deference to agency determinations.”).

25 For the reasons explained below, the 2004 Framework is adequately supported by a reasoned
26 explanation in the record, in light of the statutes providing broad discretion to manage NFS lands.
27 Therefore, Federal Defendants are entitled to summary judgment on Plaintiff’s first cause of action.
28

1 **1. The Conclusion that the 2004 Framework Would More Effectively**
2 **Achieve Goals for Reducing Hazardous Fuels is Adequately Supported**
3 **by the Record**

4 The 2004 Framework better addresses the goal of moving the landscape toward a natural fire
5 regime and, in the long run, would result in more effective fuels treatments on the landscape. See
6 SNFPA 3287, 3288 (Table 4.2.4a, Figure 4.2.4b). Because there is adequate support for the
7 determination that the 2004 Framework would better accomplish this goal, Federal Defendants are
8 entitled to summary judgment. See Native Ecosystems Council v. Forest Serv., 428 F.3d 1233 (9th
9 Cir. 2005) (“The long-term benefit of preventing stand-replacing fires, which completely destroy
10 goshawk habitat, is preferable over any short-term benefit the goshawks might receive from retaining
11 the dense forest structure in the project area Consequently, we uphold the agency action under
12 the APA's arbitrary and capricious standard.”).

13 The Sierra Nevada faces a situation today where nearly 8 million of the 11.5 million acres
14 of NFS lands are in vegetation condition classes that pose moderate to high risks from wildland fire.
15 See SNFPA 2998.^{2/} Because the 2004 Framework would employ treatments that would move more
16 of these acres out of those condition classes than under the 2001 Framework, there is ample support
17 for the decision in the record, and Plaintiff’s APA claim must be rejected.

18 First, there is adequate support for the conclusion that the 2001 Framework would not be
19 effective in meeting fuels objectives. Second, the record supports the conclusion that the 2004
20 Framework would be more effective in meeting those goals. The rationale that the 2004 Framework
21 would more effectively reduce hazardous fuels is adequate support for the change in management
22 direction sufficient to satisfy the APA.

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25
26 ^{2/} These lands are within Classes 2 and 3, which represent, respectively: areas where fire
27 regimes have been so altered from their historic range of fire return interval that they are at
28 “moderate risk of losing key ecosystem components” due to wildland fire; and areas which are at
“greatest risk of ecological collapse” because it has been so long since fire operated as a process
in the ecosystem. Id.

1 **a. The Record Contains Adequate Evidence that the 2001**
2 **Framework Would Not Effectively Meet Fuels Objectives**

3 Under the 2001 Framework, the treatments simply would not modify fire behavior to the
4 point where fuels treatment objectives would be met. See SNFPA 1946. Following the first decade
5 of implementation, acres destroyed by stand replacing wildfire would be greater under the 2001
6 Framework. See SNFPA 3287, 3288 (displaying greater acreage lost to stand-replacing fire).
7 Although the monetary costs of implementing the 2001 Framework would be lower than that of the
8 2004 Framework, the accompanying risk of wildlife habitat loss is also greater under the 2001
9 Framework. See SNFPA 3347-3348 (S2 would result in “less wildfire acres by the fifth decade . .
10 . thus a potential subsequent decreased loss of spotted owl habitat due to wildfire is expected”);
11 SNFPA 3581 (habitat projections for owl “benefit from reductions in wildfire acres burned and
12 severity of effects by the fifth decade”).

13 As the 2001 EIS itself acknowledged, the chosen alternative under the 2001 Framework
14 would hinder full implementation of an effective fuels strategy. See SNFPA 3101 (modified
15 Alternative 8 includes “stand level structural requirements that could preclude full implementation
16 of the fuels strategy.”) (quoting 2001 EIS vol. 1 Summary at 29). The 2001 ROD even
17 acknowledged that it would “increase the potential for catastrophic effects when wildfire” occurs.
18 SNFPA 0252. In sum, there is adequate support for the conclusion that the 2001 Framework would
19 not effectively meet the goal of reducing hazardous fuels.

20 **b. The Record Contains Adequate Evidence that the 2004**
21 **Framework Would Better Meet Fuels Objectives**

22 In addition to demonstrating that the 2001 Framework would not effectively reduce hazardous
23 fuels, the record also shows that the decision to adopt the 2004 Framework was supported by
24 evidence that the new management direction would better meet the goal of reducing such fuels. In
25 evaluating the direction for fuels treatments in the 2001 Framework, the Review Team identified the
26 need to more fully consider three factors. In particular, fuels treatments should: (1) be strategically
27 located across the landscape; (2) remove enough material to reduce wildfire and intensity and to
28 decrease rates of wildfire spread in treated areas compared to untreated areas; and (3) be cost-
efficient in order to accomplish program goals more efficiently. SNFPA 3100-3101. The review

1 team identified the prescriptive nature of the 2001 Framework’s vegetation management
2 requirements as the primary barrier to meeting these three needs. SNFPA 3101. Because the 2004
3 Framework addressed these three factors, it is supported by a reasoned basis as an improvement upon
4 the prior management direction. See Northwest Motorcycle Ass’n, 18 F.3d at 1479.

5 First, the 2004 Framework provides the flexibility to strategically locate treatments across the
6 landscape. SNFPA 3290, 3291. One of the main deficiencies of the 2001 Framework was that it
7 dramatically limited mechanical treatments outside the WUI, requiring prescribed fire to be used in
8 areas that already contained unnaturally high fuel loads. SNFPA 2995. Because the restrictions in
9 the 2001 ROD leave substantial areas on the landscape untreated or marginally treated, fire behavior
10 would not be as effectively modified as it would be under the 2004 Framework. See SNFPA 3290,
11 3291 (comparing rate of spread, flame length, scorch height, and projected mortality).

12 Second, the 2004 Framework results in the removal of more hazardous fuels, making the
13 mechanical treatment more effective. Under the 2001 Framework, the effectiveness of mechanical
14 treatments is “greatly compromise[d]” by the fact that 30% of the acreage is limited to removing trees
15 greater than 6" in diameter at breast height (“dbh”). SNFPA 3290 (removing such small material
16 “does not generally result in raising crown base heights to levels that effectively reduce fire intensity
17 and spotting”). Such limited treatments were estimated to be “ineffective over much of the
18 bioregion,” and in most case required a more intensive prescription or additional entries into the same
19 stand in order to meet fire behavior objectives. Id.

20 Third, the 2004 Framework provides for more cost-efficient treatments. See SNFPA 3292-
21 3295; SNFPA 2018. The SEIS estimated treatment costs on a per-acre basis by reviewing more than
22 10 years of actual data and surveying contracting officers on several national forests. SNFPA 3293-
23 4. Although the 2004 Framework would result in higher activity levels and hence would cost more
24 to implement during the first two decades, it would also generate over 3.5 times more revenue
25 annually from wood by-products than the 2001 Framework. See id. (\$80 million/year and \$33
26 million/year in first and second decades, respectively, under S2 , versus \$23 million and \$9 million
27 under S1). The revenue-to-cost ratio for the first decade is 1.38 for the 2004 Framework and 0.52
28 for the 2001 Framework, demonstrating the increased cost-efficiency from the revised direction. Id.

1 In sum, there is ample support in the record for the conclusion that the 2004 Framework
2 would more effectively reduce fuels, and this change in balance of resource uses is well within the
3 agency's discretion. See Northwest Motorcycle Ass'n, 18 F.3d at 1479; Perkins, 608 F.2d at 806.

4 **2. The 2004 Framework Would Better Meet the Goals of the HFQLG Act**
5 **by Fully Implementing the Pilot Project Required by that Act**

6 In addition to better meeting the goal of reducing hazardous fuels on the landscape, the 2004
7 Framework is also supported by the rationale that it would better achieve the goals of the HFQLG
8 Act, by fully implementing the pilot project required by that Act. The HFQLG Act consists of
9 mandatory legislative direction that the Forest Service establish a pilot project that includes DFPZ
10 construction and group selection. 16 USCA § 2104 note, sec. 401(b). The Review Team found that
11 the 2001 ROD "severely limit[ed]" implementation of the Pilot Project, as it did not allow the full
12 extent of group selection envisioned by HFQLG Act. SNFPA 1919, SNFPA 1967 (2001 ROD would
13 "preclude[] many of the resource management activities that Congress desired be tested," under the
14 Pilot Project); see SNFPA 1970 (2001 ROD allowed only "15,400 acres of group selection," less than
15 36% of what Pilot Project contemplated). The Team concluded that new direction could more
16 thoroughly test group selection and better fulfill the goals of the HFQLG Act. Id.; see also SNFPA
17 3002 ("Thus, this pilot project is back on track and meets one of the cornerstone objectives of the
18 SNFPA for adaptive management.").

19 In addition, as discussed supra at 3-4, the Review Team re-evaluated the owl analysis upon
20 which the 2001 ROD relied and found that it had taken an unnecessarily conservative approach.
21 SNFPA 1968 (analysis unnecessarily "took a worst case approach to estimating effects"); SNFPA
22 3338-39. The Review Team found that even though the prior analysis had assumed that Pilot Project
23 activities would render 100 percent of habitat unsuitable, observed effects of prior treatments would
24 be far less. Id. See also SNFPA 1968 (even assuming Pilot Project would double the highest
25 percentage of reductions in habitat previously experienced, projections still "would only be 12
26 percent instead of the 100 percent used in the analysis"); see also SNFPA 3338-39, 3608-09. Other
27 factors also were found not to have been considered in the prior analysis, indicating a new analysis
28

1 was warranted. See SNFPA 3339 (vegetation growth outside DFPZs had not been explicitly
2 considered, nor was the fact that treatments excluded PACs and SOHAs).

3 Additionally, the Team found that the community stability goals of the HFQLG Act were not
4 being met. See SNFPA 1967, 1968 (a “key component” of the Pilot Project is to “provide socio-
5 economic benefit through timber and biomass production, and therefore enhance community stability
6 in the project area.”); SNFPA 1969, 1970 (the “community stability, and socio-economic aspects of
7 the Pilot Project are not being implemented”); SNFPA 3001. The 2004 Framework responds to this
8 and estimates that under the new direction, additional sawtimber production would occur in the Pilot
9 Project area, thereby better providing community stability. See SNFPA 3386, 3697 (“Alternative
10 S2 is designed to better meet[] the goals envisioned by the Pilot Project and will contribute toward
11 producing socio-economic benefits of enhancing community stability in the pilot project area.”).

12 By revisiting the unnecessary assumptions in the BA/BE and better providing for community
13 stability, the Forest Service determined that a different resource balance could be struck that both
14 addressed the needs of wildlife and also addressed the duty under the HFQLG Act to fully implement
15 the mandatory HFQLG Pilot Project. See SNFPA 3338-39, 3608-09. The changes therefore have
16 a reasoned basis sufficient to satisfy the APA. See *Sierra Pacific Industries v. Lyng*, 866 F.2d 1099,
17 1106-07 (9th Cir. 1989) (Secretary of Agriculture had adequate basis for requiring timber harvest
18 schedules to be revised as a condition of a buy-out under federal statute); *Nat’l Wildlife Fed’n v.*
19 *Burford*, 871 F.2d 849, 856-57 (9th Cir. 1989) (Department of the Interior’s shift of bidding
20 procedures for coal leases was not arbitrary and capricious).

21 **3. The 2004 Framework is Supported by the Determination that the 2001**
22 **Framework Relied Upon A Flawed Analysis of Owls and Posed Barriers**
23 **to Consistent, On-the-Ground Application**

24 In addition to the goals of more effectively reducing hazardous fuels and fully implementing
25 the HFQLG Pilot Project, the 2004 Framework is supported by numerous other considerations related
26 to the owl, which were highlighted in the MRR.^{8/} First, the Team that reviewed the 2001 Framework

27 ^{8/} The MRR “documents a myriad of reasons to consider changes to existing management
28 also SNFPA 3569. The SEIS incorporates the MRR by reference. SNFPA 3098; see 40 C.F.R. §

1 found an important flaw in the 2001 Framework’s interpretation of a study referred to as Hunsaker
2 *et al.* (2002). The Hunsaker study reported sites that consistently had produced owl young had a
3 *median* of 60 percent of their analysis area (1000-acre circles around the nest) in 50 percent (i.e.,
4 moderate to high density) canopy cover or greater. SNFPA 1950. This finding was “interpreted in
5 the [2001] FEIS as a habitat *threshold* for owl home ranges, below which pairs could not sustain
6 themselves.” Id. (emphasis added); see SNFPA 0431. A statement to that effect is found in the
7 original owl viability analysis, which reports that owl home ranges with less than 60% of their area
8 in moderate to high density canopy cover would have habitat that “may be insufficient to support a
9 self-sustaining population of owls.” Id.

10 However, following its review, the Team concluded that this statement in the 2001
11 Framework’s viability analysis “does not accurately represent information presented in the Hunsaker
12 paper.” SNFPA 1950. The Team noted that the 60-percent figure reported in the paper “actually
13 represented the median,” or the middle value in the data set, not a threshold. SNFPA 1951. As a
14 result, the Team concluded that “the assessment of owl home range condition in the FEIS is not
15 consistent with the research findings upon which it is based and may not be representative of the
16 current status of owl habitat.” Id.^{9/}

17 The Team also found numerous practical difficulties in implementing the direction of the
18 2001 Framework. First, the Team found that there were difficulties in classifying vegetation at the
19 small (one-acre increment) scale required by the 2001 ROD and subject to inconsistent application.
20 See SNFPA 1947, 3290-91, 3612. Under the classification system used by the ROD, however,
21 vegetation types “cannot be classified correctly or consistently on the ground” at such a small scale.
22 Id.; see also SNFPA 3290 (habitat classification system is only intended for patches ≥5 acres).

23 Additionally, the Team also found that the 2001 Framework relied upon relatively small
24 differences in canopy cover, which were difficult to measure with consistency or precision. SNFPA

25 _____
26 1502.21 (encouraging incorporation by reference where appropriate).

27 ^{9/} The Team documented many instances where the 2001 EIS incorrectly assumed that there was
28 a threshold of percent habitat in moderate to dense canopy cover, that was determinative of owl
productivity and viability. SNFPA 1951-52 (citing 2001 EIS, Vol. 3, Ch. 3, Part 4.4, pages 79,
83, 92, 95).

1 1947-48; see also SEIS_04_000426. Canopy cover can be determined by numerous techniques
2 which can result in “widely divergent values” with a variation of 10% or more. SNFPA 1947; see
3 also SNFPA 3345 (each method of calculating canopy cover “has [its] own error rate”);
4 SEIS_04_000424; SEIS_04_000432 (finding observer variation from 4 to 11%). The 2001 ROD,
5 however, established standards and guidelines that are based upon differences in canopy cover that
6 are *less than* 10%. SNFPA 1948; see also SNFPA 313, 328 (mandating certain standards for 50-59%
7 cover). Given that estimates are only precise to about 10 percent, observer error could result in large
8 areas of the landscape incorrectly receiving ineffective treatments or no treatment whatsoever. See
9 SNFPA 1948. Id.^{10/}

10 In sum, the changes to owl standards and guidelines in the 2004 Framework were adequately
11 supported by both a substantive flaw in the 2001 Framework’s analysis of owls, as well as practical
12 difficulties in applying the guidelines to one-acre patches, and determining small differences in
13 canopy cover.^{11/} The changes therefore have a reasoned basis sufficient to satisfy the APA, and
14 Federal Defendants are entitled to summary judgment on Plaintiff’s first cause of action. See Sierra
15 Pacific Indus., 866 F.2d at 1106-07; Nat’l Wildlife Fed’n, 871 F.2d at 856-57.

16 **III. THE 2004 FRAMEWORK COMPLIES WITH NEPA.**

17 **A. The 2004 Framework Undertook an Objective Evaluation of Environmental** 18 **Effects**

19 Plaintiff’s second cause of action alleges that the decision to adopt the 2004 Framework was
20 predetermined and that the environmental analysis was not objective or undertaken in good faith,
21 thereby violating NEPA. Pl.’s Am. Compl. ¶¶ 40-44. These allegations are solidly refuted by the

22 ^{10/} For example, under the 2001 ROD, if pre-treatment canopy is between 50-59%, surface and
23 ladder fuels <12" dbh may be removed. SNFPA 328. If canopy cover is between 40-50%,
24 however, it may not be reduced except to remove some small trees <6" dbh. Id. If an observer at
25 the low range of variation were to determine a stand had 49% canopy cover when it actually had
59%, the agency would miss the opportunity to reduce additional hazardous fuels in that stand.

26 ^{11/} Other reasons as well are provided in the MRR that support a change in the 2001 Framework.
27 For example, the Team also determined after consulting with owl scientists that a 12" diameter
28 limit, which the 2001 ROD imposes for most mechanical treatments in old forest areas, “had not
been based on owl biology,” leading the Team to conclude that a more flexible standard was
recommended to blend the needs of the owl with other objectives such as effective vegetation
management across the landscape. SNFPA 1953-54; see also SNFPA 264.

1 voluminous administrative record, which consists of thousands of pages of objective deliberation
2 over the analysis of impacts, including an extensive review of the 2001 Framework and an analysis
3 of areas where it could be improved. Importantly, the allegations are refuted by the SEIS itself,
4 which contains an objective, good faith analysis of environmental impacts.

5 NEPA presumes that agencies will have a preferred action, and so it only requires that
6 impacts be evaluated objectively and in good faith. See 40 C.F.R. § 1502.14(e) (requiring
7 identification of agency’s preferred alternative); Metcalf v. Daley, 214 F.3d 1135, 1142 (9th Cir.
8 2002) (“NEPA assumes as inevitable an institutional bias within an agency proposing a project . . .”);
9 NRDC v. Hodel, 624 F. Supp. 1045, 1049-50 (D. Nev. 1985), aff’d, 819 F.2d 927 (9th Cir. 1987)
10 (upholding an agency’s right to “formulate a proposed action, or even decide that it *wishes* to take
11 the proposed action before preparation of an EIS.” (emphasis added)).

12 The 2004 SEIS contains such an objective, good-faith analysis. As explained in more detail
13 in Section III.B.2, *infra*, the SEIS contains extensive analysis of impacts to wildlife species, including
14 species associated with old forest ecosystems, as well as meadow and riparian ecosystems. See, e.g.,
15 SNFPA 3312-3323 (effects to fisher); SNFPA 3323-3330 (marten); SNFPA 3330-3350 (California
16 spotted owl); SNFPA 3356-3362 (willow flycatcher); id. at 3371-3375 (Yosemite toad).
17 Additionally, that analysis included many candid statements about the risks and uncertainties
18 associated with the proposed alternative. See SNFPA 3143-3148; 3212 (uncertainty about marten
19 distribution); see also SNFPA 3145 (acknowledging the “relatively little information” about key
20 habitat elements for fisher); SNFPA 3340, 3342, 3350 (acknowledging uncertainty associated with
21 mechanical treatment in PACs). In addition, consistent with NEPA the SEIS fully disclosed which
22 alternative the Agency preferred. See SNFPA 3079.

23 The decision to adopt the 2004 Framework is supported by a rational explanation in the
24 record. Because environmental impacts were evaluated objectively and in good faith in the SEIS,
25 Federal Defendants are entitled to summary judgment on Plaintiff’s second cause of action. See
26 Spiller v. White, 352 F.3d 235 (5th Cir. 2003) (evidence did not support claim that agencies’
27 environmental assessment was undertaken in bad faith, where NEPA assessment was exhaustive and
28 extensive). Cf. Env’tl. Def. Fund, Inc. v. Corps of Eng. of U.S. Army, 492 F.2d 1123, 1129 (5th Cir.

1 1974) (affirming agency’s “good faith objectivity” where record evidenced full consideration of
2 environmental consequences, despite letters from defendant agency expressing “confidence” the
3 project would be approved).

4 **B. The SEIS Took a Hard Look at Potential Effects from the 2004 Framework**

5 **1. The SEIS Took A Hard Look at Potential Effects from Timber Harvest**

6 Plaintiff’s third cause of action alleges that the SEIS contains an inadequate discussion of
7 environmental impacts from the change in management direction in the 2004 Framework. See Pl.’s
8 Am. Compl. ¶¶ 45-48. Specifically, Plaintiff contends that the 2004 SEIS “does not analyze” the
9 impacts of increased local control over timber harvest is simply wrong. Pl.’s Am. Compl. ¶ 47.^{12/}
10 The potential effects from increased timber harvest are considered throughout the analyses for
11 individual resources.^{13/} Plaintiff’s allegations ignore the fact that effects related to timber harvest
12 need not be evaluated at the same level of detail for a forest plan amendment like the 2004
13 Framework, as they would be for site-specific decisions that actually authorize timber harvest.

14 As the Supreme Court has recognized, a forest plan amendment like the 2004 Framework
15 does not *authorize* any actual timber harvest; rather, it establishes the standards and guidelines under
16 which future projects that authorize harvest would occur. See Ohio Forestry Ass’n, 523 U.S. 726;
17 SNFPA 3014 (amended plans “do not provide final authorization for any activity”). Timber harvest
18 is only authorized by site-specific decisions, which also have to comply with NEPA. See SNFPA
19 3010, 3690, 4019.

20 Because of the generalized nature of forest plan amendments, the scope of detail is
21 considerably lesser for evaluating the effects from that future harvest in a programmatic EIS like the
22

23 ^{12/} In addition to these topics, Plaintiff also alleges that the SEIS “fails to adequately describe the
24 project” and that it “does not allow” an adequate comparison of effects between the 2004
25 Framework and 2001 Framework. Pl.’s Am. Compl. ¶ 47. Because these allegations are directed
more toward the purpose and need for the project and the alternatives, rather than environmental
impacts, they are discussed in Section III.C.1, *infra*.

26 ^{13/} See, e.g., SNFPA 3271, 3272-3275 (forest vegetation); SNFPA 3280-3284 (aquatic
27 resources); SNFPA 3289-3291, 3296-3297 (fire and fuels); SNFPA 3298 (noxious weeds);
28 SNFPA 3316-3322 (fisher); SNFPA 3324-3325, 3329 (marten); SNFPA 3333, 3335, 3342, 3347
(owls); SNFPA 3353, 3354 (goshawks); SNFPA 3363, 3365 (great gray owls), and other
resources.

1 2004 Framework. Courts dealing with management plans for NFS lands have stressed that the EISs
2 for such plans are not susceptible to a demand for the level of detail appropriate to more defined
3 proposals. See Salmon River, 32 F.3d at 1357-58 (region-wide vegetation management policy
4 accompanied by adequate analysis, which although not “exhaustive,” was “reasonably thorough”);
5 Resources Ltd. v. Robertson, 35 F.3d 1300, 1401 (9th Cir. 1993); Idaho Conservation League v.
6 Mumma, 956 F.2d 1508, 1511-12 (9th Cir. 1992).

7 The detail required of an EIS also is affected by whether it is part of a multi-level staged
8 planning process; the level of detail required in such an EIS depends on the stage of the planning
9 decision which it supports. Cf. Tribal Village of Akutan v. Hodel, 869 F.2d 1185, 1192 (9th Cir.
10 1988), cert. denied, 493 U.S. 873 (1989) (“ . . . the amount and specificity of information necessary
11 to meet NEPA requirements varies at each of [Outer Continental Shelf Lands Act's] stages”). This
12 analysis has been applied to cases involving land management plans for the public forest lands. In
13 Resources Ltd., 35 F.3d 1300, the Ninth Circuit, reviewing one LRMP, stated:

14 We do not require consideration of non-Federal cumulative impacts in this
15 programmatic EIS, on the condition that the Forest Service must analyze such
16 impacts, including possible synergistic effects from implementation of the Plan as a
17 whole, before specific sales, * * *

18 We are convinced that such specific analysis [of water quality] is better done when
19 a specific development action is to be taken, not at the programmatic level. The
20 analysis will be conducted before each particular project, and projects not found to
21 meet Montana water quality standards 'will be redesigned, rescheduled, or dropped'.

19 Id. at 1401.

20 The 2004 SEIS’s analysis of environmental impacts is adequate in light of the lesser level of
21 detail required for programmatic EISs. For some resources, effects of timber harvest simply are too
22 site-specific to be meaningfully analyzed at the regional scale of the 2004 Framework. For example,
23 effects on the delivery of coarse woody debris (“CWD”) to streams--which is important for
24 stabilizing stream channels and providing cover for fish--“is difficult at the bioregional scale due to
25 extreme variability in the condition of [riparian conservation areas] and the relative importance of
26 CWD in maintaining stream channel structure and function.” SNFPA 3282. Consequently, these
27 effects will be evaluated in landscape and project-level analyses using watershed and site-specific
28 parameters such as “stream width, tree heights, distances from streams, slope steepness,” and other

1 factors. Id. Assessment of localized effects is similarly problematic for stream temperature “due to
2 highly variable conditions.” Id.

3 For hydrological effects from timber harvest, the SEIS estimated that while the increased
4 level of activity under the 2004 Framework would result in “moderately higher” risk of increased
5 runoff, overall annual increases would be relatively small (e.g., 0.5% annually in the HFQLG Pilot
6 Project area, with the greatest seasonal increase occurring at 0.7%). SNFPA 328. As with effects
7 to other resources, hydrological effects would be further evaluated and potentially mitigated on an
8 appropriate scale in future landscape and project analyses. See id. The fact that the effects were too
9 variable or site-specific to lend themselves to detailed, quantitative analysis at the bioregional scale,
10 however, does not mean that such effects will go unevaluated altogether. See SNFPA 3010, 3690,
11 4019 (noting that future decisions to authorize timber harvest would comply with NEPA). Because
12 a programmatic document like the 2004 SEIS is not required to evaluate environmental effects at the
13 same level of detail would be required for a site-specific decision, the analysis in the 2004 SEIS is
14 adequate under NEPA. See Salmon River, 32 F.3d at 1357 (“[W]hen an impact statement is
15 prepared, site-specific impacts need not be fully evaluated until a critical decision has been made to
16 act on site development”).

17 **2. The SEIS Took A Hard Look at Potential Effects to Old Forest Species**

18 The 2004 SEIS took a hard look at potential effects, including short-term impacts, on wildlife
19 species such as the owl, fisher, and marten. See SNFPA 3327,3337 (“With regard to owl population
20 persistence, the short-terms effects of management activities are believed to be most relevant . . . and
21 are highlighted in this effects analysis”), SNFPA 3339-3345. A comparative analysis was conducted
22 on late-seral stage forest in the short-term, including years 0 through 20. SNFPA 3326-3327.^{14/} The
23 SEIS concludes with respect to canopy cover and fragmentation of owl habitat that, “the overall
24 increase of suitable habitat predicted for both Alternative S1 and S2 by year 20 of treatment, and the
25 overall habitat increase over time (Year 50 and year 130, Table 4.3.2.3e), indicated that treatment
26

27 ^{14/} Figure 4.3.2.2a shows projected region-wide acreage of late seral habitat (classes 5M, 5D, and
28 6). SNFPA 3327. This habitat is considered “highest quality marten foraging and reproductive
habitat,” and is also suitable for owl nesting and foraging. SNFPA 3326, 3337.

1 prescriptions for both Alternatives S1 and S2 would contribute to increasing amounts of suitable
2 habitat.” SNFPA 3344. Recognizing that species like the owl benefit from canopy cover, big trees
3 and stand structure, the decision maintains or increases all of these parameters. SNFPA 2996;
4 SNFPA 3602 (noting that amount of old forest is projected to increase across the bioregion in the
5 short term, “despite treatments in approximately 14 % of old forest emphasis areas”); SNFPA 3615-
6 16 (noting that trees less than 24" dbh are expected to increase due to re-growth and untreated areas).

7 Evidence that the Forest Service took a hard look at the impacts to the California spotted owl
8 is well-documented in the record. The Forest Service addressed the California spotted owl through
9 a meta-analysis (SNFPA 2086-2089), assessment of publications (SNFPA 2638-57), in meetings
10 (SNFPA 2481-2747), and in evaluation of the Scientific Consistency Review Team’s findings
11 (SNFPA 2578-89, 2590-2601). As evidenced by the Forest Service’s response to comments by the
12 Scientific Consistency Review team (SNFPA 2578-2589), the Forest Service fine-tuned its analysis
13 and discussion of the California spotted owl in the SEIS. See SNFPA 2590-2601. Specifically, the
14 Forest Service stated that “[m]ore emphases and discussion on short-term effects and associated risk
15 [to the California spotted owl] added to the SEIS and considered in the Adaptive Management
16 process.” SNFPA at 2601. Specifically, Chapter 2 of the SEIS discusses application of adaptive
17 management, and that discussion was expanded from the discussion in the DEIS. It addresses short-
18 term impacts and associated risks to the California spotted owl in the Forest Service’s analysis of:
19 key areas of uncertainty and priority management questions (SNFPA 3134); old forest habitat and
20 species; uncertainties and management questions; (SNFPA 3144-46); ongoing monitoring and
21 research relevant to the adaptive management program; owl demographic studies (SNFPA 3151-2);
22 and California spotted owl response module (SNFPA 3155-6). Furthermore, the United States Fish
23 and Wildlife Service (“FWS”) concluded from the meta-analysis, conducted by both FWS and the
24 Forest Service, that “there was no clear statistical evidence to show that the [California spotted] owl
25 was decreasing across its range.” SNFPA at 3995. Based on 2004 SEIS and the biological
26 evaluation (SNFPA 2658-2664), the Forest Service openly concluded that for the California spotted
27 owl “the determination was that the 2004 SNFPA decision “may affect individuals, but not likely to
28 trend toward Federal listing.” SNFPA at 3946; see also SNFPA 3218.

1 Here, what is clear is that the Forest Service took a “hard look” at the available data and
2 opposing opinions and provided a reasoned discussion of the effects on the California spotted owl.
3 Lyons, 871 F. Supp at 1321 (the agency having engaged in numerous studies and analyses on the owl
4 satisfied NEPA’s requirement to take a “hard look” at available data.); see also Village of False Pass
5 v. Clark 733 F.2d 605, 614 (9th Cir. 1984) (quoting Sierra Club v. Sigler, 695 F.2d 957, 970 (5th Cir.
6 1983)) (“[T]he unavailability of information . . . should not be permitted to halt all government
7 action This is particularly true when information may become available at a later time and can
8 still be used to influence the agency's decision.”).

9 Similarly, the Forest Service adequately analyzed short-term impacts to the fisher as
10 summarized in the section entitled “Habitat Conditions in the Short-Term and Long-Term.” SNFPA
11 3314. The Forest Service determined that short-term impacts on snag levels, down wood debris, and
12 fisher prey would not be significantly different between Alterative S1 and Alternative S2. SNFPA
13 3318-3319. In analyzing the short-term effects from reduced canopy closure, the Forest Service found
14 that the proposed thinning of the canopy “should not limit connectivity between stands of higher
15 canopy cover, denning-quality habitat, because proposed treatment would only affect approximately
16 25-30% of the forested area.” SNFPA 3317.

17 The Forest Service adequately analyzed short-term impacts to the marten, finding that the
18 short term impacts on large live trees, snags, down wood debris and meadow and riparian habitats
19 would not be significantly different under the 2004 Framework as compared to the 2001 Framework.
20 SNFPA 3323-3330. The proposed action under both Frameworks will impact canopy cover, and
21 thereby reduce habitat quality for the marten, however, adequate levels of ground cover and downed
22 logs would remain to provide suitable marten habitat. SNFPA 3325. Quality of the marten habitat
23 is projected to increase under both Frameworks, with greater short-term increases projected for the
24 2001 Framework and greater long-term increase projected for the 2004 Framework. SNFPA 3326.
25 As the SEIS explains, this is due to the differences in standards and guidelines that will impact later
26 seral stage forest areas. Id. Those particular areas provided the highest quality marten foraging and
27 reproductive habitat. Id. However, because suitable habitats for the marten are currently either
28 broadly distributed or highly abundant and the relatively minimal impact either Framework will have

1 on the marten, both the 2001 and 2004 Frameworks are expected to result in a broad distribution of
2 marten. SNFPA 3330. As the record demonstrates, the Forest Service took the requisite hard-look
3 at the short-term effects to the fisher and marten. Simply because Plaintiffs may disagree with the
4 Forest Service’s assessment of the impacts does not allow the court to “substitute its judgment for
5 that of the agency as to the environmental consequences of its actions.” Kleppe v. Sierra Club, 427
6 U.S. 390, 410 n.21 (1976). The SEIS’s analysis of effects to other wildlife species satisfied NEPA.

7 **3. The SEIS Took a Hard Look at Potential Effects from Changes in** 8 **Grazing Management**

9 In addition to adequately evaluating the impacts to species that would primarily be affected
10 by timber harvest, the SEIS also contains a candid discussion of the effects from grazing that would
11 likely result under both the 2001 Framework and the 2004 Framework. See, e.g., SNFPA 3356-3362
12 (effects upon flycatchers); id. at 3371-3375 (effects upon toads).

13 For the flycatcher, the SEIS analyzes effects that could result from the main difference
14 between S1 and S2, namely the option of managers at occupied sites either to restrict grazing to late-
15 season, or to allow grazing year-round under a site-specific management plan. See SNFPA 3359.
16 As the SEIS explains, only about 10% of nesting attempts occur after August 15, the date for late-
17 season grazing. Id. In some of these years, late nesting occurs due to unusually wet weather. Id.
18 When that happens, the date when livestock are allowed onto allotments would likely be delayed,
19 thereby “moderating the risk” of nest disturbance. Id. Additionally, standards for willow use and
20 direction to stop livestock from browsing on willows “should also minimize this risk and result in
21 little difference between alternatives.” Id. Finally, the site-specific management plan is required to
22 protect habitat during the breeding season and to maintain long-term habitat suitability. Id.

23 As for the toad, the SEIS provides a candid assessment of the potential effects to the species,
24 noting that under both S1 and S2, due to the difficulty of herding and fencing livestock in high
25 elevation meadows, grazing and movement will take place in some portion of toad breeding and
26 rearing areas if livestock are allowed in adjacent areas. SNFPA 3372. The SEIS notes that “[l]ittle
27 information exists about the effects of land management activities on the Yosemite toad.” SNFPA
28 3371. The SEIS therefore bases its analyses upon general ecological relationships and principles.

1 Potential direct effects to the toad are noted to include “trampling of some egg masses and
2 tadpoles in shallow portions of ponds,” although most eggs will have hatched, and effects would
3 primarily be upon tadpoles by the time livestock reach the high meadows. Id. Once the breeding and
4 rearing season has ended, metamorphs, juveniles, and adult toads are “highly exposed to direct
5 trampling mortality” as a result of grazing anywhere in the meadows. Id. The SEIS disclosed that
6 metamorphs are more vulnerable due to their slow movement, and that the risk is highest from July
7 until October. SNFPA 3372-3373. Indirect effects were also fully disclosed, including:
8 modification of breeding and rearing pool structural features from livestock hooves; reduced cover
9 from trampling and matting of vegetation; and potentially delayed metamorphosis and smaller
10 metamorphs as a result of contamination of pools by livestock. Id. Finally, cumulative impacts and
11 effects to toad populations were also disclosed. SNFPA 3374-3375.

12 In sum, the SEIS includes a hard look at the effects from grazing, and Plaintiff’s allegation
13 that impacts from changes in grazing management were not adequately disclosed should be rejected.
14 See Mumma, 956 F.2d at 1519 (“Once satisfied that a proposing agency has taken a ‘hard look’ at
15 a decision’s environmental consequences, the review is at an end.”) (quoting California v. Block,
16 690 F.2d 753, 761 (9th Cir. 1982)).

17 **4. Risk and Uncertainty were Adequately Addressed**

18 Plaintiff’s allegation that the 2004 SEIS does not adequately address risk or uncertainty is also
19 refuted by the record. Pl.’s Am. Compl. ¶ 47. As a preliminary matter, the law regarding land
20 management decisions recognizes that there may be inherent uncertainty with regard to the effects
21 of an agency’s decision making. NEPA, however, does not prevent an agency from taking action
22 merely because the effects might be uncertain. See Alaska v. Andrus, 580 F.2d 465, 473-74 (D.C.
23 Cir. 1978) vacated in other part sub nom. Western Oil and Gas Ass’n. v. Alaska, 439 U.S. 922 (1978)
24 (“Predictions . . . can never be perfect . . .”, “the Secretary was not required, as a matter of law, to
25 await the results of the ongoing studies . . .”); Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d
26 1275, 1280-1281 (9th Cir. 1973) (no “requirement that complete information . . . must be obtained
27 before action may be taken”). By contrast, so long as impacts are adequately analyzed and scientific
28 uncertainty is disclosed, courts afford deference to an agency’s own evaluation of scientific impacts,

1 particularly where that evaluation is on the forefront of what is scientifically known. See NRDC v.
2 Hodel, 865 F.2d 288, 309 (D.C. Cir. 1988) (“NRDC - Outer Continental Shelf Leasing Case”)
3 (“[p]articularly when 'insufficient data is presently available to make a fully informed factual
4 determination,' [administrative agency] decisions have a legislative cast; they 'depend to a greater
5 extent upon policy judgments and less upon purely factual analysis'”) (quoting California v. Watt,
6 668 F.2d 1290, 1301 (D.C. Cir. 1981)); Indus. Union Dep't v. Hodgson, 499 F.2d 467, 474-75 (D.C.
7 Cir. 1974) (extra deference give to agency decision that is on the “frontiers of scientific knowledge”).

8 First, scientific uncertainty regarding wildlife species is discussed throughout the text of the
9 SEIS. See SNFPA 3143-3148; 3212 (uncertainty about marten distribution); see also SNFPA 3145
10 (acknowledging the “relatively little information” about key habitat elements for fisher). The SEIS
11 also recognized scientific controversy regarding these species. See SNFPA 3340 (“There is
12 conflicting science about the effects of canopy cover reductions from fuels treatments on the
13 California spotted owl.”); SNFPA 3144. As evidence of the candor with which conflicting science
14 was disclosed, the SEIS cites articles that discuss the negative effects on owls that may be caused by
15 fuels treatments. See SNFPA 3340 (citing Lee & Irwin (in review, 2003)); SNFPA 3342 (citing
16 Blakesley & Noon, 1999 for the notion that certain activities “would increase uncertainties associated
17 with successful dispersal and mate finding”). Indeed, scientific uncertainty is disclosed throughout
18 the SEIS with specific literature references.^{15/}

19 In addition to disclosing opposing science through citations in the SEIS, the Forest Service
20 also addressed scientific controversy in the response to public comments. See SNFPA 3600-3623.
21 For instance, the Forest Service responded to comments that the “SEIS does not provide adequate
22 protection of spotted owl and goshawk nests” and “[d]ue to scientific uncertainty in population
23 trends, the SEIS should exercise caution in spotted owl management efforts.” SNFPA 3606.^{16/}

25 ^{15/} See, e.g., SNFPA 3313, SNFPA 3314, SNFPA 3316 (including literature citations for fisher);
26 SNFPA 3337 (citing Self and Kerns, 2001, Kucera, 2000, Spencer 1981, SNFPA 3325, for the
marten); SNFPA 3337, 3340, 3342 (citations for the owl).

27 ^{16/} Scientific uncertainty was also addressed in the SCR, including analysis of whether (1)
28 applicable and available scientific information had been considered; (2) scientific information
was interpreted reasonably and accurately; (3) uncertainties associated with the scientific

1 In addition to disclosing scientific uncertainty through the SEIS, response to comments, and
2 SCR, the Forest Service also acknowledged such uncertainty in the 2004 ROD. SNFPA 3002
3 (explaining that SCR was used to improve the SEIS and “acknowledge scientific uncertainty and
4 differing points of view”). Regarding the fisher, the ROD states that an important change between
5 the draft and final SEIS is to reinstate the desired conditions for the Southern Sierra Fischer
6 Conservation Area. See SNFPA 2997-2998 (“ . . . [B]ecause there is some uncertainty about the
7 habitat need of the fisher . . . I am recommending the continuation of existing status and change
8 monitoring and the completion of a number of research studies currently under way”). The ROD
9 therefore shows the decision maker’s awareness of the scientific controversy related to the decision.

10 In sum, the Forest Service adequately considered and acknowledged scientific risk and
11 uncertainty in the SEIS, SCR, and ROD. The fact that uncertainty exists, however, does not prevent
12 the agency from adopting a decision to undertake the resource activities such as timber harvest that
13 are clearly part of the Forest Service’s congressional mandate to manage for multiple uses. See
14 SNFPA 3136 (“Clearly, all uncertainty cannot be eliminated.”); see also Lyons, 871 F. Supp. at 1321
15 (government will not be held to a “degree of certainty that is ultimately illusory”) (quoting
16 Greenpeace Action v. Franklin, 14 F.3d 1324, 1336 (9th Cir. 1992)). Because the 2004 SEIS took
17 a hard look at the environmental impacts of the changes in management direction in the 2004
18 Framework, Federal Defendants are entitled to summary judgment on Plaintiff’s third claim..

19 **C. The Forest Service Considered a Broad and Legally Sufficient Range of**
20 **Alternatives**

21 Plaintiff’s fourth cause of action alleges that the SEIS for the 2004 Framework violated
22 NEPA by failing to consider other reasonable alternatives to the selected management direction. See
23 Pl.’s Am. Compl. ¶¶ 49-52. For the reasons explained below, this cause of action fails.

24 **1. The 2004 SEIS’s Range of Alternatives Met the Purpose and Need**

25 In judging the adequacy of the range of alternatives, a court begins by examining the purpose
26 and need. See, e.g., Westlands Water Dist.v. Dep’t of the Interior, 376 F.3d 853, 865-66 (9th Cir.

27 information were acknowledged; and (4) risks and uncertainties were identified and documented.
28 SNFPA 3504, 3256; see also SNFPA 2356, 3503-3524 (explaining how SEIS was improved
based upon SCR).

1 2004). Agencies are afforded considerable, although not unlimited, discretion to define the purpose
2 and need of a project. Friends of Southeast’s Future v. Morrison, 153 F.3d 1059, 1066 (9th Cir.
3 1998). A statement of purpose and need is evaluated under a “reasonableness standard.” Westlands,
4 376 F.3d at 866. Under this standard, the statement of purpose cannot be unreasonably narrow.
5 Friends of Southeast’s Future, 153 F.3d at 1067; see also Citizens Against Burlington, Inc. v. Busey,
6 938 F.2d 190, 196 (D.C. Cir. 1991) (“[A]n agency may not define the objectives of its action in terms
7 so unreasonably narrow that only one alternative from among the environmentally benign ones in the
8 agency's power would accomplish the goals of the agency's action, and the EIS would become a
9 foreordained formality.”) (citation omitted). At the same time, however, a purpose and need
10 statement need not be so broad as to require consideration of alternatives that are inconsistent with
11 the proposed action's overarching purpose. Friends of Southeast’s Future, 153 F.3d at 1067 (citing
12 City of Angoon v. Hodel, 803 F.2d 1016 (9th Cir. 1986)).

13 In this case, “the purpose of the proposed action is to adjust existing management direction
14 to better achieve the goals of SNFPA.” SNFPA 3098. This statement makes clear that the needs and
15 goals underlying the 2001 EIS remain as the foundation for the 2004 SEIS.^{17/} Both the 2001 and
16 2004 decisions were fundamentally concerned with creating a workable management scheme that
17 would address several “problem areas” of the Sierra. As stated in the SEIS, the “purpose of the
18 [2001] SNFPA FEIS *and the* [2004] SEIS is to address the management of five identified problem
19 areas: old forest ecosystems and their associated species; aquatic, riparian and meadow ecosystems;
20 fire and fuels management; noxious weeds; and lower westside hardwood ecosystems.” SNFPA
21 3583 (emphasis added). At their cores, the 2001 and 2004 EISs shared a common purpose and need.

22 Because the 2004 SEIS was seeking to address the same purposes as the 2001 EIS, the Forest
23 Service decided that it was appropriate to reexamine the various non-selected alternatives from the
24 2001 EIS and ROD, as those alternatives covered a broad range of solutions for the management

25
26 ^{17/} See also SNFPA 2993 (2004 ROD “retains the overall goals of the SNFPA 2001 ROD,”
27 including the “overall strategy for addressing the fire situation in the Sierra in combination with
28 key components of the conservation strategy for old forest dependent species.”); SNFPA 3577
29 (“For the SEIS, the purpose was not to reconsider broad changes in overall program direction.
The SEIS was initiated to incorporate new information and adjust the management direction in
the existing SNFPA ROD to better achieve the goals of the SNFPA.”); SNFPA 3097-98.

1 dilemmas in the Sierra Nevada. These are alternatives F2-F8. Additionally, based upon experience
2 implementing the 2001 decision, the release of new information, and extensive review of
3 management opportunities in the Sierra, the Forest Service generated a new alternative for
4 consideration, S2. These alternatives covered an extremely wide variety of management approaches,
5 with some alternatives taking a cautious approach toward active management (e.g., F2, F5, F8), and
6 others taking a much more aggressive approach (e.g., F4, F6, F7). See SNFPA 3170 (Table 2.5.3a).
7 Together, the nine alternatives considered in detail responded to the 2004 SEIS's purpose and need
8 to explore solutions to the specific problems highlighted in the 2001 EIS, and also sought to remedy
9 those problems more effectively than the 2001 decision had. This range of alternatives fit the
10 purpose and need and thus was sufficiently broad to comply with NEPA. See Friends of Southeast's
11 Future, 153 F.3d at 1067. Federal Defendants are therefore entitled to summary judgment on the
12 claim that consideration of alternatives was inadequate, and that the proposed action was not
13 adequately described. Pl.'s Am. Compl. ¶¶ 47, 49-52.

14 2. **The 2004 SEIS's Range of Alternatives Fostered Informed Decision-** 15 **making and Informed Public Participation**

16 Not only did the 2004 SEIS's range of alternatives meet the SEIS's purpose and need, but it
17 also fulfilled the fundamental purposes of NEPA alternatives: 1) to provide for informed decision
18 making; and 2) to provide for informed public participation. See Westlands, 376 F.3d at 872 ("The
19 'touchstone' for courts reviewing challenges to an EIS under NEPA 'is whether an EIS's selection
20 and discussion of alternatives fosters informed decision-making and informed public participation.'")
21 In this case, the range of alternatives provided for informed decision making and public participation.

22 First, by having a breadth of alternatives that ranged from a passive approach (F2) to highly
23 active management (F4), with numerous alternative approaches including S1 and S2 in between, the
24 decision maker could choose among a broad array of approaches to land management after the
25 weighing the costs, benefits, and risks of each. Having such a broad range also provided different
26 members of the public with a means of comparing and commenting upon the various strategies, thus
27 allowing the parties to find an alternative best aligned with their interests. As in Westlands, 376 F.3d
28 at 872, "there was a thorough public debate about [the alternatives ..., c]ommentators posited

1 alternatives[,] . . . and the EIS team responded.” See, e.g., SNFPA 3584-88 (indicating that different
2 public comments separately urged adopting S1, S2, S3, F2, F4, F5, F6, and F7).

3 Second, by providing rigorous analysis and substantial treatment of each of the nine
4 alternatives, the SEIS (and the 2001 EIS by incorporation) ensured that both the decisionmaking and
5 public participation were fully “informed.” See Westlands, 376 at 872; 40 C.F.R. 1502.14 (stating
6 that an EIS should “[r]igorously explore and objectively evaluate all reasonable alternatives,” . . .
7 and “[d]evote substantial treatment to each alternative considered in detail . . .”). Due to the breath
8 in scope and depth of analysis of the 2004 SEIS’s alternatives, the dual goals of informed
9 decisionmaking and public participation were achieved, thereby satisfying NEPA.

10 **3. The SEIS Presented the Nine Alternatives in an Adequate Format to** 11 **Compare Them with One Another**

12 Plaintiff alleges that the 2004 SEIS “considers only one alternative” and does not present the
13 analysis of environmental consequences in an adequate format to allow the alternatives to be
14 compared with one another. Pl.’s Am. Compl. ¶¶ 47, 51. Plaintiff’s first allegation, that only one
15 alternative was considered, is simply incorrect. Id. ¶ 51; see, e.g., SNFPA 3078, 3115, 3160-62, 957
16 (2001 EIS, 83-164, 185-202); 3166-78. While the SEIS did not always analyze F2-F8 in the same
17 manner as S1 and S2, this is because the vast majority of analysis for F2-F8 had already been done
18 in the 2001 EIS. Rather than repeating that analysis, the agency simply referred to the 2001 EIS and
19 included new analysis of alternatives F2-F8 when necessary based on new information. See SNFPA
20 3577 (SEIS “relies very heavily upon the analysis presented in the FEIS and incorporates that
21 information rather than repeating it.”). The SEIS states:

22 Part 4.[5] briefly describes the environmental consequences for Alternatives F2
23 through F8. Detailed analyses of environmental consequences for Alternatives F2
24 through F8 are presented in the SNFPA FEIS, Volumes 2 and 3. The information
25 presented in this document for these alternatives (F2 through F8) addresses aspects
26 of environmental consequences that have changed based on new information
27 identified during the SNFPA review process.

28 SNFPA 3255; see SNFPA 3115, 3577. Because Alternatives F2-F8 were explored in detail in the
2001 EIS and relevant portions of that analysis were incorporated into the SEIS, NEPA was satisfied.
See 40 C.F.R. §§ 1500.4, 1502.21 (encouraging paperwork reduction, incorporation by reference);

1 Sierra Club v. Clark, 774 F.2d 1406, 1411 (9th Cir. 1985) (“By specifically referring to prior BLM
2 studies and supporting materials, the FEIS fulfilled its informational purpose.”) (citation omitted).

3 Beyond incorporating the extensive analysis of alternatives F2-F8 from the 2001 EIS, the
4 SEIS explicitly analyzed F2-F8 alongside S1 and S2. SNFPA 3166- 78; see also SNFPA 3082-3094.
5 This comparative analysis was sufficiently clear to help understand the alternative courses of action
6 and their respective impacts on the environment. See 40 C.F.R. § 1502.14 (EIS should present
7 impacts of alternatives “in comparative form, thus sharply defining the issues and providing a clear
8 basis for choice among options by the decisionmaker and the public.”). Given the incorporated
9 analysis from the 2001 EIS and extensive comparison in the SEIS, F2-F8 were adequately analyzed
10 and presented in a format sufficient to satisfy NEPA.

11 **4. The Forest Service Was Not Required to Analyze Any Additional**
12 **Alternatives**

13 **a. Plaintiff Has Forfeited the Argument that Other Alternatives**
14 **Should Have Been Considered in the 2004 SEIS Because During**
15 **the NEPA Process Plaintiff Failed to Provide a Detailed Proposal**
16 **for an Alternative to Be Considered**

17 Plaintiff contends that various additional alternatives should have been considered in the
18 2004 SEIS. Pl.’s Am. Compl. ¶ 51. However, the Supreme Court has held that if a party fails to
19 propose a potential alternative during the public comment process, that party cannot later attack a
20 federal agency for failing to consider a broad enough range of alternatives. See U.S. Dep’t of Transp.
21 v. Pub. Citizen, 541 U.S. 752, 764-65 (2004) (holding that plaintiffs forfeited any objection to the
22 range of alternatives where plaintiffs failed to propose potential alternatives during the NEPA
23 process). While Plaintiff did make some comments that allude to potential alternatives to be
24 considered, its comments were not specific enough to provide the basis for its challenge the range
25 of alternatives in litigation. The Supreme Court and Ninth Circuit have held that it is not enough to
26 simply mention an alternative during the public comment process; rather, the commenter must
27 provide a detailed proposal in order to later challenge the range of alternatives. See Vt. Yankee
28 Nuclear Power Corp., 435 U.S. at 553-54 (1978); City of Angoon, 803 F.2d at 1022 (upholding Army
Corps of Engineers’ decision not to explore alternative advanced by plaintiff where plaintiff had not

1 previously “offered a specific, detailed counterproposal” during the NEPA process); Morongo Band
2 of Mission Indians v. FAA, 161 F.3d 569, 576-77 (9th Cir. 1998).

3 In its comments, Plaintiff only mentioned alternative courses of action in the most oblique
4 and vague terms. See SNFPA 3772 (“[The DEIS] does not consider, for example, addressing the
5 issue [of local flexibility] through adaptive management, through a specific process for obtaining
6 relief from particular Standards and Guidelines on a project basis, or through a pilot project for a
7 section of the Sierras.”) Because Plaintiff did not describe in detail the alternatives it wished to be
8 considered, it may not raise such an argument in this matter.

9 **b. The 2004 SEIS’s Sixteen Alternatives Met NEPA’s Requirement**
10 **for a Range of Reasonable Alternatives**

11 **(1) The Forest Service Did Not Need to Consider Every**
12 **Conceivable Alternative**

13 Plaintiff’s allegation that the Forest Service did not consider all possible alternatives is beside
14 the point.^{18/} See Pl.’s Am. Compl. ¶ 51. Though the Forest Service could have analyzed other
15 alternatives, NEPA does not require such makework. See, e.g., Vt. Yankee, 435 U.S. at 551 (“Time
16 and resources are simply too limited to hold that an impact statement fails because the agency failed
17 to ferret out every possible alternative, . . .”). See Westlands, 376 F.3d at 871 (“NEPA does not
18 require the EIS to have considered every conceivable permutation ...”) (citation omitted); City of
19 Carmel-by-the-Sea v. U.S. Dept. of Transp., 123 F.3d 1142, 1155 (9th Cir. 1997) (“[An EIS] need not
20 consider an infinite range of alternatives”); Headwaters, Inc. v. BLM, 914 F.2d 1174, 1181 (9th
21 Cir. 1990) (“an agency’s consideration of alternatives is sufficient if it considers an appropriate range
22 of alternatives, even if it does not consider every available alternative.”) Rather, NEPA documents
23 should avoid producing needless paper, and should instead focus on the significant issues at hand.
24 See, e.g., 40 C.F.R. § 1502.1 (“Agencies shall focus on significant environmental issues and
25 alternatives and shall reduce paperwork”); see also SNFPA 3578 (discussing how range of
26 alternatives satisfies NEPA); 40 C.F.R. § 1500.1(b), 40 C.F.R. § 1500.4, 40 C.F.R. § 1501.1(d), 40

27 ^{18/} Even if the Plaintiff had a basis to challenge the range of alternatives in the SEIS, the Forest
28 Service did consider some of Plaintiff’s proposals. However, those proposals were not examined
in detail because they would not meet the project’s purpose and need. *See infra* at 35.

1 C.F.R. § 1502.1, 40 C.F.R. § 1502.2(b). In this case, the Forest Service crafted a broad range of
2 alternatives that responded to public input, addressed significant ecological issues, and responded
3 to the purpose and need for the SEIS. By doing so, the sixteen alternatives served the goals of
4 fostering informed decision-making and informed public participation, thereby satisfying NEPA.
5 See Westlands, 376 F.3d at 872; Block, 690 F.2d at 767.

6 Plaintiff’s allegation that the Forest Service is using timber harvesting to generate “continued
7 agency funding” and therefore should have considered other alternatives for generating such funds
8 is based on a misconception of the role of economics in the 2004 Framework. Pl.’s Am. Compl. ¶
9 51. The Forest Service is not, as Plaintiff implies, abandoning appropriated dollars and relying solely
10 upon timber harvest revenues to fund treatments.^{19/} Rather, it is making use of the commercial value
11 of wood by-products in order to more efficiently and effectively reduce fuels on the landscape, which
12 results in non-commercial benefits by avoiding loss of wildlife habitat to stand replacing fires--
13 something not possible under the 2001 Framework. See SNFPA 2005 (under the 2001 Framework,
14 “using timber sale contracts as a tool to leverage appropriated funds and achieve higher levels of
15 accomplishment will not be possible”); SNFPA 3654 (field professionals expressed concerns over
16 the “inability to create effective and cost-efficient fuels treatments) (citing SNFPA 1923). Because
17 the 2004 Framework is not a substitute for continued funding, it is entirely reasonable for the SEIS
18 not to have considered other “alternative[s] for generating funds.” Pl.’s Am. Compl. ¶ 51.

19 **(2) The Forest Service Reasonably Eliminated Seven**
20 **Alternatives from Detailed Consideration**

21 In addition to the nine alternatives considered in detail, the Forest Service considered another
22 seven alternatives, including several of the alternatives mentioned by Plaintiff. SNFPA 3163-65.
23 The Forest Service eliminated those alternatives from detailed consideration in accordance with 40
24 C.F.R. § 1502.14(a), because the alternatives were inconsistent with the EIS’s purpose and need. See

25
26 ^{19/} See SNFPA 3100 (increasing the economic value of wood byproducts would improve the
27 ability to “treat the desired acreage of hazardous fuels *with available appropriated dollars*”)
28 (emphasis added); SNFPA 3584 (2004 Framework would allow treatments to “generate revenues
through commercial forest products to increase the number of acres that can be treated with the
available appropriated funds”); SNFPA 3651 (proceeds from harvest of some larger trees would
be used to treat *additional acres*) (emphasis added); SNFPA 3652.

1 SNFPA 3009 (“Alternatives were eliminated [from detailed study] because they did not respond to
2 the purpose and need for action, new information, and/or implementation concerns.”); see also
3 SNFPA 3163; 4014; see also SNFPA 3163-65, 3583-84 (explaining why each alternative was
4 eliminated). While Plaintiff may have preferred that the SEIS provide detailed treatment of all
5 sixteen alternatives, an agency is not required to consider alternatives inconsistent with the agency’s
6 policy objectives. See Westlands, 376 F.3d at 871-72 (“It would turn NEPA on its head to interpret
7 the statute to require that [an agency] conduct in-depth analyses of . . . alternatives that are
8 inconsistent with the [agency’s] policy objectives.”) (quoting Kootenai Tribe of Idaho v. Veneman,
9 313 F.3d 1094, 1122 (9th Cir. 2004); Moseley, 80 F.3d at 1404 (agency need not consider
10 alternatives that are “inconsistent with its basic policy objectives”). Because the seven alternatives
11 eliminated from detailed consideration were inconsistent with SEIS’s goals or were very similar to
12 other alternatives, the SEIS was reasonable in its treatment of those alternatives. See Westlands, 376
13 F.3d at 871-72.

14 In sum, the Forest Service provided detailed treatment of nine disparate alternatives and
15 provided reasonable bases for eliminating seven others from detailed consideration. This is all that
16 was required under NEPA. See Headwaters, 914 F.2d at 1180 (“Nor must an agency consider
17 alternatives which are infeasible, ineffective, or inconsistent with the basic policy objectives”)
18 (citation omitted). Because the SEIS considered an adequate range of alternatives and reasonably
19 explained why other alternatives suggested by the public did not meet the purpose and need, Federal
20 Defendants are entitled to summary judgment on Plaintiff’s fourth cause of action.

21 **CONCLUSION**

22 For the foregoing reasons, the Court should grant summary judgment for Federal Defendants
23 on all counts in Plaintiff’s Amended Complaint.

24 Respectfully submitted this 16th day of December 2005.

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