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13 IN THE UNITED STATES DISTRICT COURT
14 FOR THE EASTERN DISTRICT OF CALIFORNIA
15 SACRAMENTO DIVISION

16 PACIFIC RIVERS COUNCIL,)
17 Plaintiff,)
18 v.)
19 United States Forest Service, *et al.*,)
20 Federal Defendants,)
21 and)
22 CALIFORNIA FORESTRY ASSOCIATION,)
23 *et al.*,)
24 Defendant-Intervenors,)
25 and)
26 CALIFORNIA SKI INDUSTRY)
ASSOCIATION,)
27 Defendant-Intervenor,)
28 and)

No. CIV-S-05-0953 MCE/GGH
**FEDERAL DEFENDANTS'
MEMORANDUM IN OPPOSITION
TO PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT**

1 QUINCY LIBRARY GROUP, *et al.*,)
2 Defendant-Intervenors.)
3 _____)

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ACRONYMS AND ABBREVIATIONS

1		
2	APA	Administrative Procedure Act
3	dbh	Diameter at Breast Height
4	DFPZ	Defensible Fuel Profile Zone
5	EIS	Environmental Impact Statement
6	EPA	United States Environmental Protection Agency
7	FSEIS	Final Supplemental Environmental Impact Statement
8	HFQLG	Herger-Feinstein Quincy Library Group Forest Recovery Act
9	NEPA	National Environmental Policy Act of 1969
10	NFMA	National Forest Management Act
11	NFS	National Forest System
12	NWFP	Northwest Forest Plan
13	PAC	Protected Activity Center
14	ROD	Record of Decision
15	SAT	Scientific Analysis Team
16	SCR	Science Consistency Review
17	SEIS	Supplemental Environmental Impact Statement
18	SNFPA	Sierra Nevada Forest Plan Amendment
19	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
3 materials:

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

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

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

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

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

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

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

3 5. Several additional volumes of administrative record materials are also associated
4 with three 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
7 cited in that volume are referenced as “CA xxxx,” where “xxxx” is the
8 bates-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-
12 stamped number at the bottom of the page in that record.
- 13 c. One additional binder is associated with Pacific Rivers Council v. U.S.
14 Forest Service, No. CIV-S-05-953 MCE GGH. Any pages cited in that
15 volume are referenced as “PRC xxxx,” where “xxxx” is the bates-stamped
16 number at the bottom of the page in that record.

17 6. 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
19 and 2 was originally included at the front of the first volume of the eight-volume SNFPA record
20 set. After errors were discovered in the numbering on the CDs mentioned above, an amended
21 index was prepared and provided to the parties. That amended index is also being lodged with
22 the Court.

1 **INTRODUCTION**

2 In this case, plaintiff Pacific Rivers Council (“Plaintiff”) argues that the 2004 Sierra Nevada
3 forest plan amendment (“SNFPA”), commonly referred to as the “2004 Framework,” violates the
4 Administrative Procedure Act (“APA”) and the National Environmental Policy Act of 1969
5 (“NEPA”). However, as the administrative record demonstrates, each of Plaintiff’s arguments lacks
6 merit and should be rejected.

7 Plaintiff’s first claim--that the 2004 Framework violates NEPA for failing to analyze direct
8 and indirect effects to aquatic ecosystems and species from the 2004 Framework (including activity
9 related to roads, log landings, and skidtrails), Pl.’s Mem. at 16-29-- is forfeited in part, because
10 Plaintiff did not raise critical aspects of its claim during the public comment period. As to the
11 portions of Plaintiff’s first claim not subject to forfeiture, the final supplemental environmental
12 impact statement (“SEIS”) for the 2004 Framework demonstrates that impacts to aquatic ecosystems
13 from road and timber harvest activities were adequately analyzed under NEPA given the broad,
14 programmatic role of a forest plan amendment like the SNFPA.

15 Plaintiff’s cumulative effects claims (Pl.’s Mem. at 30) must fail, because Plaintiff has
16 misconstrued the meaning of “cumulative” effects, thereby, rendering its claim unsubstantiated. In
17 addition, because timber harvest and road activities were appropriately analyzed as direct and indirect
18 effects of the 2004 Framework in the same manner as Plaintiff requests to be analyzed cumulatively,
19 Plaintiff’s cumulative effects claim must also fail. In any case, the SEIS contains an adequate
20 analysis of cumulative effects related to these resources. Plaintiff also alleges that the 2004 SEIS
21 violates NEPA because it does not adequately analyze mitigation measures. Pl.’s Mem. at 36. As
22 with their other NEPA claims, this claim both ignores the different level of detail required in a
23 programmatic EIS and is solidly refuted by the record. For these reasons, all of Plaintiff’s NEPA
24 claims should be dismissed.

25 Finally, Plaintiff raises independent claims under the APA, which allege without reference
26 to any substantive statute, that the 2004 Framework is not supported by the record. Pl.’s Mem. at 41.
27 The caselaw has clearly establishes that APA claims must be read in light of the relevant substantive
28 statutes that guide and constrain agency action. The Forest Service manages National Forest System

1 (“NFS”) lands under several substantive statutes which provides the Forest Service with broad
2 discretion to manage for the multiple use of resources on its lands. The 2004 Framework is a
3 reasonable exercise of that discretion and is supported by sound rationale. Therefore, Plaintiff’s APA
4 claims must be rejected.

5 **ARGUMENT^{1/}**

6 **I. THE 2004 FRAMEWORK COMPLIES WITH NEPA**

7 Plaintiff brings three claims alleging that the 2004 Framework violates NEPA. They are: (1)
8 failure to analyze direct and indirect effects to aquatic ecosystems and species from the 2004
9 Framework (including activity related to roads, log landings, and skidtrails), Pl.’s Mem. at 16-29;
10 (2) failure to adequately analyze cumulative effects (including impacts to aquatic resources from
11 increased logging and road construction), *id.* at 30-43; and, (3) failure to analyze mitigation measures
12 for project impacts. *Id.* at 36-40. As addressed in detail below, each of these claims must fail.

13 **A. Plaintiff Has Forfeited Its Claims that the Forest Service Inadequately Analyzed**
14 **Direct and Indirect Effects from Logging and Prescribed Burning, Because**
Plaintiff Failed to Raise Those Issues During the Public Comment Period.

15 As explained in greater detail in Federal Defendants’ Summary Judgment Brief, Plaintiff’s
16 claims that the Forest Service violated NEPA by failing to analyze adequately the direct and indirect
17 impacts to fish, aquatic and amphibian species from logging, prescribed burning, skid trails and log
18 landing construction have been forfeited. Pl.’s Mem. at 15, 24; *see* Fed. Defs.’ Summ. J. Mem. at
19 12-13. Plaintiff has waived these claims by failing to raise them as specific objections to the 2004
20 Framework during the comment period. *See Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 764-65
21 (2004) (failure to raise “particular objections” in a party’s comments results in the forfeiture of those
22 objections.); *Vermont Yankee Nuclear Power v. Natural Res. Def. Council*, 435 U.S. 519, 553-554
23 (1978) (same). During the comment period on the SEIS, Plaintiff did not allege NEPA deficiencies
24 pertaining to the direct and indirect effects to fish and amphibian species from logging and prescribed
25

26 ^{1/} Relevant factual and legal background is found in Federal Defendants’ Memorandum in
27 Support of Cross-Motion for Summary Judgment (“Federal Defendants’ Summary Judgment
28 Brief”) and is incorporated here by reference. Furthermore, references to arguments presented in
Federal Defendants’ Summary Judgment Brief are hereby incorporated by reference into this
memorandum.

1 burning and aquatic species from skid trail and log landing construction and use. See, e.g., PRC 81-
2 90, 91-100 (nowhere raising such arguments). Instead, Plaintiff raised those issues for the first time
3 here, in litigation. However, “[p]ersons challenging an agency’s compliance with NEPA must
4 ‘structure their participation so that it . . . alerts the agency to the [parties’] position and contentions,’
5 in order to allow the agency to give the issue meaningful consideration.” Pub. Citizen, 541 U.S. at
6 764 (quoting Vermont Yankee, 435 U.S. at 553). Therefore, Plaintiff has forfeited its challenges to
7 the analysis of direct and indirect effects to aquatic species from logging and prescribed burning, and
8 the Court should dismiss those claims and strike the relevant portions of Plaintiff’s brief. See id.;
9 Pl.’s Mem. at 15, 24.^{2/}

10 **B. Even if Plaintiff is Not Procedurally Barred from Raising Its Arguments, the**
11 **SEIS Took A Hard Look at Direct and Indirect Effects to Aquatic Ecosystems**
12 **at the Appropriate Level of Detail for a Programmatic EIS**

13 In this case, the Forest Service properly determined the scope and level of detail of its analysis
14 for the 2004 Framework SEIS. Based on the scope and level of detail necessary for a programmatic-
15 level SEIS, the Forest Service adequately addressed direct and indirect effects of on-the-ground
16 activities about which Plaintiff complains. See Pl.’s Mem. at 16, 20, 24, 25, 26.

17 **1. NEPA Does Not Require the Same Level of Detail in a Programmatic**
18 **SEIS Where Future, Site-Specific Activity Will Be Subject to Further**
19 **Analysis**

20 Contrary to Plaintiff’s contentions, direct and indirect impacts *can be* analyzed in further
21 detail once a site-specific activity has been proposed. Pl.’s Mem. at 19. As explained in Federal
22 Defendants’ Summary Judgment Brief, the law on this point is clear: programmatic decisions do

23 ^{2/} In addition to forfeiting the claims under Vermont Yankee and Pub. Citizen, Plaintiff’s
24 allegations also must be dismissed for failure to exhaust administrative remedies. The Ninth
25 Circuit has repeatedly held that if matters are not raised on appeal, the plaintiff is barred from
26 later raising such matters in a lawsuit. “As a general rule, if a petitioner fails to raise an issue
27 before an administrative tribunal, it cannot be raised on appeal from that tribunal.” Reid v.
28 Engen, 765 F.2d 1457, 1462 (9th Cir. 1985) (applying issue exhaustion requirement even where
the governing statute provided exceptions, which is not the case with the Department of
Agriculture Reorganization Act); see also National Forest Preservation Group v. Butz, 485 F.2d
408, 411 (9th Cir. 1973) (declining to consider Wilderness Act claims not raised on
administrative appeal); Idaho Sporting Cong. v. Rittenhouse, 305 F.3d 957, 965 (9th cir. 2002)
 (“claims must be raised with sufficient clarity to allow the decisionmaker to understand and rule
on the issue raised”).

1 not require the same level of detail as site-specific decisions. See Fed. Defs.’ Summ. J. Mem. at 14-
2 16. Plaintiff has failed to understand this distinction in the law as applied to the facts of this case.
3 Plaintiff constructs its argument as if the 2004 Framework were a site-specific project. See Pl’s
4 Mem. at 17 (“the FSEIS ... fails to analyze the direct and indirect impacts to aquatic habitats,
5 amphibians species, and fish resulting from *this project’s* substantial logging increases.”) (emphasis
6 added). This assumption contradicts the law. The more programmatic in nature the decision-making
7 is, the lesser amount of detail is required. See Conner v. Burford, 848 F.2d 1441, 1448 (9th Cir.
8 1988), cert. denied, 489 U.S. 1012 (1989).

9 The Ninth Circuit has repeatedly emphasized that the level of detail required for a
10 programmatic EIS accompanying land use management plans is not as great as that required for the
11 analysis of effects for site-specific actions. See Friends of Yosemite Valley v. Norton, 348 F.3d 789
12 (9th Cir. 2003); Resources Ltd. v. Robertson, 35 F.3d 1300, 1306 (9th Cir. 1993); Salmon River
13 Concerned Citizens v. Robertson, 32 F.3d 1346 (9th Cir. 1994); California v. Block, 690 F.2d 761,
14 765 (1982). In Block, 690 F.2d at 761, the Ninth Circuit held that in considering the adequacy of a
15 largely programmatic EIS for a large scale, multi-step project, detailed analysis should be deferred
16 until a “concrete development proposal crystallizes the dimensions of a project’s probable
17 environmental consequences.” In Resources Ltd., 35 F.3d at 1306, the Ninth Circuit considered
18 challenges to an EIS for a forest plan for allegedly failing to analyze cumulative impacts, including
19 those of future road construction, as well as the plan’s impacts on water quality and fish. The court
20 flatly rejected the plaintiffs’ argument:

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

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

26 Id.; see also Salmon River, 32 F.3d at 1357 (EIS for regionwide vegetation management program
27 contained cumulative effects analysis which although “not exhaustive,” was “reasonably thorough,”
28 satisfying NEPA); Seattle Audubon Soc’y v. Lyons, 871 F. Supp. 1291, 1324 (W.D. Wash. 1994)

1 (analysis for regionwide forest plan amendment, although “general due to the programmatic nature
2 of the FSEIS,” still complied with NEPA).

3 The Ninth Circuit has been consistent with the reasoning of this line of case law, applying
4 it more recently in Friends of Yosemite Valley, 348 F.3d 789, where the Court opined that “site-
5 specific impacts need not be fully evaluated until a critical decision has been made to act on site
6 development.” Id. at 800 (quoting N. Alaska Env'tl. Ctr. v. Lujan, 961 F.2d 886, 890-91 (9th Cir.
7 1992)); see also Salmon River, 32 F.3d at 1357 (full evaluation of site-specific impacts required only
8 when a “critical decision” has been made to act on site development); Block, 690 F.2d at 761 (same).
9 Only a critical decision triggers a more detailed review. See Friends of Yosemite Valley, 348 F.3d at
10 801.

11 In sum, Plaintiff’s claims that the 2004 SEIS did not contain an adequate analysis of impacts
12 from future road construction, timber harvest, log landing and skid trail construction, and grazing
13 must all be considered in light of the less detail required for programmatic EISs, particularly in
14 situations where a “critical decision” has not been made on site-specific action. Block, 690 F.2d at
15 761; see also Salmon River, 32 F.3d at 1357; N. Alaska Env'tl. Ctr., 961 F.2d at 891.

16 **2. Because the 2004 Framework Does Not Make a “Critical Decision” to**
17 **Authorize Any On-the-Ground Activities, the SEIS Was Not Required**
to Contain the Detailed Analysis of Activities that Plaintiff Seeks

18 Plaintiff claims that direct and indirect impacts of road construction, logging activities, log
19 landings, skid trail construction, and grazing must be dismissed. See Pl.’s Memo at 20, 24, 25, 26.
20 As discussed in greater detail in Federal Defendants’ Summary Judgment Brief at 15-17, the 2004
21 Framework does not make a “critical decision” involving the irretrievable commitment of resources.
22 See 42 U.S.C. § 4332(C)(v); Resources Ltd., Inc. v. Robertson, 789 F. Supp. 1529, 1540 (D. Mont.
23 1991) (“The Forest Plan does not make an ‘irretrievable commitment’ to the construction of these
24 roads”), aff’d in part, rev’d in part on other grounds, 35 F.3d 1300 (9th Cir. 1994); cf. Conner, 848
25 F.2d at 1447-48. The 2004 Framework ROD does not authorize any actual timber harvest, road
26 construction, log landing or skid trail construction, or grazing. See SNFPA 3014 (the amended plans
27 “do not provide final authorization for any activity...”); see also Ohio Forestry Ass’n v. Sierra Club,
28 523 U.S. 726, 729 (1998). The proposed action in the 2004 Framework is a refinement of the

1 management direction of the SNFPA modifying standards and guidelines of the existing SNFPA
2 strategy, clarifying management intent, and implementing a pilot project required by the Herger-
3 Feinstein Quincy Library Group Forest Recovery (“HFQLG”) Act.^{3/} SNFPA 3077. A “critical
4 decision” has not been made in this case that would trigger the need for a detailed analysis of impacts
5 from the activities about which Plaintiff complains. See Friends of Yosemite Valley, 348 F.3d at
6 800; see also Resources Ltd., 789 F. Supp. at 1540 (“The Forest Plan EIS need not become a
7 substitute for site-specific NEPA analysis at the project level when a specific project is proposed for
8 a specific area.”); Salmon River, 32 F.3d at 1357 (9th Cir. 1994) (“when an impact statement
9 [programmatic] is prepared, site-specific impacts need not be fully evaluated until a ‘critical
10 decision’ has been made to act on site development”). For this reason alone, Plaintiff’s claims fail.

11 **C. Based on the Programmatic Nature of the Forest Plan, the 2004 SEIS Provided**
12 **a Sufficiently Detailed Analysis of Impacts to Aquatic Ecosystems**

13 Given that the 2004 Framework is a programmatic forest plan that does not make any “critical
14 decision” to authorize road construction, skid trails, log landings, or timber harvest, the SEIS
15 constitutes a reasonably thorough discussion with sufficient detail in its analysis of potential direct
16 and indirect effects of the 2004 Framework and complies with NEPA. Block, 690 F.2d at 761 (what
17 suffices as “reasonably thorough” depends on the level of decision-making or planning at issue).

18
19 ^{3/} The HFQLG Act requires the Forest Service to conduct a pilot project on about 1.5 million
20 acres on the Plumas NF, Lassen NF, and a portion of the Tahoe NF, to “demonstrate the
21 effectiveness” of several resource management techniques. HFQLG Act, Pub. L. No. 105-277,
22 § 401(b), 112 Stat. 2681-231 (1998) (codified as 16 U.S.C. § 2104 note); see also SNFPA 986
23 (HFQLG FEIS at 2-3) (pilot project area encompasses about 1.53 million acres); SNFPA 3131.
24 The techniques include the construction of fuelbreaks called defensible fuel profile zones
25 (“DFPZs”), and two uneven-aged methods of timber harvest: group selection, and harvest by
26 selection of individual trees. See id. § 401(d). Plaintiff’s characterization of group selection as
27 “clear-cut logging” is incorrect. Pl.’s Mem. at 10. Clear-cutting is an even-aged harvest method
28 that removes all trees so as to create stands in which trees of “essentially the same age grow
together.” 36 C.F.R. § 219.3 (2000) (definition of “Even-aged management”). By contrast,
group selection involves harvest of small patches (0.25 to 2 acres) for the purposes of
regenerating *uneven-aged* stands and promoting the growth of shade-intolerant trees. SNFPA
3276, 3329, 3339; see 36 C.F.R. § 219.3 (2000) (defining “Uneven-aged management” to include
group selection); see also *Sierra Nevada Forest Prot. Campaign v. Forest Serv.*, No. Civ. S-04-
2023-MCE/GGH, 2005 WL 1366507, *15 (E.D. Cal. May 26, 2005)* (explaining purposes of
group selection under the HFQLG Act); SEIS Vol. 2 at 89 (“The Forest Service has not allowed
clearcutting of green trees on the national forests of the Sierra Nevada, except for some very
special cases, for many years.

1 All of Plaintiff's claims relating to the sufficiency of direct and indirect impacts analysis in the 2004
2 Framework thus fail.

3 **1. Impacts Related to Roads Were Adequately Analyzed**

4 Plaintiff argues in two ways that the NEPA analysis of roads was inadequate. First, Plaintiff
5 contends that direct and indirect impacts of road construction and reconstruction were not sufficiently
6 analyzed. Pl.'s Mem. at 20. Second, Plaintiff argues that the 2004 Framework fails to adequately
7 analyze direct and indirect impacts from a projected increased usage of roads. Pl.'s Mem. at 25.
8 These separate claims have overlapping arguments, and both fail for the same reason. Impacts
9 related to roads were adequately analyzed in the SEIS.

10 The SEIS includes a sufficiently detailed analysis as to how roads would impact aquatic,
11 riparian and meadow ecosystems. SNFPA 3279, 3282-3283, 3394-3395. Specifically, the SEIS
12 discusses how roads affect geomorphic, hydrologic, and biological processes in aquatic ecosystems.
13 SNFPA 3279. The SEIS explains that roads contribute to surface erosion and mass wasting, altering
14 stream channel morphology, and can modify surface flows. Id. Roads also have the effect of
15 intercepting rainfall, thereby modifying the amount of time required for water to enter streams. Id.
16 The SEIS further discusses how erosion from roads can be reduced by proper road placement and
17 design, as well as by decommissioning and restoration (SNFPA 3279), thereby addressing Plaintiff's
18 concerns possible degradation to riparian habitats. See Pl.'s Mem. at 21.

19 Contrary to Plaintiff's ascertains, Pl.'s Mem. at 21, effects of road reconstruction are also
20 addressed in the SEIS. See SNFPA 3282, 3283. The SEIS explains that road reconstruction can
21 have short-term (months to a year or more) adverse effects such as accelerated erosion. SNFPA
22 3282. Many road reconstruction projects are intended to improve water quality and aquatic habitat
23 over the long-term by improving surface drainage and reducing sedimentation. SNFPA 3282-3823.

24 Concerns associated with future road construction are addressed in the SEIS. Guidelines
25 and standards are incorporated into the 2004 Framework to minimize and avoid watershed impacts
26 from future road construction, reconstruction, and location. See SNFPA 3049 (imposing
27 requirements on design of stream crossings, as well as requirements that roads avoid or minimize
28 impacts to wetlands, and to "avoid road construction in meadows"). For example, the 2004

1 Framework imposes several standards for road construction and reconstruction in order to protect
2 watershed resources:

3 (1) design new stream crossings and replacement stream crossings for at least the
4 100-year flood; (2) design stream crossings to minimize the diversion of streamflow
5 out of the channel and down the road in the event of a crossing failure; (3) design
6 stream crossings to minimize disruption of natural hydrologic flow paths, including
7 minimizing diversion of streamflow and interception of surface and subsurface water;
8 (4) avoid wetlands or minimize effects to natural flow patterns in wetlands; and (5)
9 avoid road construction in meadows.

10 SNFPA 3049.

11 Here Plaintiff seeks a level of detail in the analysis of road impacts which is not required for
12 a programmatic EIS, but is appropriate for a site-specific project level decision. See Pl.'s Mem. at
13 22 (alleging the SEIS fails to discuss impacts of road construction and reconstruction on aquatic
14 species and their habitats in the project area). For the reasons set forth in Federal Defendants'
15 Summary Judgment Brief, at 14-16, that level of detail is not required for a programmatic decision
16 such as the 2004 Framework. Site-specific analysis will be conducted in the future, including the
17 possible effects of new road construction proposed in the proximity of know of suspected habitat of
18 riparian species such as the foothill yellow-legged frog. SNFPA 3368.

19 Plaintiff also seeks analysis where analysis is not required. Plaintiff alleged that analysis of
20 direct and indirect impact to certain species has been entirely omitted or is inadequate. Pl.s' Mem.
21 at 17-18, 25. However, as the record demonstrates, the analysis in the SEIS is correctly tailored to
22 those species that are likely to be affected by the 2004 Framework. The Yosemite toad populations
23 are found in unroaded areas and it does not occur within the HFQLG Pilot Project Area. SNFPA
24 3373.^{4/} The Mountain yellow-frog's habitat overlaps with the Yosemite toad. SNFPA 3369. No
25 populations of the Northern leopard frog are known to exist on national forest in the Sierra Nevada.
26 SNFPA 3376. As the SEIS demonstrates, impacts of road to species are dependent on proposed
27 locations for roads in relation to the species habitat. If the habitat and roads do not overlap, impacts
28 to roads will be minimal if not non-existent. The Yosemite toad, the northern leopard frog, and the

^{4/} The difference in road construction between the 2001 and 2004 Frameworks is attributed to the HFQLG Pilot Project where it estimates up to 100 miles of new road construction may be needed.

1 Mountain yellow frog’s habitat is not predicted to be at risk from road activities, and therefore, the
2 level of detail in the analysis reflected the scope of the proposed action under the 2004 Framework.
3 Block, 690 F.2d at 761, 765 (The level of “detail that NEPA requires in an EIS depends upon the
4 nature and scope of the proposed action.”).

5 In sum, the discussion of the possible impacts of roads is reasonably thorough, especially
6 given that further analysis of site-specific impacts would occur once projects involving roads are
7 actually proposed. See Resources Ltd., 35 F.3d at 1306 (forest plan EIS contained a “reasonably
8 thorough discussion” of potential effects of road construction); see also Lyons, 871 F. Supp. at 1324.

9 **2. Effects Related to Timber Harvest Activities Were Adequately Analyzed**

10 Plaintiff argues that the impact of logging, skid trails, log landing construction, and prescribed
11 burning were not adequately analyzed. Plaintiff focuses on the differences between the 2001
12 Framework and the 2004 Framework suggesting that somehow the proposed increase in vegetation
13 management activities under the 2004 Framework render its analysis inadequate. Pl.’s Mem. at 16-
14 17.^{5/} Plaintiff similarly characterizes its argument pertaining to log skid trails and log landings. Pl.’s
15 Mem. at 24. However, for the reasons discussed below, these claims lack merit.

16 The 2004 SEIS provides sufficient detail regarding impacts from timber harvest and its
17 associated activities (e.g., log landings, skid trails). See Resources Ltd., 35 F.3d at 1306. Possible
18 impacts from timber harvest are discussed, including runoff water temperatures, and sedimentation
19 which can occur from skid trails and log landings. SNFPA 3281. Effects of fuels treatments on the
20 supply of CWD, which is important for stabilizing stream channels and providing cover for fish is
21 also analyzed. SNFPA 3282. However, the SEIS notes that assessment of these effects is difficult
22
23

24
25 ^{5/} Although the FSEIS states that the 2004 Framework proposes to allow for 45% more acres of
26 initial fuels treatment than the 2001 Framework it does so over 20 years and amounts to a
27 difference of 713, 504 acres. SNFPA 3280; SNFPA 3292 (Table 4.2.4c). Total areas to be
28 mechanically treated under the 2001 Framework is 1,026,900, with acres “effected” summing to
578,696. Id. SNFPA 3280. Under the 2004 Framework a total of 1,444,000 acres are to be
mechanically treated. Id. [What Does the Table mean by “effected acres”]. The difference in
acres between 1,444,000 (2004 Framework) and 578,696 (2001 Framework) to be mechanically
treated is 865,304, representing a 150% increase in acres, not a 250% increase.

1 at the programmatic scale “due to the extreme variability in the conditions of RCAs . . . consequently,
2 landscape and project-level analysis will be used to assess these effects in detail.” Id.

3 Impacts of timber harvest activities on individual aquatic, riparian or meadow species were
4 also addressed. As explained in section C.1. *supra*, direct and indirect impact analyses focused on
5 factors that were considered to have an impact. Paramount to such analyses are the locations of
6 species’ habitat ranges. For the Yosemite toad, activities determined to have potential impacts were
7 livestock grazing, pack and saddle stock use, recreational activities, exotic fish stocking and chemical
8 toxins. SNFPA 3371. Because the Yosemite toad’s habitat is found in mountain meadow
9 ecosystems, and because logging is not expected to occur in meadows, the SEIS did not specifically
10 evaluate impacts of log landings and skid trails to the toad. SNFPA 3373 (i.e. The Yosemite toad
11 does not occur within the HFQLG Pilot Project area.). Similarly, the SEIS determined that activities
12 that have the potential to affect the northern leopard frog include livestock grazing, exotic fish
13 stocking and chemical toxins (not logging). SNFPA 3375. As for Yosemite toad, the northern
14 leopard frog’s habitat is not considered to be at risk from logging activities, and therefore, the level
15 of detail in the analysis reflected the scope of the proposed action under the 2004 Framework. Block,
16 690 F.2d at 761, 765. For species that are or are suspected to be present in areas where logging
17 activities may occur, analysis of possible impacts was conducted at a level appropriate for a
18 programmatic EIS. For example, recognizing the impact of direct mortality from crushing,
19 mechanical equipment used in logging activities would be used during the dry season, when
20 California red-legged frogs are least likely to be dispersing, resulting in minimal risk of direct
21 mortality from crushing. SNFPA 3307. Prescribed burning was analyzed and expected to have
22 minimal direct effects to the frog, since burning would typically not be conducted when the ground
23 has surface moisture and frogs are most likely to be actively dispersing. Id. Further detail as to the
24 effects from timber harvest would not be meaningful in the SEIS, in part because of the
25 impracticability, but especially since further analysis will be conducted at the project level. See, e.g.,
26 SNFPA 3281-82.

27 Plaintiff contends that the SEIS failed to analyze the impacts to fish species. Pl.’s Mem. at
28 18. Plaintiff is incorrect. Effects of the 2004 Framework on ten species of fish is found in a July

1 2003 Biological Assessment (“BA”), which is incorporated by reference into the SEIS. See generally
2 SNFPA 2095-2430; see also SNFPA 3304 (incorporating by reference BAs for SEIS and EIS);
3 SNFPA 3487-3488 (referencing 2000 EIS and July 2003 BA for documentation of effects to fishes).
4 Incorporation by reference is adequate and indeed encouraged by NEPA. See 40 C.F.R. §§ 1500.4,
5 1502.21; Sierra Club v. Clark, 774 F.2d 1406, 1411 (9th Cir. 1985) (“By specifically referring to
6 prior BLM studies and supporting materials, the FEIS fulfilled its informational purpose.”). The ten
7 fish species analyzed include: Little Kern golden trout, SNFPA 2232-2238; Lahontan cutthroat trout,
8 SNFPA 2239-2245; Paiute cutthroat trout, SNFPA 2246-2251; Central valley steelhead, SNFPA
9 2252-2257; Central Valley spring-run chinook salmon, SNFPA 2258-2264; Modoc sucker, SNFPA
10 2265-2266; Lost River sucker and Shortnose sucker, SNFPA 2267-2269; Warner sucker, SNFPA
11 2270-2277; and Owen’s tui chub. SNFPA 2331-2235. Analysis of effects to the four sucker species
12 (Modoc, Lost River, Shortnose, Warner suckers) is combined. SNFPA 2273-2277. The July 2003
13 BA specifically discusses the species’ general distribution, status, reproductive biology and breeding
14 habitat, diet, general habit use, and also analyzes direct, indirect, and cumulative effects of the 2004
15 Framework on those species. Several other fish species were also considered, but dropped from
16 further analysis either “because they do not occur in the analysis area . . . or they will not be directly,
17 indirectly, or cumulatively affected by the proposed activities” in the 2004 Framework. SNFPA
18 2201; see SNFPA 2203-2206 (discussing Sacramento winter-run chinook salmon, Delta smelt,
19 Sacramento splittail, Green sturgeon, Cowhead Lake tui chub, Owen’s pupfish). As the record
20 demonstrates, Plaintiff’s argument that effects to fish were wholly overlooked is unsupported by the
21 record.

22 In sum, given this discussion of effects to watershed resources related to timber harvest and
23 related activities, the SEIS must be upheld under NEPA. See Friends of Yosemite Valley, 348 F.3d
24 at 800; Salmon River, 32 F.3d at 1357; Resources Ltd., 35 F.3d at 1306.

25 3. Effects Related to Grazing Were Adequately Analyzed

26 Plaintiff alleges that effects of grazing on aquatic ecosystems and associated species was
27 inadequate. Pl.’s Mem. at 26. Specifically, Plaintiff argues that the impacts were not considered
28 from the changes to the grazing standards and guidelines in the 2004 Framework were not analyzed.

1 Pl.'s Mem. at 27. However, as the record demonstrates, the effects of the grazing standards are
2 discussed in detail in the SEIS:

3 These standards are expected to reduce erosion of meadows and improve aquatic
4 habitat conditions by facilitating the growth of stabilizing vegetation along streams.
5 This should result in the reduction of sediment loading into streams for most flow
6 regimes and may also reduce summer stream temperatures as vegetation along
7 streambanks provides increasing levels of shade. The effects of allowing utilization
8 and stubble height requirements to be altered under Alternative S2 are expected to be
9 limited because these changes would occur only if current practices are resulting in
10 good to excellent range conditions and alternative practices would be rigorously
11 evaluated. Alternatives S1 and S2 both require that existing facilities be evaluated for
12 consistency with RCOs and new facilities be excluded from riparian areas. This
13 should also reduce erosion and sedimentation.

14 SNFPA 3284. The SEIS further details the differences in grazing impacts between the Frameworks
15 and explains the reasoning behind the revisions. See Fed. Defs' Mem. in Supp. of Cross-Mot. for
16 Summ. J. at 23-25.

17 Contrary to Plaintiff's claims, Pl.'s Mem. at 27, the SEIS includes separate discussions of
18 the effects of livestock grazing upon specific wildlife species that utilize aquatic, meadow, or riparian
19 habitat, including: willow flycatcher, SNFPA 3356-3362; foothill yellow-legged frog, SNFPA
20 3366-3369; mountain yellow-legged frog, SNFPA 3369; Yosemite toad, SNFPA 3371-3375;
21 northern leopard frog, SNFPA 3375-3376; and cascades frog, SNFPA 3376-3378. For each of these
22 species, the SEIS describes relevant analysis of the species in the 2001 FEIS,^{6/} including the factors
23 used to evaluate effects to that species. See, e.g., SNFPA 3366. The SEIS identifies the analysis
24 assumptions and limitations, followed by a discussion of direct and indirect effects related to various
25 activities, including livestock grazing, prescribed fire, mechanical timber harvest, and other activities.

26 To illustrate, the SEIS provides a candid assessment of the potential effects to the Yosemite toad,
27 noting that under both S1 and S2, due to the difficulty of herding and fencing livestock in high
28

^{6/} Because the SEIS is a supplement to the analysis already conducted for the 2001 Framework, it
incorporates much of the detail and information already contained in the 2001 EIS. See SNFPA
3577 (SEIS "relies very heavily upon the analysis presented in the FEIS and incorporates that
information rather than repeating it."); SNFPA 3115, 3255 (information presented for F2-F8
"addresses aspects of environmental consequences that have changed based on new information
identified during the SNFPA review process"). Such an approach is acceptable under NEPA.
See 40 C.F.R. §§ 1500.4, 1502.21 (encouraging incorporation by reference); Clark, 774 F.2d at
1411

1 elevation meadows, grazing and movement will take place in some portion of toad breeding and
2 rearing areas if livestock are allowed in adjacent areas. SNFPA 3372. The SEIS noted that “[l]ittle
3 information exists about the effects of land management activities on the Yosemite toad.” SNFPA
4 3371. The SEIS therefore bases its analyses upon general ecological relationships and principles.
5 Effects to the toad would include “trampling of some egg masses and tadpoles in shallow portions
6 of ponds,” although most eggs will have hatched, and effects would primarily be upon tadpoles by
7 the time livestock reach the high meadows. *Id.* The SEIS also disclosed that metamorphs are more
8 vulnerable due to their slow movement, and that the risk is highest from July through October.
9 SNFPA 3373. Indirect effects were also fully disclosed and include: modification of breeding and
10 rearing pool structural features from livestock hooves; reduction of cover from trampling and matting
11 of vegetation; and potentially delayed metamorphosis and smaller metamorphs as a result of
12 contamination of pools by livestock. *Id.*

13 Finally, the SEIS discusses cumulative effects, both to habitat and populations of various
14 species. *See, e.g.*, SNFPA 3361-3362, 3368-3369, 3370-3371, 3374-3376, 3377-3378. This species-
15 specific analysis, combined with the broader discussion of effects from grazing mentioned in Section
16 C.3, *supra*, constitutes a reasonably thorough discussion of effects and satisfies NEPA. *See Friends*
17 *of Yosemite Valley*, 348 F.3d at 800; *Salmon River*, 32 F.3d at 1357; *Resources Ltd.*, 35 F.3d at
18 1306.

19 In sum, Plaintiff cannot demonstrate in the overall context of the limited revisions of the
20 standards and guidelines applicable to aquatic, riparian and meadow ecosystems that environmental
21 impacts were ignored. The SEIS adequately analyzed effects from grazing, and Plaintiff’s argument
22 to the contrary should be rejected. *See Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519
23 (9th Cir. 1992) (“Once satisfied that a proposing agency has taken a ‘hard look’ at a decision’s
24 environmental consequences, the review is at an end.”) (quoting *Block*, 690 F.2d at 761).

25 **4. The Decision in the 2004 Framework to Amend Standards and Guidelines**
26 **Relating to the Aquatic Management Strategy is Adequately Supported by the**
Record

27 Plaintiff raises an argument that the 2004 Framework FSEIS lacks adequate discussion of
28 changes to certain standards and guidelines relating to the Aquatic Management Strategy (“AMS”).

1 Pl.'s Mem. at 30. While Plaintiff may not agree with the revisions, the record adequately supports
2 the decision to revise the standards and guidelines relating to the AMS. Because this change is a
3 reasonable exercise of agency's discretion, Plaintiff's argument must be rejected. See Northwest
4 Motorcycle Ass'n v. U.S. Dep't of Agriculture, 18 F.3d 1468, 1479 (9th Cir. 1994); Perkins v.
5 Bergland, 608 F.2d 803, 806 (9th Cir. 1979). As the record demonstrates, differences between the
6 approach taken in the 2001 Framework and 2004 Framework are to improve effective
7 implementation of the AMS by incorporating more site-specific analysis. Once it was determined
8 that some of the assumptions made in the 2001 Framework were no longer valid (see i.e. SNFPA
9 3277) the Forest Service decided to improve the ability to develop site-specific evaluations tailored
10 to address conservation at a local level while still allowing for fuels treatments, wildfire recovery,
11 timber harvest, wildfire risk reduction, road management, and grazing. See SNFPA 3277-3285. As
12 Plaintiff notes, one of these changes is to the soil compaction limit on riparian conservation areas
13 ("RCAs"). SNFPA 3280. As the SEIS explains, removing the firm 5 % numeric standard allows for
14 site-specific evaluations. Id. The reason for this change is to eliminate retention of untreated areas
15 within a designated fuels treatment unit "so that fire behavior and fire effects are effectively reduced
16 within the entire unit." SNFPA 3280. Possible impacts of a change such as this one which is
17 designed to improve the effectiveness through site-specific evaluation and application will occur at
18 a watershed-scale as part of project-level analysis. Id.

19 Plaintiff further alleges that the 2004 Framework fails to analyze the alleged elimination of
20 the prohibition against the application of pesticides in livestock grazing areas--another unacceptable
21 change in the eyes of the Plaintiff. Pl.'s Mem. at 29. However, as with other aspects of the AMS,
22 the standards and guidelines have been revised to incorporate greater flexibility and evaluation at
23 the site specific project level. The 2004 Framework require the limiting of pesticide application only
24 to where project level analysis indicates that use of pesticides is consistent with riparian conservation
25 objectives. SNFPA 3053. Specifically, the 2004 Framework imposes the standard that "[w]ithin 500
26 feet of known occupied sites for the California red-legged frog, Cascades, frog, Yosemite toad,
27 foothill yellow-legged frog, mountain yellow-legged frog, and northern leopard frog, design pesticide
28 applications to avoid adverse effects to individuals and their habitat." Id. Therefore, the guideline

1 itself incorporate impact analysis of pesticide application, and tailors such application to comply with
2 established riparian objectives.

3 As a whole, the SEIS provides a thorough discussion of the potential impacts to aquatic,
4 riparian and meadow ecosystems, and compares the changes in the standards and guidelines. The
5 SEIS identifies and discusses the environmental consequences, including comparison of Alternative
6 S1 (2001 Framework proposed action) and Alternative S2 (2004 Framework proposed action).
7 SNFPA 3277-3285. Environmental consequences were “assessed by estimating the relative
8 effectiveness of the land management activities and management direction proposed by the
9 alternatives in meeting the AMS goals.” SNFPA 3277. In doing so, the SEIS describes the effects
10 related to wildfire risk, fuels treatments, management within RCAs, road management and wildfire
11 recovery and timber salvage, and livestock grazing. SNFPA 3278-3284. In summary, Plaintiff cannot
12 demonstrate in the overall context of the limited revisions to the standards and guidelines applicable
13 to aquatic, riparian and meadow ecosystems that environmental impacts were ignored. Plaintiff’s
14 argument that there is an inadequate basis and explanation for adjusting some of the standards and
15 guidelines of the 2004 Framework AMS should therefore be rejected. See Northwest Motorcycle,
16 18 F.3d at 1479; Lead Indus. Ass’n v. U.S. Env’tl. Prot. Agency, 647 F.2d 1130, 1160 (D.C. Cir.),
17 cert. denied, 449 U.S. 1042 (1980).

18 **D. Based on the Programmatic Nature of the Forest Plan, the 2004 SEIS**
19 **Adequately Analyzed Cumulative Effects**

20 Next, Plaintiff contends that the 2004 SEIS failed to adequately analyze cumulative impacts
21 of logging and road construction to aquatic ecosystems and associated species of “the whole project”.
22 Pl.’s Mem. at 30. Plaintiff’s claim fails for two distinct reasons. First, Plaintiff is mistaken, and/or
23 confused, that timber harvest and road building are “cumulative effects” of the 2004 Framework--
24 they are in fact direct and indirect effects of the Framework, which provides management direction
25 for such projects.

26 As discussed in Section C.3, *supra*, the direct and indirect effects from timber and roads were
27 adequately analyzed in the SEIS, and Plaintiff’s claim here must fail for the same reason. Second,
28 to the extent that Plaintiff’s cumulative effects claim is really a request for a programmatic analysis

1 of impacts from all road construction throughout the entire Sierra Nevada, that challenge must fail,
2 since road construction has not been in fact proposed as part of the 2004 Framework.

3 **1. Road Construction, Timber Harvest, Fuels Treatment, and Grazing**
4 **Contemplated by the 2004 Framework Do Not Cause “Cumulative**
5 **Effects” Within the Meaning of NEPA**

6 Plaintiff contends that the 2004 Framework SEIS failed to adequately analyze the alleged
7 cumulative effects from road use, road construction, and timber harvest. Pl.’s Memo. at 30-34.
8 Plaintiff makes the same argument for fuels treatments and grazing. Pl.’s Mem. at 35-36. For the
9 reasons set forth in Federal Defendants’ Summary Judgment Brief at 26-27, Plaintiff is mistaken that
10 the activities about which it complains cause “cumulative effects” under the law.^{2/}

11 Plaintiff’s mistake stems from its reliance on Thomas v. Peterson, 753 F.2d 754 (9th Cir.
12 1985) which is inapposite to this case. See Pl.’s Memo. at 31. In Thomas, the court properly
13 considered the cumulative impacts of two separate actions: one contemplating timber sales; and, the
14 other, was a proposed action to build a road. 753 F.2d at 756-57. As the court explained, these were
15 separate actions that could have cumulative effects because the road construction and timber sales
16 were not two activities comprising of the same proposed action. Id. at 759; see also Blue Mountains
17 Biodiversity Project v. Blackwood, 161 F.3d 1208, 1215 (9th Cir. 1998) (Cumulative effects include
18 the impacts of other actions, not simply those from the activities that are contemplated by the
19 proposed action); 40 C.F.R. § 1508.7. The proposed road construction in Thomas was outside the
20 proposed action for the timber sale. Id. Therefore, the road construction and timber sales could have
21 cumulative impacts. Id. at 759. This is not the case here. The scope of the 2004 Framework includes
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27 ^{2/} “Cumulative impact” is defined as “the impact on the environment which results from the
28 incremental impact of the action when added to *other* past, present, and reasonably foreseeable
future actions” 40 C.F.R. § 1508.7.

1 both road construction and logging activities.^{8/} As such they do not cause the cumulative effects as
2 argued by Plaintiff. See Pl.’s Mem. at 31.

3 Furthermore, because Plaintiff’s “cumulative effects” claim is, in essence, identical to their
4 claim that direct and indirect effects were not considered, Plaintiff’s claim fails. To the extent that
5 the 2004 Framework contemplates road construction and logging, those activities and their impacts
6 are discussed and addressed as direct and indirect effects, on a species-by-species basis where
7 applicable. See, e.g., SNFPA 3279, 3282-83, 3307 (impacts of roads), 3280-3283 (impacts of fuels
8 treatments), 3283-3284 (timber salvage), 3304-3385 (impacts to individual species). In addition,
9 because the differences in the proposed action of the 2004 Framework compared to the 2001
10 Framework are “consistent with the range of choices in the FEIS [2001 Framework]” the cumulative
11 effects of the SNFPA alternatives on old forests, aquatic, riparian, and meadow habitats, forest fuels
12 and fire protection, and invasive plants as analyzed in the 2001 Framework FEIS (volume 2, part 1.3,
13 pages 16-25) remain the same and incorporated into the 2004 Framework SEIS. See SNFPA 3261.
14 Impacts of grazing on wildlife species that utilize aquatic, meadow, or riparian habitat is also
15 discussed. See SNFPA 3356-3362 (willow flycatcher); SNFPA 3366-3367 (foothill yellow-legged
16 frog); SNFPA 3369, (mountain yellow-legged frog); SNFPA 3371-3375 (Yosemite toad,); SNFPA
17 3375-3376, (northern leopard frog); SNFPA 3376-3378 (cascades frog); see also supra at Section
18 C.3. As the record demonstrates, the discussion of the impacts from road construction, timber
19 harvest activities, fuels treatments and grazing in the 2004 Framework SEIS is reasonably thorough
20 and meets the requirements of NEPA. See Resources Ltd., 35 F.3d at 1306.

21 **2. The 2004 SEIS Takes a “Hard Look” at Cumulative Impacts to Aquatic**
22 **Ecosystems and Associated Species.**

23 Setting aside Plaintiff’s misapprehension of the definition of “cumulative effects,” the SEIS
24 contains an adequate analysis of cumulative effects related to aquatic and riparian ecosystems. First,

25 ^{8/} Actions that would properly be included in a cumulative effects analysis are those that are
26 outside the scope of actions contemplated and regulated by the 2004 Framework, such as actions
27 on private lands; past timber harvest, mining, or grazing; future mining or other future actions
28 outside the scope of the Framework. See Natural Res. Def. Council v. Forest Serv., 421 F.3d
797, 815 (9th Cir. 2005); Resources Ltd., 35 F.3d at 1305; Lyons, 871 F. Supp. at 1323, aff’d,
Moseley, 80 F.3d at 140.

1 as already explained, the Forest Service reasonably concluded that a detailed analysis of cumulative
2 impacts from road construction is more appropriately conducted at the project-level NEPA analysis
3 when an actual decision to construct a road as part of a site-specific project has been made. See supra
4 at 16-19; see also SNFPA 3596 (“Detailed cumulative effects analysis at the individual watershed
5 scale is conducted at the project level because of the site-specific data required for this type of
6 analysis.”). To this end, the SEIS specifically states that placement of roads in relation to occupied
7 and suitable habitat for aquatic species would be evaluated on a site-specific basis, and mitigation
8 measures would be implemented to avoid adverse impacts. SNFPA 3307 (discussing California red-
9 legged frog); SNFPA 3368 (foothill yellow-legged frog). As explained in Section B.1, *supra*, the
10 Court must presume that the agency will fully comply with NEPA when it analyzes effects in the
11 context of future project proposals. See Salmon River, 32 F.3d at 1358; Conner, 848 F.2d at 1448
12 (“We cannot assume that government agencies will not comply with their NEPA obligations in later
13 stages of development”).

14 Second, and contrary to Plaintiff’s allegations, the SEIS took a “hard look” cumulative
15 impacts for individual aquatic and riparian species. The SEIS begins by explaining that cumulative
16 effects were analyzed in detail for the eight alternatives considered in the EIS for the 2001
17 Framework. SNFPA 3256. The SEIS then identifies activities that have occurred since the 2001
18 EIS-- including noxious weed treatments, soil and water resource improvements, hazardous fuels
19 reductions, wildfire suppression, road construction and reconstruction--and determines that they
20 occurred at levels that are well within the range of what was previously analyzed in the prior EIS.
21 See SNFPA 3256-3257 (observing that only 58% of projected fuel treatments occurred).

22 Because the changes proposed for the 2004 Framework were “consistent with the range of
23 choices” in the prior EIS, that document “adequately describes the conditions that would result from
24 implementing the alternatives in [the] SEIS” as well. SNFPA 3261. The SEIS therefore summarizes
25 the key findings from the EIS for cumulative effects to the five problem areas that the 2001 and 2004
26 Frameworks were intended to address, including aquatic, riparian, and meadow habitats. Id.

27 Much of the SEIS’s cumulative effects analysis is contained in discussions of individual
28 species, including aquatic, riparian, and meadow species. See supra at 23 n.11 (identifying species-

1 specific analyses for aquatic, riparian, and meadow species). For each species, the SEIS includes a
2 section that analyzes overall trends for the species habitat, effects of the alternatives, as well as the
3 effects of any “other” significant activities. For example, in the context of the California red-legged
4 frog, the SEIS discusses actions outside the Forest Service’s control, including: the expansion of
5 human presence in the Sierra Nevada foothills, associated water use patterns and agricultural
6 activities—all of which are expected to “continue to limit or reduce populations of this species.”
7 SNFPA 3309 (discussing how the species is believed to have been extirpated from much of its
8 historic range due “principally to water and hydroelectric development, grazing, and urbanization .
9 . . . mostly on lands outside of the national forests”).

10 Impacts from past grazing practices were discussed, for example, in the context of effects to
11 willow-flycatcher. See SNFPA 3361. As the SEIS explains:

12 Past and recent land management, primarily grazing, has likely reduced habitat
13 capability of otherwise suitable meadows by reducing or eliminating the willow and
14 woody shrub component and changing meadow hydrology. Less intensive grazing
15 from increasing numbers of inactive allotments, reductions in livestock numbers, and
16 adjustments in livestock management to address resource concerns, has allowed
17 willows to begin recovering in some areas. This should increase habitat over time.
18 Current direction in both alternatives that limits willow browsing will also aid in
19 willow maintenance and restoration.

20 Id. Foreseeable future cumulative effects to the Yosemite toad were also discussed, including:
21 pesticide drift, airborne industrial and automotive pollution, all forms of livestock grazing, disease
22 and parasites, dams and water diversions, timber harvesting that affects streams and meadows,
23 recreation and other human disturbance activities in toad breeding areas, introduced fish, climate
24 change, and other factors. SNFPA 3375. However, the extent to which these possible adverse
25 effects may operate synergistically is unknown. Id.; see also 67 Fed. Reg. 75,838 (December 10,
26 2002).

27 In summary, the SEIS built upon the analysis that had already been prepared in the EIS for
28 the 2001 Framework and discussed new cumulative impacts to aquatic and riparian species and their
29 habitat that would result from the 2004 Framework. Given the agency’s evaluation of cumulative
30 impacts and the review of existing reference material and known studies, the Forest Service has
31 followed the rule of reason required to satisfy NEPA. See Pub. Citizen, 541 U.S. at 769-70 (agency

1 adequately analyzed incremental effect of regulation of Mexican truck emissions without having to
2 consider the effect of the President’s lifting of a moratorium and allowing such trucks to enter the
3 United States). Given there would be additional opportunity for analysis of cumulative effects once
4 site-specific projects are proposed, the analysis of cumulative effects in the SEIS was adequate and
5 satisfied NEPA. See Resources Ltd., 35 F.3d at 1306 (noting that forestwide EIS contained
6 “reasonably thorough” discussion of cumulative impacts from future road construction, and that
7 Forest Service was preparing EIS that would address more fully additional road construction); Lyons,
8 871 F. Supp. at 1323 (“The discussion is adequate for purposes of this programmatic EIS; cumulative
9 impact analysis will be made for site-specific actions including timber sales.”).

10 Finally, the details of any future harvest are “speculative” with too many uncertain variables
11 for analysis to be meaningful at this stage. Inland Empire Pub. Lands Council v. Schultz, 992 F.2d
12 977, 981 (9th Cir. 1993). At the time the 2004 Framework decision was completed, it was, and still
13 is, not clear where individual roads would be located, what construction or reconstruction methods
14 would be used for any particular road, and whether any of the road activities would involve site-
15 specific environmental concerns such as the proximity to streams or hiking trails. Road construction
16 needs are still in the stage of estimates, nothing more. SNFPA 3368 (“It has been *estimated* that up
17 to 100 miles of new road construction *may be needed* . . .”).

18 As in Inland Empire, the Forest Service will comply with NEPA before any timber sales and
19 road construction decisions are made. SNFPA 3010, 3690, 4019; See Inland Empire, 992 F.2d at 981
20 (“[T]he agency intends to comply with NEPA requirements before the authorization of each future
21 sale in the watershed.”). For these reasons, Plaintiff’s contentions that the SEIS contains
22 inappropriate “conclusory assertions” or “perfunctory cataloging of adverse effects” lack merit, Pl.’s
23 Mem. at 34, as the level of detail provided by the SEIS in its cumulative effects analysis meets
24 NEPA’s requirements.

25 **E. The 2004 SEIS Contains an Adequate Analysis of Mitigation Measures for a**
26 **Programmatic EIS**

27 Plaintiff alleges the 2004 SEIS fails to adequately discuss mitigation measures. Pl.’s Mem.
28 at 36. In particular, Plaintiff criticizes the SEIS for only alluding to mitigation measures, Pl.’s Mem.

1 at 37, and for not analyzing mitigation measure specific to livestock grazing. Pl.’s Mem. at 39. For
2 the same reasons that many of Plaintiff’s other claims fail, this claim fails – the level of detail
3 Plaintiff seeks is not required by a programmatic EIS. The 2004 SEIS contains a reasonably
4 thorough discussion of mitigation measures, and it is entirely permissible under NEPA to allow
5 further mitigation measures to be developed in the future for site-specific projects.

6 An EIS is required to discuss possible mitigation measures. See 40 C.F.R. § 1502.14(f)
7 (alternatives section should include “appropriate mitigation measures not already included in the
8 proposed action or alternatives”); 40 C.F.R. § 1502.16(h) (environmental consequences section shall
9 discuss “[m]eans to mitigate adverse environmental impacts (if not fully covered under §
10 1502.14(f)”). However, NEPA does not require an agency to develop or adopt a mitigation plan.
11 Laguna Greenbelt, Inc. v. U.S. Dep’t of Transp., 42 F.3d 517, 528 & n.11 (9th Cir. 1994) (“NEPA
12 does not require a fully developed plan that will mitigate all environmental harm before an agency
13 can act; NEPA requires only that mitigation be discussed in sufficient detail to ensure that
14 environmental consequences have been fully evaluated”). Nor is a court permitted to review under
15 NEPA the extent to which adopted mitigation measures will be implemented, and then prove
16 effective upon implementation. See Robertson v. Methow Valley Citizens Council, 490 U.S. 332,
17 353 (1989); Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 206 (D.C. Cir. 1991), cert.
18 denied, 502 U.S. 994 (1991) (NEPA “does not require agencies-or third parties-to effect any
19 [mitigation plans]”). In sum, discussion of mitigation satisfies NEPA if it is “reasonably thorough.”
20 City of Carmel-by-the-Sea v. U.S. Dep’t of Transp., 123 F.3d 1142, 1154 (9th Cir. 1997); see also
21 Methow Valley, 490 U.S. at 353.

22 The analysis of mitigation measures in the 2004 SEIS is reasonably thorough, as
23 demonstrated by the discussion of studies from both the scientific literature and actual Forest Service
24 monitoring in California. See SNFPA 3279 (“Many studies have shown that surface erosion from
25 roads can be reduced through improved design, construction, and maintenance practices”). For
26 example, the SEIS considered ten years of monitoring data for road-related BMPs, which found that
27 such measures were adequately protective of water quality. See id. (reporting that BMPS were
28 “effective in meeting onsite water quality objectives at 90% of the 1072 sites” were implemented,

1 and significant effects occurred at less than 1% of all monitored sites); see also SEIS_05_000885 to
2 1021 (BMP study). As already noted in Section C.1, *supra*, the SEIS also considered other studies
3 that demonstrate the importance of road location, drainage, surfacing, and other factors in limiting
4 effects such as fine sediment. SNFPA 3279 (“MacDonald (2002), for example, found that rocked
5 roads in the Central Sierra Nevada produce 10-50% less sediment than native surfaced roads. Others
6 have observed greater reductions, up to 80% or more (Burroughs and King, 1989).”). Given the
7 discussion of supporting studies and data, the SEIS’s analysis of mitigation measures is surely
8 “reasonably thorough” enough to satisfy NEPA. See Carmel-by-the-Sea, 123 F.3d at 1154; N.
9 Alaska Env’tl. Ctr., 961 F.2d at 891.

10 Similarly, the discussion of mitigation measures for riparian areas, including riparian habitat
11 for the Mountain yellow-legged frog and the Yosemite toad “reasonably thorough” enough to satisfy
12 NEPA. See Carmel-by-the-Sea, 123 F.3d at 1154; N. Alaska Env’tl. Ctr., 961 F.2d at 891. The SEIS
13 discusses that:

14 Grazing has occurred throughout Yosemite toad habitats for well over 150 years,
15 and hundreds of toad populations persists to this day where livestock grazing
16 continues. . . . Thousands of sheep and cattle are known to have grazed portions of
17 the Yosemite toad’s range, and meadow degradation has been documented in
18 photos and agency reports. . . . In the last 10 to 20 years, the number of active
allotments had decreased and management within allotments has increased focus
on managing wet meadows and sensitive aquatic areas which has resulted in
improvements in condition at some Yosemite toad sites.

19 SNFPA 3373. Against this backdrop, the 2004 FEIS employs the following mitigation measures to
20 protect the Yosemite toad, which also have applicability to the Mountain yellow-legged frog and
21 other riparian species: (1) exclusion of livestock grazing from standing water, saturated soils in wet
22 meadows, stream channels, and springs in occupied toad habitat; (2) site-specific management of
23 movement of livestock around wet areas; and, (3) species surveys of suitable unoccupied habitat.
24 SNFPA 3046. For many riparian, livestock grazing is prohibited in established CARs. See SNFPA
25 3366 (Foothill yellow-legged frog); SNFPA 3369 (Mountain Yellow-legged frog); SNFPA 3371
26 (Yosemite toads); SNFPA 3377 (Cascades frogs). In addition monitoring of meadows is required
27 under the 2004 Framework to further address the health of montane meadows and reduce
28 management uncertainties. SNFPA 3151. Such on-going development of information can be used

1 to advance mitigation for meadows where appropriate. See, e.g., SNFPA 3055 (directing project-
2 level planning to “evaluate and consider relocating existing livestock facilities outside of meadows
3 and riparian areas”); SNFPA 3056 (requiring inclusion of ecological status of meadows data in a
4 spatial database and if such status is “determined to be moving in a downward trend,” directing
5 Forest Service to “modify or suspend grazing”).

6 Furthermore and contrary to Plaintiff’s allegations and reliance on Neighbors of Cuddy
7 Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1381 (9th Cir. 1998),^{2/} Pl.’s Mem. at 36- 37, the
8 caselaw makes clear that the Forest Service is not prohibited from waiting until site-specific projects
9 are developed before analyzing mitigation measures in more detail. Pl.’s Compl. ¶ 116; see N.
10 Alaska Env’tl. Ctr., 961 F.2d at 891. As explained in Section B.1, *supra*, the level of detail required
11 in the analysis of impacts in a programmatic EIS like the 2004 SEIS is much less than that required
12 for site-specific projects. See Conner, 848 F.2d at 1448. This holds true for the analysis of
13 mitigation measures as well. N. Alaska Env’tl. Ctr., 961 F.2d at 891 (“The alleged failure of the EISs
14 to consider mitigation measures . . . does not foreclose later analysis of these factors”). As the Ninth
15 Circuit has explained in numerous cases, courts are to assume that federal agencies will comply with
16 their NEPA obligations in future decisions. See id.; Salmon River, 32 F.3d at 1358; Conner, 848
17 F.2d at 1448 (“We cannot assume that government agencies will not comply with their NEPA
18 obligations in later stages of development”); see also Citizens to Preserve Overton Park, Inc. v.
19 Volpe, 401 U.S. 402, 415 (1971) (administrative decision is “entitled to a presumption of
20 regularity”).

21 Here, it is clear that because the forest plan does not authorize any on-the-ground activity,
22 future site-specific decisions would have to comply with NEPA and other environmental laws,
23 including the opportunity, where applicable, for public comment and participation. See SNFPA
24 3010, 3690, 4019. For instance, management direction of pack and saddle stock in essential habitat
25 for Yosemite toads is deferred to the project level. SNFPA 3372. Because the SEIS contains a
26

27 ^{2/} Cuddy Mountain is inapposite here because it involved a site-specific project decision, not a
28 programmatic level decision.

1 “reasonably thorough” discussion of mitigation and there would be further opportunity for mitigation
2 measures to be developed and analyzed prior to actual timber harvest or road construction, the 2004
3 SEIS satisfies NEPA. See Carmel-by-the-Sea, 123 F.3d at 1154; Alaska Env'tl. Ctr., 961 F.2d at 891.

4 **II. FEDERAL DEFENDANTS REASONABLY DETERMINED THE MANAGEMENT**
5 **STRUCTURE AND COMBINATION OF MULTIPLE USES UNDER THE 2004**
6 **FRAMEWORK**

7 Citing to no relevant statute, Plaintiff brings a number of APA claims against Federal
8 Defendants. Pl.’s Mem. at 41. Specifically, Plaintiff argues that the decision to replace the 2001
9 Framework was arbitrary for failure to provide a reasoned justifications for changes to grazing
10 restrictions, implementation of the HFQLG Act, and asserted inconsistencies with the National Fire
11 Plan. Pl.’s Mem. at 42-46. Plaintiff’s other principle argument under the APA is that the 2004
12 Framework failed to consider “important aspects” of its decision, such as the effects on fish species.
13 Id. at 47.

14 However, as explained below, Plaintiff’s APA claim must be viewed against the background
15 of substantive forest management statutes, which give the Agency broad discretion in determining
16 the combination of multiple uses that best meet the needs of the American people. The 2004
17 Framework is a reasonable exercise of that discretion to balance a variety of multiple uses and,
18 therefore, does not violate the APA. Furthermore, Federal Defendants provided a reasoned analysis
19 and considered the necessary important aspects, which lead to its decision in the 2004 Framework.

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

22 Plaintiff alleges--without reference to any substantive statute--that the decision to replace the
23 2001 Framework with the 2004 Framework violates the APA because it is not supported by the
24 administrative record. Pl.’s Mem. at 41. Claims under the APA must be considered in light of the
25 substantive statutes at issue. See ONRC v. Thomas, 92 F.3d 792, 798 (9th Cir. 1996) (factor for
26 determining whether an action violates the APA “turns on what a relevant substantive statute makes
27 ‘important’”); Preferred Risk Mut. Ins. Co. v. United States, 86 F.3d 789, 792 (8th Cir. 1996)
28 (plaintiff “must identify a substantive statute or regulation that the agency action had transgressed and
establish that the statute or regulation applies to the United States.”); Nat’l Wildlife Fed’n v. U.S.

1 Army Corps of Eng'rs, 132 F. Supp.2d 876, 889 (D. Or. 2001) (“Review under the [APA] requires
2 references to the legal duty set forth in the governing substantive statute.”).

3 In this case, the substantive law grants the Forest Service broad discretion to consider the
4 balance of multiple uses that best meets the needs of the public. See 16 U.S.C. §§ 529, 531(a)
5 (requiring management of surface resources in the combination that “will best meet the needs of the
6 American people”); Perkins, 608 F.2d at 806; Intermountain Forest Industry Ass’n v. Lyng, 683 F.
7 Supp. 1330, 1337-38 (10th Cir. 1988) (Forest Service need only consider the various uses, multiple
8 use mandate does not direct how to allocate those uses). Additionally, the HFQLG Act imposes a
9 substantive duty for the Forest Service to implement a Pilot Project, which consists of various timber
10 harvest activities. See Herger-Feinstein Quincy Library Group Forest Recovery Act, Pub. L. No. 105-
11 277, 112 Stat. 2681-231 (codified as 16 U.S.C. § 2104 note), sec. 401(b). Plaintiff’s APA claims must
12 therefore be considered against this statutory background. See Thomas, 92 F.3d at 798.

13 The 2004 Framework is an amendment to forest plans that is well within the agency’s
14 discretion. The 2004 ROD was issued after a thorough review of the 2001 Framework was
15 conducted, a proposed action was developed to modify and improve then-existing direction, and an
16 SEIS was prepared to evaluate the environmental consequences of such changes. As such, the 2004
17 Framework is a product of the Forest Service’s discretion to change its management direction. See
18 Nat’l Cable & Telecom. Ass’n v. Brand X Internet Servs., 125 S. Ct. 2688, 2700 (2005) (agency “must
19 consider varying interpretations and the wisdom of its policy on a continuing basis, for example, in
20 response to changed factual circumstances, or a change in administrations”) (internal citation
21 omitted); Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 59
22 (1983) (“A change in administration brought about by the people casting their votes is a perfectly
23 reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and
24 regulations.”). Any implication that the agency is prohibited from striking a different multiple use
25 balance simply because of its past practice must therefore be rejected. See id.; see also Seldovia
26 Native Ass’n, Inc. v. Lujan, 904 F.2d 1335, 1346 (9th Cir. 1990) (“[A] reversal of prior policy or
27 statutory interpretation does not wholly vitiate deference to agency determinations.”).

1 **1. The Decision in the 2004 Framework to Amend Standards and Guidelines**
2 **for Grazing is Adequately Supported by A Reasoned Analysis in the**
3 **Record**

4 Plaintiff argues that the Forest Service failed to adequately explain, or provide support for,
5 its decision to amend the standards and guidelines on grazing. Pl.’s Mem. at 43-44. As the record
6 demonstrates, Plaintiff’s argument is wrong. It was only after initiating surveys following the 2001
7 ROD that the full extent of impacts to grazing permittees became clear. SNFPA 3392. From this
8 information, it was determined that application of the 2001 ROD to many allotments would result in
9 non-use. The agency therefore decided--not to eliminate protections for riparian species--but to
10 improve the ability to develop site-specific plans that could be tailored to address conservation at a
11 local level while still allowing grazing.^{10/} This improvement is reflected in changes made to the
12 standards and guidelines, and because the change is a reasonable exercise of agency’s discretion to
13 emphasize different resource uses than those in the 2001 ROD, Plaintiff’s argument must fail. See
14 Northwest Motorcycle, 18 F.3d at 1479 (“Even if the closure of the North Entiat [to off-road vehicle
15 use] was viewed as a policy change, it was . . . based on a rational and principled reason: to minimize
16 ‘user conflicts’ in the North Entiat”); Perkins, 608 F.2d at 806 (the mandate to manage for multiple
17 uses ‘breathes discretion at every pore.’”) (citation omitted)).

18 Comparatively, the 2004 ROD still incorporates surveys and protections of occupied sites, but
19 it also makes adjustments to encourage conservation partnerships. In particular, grazing may be
20 allowed at occupied sites where the Agency has developed a site-specific management strategy.
21 SNFPA 3048. The strategy focuses on “protecting the nest site and associated habitat during the
22 breeding season and the long-term sustainability of suitable habitat at breeding sites.” Id. This is in

23 ^{10/} The Review Team collected information from the surveys and found that at least two
24 allotments would go to non-use based on a restriction to late-season grazing at sites *unoccupied*
25 by the flycatcher. SEIS_01_000063 to 64. The Team also found that the 2001 ROD actually
26 provided a disincentive for grazing permittees to facilitate species recovery. For example, at the
27 Perrazzo Meadow complex on the Tahoe the Forest Service worked with the permittee to
28 “develop allotment plans that protect areas where willow flycatchers are nesting.”
 SEIS_01_000064. Perrazzo Meadows reportedly has one of the two highest concentrations of
 flycatcher territories in the Sierra. Id. Under the 2001 ROD, however, this successful partnership
 between the Forest Service and the permittee would be “reduced to a meadow closure and a non-
 use situation.” Id.

1 accordance with the Review Team’s observation that impacts from grazing (such as fly-catcher nest
2 bumping) could be addressed by working with permittees to adjust the timing, location, and intensity
3 of grazing to keep livestock out of willows during the bird’s breeding period. SEIS_01_000067.

4 Contrary to Plaintiff’s argument (Pl.’s Mem. at 43), the 2004 Framework does not eliminate
5 protections for riparian species such as the Yosemite toad. The 2004 Framework retains numerous
6 components of the 2001 ROD that are important for protecting riparian and aquatic habitat. SNFPA
7 3000 (2004 ROD retains “Critical Aquatic Refuges, the Riparian Conservation Areas, and the goals
8 of the Aquatic Management Strategy [“AMS”]”). The 2004 ROD also builds upon two years of field
9 surveys for the Yosemite toad. Id. The 2004 Framework excludes grazing from occupied habitat
10 “except where an interdisciplinary team has developed a site-specific plan to successfully manage
11 stock around these areas.” SNFPA 3001. Although the restrictions do not apply to packstock or
12 saddle stock, those animals are in low concentration in the affected areas and have disparate needs;
13 thus, the direction is more “appropriately developed as part of individual forest plan direction.” Id.
14 As to pesticide application, it will be avoided within 500 feet of known sites for the Yosemite toad,
15 as well as other riparian species, unless such application is determined on a site-specific basis to be
16 necessary in order to restore or enhance their habitat. See SNFPA 3053. Additionally, should the
17 toad become listed under the ESA, site-specific plans could also be used to incorporate measures
18 required to comply with that statute.

19 By employing an alternative means for balancing grazing uses and protection for riparian
20 species such as the Yosemite toad, the 2004 ROD results in a variety of lessened impacts to
21 permittees, including: 56 allotments with known but unoccupied flycatcher sites would no longer be
22 limited to late-season grazing; 15 allotments with known occupied willow flycatcher sites would have
23 a late season grazing opportunity after August 15, rather than total exclusion under the 2001 ROD;
24 and 14 of the allotments showing low, medium, or high impacts under the 2001 ROD would not be
25 impacted at all under the 2004 ROD. SNFPA 3393-94. In sum, the record provides adequate support
26 for the decision to strike a different multiple use balance for grazing under the 2004 ROD. See Brand
27 X,125 S.Ct. at 2700; Northwest Motorcycle, 18 F.3d at 1479; Perkins, 608 F.2d at 806. The changes
28 therefore have a reasoned basis sufficient to satisfy the APA. See Sierra Pacific Industries v. Lyng,

1 866 F.2d 1099, 1106-07 (9th Cir. 1989); Nat'l Wildlife Fed'n v. Burford, 871 F.2d 849, 856-57 (9th
2 Cir. 1989).

3 **2. The Decision in the 2004 Framework to Implement Fully the HFQLG
4 Pilot Project is Adequately Supported by the Record**

5 Next, Plaintiff argues that the Forest Service has not provided adequate record support for the
6 decision to implement fully the HFQLG Pilot Project. Pl.'s Mem. at 46. To the contrary, the Forest
7 Service provided a reasonable explanation of the decision to change the 2001 Framework and fully
8 implement the mandatory Pilot Project, thereby satisfying the APA. Brand X, 125 S.Ct. at 2700; State
Farm, 463 U.S. at 59.

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

19 Among the Team's findings, it determined that the community stability goals of the HFQLG
20 Act were not being met. See SNFPA 1967, 1968 (a "key component" of the Pilot Project is to
21 "provide socio-economic benefit through timber and biomass production, and therefore enhance
22 community stability in the project area."); SNFPA 1969, 1970 (the "community stability, and socio-
23 economic aspects of the Pilot Project are not being implemented"); SNFPA 3001. The 2004
24 Framework responded by adopting direction that would allow additional sawtimber production from
25 the Pilot Project area, thereby better providing community stability. See SNFPA 3386, 3697
26 ("Alternative S2 is designed to better meet the goals envisioned by the Pilot Project and will
27 contribute toward producing socio-economic benefits of enhancing community stability in the pilot
28 project area.").

1 Based on the Team’s review findings, the Forest Service decided upon a different resource
2 balance that would address both the needs of wildlife and the duty under the HFQLG Act to fully
3 implement the Pilot Project. See SNFPA 3338-3339, 3608-3609. Plaintiff’s arguments therefore lack
4 merit and should be rejected. See Sierra Pacific Indus. v. Lyng, 866 F.2d 1099, 1106-07 (9th Cir.
5 1989) (Secretary of Agriculture had adequate basis for requiring timber harvest schedules to be
6 revised as a condition of a buy-out under federal statute); Nat’l Wildlife Fed’n v. Burford, 871 F.2d
7 at 856-57 (Interior Department’s shift of bidding procedures for coal leases was not arbitrary and
8 capricious).

9 **3. The Conclusion that Expected Outcomes Under the 2004 Framework**
10 **Would Better Achieve the Goals of the National Fire Plan Is Adequately**
11 **Supported by the Record**

12 Plaintiff argues that the adoption of the 2004 Framework is not supported by the record
13 because there is allegedly “no evidence” that the 2001 Framework was inconsistent with the National
14 Fire Plan (“Fire Plan”). Pl. Mem. at 46. Plaintiff’s argument must fail, because it neglects the
15 Review Team’s findings that the expected outcomes under the 2001 ROD were “not consistent with
16 the ‘Goals and Implementation Outcomes’” found in the recently developed implementation
17 component of the Fire Plan. SNFPA 1959 (emphasis omitted).

18 Although the Review Team found that the priorities and goals of the 2001 Framework were
19 consistent with the Fire Plan, the expected outcomes were found to be “not consistent” with the goals
20 and outcomes of the Fire Plan’s implementation plan for its 10-year comprehensive strategy. Id.
21 (emphasis omitted); see also SNFPA 3662-3663.^{11/} The first goal, improving fire prevention and
22 suppression, is measured by the number of high severity acres burned by unplanned, unwanted
23 wildland fire. SNFPA 1959, 3197-98. The Review Team undertook an analysis of the Middle Fork
24 Cosumnes landscape on the Eldorado NF that provided “evidence that the current [2001] direction
25 will perform poorly under this measure.” SNFPA 1959. Specifically, the analysis indicated that on

26 ^{11/} The Fire Plan includes a 10-year comprehensive strategy, which was developed by the
27 Secretaries and western state governors after the 2001 Framework, in August 2001. SNFPA
28 3197. In May 2002 the Secretaries and governors developed an implementation plan for the 10
year comprehensive strategy. Id.; see also SNFPA 3197-99.

1 the Eldorado NF, the number of acres per decade burned by wildland fire is projected to increase to
2 over 30,000 within 30 years under the 2001 ROD. SNFPA 1960. The Team therefore concluded this
3 was “clear evidence” that the direction in the 2001 ROD would perform poorly under the first goal.
4 SNFPA 1959-60.

5 The second goal, reducing hazardous fuels, is measured by the number of acres treated and
6 the number of acres treated per million dollars gross investment in targeted areas. SNFPA 1960,
7 3198. The Team found that although the 2001 ROD would allow fuels to be treated economically
8 within the defense zone of the wildland urban intermix (“WUI”),^{12/} higher cost treatments would
9 occur outside that zone. SNFPA 1960. Because treatments under the 2001 ROD would result in
10 fewer acres treated per million dollars invested, the Team determined there was “significant
11 opportunity to better harmonize the SNFPA strategy” with the second goal. Id.

12 The third goal, restoring fire-adapted ecosystems, is measured by the number of acres moved
13 to a better condition class (both total acreage moved and percent moved of total acres treated).
14 SNFPA 1960, 3198. Over seven million of the 11.5 million acres in the Sierra are in condition
15 classes that are at ecological risk due to their high vulnerability to catastrophic fire. See SNFPA 1960,
16 2998. The Team found goal three to be an area in which the 2001 Framework was in “significant
17 conflict with the National Fire Plan.” Id. The 2001 ROD itself admits that it would “increase
18 homogenous vegetation structure across the landscape over time” and “would increase the potential
19 for catastrophic effects when wildfire” occurs. Id. (quoting SNFPA 0252). The 2001 ROD was not
20 designed to move forests toward their historic ecological condition, but rather was developed with
21 the goal of “minimally modifying fire behavior while avoiding short-term adverse effects” to owl
22 habitat. SNFPA 1961. Consequently, the 2001 ROD was determined to “preclude embarking on
23 meaningful restoration of historic fire regimes” for the next few decades, leading the Team to
24 conclude that the situation was “not compatible” with goal three. Id.

26
27 ^{12/} This land use area is the buffer in closest proximity to communities and generally extends
28 about a 1.5 miles from such areas. See SNFPA 3030. The focus of treatment within the quarter
mile closest to communities, the defense zone, is to reduce fire spread and intensity sufficiently
for fire-fighters to successfully protect human life and property. Id.

1 Finally, goal four, promoting community assistance, is measured by the percentage of acres
2 which are mechanically treated and from which forest products are recovered and used. SNFPA
3 1961, 3199. The Team found that the 2001 ROD “performs poorly” under this measure. SNFPA
4 1961. A predictable supply of forest products sufficient to sustain the local, community-based timber
5 infrastructure was not a goal of the 2001 ROD. *Id.* By contrast, the 2004 Framework offers over 3.5
6 times more annual revenue from wood by-products on average in the first and second decades.
7 SNFPA 3294 (\$80 million/year and \$33 million/year in first and second decades, respectively, under
8 S2, versus \$23 million and \$9 million under S1). This is supported by the Review Team’s conclusion
9 that changing the 2001 ROD to allow more flexibility to design fuel reduction projects that provide
10 useful wood products would “improve consistency” with the Fire Plan. In sum, the inconsistencies
11 and poor performance of the expected outcomes of the 2001 Framework as compared to the Fire Plan
12 reasonably support the adoption of the 2004 Framework, and Plaintiff’s argument to the contrary
13 should be rejected. *See Northwest Motorcycle*, 18 F.3d at 1479.

14 In sum, there is adequate support in the record for the conclusion that the 2004 Framework
15 would more effectively reduce fuels on the landscape, and this change in mixture of resource uses
16 is well within the agency’s statutory discretion. *See Northwest Motorcycle*, 18 F.3d at 1479; *Perkins*,
17 608 F.2d at 806.

18 **B. The SEIS Is not Arbitrary and Capricious and Did Not Fail to Consider**
19 **Effects Related to Fish Species**

20 Finally, Plaintiff argues that the Forest Service failed to consider the important aspect of the
21 potential effects on fish in violation of *State Farm*, 463 U.S. at 43. Pl.’s Mem. at 47. This argument
22 fails for the reasons explained in Section II.A, *supra*. First, as in *Resources Ltd.*, 35 F.3d 1300,
23 Plaintiff’s argument fails to recognize that a programmatic level analysis like the SEIS need not
24 contain the same level of detail as a project-specific analysis. *See id.* at 1306 (rejecting challenge to
25 forest plan EIS for failure to analyze impacts to fish). The SEIS adequately explains why such an
26 analysis would be more meaningfully conducted at the project level. *See, e.g.*, SNFPA 3282
27 (explaining that analysis of the delivery of CWD to streams “is difficult at the bioregional scale due
28 to extreme variability in the condition of RCAs and the relative importance of CWD in maintaining

1 stream channel structure and function”). Consequently, these effects will be evaluated in future
2 landscape and project-level analyses using watershed and site-specific parameters such as “stream
3 width, tree heights, distances from streams, slope steepness,” and other factors. Id.

4 Additionally, Plaintiffs’ argument that Forest Service does not “even attempt to analyze” the
5 effects of the 2004 Framework on various factors affecting fish is simply wrong. A detailed analysis
6 of the effects of the 2004 Framework on ten species of fish is found in a July 2003 Biological
7 Assessment (“BA”), which is incorporated by reference into the SEIS. See generally SNFPA 2095-
8 2430; see also SNFPA 3304 (incorporating by reference BAs for SEIS and EIS); SNFPA 3487-3488
9 (referencing 2000 EIS and July 2003 BA for documentation of effects to fishes). For ten fish species,
10 the July 2003 BA discusses the species’ general distribution, status, reproductive biology and
11 breeding habitat, diet, general habit use, and also analyzes direct, indirect, and cumulative effects of
12 the 2004 Framework on those species.^{13/} Several other fish species were considered but dropped from
13 further analysis either “because they do not occur in the analysis area . . . or they will not be directly,
14 indirectly, or cumulatively affected by the proposed activities” in the 2004 Framework. SNFPA 2201;
15 see SNFPA 2203-2206 (discussing Sacramento winter-run chinook salmon, Delta smelt, Sacramento
16 splittail, Green sturgeon, Cowhead Lake tui chub, Owen’s pupfish).

17 Contrary to Plaintiff’s suggestion, the value of the analysis in the July 2003 BA is not
18 diminished simply because it is incorporated by reference. See Pl.’s Mem. at 47 (arguing that fish
19 are not analyzed “within the FSEIS focal species context”). Incorporation by reference is adequate
20 and indeed encouraged by NEPA. See 40 C.F.R. §§ 1500.4, 1502.21; Clark, 774 F.2d at 1411. In
21 sum, Plaintiff’s argument that effects to fish were wholly overlooked is unsupported by the record.
22
23
24

25 ^{13/} The species analyzed are: Little Kern golden trout, SNFPA 2232-2238; Lahontan cutthroat
26 trout, SNFPA 2239-2245; Paiute cutthroat trout, SNFPA 2246-2251; Central valley steelhead,
27 SNFPA 2252-2257; Central Valley spring-run chinook salmon, SNFPA 2258-2264; Modoc
28 sucker, SNFPA 2265-2266; Lost River sucker and Shortnose sucker, SNFPA 2267-2269; Warner
sucker, SNFPA 2270-2277; and Owen’s tui chub. SNFPA 2331-2335. Analysis of effects to the
four sucker species (Modoc, Lost River, Shortnose, Warner suckers) is combined. SNFPA 2273-
2277.

1 CONCLUSION

2 For the foregoing reasons, the Court should deny Plaintiff's motion for summary judgment.

3
4 Respectfully submitted this 16th day of December 2005.

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