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13 **PACIFIC RIVERS COUNCIL**

14 **IN THE UNITED STATES DISTRICT COURT**
15 **EASTERN DISTRICT OF CALIFORNIA**
16 **SACRAMENTO DIVISION**

17 PACIFIC RIVERS COUNCIL _____)
18 Plaintiff,)
19 vs.)
20 UNITED STATES FOREST SERVICE et al.,)
21 Defendants,)
22 CALIFORNIA FORESTRY ASSOCIATION et al.,)
23 QUINCY LIBRARY GROUP, an unincorporated)
citizens group; and CALIFORNIA SKI INDUSTRY)
ASSOCIATION,)
24 Intervenor-Defendants.)
25 _____)

Case No: CIV-S-05-0953 MCE/GGH
Related Cases: CIV-S-05-0211 MCE/GGH
CIV-S-05-0905 MCE/GGH
CIV-S-05-0205 MCE/GGH

MEMORANDUM IN SUPPORT OF PACIFIC
RIVERS COUNCIL'S MOTION FOR SUMMARY
JUDGMENT

Date:
Time:
Judge: Hon. Morrison C. England, Jr.

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1 **I. INTRODUCTION and STATEMENT OF FACTS**

2 The Forest Service took a plan (“2001 Framework”) that was barely sufficient to protect
3 aquatic, riparian and meadow habitats and associated species and replaced it with a plan (“2004
4 Framework”) that removed the very checks-and-balances that allowed the original plan to meet the
5 letter and intent of the law. The agency justified these changes based on questionable “new
6 information” and “changed circumstances” while it simultaneously ignored new information that
7 would not support the new direction of the 2004 Framework. Furthermore, the Forest Service
8 obscured the true extent of the significant changes between the two plans, failed to disclose and
9 analyze these changes as relates to aquatic systems, and thus conducted a disingenuous and
10 misleading environmental review of the proposed action in violation of the National Environmental
11 Policy Act and the Administrative Procedures Act.

12 **FACTUAL BACKGROUND:**

13 The Sierra Nevada region is delineated by numerous watersheds supporting diverse habitats
14 – rivers, streams, lakes, ponds, wetlands, and riparian areas – and a rich array of native aquatic
15 species, many of which have declined dramatically over the last century. Impact Statement (“2001
16 DEIS”), Vol. 2, ch. 3 at p. 489.

17 The waters of Sierra Nevada national forests support 63 native fish species. 2001 DEIS,
18 Vol. 3, app. R, at pp. 28 – 31; SNFPA 02667. Although thirty-eight (60%) of these species have
19 declined in population size and are at moderate to high risk of continuing to decline (2001 DEIS,
20 Vol. 3, app. R, at pp. 28 – 33), none of the species have robust populations because “continued loss
21 of aquatic habitat characterizes the region as a whole.” 2001 DEIS, Vol. 2, ch. 3, at 489. Thirteen
22 Sierra fish species are listed under the Endangered Species Act¹ and 3 are presumed extinct². 2001
23 DEIS, Vol. 3, app. R, at pp. 28 - 33. Among those listed are Paiute Cutthroat trout, Lahonton
24 cutthroat trout, Little Kern golden trout, and Central Valley Chinook salmon (Id.) – all rare native
25

26
27 ¹/ This number changed slightly between 2001 and 2004 because the Sacramento splittail was delisted,
and right now National Marine Fisheries Service (“NMFS”) is in the process of a status review of all
steelhead, so that species is technically neither listed nor delisted.

28 ²/Bull trout, Cowhead lake tui chub, and Eagle Lake tui chub. 2001 DEIS, Vol. 3, app.
R, at pp. 29 and 31.

1 fish that distinguish the Sierra’s unique natural diversity. Eleven of these fish species are found
2 exclusively or primarily within national forest boundaries. 2001 DEIS, Vol. 2, ch. 3 at p. 490.
3 SNFPA CD#17, Doc. 503 at pp. 1 and 3. Additionally, "one-third of the Sierra fishes suffering
4 significant declines from historic abundance are confined to, or overwhelmingly influenced by
5 activities on, Forest Service lands." SNFPA CD#17, Doc. 503 at p. 3. Habitat modification is an
6 important factor in the decline of Sierra fishes, and “[w]hile road building, channelization, and
7 riparian grazing appear unlikely to individually threaten the population viability of many species,
8 these activities clearly alter habitat and may contribute to significant cumulative effects on fishes.”
9 *Id.* at p. 2.³

10 Equally alarming, once wide-ranging amphibians have almost disappeared. The foothill
11 yellow-legged frog, mountain yellow-legged frog, California red-legged frog, Cascades frog,
12 Northern leopard frog, and Yosemite toad are at risk of extirpation in the Sierra. SNFPA CD#17,
13 Doc. amphib_arm_deis_admi#1EA13C. at pp. 3-4. Sadly, the California red-legged frog Sierra
14 population has declined by 99%. *Id.* at p.3. The Cascades frog and northern leopard frog have both
15 disappeared from 99% of their historic range in the Sierra Nevada. *Id.* at p.4. The foothill yellow-
16 legged frog has disappeared from 66% of its historic range in the Sierra Nevada. *Id.* In 2001 the
17 mountain yellow-legged frog and Yosemite toad were placed on the endangered species candidate
18 list – habitat loss and alteration from national forest management were listed as factors in their
19 declines. SNFPA CD# SEIS_05_003974, Doc. 512019, SNFPA CD# SEIS_05_003974; Doc.
20 512019.

21 The 1996 Congressionally sponsored Sierra Nevada Ecosystem Project (“SNEP”) Report – a
22 comprehensive scientific and socioeconomic analysis of the region – concluded that aquatic and
23 riparian ecosystems “are the most degraded of all habitats in the Sierra Nevada.” 2001 FEIS, Vol.
24 1, ch. 1, at p. 4. The SNEP report also found that “the most important identified cause of the
25 decline of Sierran vertebrates has been loss of habitat, especially foothill and riparian habitats.”
26 SNFPA 1649. The SNEP Report Authors further explained “riparian areas have been damaged
27

28 ^{3/} Curiously, despite the vulnerable status of Sierra fishes, the Forest Service chose not to focus on a
single fish species when developing the 2001 or 2004 Framework. PRC 0002, PRC 0012, PRC 0110.

1 extensively by placer mining (northern and west-central Sierra) and grazing (Sierra-wide), and
2 locally by dams, ditches, flumes, pipelines, roads, timber harvest, residential development, and
3 recreational activities.” SNFPA 1652. In other words, one of the Sierra’s most important and
4 sensitive habitats – riparian areas – is in bad shape.

5 Under the National Forest Management Act (“NFMA”), national forest lands must be
6 managed to protect watershed conditions, soil productivity, and species diversity. 16 U.S.C. §
7 1604(g)(3)(E)(I) & (F)(I). To this end, NFMA requires that the Forest Service “provide for
8 diversity of plant and animal communities,” and to “insure that timber will be harvested ... only
9 where ... protection is provided for streams, streambanks, shorelines, lakes, wetlands, and other
10 bodies of water ... where harvests are likely to seriously and adversely affect water conditions or
11 fish habitat.” 16 U.S.C. § 1604(g)(3)(B),(E)(iii). In short, the Forest Service’s duty encompasses
12 conservation of the full range of fish, wildlife, and ecological processes that are integral
13 components of the forest ecosystem. As aquatic species’ diversity continued to decline across the
14 Sierra it became increasingly obvious that the Forest Service was not fulfilling its responsibilities
15 under NFMA.

16 Sierra Nevada Regional Planning Efforts

17 In the early 1990s the U.S. Forest Service initiated a series of regional management
18 processes that focused not only on forests but also on the watersheds that sustain them.¹ A
19 compelling reason for the agency to incorporate a regional perspective into its national forest
20 planning was the decline of once wide-ranging aquatic species such salmon, steelhead, trout, frogs,
21 and toads. A primary factor in the decline of these species was, and continues to be, habitat loss
22 and alteration. Because the Sierra Nevada region experienced marked declines in native fish and
23 amphibian species, it was a prime candidate for this type of planning effort. PRC 0006.

24 The planning process covering the 11 national forests spanning the Sierra Nevada mountain
25 range went through several iterations before emerging as the Sierra Nevada Forest Plan
26 Amendment, otherwise known as the Sierra Framework. This multi-year effort began when the

27 _____
28 ¹ Three examples of such regional planning efforts are the Northwest Forest Plan, the Interim
Strategies for Managing Anadromous Fish-Producing Watersheds in Eastern Oregon and
Washington, Idaho and portions of California (PACFISH), and the Interior Columbia Basin
Ecosystem Management Project.

1 experimental forest management project (“HFQLG Project”) spanning portions of the Plumas and
2 Lassen National Forests and the Sierraville Ranger District of the Tahoe National Forest totaling
3 2,422,163 acres, with approximately 1,528,667 acres of that area available for “group selection”
4 logging¹. *Id.*, ch. 3 at p. 3 and ch. 1 at pp. 2 - 3. The QLG Project is an aggressive logging program
5 that focuses on intensive, broad scale group selection (i.e., clear cuts) and the creation of
6 “defensible fuel profile zones” (“DFPZs”), which are areas “approximately 1/4 to 1/2 mile wide”
7 where trees and brush are clear cut logged, partially logged, and/or removed by hand; “they usually
8 are constructed along roads so as to break up fuel continuity across the landscape...” *Id.*, Glossary
9 at p. 5. Both the creation and maintenance of DFPZs and group selection logging require an
10 extensive road system, and the HFQLG Project area contains some of the highest road densities,
11 highest occurrences of road stream crossings, and some of the most fragile soils in the Sierra. *Id.*,
12 ch. 3 at p.4; app. P at pp. 1 – 16. Additionally, the HFQLG FEIS/ROD calls for a projected 1700
13 miles of combined road construction, reconstruction, maintenance, and decommissioning over the
14 5-year life of the project. SNFPA CD#SEIS_04_000209.

15 Development Of The 2001 Framework

16 On Nov. 20, 1998, the United States Forest Service published a notice of intent to prepare an
17 EIS for 11 national forests² spanning the Sierra Nevada from the Modoc Plateau, south to the giant
18 sequoia groves, and east into Nevada. The DEIS was published in April 2000. While each of the
19 previous Sierra-wide planning iterations recognized the vital importance of protecting the region’s
20 watersheds, not until the 2001 Framework did a comprehensive Aquatic Management Strategy
21 (“AMS”) emerge. *See* SNFPA 00292. The AMS consisted of a set of management goals, standards
22 and guidelines encapsulated in Riparian Conservation Objectives (RCO)³, and two land allocations

26 ¹ Group selection is a term of art; it means the creation of clear cuts of usually less than 2 acres in
27 size. HFQLG FEIS/ROD, Glossary at p. 7.

28 ² These forests are the Modoc, Lassen, Plumas, Tahoe, Eldorado, Stanislaus, Sierra, Sequoia, Inyo,
Humboldt-Toiyabe, and the Lake Tahoe Basin Management Unit.

³ Riparian Conservation Objectives “...provide a checklist for evaluating whether a proposed
activity is consistent with the desired conditions described by the AMS goals.” Each RCO has
associated standards and guidelines for management. SNFPA 00295.

1 Riparian Conservation Areas (RCA)¹, and Critical Aquatic Refuges(CAR)². SNFPA 00293-00296.
2 This strategy consisted of measurable, enforceable standards and guidelines designed to operate as
3 checks and balances to continued habitat loss and alteration while the Forest Service developed
4 species- and site-specific data through its adaptive management and species conservation plans.

5 While the 2001 Framework was a marked improvement over the management direction of
6 the existing forest plans (developed 10 or more years previously), it left little room for error with
7 regard to the management of aquatic, riparian, and meadow ecosystems. Some of its provisions
8 even allowed for further degradation of sensitive habitats, such as riparian areas.³ However,
9 underlying all of these provisions was the assumption that impacts to riparian ecosystems resulting
10 from allowed activities (such as logging, road construction, and grazing) would be wholly mitigated
11 by the full implementation of standards and guidelines developed for Riparian Habitat Conservation
12 Areas. *See e.g.* SNFPA 00252, 00257 and 00260.

13 The Final EIS and Record of Decision (“ROD”) were issued in January of 2001. In issuing
14 the ROD, the Regional Forester explained:

15 I fully understand that there will be social and economic impacts from the
16 selection of Alternative Modified 8. The quantity of goods and services,
17 specifically timber and grazing, will be affected by this decision. However, I
18 believe the restoration and protection of old forests and restoration of aquatic,
19 riparian and meadow ecosystems are most important to the long-term health and
sustainability of Sierra Nevada ecosystems. I could have selected an alternative that
would produce higher levels of measurable goods and service, but these options pose
greater uncertainties and higher risks to ecosystem sustainability and species viability
(ROD, pages 27-29)." SNFPA 00829.

20 Over 200 individuals and organizations appealed the FEIS/ROD. In an unusual move, the
21 Chief of the Forest Service designated himself reviewing officer for the purpose of the consolidated
22 appeals and then determined that none had merit. SNFPA 00564-00567. In the appeal decision, he

24 ^{1/} Riparian Conservation Areas are “...land allocations that are managed to maintain or restore the
25 structure and function of aquatic riparian and meadow ecosystems.” SNFPA 00294.

26 ^{2/} A Critical Aquatic Refuge is a land allocation defined as “A relatively small watershed, ranging in
27 size from about 3,000 to 85,000 acres, that is sometimes nested within an emphasis watershed and has
28 localized populations of rare and/or at-risk populations of native fish and/or amphibians.” 2001 FEIS,
Vol. 1, Glossary at p. 2. “The primary management goal for CARs is to preserve, enhance, restore or
connect habitats distributed across the landscape for sensitive or listed species to contribute to their
viability and recovery.”

^{3/} Standard RCA-000 allowed up to 25% of an RCA to be impacted by ground-disturbing activities
without any type of a review process. Standard RCA-18 allowed disturbance of 20% of meadow-
associated streambanks and natural lake and pond shorelines. 2001 SEIS, vol.4, App. I, p. 52.

1 recommended that the Framework be reviewed in light of the recent severe fire seasons and the
2 perceived need to manage hazardous fuels. SNFPA 00564-00567. Shortly thereafter, the Bush
3 Administration commenced a review of the plan to address concerns raised by a select group of
4 appellants, including timber companies, grazing permittees, ski resort operators, and off-road
5 vehicle associations. SNFPA CD# SEIS_01_000693, Doc. 11091.

6 Concurrently, the Forest Service launched a campaign titled “Forests with a Future,” to raise
7 awareness about the need to protect California forests from so-called “catastrophic wildfire.”
8 SNFPA CD# SEIS_02_002123, Doc. 216007; SNFPA CD#SEIS_02_002173, Doc. 216009. The
9 U.S. Fish and Wildlife Service Biological Opinion (“USFWS BiOp”) finding that the 2001
10 Framework would not jeopardize the continued existence of listed and candidate fish and amphibian
11 species also relied on the assumption of full implementation of the plan’s standards and guidelines.
12 SNFPA 00360. Yet the Forest Service did not implement the Framework as written. Rather, almost
13 immediately after the ROD was signed the new Forest Service Chief ordered the Regional Forester
14 to conduct a preliminary review of the plan, which led to a formal review, which led to the plan’s
15 dramatic revision in 2004.

16 Development Of The 2004 Framework

17 In March 2003, the Forest Service concluded its review of the 2001 Framework and
18 recommended major changes to the portions of the plan governing grazing, recreation, and fuels
19 treatments⁵ in the northern Sierra. These recommendations were incorporated into a Draft
20 Supplemental EIS (“DSEIS”) issued in June 2003, and were touted in the draft as necessary, in part,
21 to answer the threat of wildfire: “This alternative uses a more active management approach, where
22 Forest Service managers use thinning, salvage, and prescribed and natural fires to make forests less
23 susceptible to the effects of uncharacteristically severe wildland fires...”(DSEIS, Summary at p.7).

24 The DSEIS unacceptably weakened protections of meadows, important habitat for imperiled
25 Yosemite toad, by allowing habitat degrading activities in these areas, as is clearly seen in the

27 ⁵/ The term “fuels treatments” is defined as “The treatment of fuels that left untreated, would otherwise
28 interfere with effective fire management or control. For example, prescribed fire can reduce the amount
of fuels that accumulate on the forest floor.” 2001 FEIS, Vol. 1, Glossary at p. 4. Known practices that
fall within the realm of “fuels treatments” include logging activities such as mechanical and hand
thinning, piling and burning, and prescribed fire, as described at SNFPA 03280-03282

1 comparison of 2001 Framework and 2004 Framework Standards and Guidelines in the DESIS. *See*
2 *e.g.* S1 Standard and Guideline “If [Yosemite toad occupancy] surveys are not completed for any
3 meadow, occupancy will be assumed and the above restrictions apply” 2004 DSEIS, Appendix A at
4 p. 260; this restriction is not present in the 2004 Framework Standard and Guideline 2004 DSEIS,
5 Appendix A at p. 261.

6 The preferred alternative in the DSEIS also allowed for a massive increase in logging
7 without providing adequate environmental analysis or scientific rationale for such an increase.
8 According to the DSEIS, the estimated salvage and green tree timber offered for sale under the 2001
9 Framework would be 157 million board feet per year in the first decade, whereas under the 2004
10 Framework the estimate would be 448 million board feet per year for the first decade, which is
11 nearly a three-fold increase. 2004 DSEIS, Summary at p. 24. Despite PRC’s comments outlining
12 these flaws and other similar flaws, the FSEIS was issued in January 2004 with no improvements
13 made in these flaws. *See e.g.* SNFPA 03417-03418.

14 In January 2004 Regional Forester Blackwell signed the 2004 ROD, replacing the 2001
15 ROD and establishing Alternative S2 as the 2004 Sierra Nevada Framework. SNFPA 02993. There
16 6, 241 appeals of the 2004 ROD, 27 of which were unique letters. SNFPA 04003.

17 THE 2004 FRAMEWORK MAKES SIGNIFICANT CHANGES TO SIERRA NEVADA NATIONAL FOREST
18 MANAGEMENT DIRECTION AND RENEGES ON AQUATIC MANAGEMENT STRATEGY PROTECTIONS

19 In comparing the effects of the alternatives, the FSEIS asserts that “Alternative S1 [2001
20 Framework] and S2 [2004 Framework] incorporate the AMS and the same standards and guidelines
21 for aquatic, riparian, and meadow ecosystems.” SNFPA 03173. However, simply stating a thing
22 does not make it true. This statement is contradicted explicitly and implicitly throughout the
23 FSEIS. For example, in the comparison of the effects of the alternatives, the FSEIS states that
24 ”Alternative S2 may pose higher short-term risks to aquatic resources because it prescribes larger
25 amounts of mechanical treatments and greater treatment intensities.” SNFPA 03169. In Appendix
26 A is a Standards and Guidelines chart comparing Alternative S1 and S2. SNFPA 03407-03459. If,
27 in fact, the two approaches “incorporate the AMS and the same standards and guidelines” then there
28 would not have been a need to create a chart to compare the respective Standards and Guidelines.

The Aquatic Management Strategy (AMS), as developed under the 2001 Framework, is a
spatially-explicit strategy designed to address aquatic ecosystem protection and recovery at multiple

1 scales: regional, watershed, and site. The 2004 Framework does not carry forward with this
2 approach. Several key differences exist between the 2001 ROD and 2004 ROD, which translate
3 into a major weakening of protection for aquatic ecosystems and demonstrate the overall failure of
4 the FSEIS and ROD to carry forward the intent of the AMS. For example:

- 5 a. Whereas the 2001 ROD set a 5 year timeline for conducting watershed and landscape
6 analyses to inform the planning of site-specific projects, the 2004 ROD contains no
7 such timeline. SNFPA 00308.
- 8 b. Whereas the 2001 ROD included a guidelines to address soil loss, detrimental soil
9 compaction, and management-related erosion, the 2004 ROD includes no such
10 Standard and Guideline. SNFPA 00340.
- 11 c. Whereas the 2001 ROD required that abandoned mine sites be made a priority for
12 reclamation, the 2004 ROD has no such requirement. SNFPA 00346.

13 Several aspects of the 2004 Framework ROD and FSEIS embody a weakening that puts
14 aquatic species at undue risk. The discretionary language common in the Standards and Guidelines
15 render actual protection of aquatic species uncertain at best. Statements such as “...treatments in
16 RCAs *would probably* be limited...”and “In general, implementation of the AMS . . . *should* provide
17 protection...” demonstrate the speculative nature of species and habitat protections afforded by the
18 2004 Framework. SNFPA 03369, emphasis added. The 2004 Aquatic Management Strategy is
19 likewise weakened by the removal of language mandating that activities within RCAs and CARs be
20 consistent with Riparian Conservation Objectives. For example, the 2001 ROD reads “Site-specific
21 project-level analyses will be conducted...These analysis will assure consistency with RCOs”
22 SNFPA 00295. The 2004 ROD only calls for “...analysis to determine consistency...” with no
23 mandate that activity be consistent with the Riparian Conservation Objectives. SNFPA 03052.

24 A significant difference between S1 and S2 is full implementation of the Herger-Feinstein
25 Quincy Library Group Act by the latter, yet there is no analyses of what this difference means for
26 aquatic ecosystems. See SNFPA 03118 and SNFPA 03131-03134.

27 The treatment of grazing under the two plans aptly illustrates the manner in which – against
28 the available evidence and the clear advice of experts – the 2004 Framework unravels needed
protections. The 2001 Framework contained clear standards and guidelines to prevent further

1 degradation of aquatic, riparian, and meadow ecosystems from grazing. *See e.g.* “Application to
2 Grazing Permits” SNFPA 00277. The USFWS 2001 BiOp cites grazing as one of the most
3 detrimental activities to listed fish species within the planning area. SNFPA 00460.

4 The Science Consistency Review team, convened to evaluate the DSEIS, found that its
5 “treatment of meadows and riparian areas and their associated sensitive animal species is awkward
6 and inconsistent” (SNFPA at 02512) and that “allowing grazing and most recreational activities to
7 continue in areas occupied or historically occupied by any of these species is almost certainly
8 incompatible with population recovery.” *Id.* A supplemental Science Consistency Review Report
9 put it this way: “Grazing can always be reinstated but extinction is permanent.” SNFPA at 2614.

10 Although the USFWS concluded that the 2001 Framework would not jeopardize listed or
11 candidate species it did find that the plan was “likely to adversely affect listed and proposed
12 species.”¹ SNFPA 00510. The Service made specific conservation recommendations for listed and
13 candidate species above and beyond those contained in the 2001 Framework, including, California
14 red-legged frog, mountain yellow-legged frog, and Yosemite toad. SNFPA 00511 – 00523. For
15 example, the Service recommended

16 Standard and Guideline RCA-41 should go further to eliminate livestock
17 grazing from Yosemite toad habitat throughout the year to prevent the
18 degradation of adjacent upland habitats, the introduction of sediment and
19 pollutants into toad breeding sites, trampling of upland refugial habitat,
dispersing cover for juvenile and adult toads, and alteration of meadow,
stream and spring hydrology which constitutes toad breeding sites. SNFPA
517.

20 Yet against the advice of the USFWS and its own Science Review team the USFS took exactly the
21 opposite approach in the 2004 Framework and *weakened* grazing protections for the toad.

22 The weakening of protections for the Yosemite toad provides another example of the
23 distinct difference between the 2001 and 2004 plans. In 2002, the USFWS determined that listing
24 of the Yosemite toad under the Endangered Species Act was warranted and thereafter placed the
25 species on the candidate list. The USFWS and the FSEIS both identify grazing as having adverse
26 effects on Yosemite toad habitat: “livestock grazing in occupied meadows where the species has not
27 been discovered may contribute to localized extirpations” SNFPA 03374. Nonetheless, the 2004
28

U.S. Fish and Wildlife Service Biological Opinion, January 11, 2001.

1 FSEIS and ROD under Alternative 2 provide inadequate meadow, stream and spring protection, put
2 the species at risk of localized extirpations. SNFPA 03374. Further, the USFWS BiOp on the 2004
3 Framework found that it would adversely affect Yosemite toad. SNFPA 2898 – 99.

4 Logging provides another example. Based on data in the 2004 FSEIS, green tree logging in
5 the first decade will *more than quadruple* under the 2004 Framework as compared to the 2001
6 Framework. For example, in the first decade of implementation, annual green tree logging volume
7 under the 2001 Framework is estimated at 70 million board feet (mmbf), whereas the estimate for
8 annual green tree logging in the first decade under the 2004 plan is 329 mmbf. SNFPA 03091.

9 The SEIS attempts to downplay the true impact of the staggering increase in the amount of
10 logging and related activities that are authorized by the 2004 amendments. Despite the 250%
11 increase in the number of acres that will be treated and the four-fold increase in timber harvest, the
12 SEIS claims that risk for increased erosion and soil sedimentation, run-off, and changes in runoff is
13 only “moderately higher” under the 2004 amendments. SNFPA 3280-3281. Logic dictates that a
14 250% increase in acres disturbed by logging will result in some proportional increase in soil
15 damage, erosion, and runoff. There is no rational relation between the vastly greater and more
16 intense mechanical treatment and timber harvest under 2004 amendments and the SEIS’ claim that
17 the resulting risk of adverse environmental impact will be only “moderately higher.” If there is a
18 justification for such a counter-intuitive claim, it is not revealed in the SEIS, which contains no
19 analysis of specific factors that may support this claim.

20 In many ways, the 2004 amendments replace the definite and precise standards contained in
21 the 2001 SNF with vague and “flexible” guidelines. For example, the 2001 plan limited
22 compaction in the RCAs to 5% of project activity area. SNFPA 3280. The 2004 amendments
23 remove this restriction, and instead provide for “project-level analysis” and “site-specific
24 evaluations.” *Ibid.* The SEIS fails in anyway to assess the extent to which replacing the mandatory
25 language and specific restrictions of the 2001 with more local flexibility and site-specific analysis in
26 the 2004 amendments will result in adverse direct, indirect, and cumulative impacts .

27 Even more disturbing is the fact that some of the changes to the 2001 plan are not even
28 mentioned in the SEIS at all. For example, in order to achieve the goal of improving aquatic
habitats, the 2001 contained the following guideline:

1 Determine if the age class, structural diversity, composition and cover of riparian
2 vegetation are within the range of natural variability for the vegetative community.
3 If outside the range of natural variability, **implement** restoration actions that will
4 result in an upward trend. . . . (emphasis added).

5 SNFPA 3412. The 2004 amendments replace the mandatory directive to ‘implement’ restoration
6 actions with the following language: “If outside the range of natural variability, consider
7 implementing mitigation and/or restoration actions . . .” *Ibid.*

8 Likewise, it appears that the 2001 plan’s prohibition against the use of pesticides to
9 livestock within RCAs and CARs is eliminated in the 2004 amendments (SNFPA 3408), yet this
10 change is not even mentioned in the text of the SEIS.

11 The SEIS does not contain a reference to these changes in the standards and guidelines, and
12 therefore fails to discuss and analyze the direct, indirect and cumulative impacts of these and other
13 changes to the 2001 plan. Nevertheless, the SEIS claims that 2004 amendments’ demonstrably
14 greater impacts to aquatic and riparian habitats will be “greatly reduced through the application of
15 the same Aquatic Management strategy with **similar** standards and guidelines.” (Emphasis added.)

16 SNFPA 3084. Though the standards and guidelines proposed by the 2004 amendments are in some
17 sense ‘similar’ to those proposed by the 2001 plan, in many significant respects, they are not
18 similar. As we have shown above, the 2004 standards stray from definite standards and mandatory
19 duties and place greater flexibility and decision making authority in the hands of the local managers
20 and decision-makers. Accordingly, the SEIS’s claim that as a result of the implementation of the
21 standards and guidelines contained in the 2004 amendments, “short-term risks associated with S2
22 will be greatly reduced” is an exaggerated claim that is not supported by the evidence in the record.

23 The SEIS misrepresents the risk of fire, overstates the speculative benefits of the additional
24 fuel treatment logging, and understates the true level of watershed disturbing activity that will occur
25 under the 2004 amendments. The SEIS’ predictions suggest that the trade off between short-term
26 impacts, (i.e. significant adverse impacts to aquatic habitat that will result from the additional
27 logging and related activities), is much greater in magnitude as compared to the long-term gains in
28 decrease potential for wild fires. The total area that will be treated mechanically under the 2004
amendments is about 250% greater as compared to the 2001 SNFPA 3280. Yet the SEIS admits
that “annual wildfire acreage burned under Alternative S2 [2004 amendments] would be about 20%

1 less than under Alternative S1 [2001 SNF].” SNFPA 3287. The FSEIS fails to reasonably analyze
2 and disclose the direct, indirect and cumulative impacts of fire under the alternatives on watershed
3 and aquatic resources, or compare these impacts to those of proposed fuel treatments, roads and
4 grazing. *See Rhodes Declaration* ¶ 56.

5 Agency scientists recognized that roads have significant negative effects on streams. SNFPA
6 03279. In fact, in discussing the Framework’s soil standards and their effect on water quality, a
7 Sierra National Forest soil scientist declared “I believe that roads are the major source [“of
8 sediment].” SNFPA CD# SEIS_05_000844, Doc. 58002. Despite the fact that agency scientists
9 recognized the impact roads have on aquatic ecosystems, at no point during the planning, either in
10 the 2001 or 2004 Framework planning exercise did the Forest Service actually analyze the
11 information that they provided regarding roads and come to discernible conclusions about road
12 impacts on aquatic systems. As the declaration demonstrates, this exercise can be done using the
13 agency’s own data and methodologies. See Rhodes Declaration (October 14, 2005) ¶ 16-47.
14 Similarly, the Forest Service did not adequately analyze the cumulative impacts of logging, fuels
15 treatments and their associated activities, despite the fact that such an analysis is possible using the
16 agency’s own data. See Rhodes Declaration ¶ 48-55.

17 Pacific Rivers Council’s Participation in the Sierra Nevada Planning Process

18 Pacific Rivers Council (“PRC”) participation in Sierra Nevada forest issues began in the early
19 1990’s with its involvement in the management planning for the Quincy Library Group area and
20 larger Sierra Nevada-wide planning effort. In these early stages of Sierra Nevada forest planning,
21 PRC participated in public meetings and submitted the report “The Urgent Need for Watershed
22 Protection and Restoration in the Sierra Nevada”. SNFPA CD #17, Doc. 1950. This report
23 highlighted the species and ecosystems at risk in the Sierra Nevada, and offered recommendations
24 for protecting Sierra Nevada watersheds. One of the key recommendations included using
25 established scientific principles to formulate a comprehensive Aquatic Conservation Strategy for the
26 area. In September of 1997, PRC also submitted comments on the California Spotted Owl Draft
27 Environmental Impact Statement and Revised Draft Environmental Impact Statement (RDEIS), and
28 testified before California Spotted Owl Federal Advisory Committee, which was chartered to ensure
that all relevant scientific information had been incorporated into the RDEIS analysis.

1 2001 Framework

2 During the development of the 2001 Framework, PRC staff attended public meetings, met
3 with USFS ID team members, planners, Regional Forester, PSW Director and staff to discuss
4 management affecting native aquatic species and aquatic ecosystems. PRC participated on a panel at
5 a United States Forest Service-sponsored workshop surrounding the 2001 Framework. PRC
6 submitted into the record a science and technical report entitled “Thinning for Increased Water
7 Yield in the Sierra Nevada”. SNFPA CD #17, Doc. 1948. This report provided a scientific rebuttal
8 of the theory that forest health related thinning in the national forests in the Sierra Nevada would
9 increase annual water yield and/or baseflow for use by downstream users. It also outlined the
10 ecological damage that can be caused by intensive thinning and its associated road system.

11 PRC’s report “Conservation of Aquatic Diversity in the Sierra Nevada: Preliminary
12 Identification of Aquatic Diversity Areas and Critical Refuges with Recommendations on their
13 Management” (Pacific Rivers Council, 1998) was used by the Forest Service in establishing the
14 Sierra Nevada Emphasis Watersheds and Critical Aquatic Refuges. 2001 DEIS, Vol. 3, Appendix I
15 at p. 21. The DEIS also explains that the Aquatic Diversity Management Areas and Critical Refuges
16 included in the proposed Alternative 5 were taken directly from those proposed by PRC. 2001
17 DEIS, Vol. 3, Appendix I at p. 22.

18 In August 2000, PRC submitted comments on the Sierra Nevada Forest Plan Amendment
19 Draft Environmental Impact Statement, in which we outlined the need to protect critical aquatic
20 areas in order to maintain viable populations of aquatic species and the importance of riparian
21 protection. PRC 0006. PRC’s comments on the DEIS also recognized the document’s inadequate
22 analysis of the effects of the road system on aquatic communities and its inflation of the risk fire
23 poses to aquatic ecosystems. At the same time, PRC also submitted a letter in conjunction with the
24 California/ Nevada Chapter of the American Fisheries Society which recommended the tightening
25 of the linkage between the goals and management direction of the Aquatic Conservation Strategy,
26 incorporating landscape-level protections through explicit management direction for aquatic
27 refugia, and bolstering protection for key riparian function. PRC 0001. PRC also co-authored the
28 comments submitted on the DEIS on behalf of the Sierra Nevada Forest Protection Campaign.
SNFPA CD#SEIS 10, Doc. SN-1467. PRC’s portion of these comments focused on management of

1 the aquatic ecosystems of the Sierra Nevada.

2 In April 2001, PRC appealed the 2001 FEIS and ROD citing, among other inadequacies, the
3 FEIS's inadequate cumulative effects analysis and inadequate analysis of management impacts on
4 aquatic, riparian and meadow associated species. PRC 0043. The appeal posited that the ROD did
5 not fulfill the Forest Service's legal obligation toward aquatic species under NEPA, National Forest
6 Management Act, Endangered Species Act and Clean Water Act.

7 2004 Framework

8 In September 2002, during the Forest Service's review of the 2001 Framework, PRC
9 submitted a technical report titled "Watershed Restoration in the Sierra Nevada: Ecological and
10 Economic Principles" that provides extensive scientific analysis of the causes and consequences of
11 watershed degradation in the Sierra Nevada region, focusing on national forest lands and relying to
12 a great extent on information provided in the 2001 Framework DEIS, FEIS, and Administrative
13 Record., *See Rhodes Declaration (October 14, 2005) ¶ 8*. This analysis constitutes new scientific
14 information that was not considered nor referenced in the 2004 DSEIS, FSEIS or ROD.

15 In September 2003, PRC submitted comments on the Draft Supplemental EIS (DSEIS),
16 documenting major changes between the 2001 FEIS/ROD and 2004 DSEIS and the detrimental
17 effects these changes would have on watersheds and aquatic species. PRC 0091. PRC's comments
18 pointed in part to the DSEIS's inadequate cumulative effects analysis, inadequate analysis of the
19 environmental effects of the road system, and inadequate analysis of the proposed changes to the
20 Aquatic Management Strategy.

21 In April 2004, PRC appealed the FSEIS and ROD. PRC 0102. The appeal cited how the
22 discretionary language common in the Standards and Guidelines of Alternative S2, the alternative
23 chosen for implementation in the ROD, would not provide adequate protection for watershed
24 conditions, soil productivity, and biological diversity as required under the NFMA. PRC 0107-
25 0109. It also provided examples of how the weakened aquatic protections under Alternative S2 put
26 the alternative below the NFMA legal bar of maintaining viable populations. PRC 0105-0107. The
27 appeal also highlighted several inadequacies in the environmental effects analysis in the FSEIS,
28 putting the FSEIS under the legal bar required under the NEPA. PRC 0111-0114.

In November 2004, Forest Service Chief Dale Bosworth issued his appeal decision. SNFPA

1 (“APA”), 5 U.S.C. § 706(2); *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d
2 1372, 1376 (9th Cir. 1998) (National Forest Management Act); *Blue Mountains Biodiversity*
3 *Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998) (National Environmental Policy Act).
4 Under the APA, courts are to set aside agency action that is “arbitrary, capricious, an abuse of
5 discretion, or otherwise not in accordance with law,” or found to be “without observance of
6 procedure required by law.” 5 U.S.C. § 706(2)(A), (D). The Court is to consider whether the Forest
7 Service’s decision “was based on a consideration of the relevant factors and whether there has been
8 a clear error of judgment,” *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1149 (9th Cir.
9 1998). This inquiry requires the agency to articulate a rational connection between the evidence in
10 the record and the decision made. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463
11 U.S. 29, 43 (1983). The decision must also be supported by substantial evidence. “We must set
12 aside the Secretary’s decision if it was ‘arbitrary’ or ‘capricious’ because the decision was based on
13 inadequate factual support. *See* 5 U.S.C. § 706(2)(a). We review the full agency record to determine
14 whether substantial evidence supports the agency’s decision. . . .” *Bonnichsen v. United States*, 367
15 F.3d 864, 880 (9th Cir. 2004).

16 The traditional basis for permanent injunctive relief is irreparable injury and the inadequacy
17 of legal remedies. *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987);
18 *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). Because environmental injury, by its
19 nature, “can seldom be adequately remedied by monetary damages and is often permanent . . . the
20 balance of harms will usually favor the issuance of an injunction to protect the environment.”
21 *Amoco Production Co.*, 480 U.S. at 545.

22 Absent “unusual circumstances,” an injunction is the appropriate remedy for a violation of
23 the environmental laws, including NEPA’s procedural requirements. *See Seattle Audubon Soc’y v.*
24 *Evans*, 771 F. Supp. 1081, 1095-96 (W.D. Wash. 1991); *Thomas v. Peterson*, 753 F.2d 754, 764
25 (9th Cir. 1985). “Irreparable damage is presumed to flow from a failure properly to evaluate the
26 environmental impact of a major federal action.” *Id.*

27 **III. NEPA BACKGROUND AND STANDARD OF REVIEW**

28 Valid NEPA analysis “ensures that the agency . . . will have available, and will carefully
consider, detailed information concerning significant environmental impacts; it also guarantees that

1 the relevant information will be made available to the larger [public] audience.” *Blue Mountains*
2 *Biodiversity Project*, 161 F.3d at 1211-12 (quotation omitted). The Forest Service must insure “the
3 professional integrity, including scientific integrity,” of the analysis in an EIS. 40 C.F.R. § 1502.24.
4 “Accurate scientific analysis” is essential to implementing NEPA. 40 C.F.R. § 1500.1(b). NEPA
5 further requires that “the public receive the underlying environmental data from which a Forest
6 Service expert derived her opinion.” *Idaho Sporting Congress*, 137 F.3d at 1150.

7 A valid EIS must contain a “reasonably thorough discussion of the significant aspects of the
8 probable environmental consequences.” *Marsh*, 490 U.S. at 374. The agency must consider “every
9 significant aspect of the environmental impact of a proposed action” and inform the public that it
10 has considered environmental concerns in its decision-making process. *Lands Council v. Powell*,
11 395 F.3d 1019, 1026. (9th Cir. 2005). (emphasis added). The agency is required to disclose and
12 analyze accurate scientific information and analysis, including credible scientific evidence that
13 contradicts the agency’s position with respect to a proposed action. *Sierra Club v. Eubanks*, 335
14 F.Supp. 2d 1070, 1076 (E.D.Cal. 2004).

15 The Ninth Circuit has adopted a “rule of reason” for review of an EIS that asks whether the
16 document contains a reasonably thorough discussion of the significant aspects of the probable
17 environmental consequences. *Cuddy Mountain*, 137 F.3d at 1376. The Court must insure that the
18 Forest Service took a “hard look” at the environmental effects of the proposed action. *See Vermont*
19 *Yankee v. Natural Resources Defense Council*, 435 U.S. 519, 535 (1978); *see also Kern v. U.S.*
20 *Bureau of Land Management*, (“Kern”) 284 F.3d 1062, 1066 (9th Cir. 2002) (NEPA establishes
21 “action-forcing” procedures that require agencies to take a “hard look” at environmental
22 consequences).

23 This system of assessment and analysis of environmental impacts—both for the benefit of
24 the agency making the decision and for the concerned public—falls apart if the agency curtails its
25 examination of impacts or uses flawed information and analytical tools. Likewise, meaningful
26 analysis is precluded unless the agency discloses and discusses credible opposing points of view.
27 *Sierra Club v. Eubanks*, 335 F.Supp.2d at 1076.

28 While NEPA does not compel a certain substantive result, without rigorous scientific
analysis the entire purpose of NEPA is undercut. *See Idaho Sporting Congress*, 137 F.3d at 1149.

1 “A plaintiff need not show that significant effects will in fact occur, raising substantial questions
2 whether a project may have a significant effect is sufficient.” *Id.* at 1150 (quotations omitted).
3 NEPA is designed to force agencies to publicly consider the environmental impacts of their actions
4 before going forward. *Metcalf v. Daley*, 214 F.3d 1135, 1141 (9th Cir. 2000).

5 **IV. THE 2004 FRAMEWORK FSEIS FAILS TO ADEQUATELY ANALYZE THE**
6 **DIRECT AND INDIRECT IMPACTS OF THE 2004 FRAMEWORK**

7 NEPA requires disclosure of all foreseeable direct and indirect impacts. 40 C.F.R. §
8 1502.16; *City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975). “Direct” environmental
9 effects are those “which are caused by the action and occur at the same time and place.” 40 C.F.R. §
10 1508.8(a). “Indirect” environmental effects are those:

11 which are caused by the action and are later in time or farther removed in distance, but are
12 still reasonably foreseeable. Indirect effects may include growth inducing effects and other
13 effects related to induced changes in the pattern of land use, population density or growth
14 rate, and related effects on air and water and other natural systems, including ecosystems.

15 *Id.* at 1508.8(b). “For many projects, [indirect] effects may be more significant than the project's
16 [direct] effects.” *City of Davis v. Coleman*, 521 F.2d at 676 (9th Cir. 1975)

17 The 2004 Framework FSEIS does not adequately analyze the direct and indirect impacts of
18 the whole project, particularly to endemic amphibians, frogs and fish in the project area resulting
19 from, (A) extensive additional logging and associated increases in road construction, reconstruction
20 and use, and mechanical treatment, and (B) changes in the grazing standards and guidelines.

21 **A. The FSEIS Does Not Adequately Analyze the Direct and Reasonably**
22 **Foreseeable Indirect Impacts to Fish and Amphibian Species From the 2004**
23 **Framework Logging and Intentional Burning.**

24 The 2004 Framework triples the volume of logging throughout the eleven Sierra Nevada
25 national forests and permits logging of larger trees than the 2001 Framework. SNFPA 03176, Table
26 2.5.7b. In the first decade alone, the 2004 Framework will more than quadruple green-tree logging
27 from 70 mmbf/year (under the 2001 Framework) to 329 mmbf/year. SNFPA 03086. The 2004
28 Framework also allows 45% more acres of initial intentional burning and fuel management logging,
including a 250% increase in areas that are mechanically logged. SNFPA 03280; SNFPA 03290–91.

Whereas the 2001 Framework strictly regulated the portion of the stand area that must be
left unlogged (10% in the “defense zone”, 15% in the “threat zone”), the 2004 amendments do not

1 require leaving areas unlogged.” SNFPA 3290. Likewise, though the 2001 Framework required
2 that following wildfires, “at least 10% of the total stand-replacement area must remain unsalvaged
3 to provide for wildlife and ecosystem needs,” the 2004 Framework contains no such restriction on
4 post-fire logging. SNFPA 3283. Clearly, the 2004 Framework “has fewer restrictions on [fuels]
5 treatment methods and intensity.” SNFPA 03086.

6 Increased logging and intentional burning and associated activities authorized by the 2004
7 Framework will result in myriad adverse environmental impacts to fish and amphibian species.
8 Fuel management logging causes “soil disturbance and biomass removal and consequently may
9 result in increased erosion and sedimentation, runoff, [increased] water temperatures, and altered
10 inputs of woody debris to stream channels.” SNFPA 03281. The soil compaction and biomass
11 removal caused by fuels management logging alters stream structure and fish habitat. SNFPA
12 03283. Logging also decreases the input of vegetation and animals from floodplains into streams
13 and changes surface and subsurface water flows. QLG FEIS, Chp. 3, Section 2. Logging within
14 Riparian Conservation Areas (“RCAs”) reduces forest canopy cover, which in turn adversely
15 affects stream temperature, primary productivity, fish habitat, and riparian microclimate. SNFPA
16 03281. The FSEIS failed to take a “hard look” at the significant increased risk to aquatic species
17 and their habitat posed by the 2004 Framework’s increased logging, mechanical treatment,
18 intentional burning and related activities.

19 While acknowledging that logging causes erosion and sedimentation and adversely affects
20 water temperatures, the FSEIS fails to analyze the direct and indirect impacts to aquatic habitats and
21 fish and amphibian species resulting from the substantial increases in logging. The FSEIS itself
22 acknowledges that in at least two separate instances, the larger amounts of logging and more
23 intensive logging methods authorized by the 2004 Framework pose a risk to aquatic habitats.
24 SNFPA 03281–82. The mere acknowledgment that increased logging under the 2004 Framework
25 will result in greater risk to amphibians is insufficient under NEPA; it is well-settled that “[g]eneral
26 statements about ‘possible’ effects and ‘some risk’ do not constitute a ‘hard look’ absent a
27 justification regarding why more definitive information could not be provided.” *Cuddy Mountain*,
28 137 F.3d 1372, 1380 (9th Cir. 1998). Thus, the FSEIS’s determination that the risks posed to fish

1 and amphibian species are higher under the 2004 Framework than under the 2001 Framework does
2 not obviate the need for analysis of the nature and magnitude of the risk and expected impacts; it
3 makes detailed analysis more crucial.

4 The FSEIS attempts to downplay the true impact of the staggering increase in the amount of
5 logging and related activities that is authorized by the 2004 amendments. Despite the 250%
6 increase in the number of acres that will be logged and the three-fold increase in salvage logging
7 and four-fold increase in green logging in the first decade alone, the SEIS claims that risk for
8 increased erosion and soil sedimentation, run-off, and changes in runoff is only “moderately higher”
9 under the 2004 amendments. SNFPA 3281. Given the vastly greater and more intense mechanical
10 logging that is authorized by the 2004 amendments, the FSEIS’ bald claim that the resulting risk of
11 adverse environmental impact will be only “moderately higher” is not supported by the evidence in
12 the record and cannot be rationally explained.

13 The FSEIS discussion of the impacts from increased logging violates NEPA for at least two
14 reasons. First, the FSEIS contains numerous unsupported claims that impact on aquatic habitat and
15 species will be “limited⁶”, or that risks associated with the proposed additional logging and
16 mechanical treatment under the 2004 Framework are only “moderately higher” as compared to the
17 2001 Framework. SNFPA 3281. Under NEPA, however, the FSEIS may not “rely on conclusory
18 statements unsupported by data, authorities, or explanatory information.” *Seattle Audubon Soc’y v.*
19 *Moseley*, 798 F. Supp. 1473, 1482 (W.D. Wash. 1992), *aff’d*, 998 F.2d 699 (9th Cir. 1993); *see also*
20 *Idaho Sporting Congress*, 137 F.3d at 1150 (“The Forest Service cannot simply rely on a conclusory
21 assertion of its opinion without any data or analysis for the decisionmaker and public to assess or
22 the courts to review”); *Silva v. Lynn*, 482 F.2d 1282 (1st Cir. 1973) (EIS may not contain vague,
23 general and conclusory reasoning). Here, the FSEIS contains neither analysis nor citations to
24 scientific studies, reports, or other literature to support its contention that substantial increases in
25 logging and intentional burning will have “limited” effects on aquatic ecosystems, associated
26 species and water quality. In fact, compelling studies in the record that address this issue reach the

27
28 ^{6/} Impacts to aquatic habitat “are expected to be of limited magnitude, duration, and extent because [subsequent] landscape and project analysis will be used to ensure that these treatments meet RCOs.” SNFPA 03282.

1 opposite conclusion. SNFPA 3279; 2001 FEIS Vol.2, Ch.3, pp.207-8; Rhodes Dec ¶23-6.

2 Further, the FSEIS fails to identify and discuss the scientific evidence in the record which
3 reach the opposite conclusion. Some of this evidence was supplied by PRC in its comments and
4 appeals. See, Rhodes Declaration at ¶ 16-22. The FSEIS violates NEPA because the Forest Service
5 was required not only to identify opposing points of view such that differences of opinion are
6 readily apparent,” but also to provide “good faith, reasoned analysis in response.” *California v.*
7 *Block*, 690 F.2d 753(9th Cir. 1982).

8 Second, NEPA does not permit deferral of the consideration of direct and indirect impacts to
9 a future date, as the SEIS does here. "NEPA requires consideration of the potential impact of an
10 action before the action takes place." *Cuddy Mountain*, 137 F.3d at 1380, quoting *City of Tenakee*
11 *Springs v. Clough*, 915 F.2d 1308, 1313 (9th Cir. 1990). As this Court has recognized, “NEPA
12 emphasizes the importance of coherent and comprehensive up-front environmental analysis to
13 ensure informed decision-making to the end that the agency will not act on incomplete information,
14 only to regret its decision after it is too late to correct.” *Sierra Nevada Forest Prot. Campaign v.*
15 *U.S. Forest Serv.*, 2005 WL 1366507, at *5 (E.D. Cal. May 26, 2005) (quoting *Center for*
16 *Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1166 (9th Cir. 2003)). The FSEIS cannot
17 defer analysis of direct and indirect impacts to subsequent “landscape and project analysis.” If an
18 agency were able to defer analysis of environmental consequences, based on a promise to perform a
19 comparable analysis at a later date, no environmental consequences would ever need to be
20 addressed in an EIS. Further, this approach directly contradicts the dual purpose of NEPA, which is
21 “to obviate the need for speculation by insuring that available data is gathered and analyzed prior to
22 the implementation of the proposed action” and to produce an informed estimate of the
23 environmental consequences. *Foundation for North American Wild Sheep v. United States*
24 *Department of Agriculture*, 681 F.2d 1172, 1179 (9th Cir. 1982).

25 This FSEIS also fails to adequately analyze the impacts of the 2004 Framework’s substantial
26 increases in logging when addressing the “Factors Used to Assess Environmental Consequences”
27 for aquatic and riparian dependant species. For example, the FSEIS provides no discussion of the
28 effects of logging on either the Yosemite toad or the Northern leopard frog, and improperly defers

1 analysis until the subsequent project planning stage with the California red-legged frog. SNFPA
2 03371, 03375 & 03307. With both the California red-legged frog and the foothill yellow-legged
3 frog, the FSEIS only briefly discusses the risk of mortality from crushing by logging equipment, but
4 it does not provide any meaningful analysis concerning adverse effects of logging on the habitat of
5 these species. *See* SNFPA 03307 & 03367. The statement that the effects of microclimate change
6 in Foothill Yellow-Legged Frog habitat is “unknown” does not amount to analysis. SNFPA 03367.
7 Likewise, the vague admission that the potential for Mountain Yellow-Legged Frog habitat
8 alteration as a result of logging is “slightly greater” under 2004 Framework is not “coherent and
9 comprehensive” analysis. *Sierra Nevada Forest Prot. Campaign*, 2005 WL 1366507 at *5; SNFPA
10 03370. Finally, with the Cascades Frog, there is only a vague reference to the QLG FEIS rather than
11 any impact analysis. SNFPA 03377.

12 Furthermore, despite the significant number of federally listed and at-risk fish species within
13 the planning area, incredibly the FSEIS entirely fails to analyze the impacts of the 2004 Framework
14 on fish species.⁷ The 2004 Framework FSEIS fails to analyze the direct and reasonably foreseeable
15 indirect impacts of the project on fish feeding, breeding, rearing and/or migration habitat. Not one
16 fish is analyzed within the FSEIS focal species context. *See* SNFPA 03304–03378.

17 Of the 63 native fish species of the Sierra Nevada (2001 DEIS, Vol. 3, app. R, at pp. 28 –
18 31; SNFPA 02667), thirty-eight (60%) have declined in population size and are at moderate to high
19 risk of continuing to decline (2001 DEIS, Vol. 3, app. R, at pp. 28 – 33). None of the species have
20 robust populations because “continued loss of aquatic habitat characterizes the region as a whole.”
21 2001 DEIS, Vol. 2, ch. 3, at 489. Thirteen of the 63 species are listed under the Endangered Species
22 Act⁸ and 3 are presumed extinct. In the July 30, 2003 Biological Assessment, FWS determined that
23 the 2004 Framework was “likely to adversely affect” the Lahonton cutthroat trout, Paiute cutthroat
24 trout and Little Kern golden trout. SNFPA 02668. Because of their isolation from other populations

26 ^{7/} *See* 2001 Final Environmental Impact Statement (“2001 FEIS”) for a discussion of the federally listed and at-risk fish
27 species within the planning area. 2001 FEIS Vol. 3, Chp. 3, Part 4.2.5, pgs. 63–67; Part 4.3.4., pgs. 40–62; Part 4.4.4., pgs.
246–266; Part 4.5.4., pgs. 111–125.

28 ^{8/} This number changed slightly between 2001 and 2004 because the Sacramento splittail was delisted,
and right now National Marine Fisheries Service (“NMFS”) is in the process of a status review of all
steelhead, so that species is technically neither listed nor delisted.

1 they are unable to recover from watershed disturbance and changes in aquatic habitat, which can
2 have repercussions for the taxon as a whole. *Id.*

3 The FSEIS violates NEPA because it does not adequately analyze the direct and indirect
4 impacts to aquatic species resulting from the increase in logging allowed by the 2004 Framework.

5 **B. The FSEIS Fails to Adequately Analyze the Direct and Indirect Impacts to**
6 **Aquatic Species from the Road System Needed to Achieve the 2004**
7 **Framework's Increased Logging Levels**

8 The FSEIS fails to disclose or analyze the direct and reasonably foreseeable indirect impacts
9 to aquatic ecosystems and associated species resulting from the 2004 Framework's increased road
10 construction and reconstruction. The 2004 Framework allows 115 miles of road construction and
11 1520 miles of road reconstruction in the first decade of implementation alone. SNFPA 03395, Table
12 4.4.3b. According to Table 4.4.3a., the 2004 Framework more than quadruples the miles of road
13 construction from that projected by the 2001 Framework during the first decade (from 25 miles to
14 115 miles) and more than doubles the miles of road reconstruction (from 655 miles to 1520 miles).⁸
15 Following the first decade, approximately 15 miles of additional road construction per decade will
16 be needed outside the QLG area for access to logging. SNFPA 03368. Compared to the 2001
17 Framework, the 2004 Framework "is projected to result in an additional 86 miles of road
18 construction, 43 miles of temporary road construction, and 640 miles of road maintenance per year
19 during the period of full HFQLG implementation." SNFPA 03395.

20 Roads "have the greatest effects on aquatic ecosystems and water quality in forested
21 environments." SNFPA 03279. Throughout the Sierra Nevada, roads are the largest single human-
22 caused source of sedimentation and aquatic and riparian habitat degradation. QLG FEIS, chp. 3, p.
23 3-7. Both the Sierra Nevada Ecosystem Project report and 1998 Sierra Nevada Science Review
24 specifically identified roads as "a major cause of water quality problems and adverse impacts to
25 aquatic ecosystems." SNFPA 03907. "Many researchers have shown that roads can deliver more
26 sediment to streams than any other human disturbance in forested environments." SNFPA 03279
27 [citations omitted]. The use of roads near aquatic ecosystems contributes to both temperature

28 ^{8/} "[T]wice as many miles of roads would be reconstructed under [the 2004 Framework] than [under the 2001 Framework]." SNFPA 03282. Much of this construction results from full implementation of the QLG pilot project, which allows "substantial amounts of road reconstruction." *Id.*

1 alteration and increased sedimentation, and temperature alteration and increased sedimentation are
2 the most widespread symptoms of stream degradation caused by land management in the Sierra
3 Nevada. Yet, the FSEIS fails completely to quantify “likely future levels of road crossings and
4 roads proximate to streams under the alternatives.” Rhodes Declaration, at ¶46.

5
6 The FSEIS acknowledges numerous general problems associated with roads, but fails to
7 analyze the specific impacts to aquatic ecosystems and associated species from the 2004
8 Framework’s increased road construction and reconstruction. For example, the FSEIS
9 acknowledges that “[r]oad building is likely to cause the greatest increase in sediment transport off-
10 site.” SNFPA 03283. When discussing road management, the FSEIS points out that “[r]oads have
11 effects on geomorphic, hydrologic, and biological processes in aquatic ecosystems . . . by
12 increasing mass wasting and surface erosion, altering stream channel morphology, extending stream
13 channel networks by modifying surface flows, and causing interactions of water, sediment, and
14 wood at road-stream crossings.” SNFPA 03279. The FSEIS also mentions that roads affect
15 hydrologic processes by intercepting “rainfall on the road surface and cutbanks, and intercept[ing]
16 subsurface water moving down adjacent hillslopes. . . [and] also concentrate flow and divert water
17 from areas to which it would normally flow.” *Id.* See, also, Rhodes Declaration at ¶38-9.

18
19
20 However, having recognized the role of roads in general in causing erosion, sedimentation
21 and diverted stream flow, the FSEIS fails to discuss the impacts of the 2004 Framework’s road
22 construction and reconstruction on aquatic species and their habitats in the project area. In the
23 “Factors Used to Assess Environmental Consequences” sections of the FSEIS, the only analysis
24 provided is a brief discussion limited to road construction adjacent to stream crossings and in
25 riparian areas. There is no discussion of road-related impacts to aquatic species such as the
26 Mountain Yellow-Legged Frog, the Northern Leopard Frog or the Cascades Frog. SNFPA 03369,
27 03375 & 03376. There is only a brief, superficial examination of roads in California Red-Legged
28

1 Frog riparian habitat before the FSEIS refers the reader to the QLG FEIS. SNFPA 03305–07.

2 The FSEIS violates NEPA by deferring analysis of the impacts from road construction
3 within the habitat of the Foothill Yellow-Legged Frog until after “the biological evaluation
4 process,” because NEPA is not designed to “postpone analysis of an environmental consequence.”
5 *Kern*, 284 F.3d at 1072; SNFPA 03366 & 03368. Likewise, the FSEIS contains only an incomplete
6 and cursory discussion of road-related impacts on the Yosemite Toad. SNFPA 03371.

7 The brief general discussion of road construction in the FSEIS is limited to construction of
8 roads adjacent to streams. SNFPA 3305. Absent from the FSEIS is any comprehensive analysis of
9 the effect of the massive road construction and reconstruction where the roads are not immediately
10 adjacent to stream crossings and riparian areas. Yet, the FSEIS does not provide any explanation
11 for its failure to analyze sediment loading from constructing roads that are not immediately adjacent
12 to stream crossings or riparian areas.

13 As previously discussed, the 2004 Framework FSEIS fails to analyze the direct and
14 reasonably foreseeable indirect impacts of any aspects of the project on fish feeding, breeding,
15 rearing and/or migration habitat. Not one fish species is analyzed within the FSEIS focal species
16 context (SNFPA 03304–03378) despite the substantial increase in road construction and
17 reconstruction allowed by the 2004 Framework. SNFPA CD#17m Doc.503, at 3, Rhodes Dec. ¶12

18 Rather than analyzing the direct and indirect impacts of road construction and reconstruction
19 on fish species, the FSEIS impermissibly marginalizes these impacts by asserting that “the effects of
20 roads on streamflow are generally smaller than the effects of timber harvest.” SNFPA 03279. Even
21 if this statement is correct, it does not relieve the Forest Service of its obligation to analyze the
22 impacts that the increased road construction and reconstruction will have on aquatic ecosystems and
23 fish species. “NEPA requires that a federal agency consider every significant aspect of the
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1 environmental impact of a proposed action and inform the public that it has indeed considered
2 environmental concerns in its decisionmaking process.” *Lands Council*, 395 F.3d at 1026. The
3 FSEIS acknowledges that roads have the greatest adverse environmental effect on aquatic
4 ecosystems and water quality in the Sierra Nevada. SNFPA 03279. Under NEPA, the FSEIS is
5 required to analyze the significant effects that road construction has on fish species and conduct “a
6 reasonably thorough discussion of the significant aspects of the probable environmental
7 consequences.” *Marsh*, 490 U.S. at 374. Even if logging has a greater impact on streamflow than
8 road construction, this does not excuse the FSEIS’s failure to analyze the direct and indirect effects
9 of road construction on fish species.
10
11

12 The Forest Service attempts to justify its utter failure to analyze the effects of the massive
13 road construction by relying on the speculative benefits that can be achieved in the long-term by the
14 decommissioning of certain roads within the project area. SNFPA 3084. In its “Roads” section, the
15 FSEIS prospectively analyzes the speculative benefits of road mile reduction while ignoring the
16 direct and indirect impacts caused by the massive increase in miles of road construction and
17 reconstruction:
18

19 By reducing the amount of roads on the landscape, the effects of fragmentation and
20 disturbance to wildlife and associated habitats should decrease overtime. The
21 potential for sedimentation effects to streams should also decrease, especially since
22 many of the decommissioned roads are located next to streams. Further
23 improvements in reducing the effects of roads should be realized through the
24 reconstruction and maintenance of roads, which includes upgrading of drainage and
25 drainage structures. This would reduce road-related impacts (soil erosion) to water
26 quality. SNFPA 03395.

25 This analysis describes the future benefits of road reduction and road reconstruction, but it
26 fails to proffer any meaningful discussion regarding the extensive road construction and
27 reconstruction that is required to realize this benefit. The FEIS incorrectly assumes that the
28 environmental benefit of road decommissioning matches the adverse impact of road construction mile

1 for mile. This assumption is completely wrong because the largest increases in erosion and
2 sediment delivery from roads occur in the first few years after construction, but any reduction in
3 these adverse impact after decommissioning is gradual and slow. Rhodes Decl. at ¶38-40.
4

5 In light of the known environmental impacts on aquatic ecosystems, fish and amphibians
6 resulting from road construction and reconstruction, such as sediment delivery to streams,
7 temperature alteration, erosion, landslides, mass wasting, the FSEIS's failure to adequately address
8 these impacts is particularly egregious.

9
10 **C. The FSEIS Does Not Adequately Analyze the Direct and Indirect Impacts to**
11 **Aquatic Species and Their Habitat Caused by the 2004 Framework's Log Skid**
12 **Trail and Log Landing Construction and Use**

13 The FSEIS fails to adequately analyze the direct and indirect impacts to aquatic ecosystems
14 and associated species resulting from the 2004 Framework's increased log skid trail and log landing
15 construction and use. Log skid trails and log landings both cause soil compaction, increase
16 sediment runoff, disrupt surface and subsurface water flow, and degrade water quality. 2001 Record
17 of Decision ("2001 ROD") 3-126. The FSEIS acknowledges that the "primary potential sources for
18 sediment are skid trails, landings, and treatment areas near watercourses" SNFPA 03281. The
19 FSEIS admits that the risks are higher under the 2004 plan because of higher intensity logging and
20 the likely "need for more skid trails, landings, and other possible sources of sediment." *Ibid.*
21

22 Astonishingly, however, the FSEIS includes no discussion of how the increased construction
23 and use of log skid trails and log landings—"the primary potential sources for sediment"—will
24 directly or indirectly impact aquatic ecosystems and the associated species. The FSEIS
25 acknowledges that the construction and use of log skid trails and log landings will have negative
26 effects on aquatic ecosystems and associated species but completely fails to analyze the significance
27 of this determination. For example, the FSEIS admits in passing that the risks are "moderately
28 higher" under the 2004 Framework because of the higher intensity fuels management logging

1 allowed by the 2004 Framework, but the FSEIS conducts no meaningful analysis of these risks. *See*
2 SNFPA 3281. (after determining that the 2004 Framework calls for “more skid trails, landings, and
3 other possible sources of sediment,” the FSEIS does not even attempt to analyze the impacts
4 associated with this increase). At no point does the FSEIS discuss the specific direct impacts of
5 increased construction and use of log skid trails and log landings on aquatic ecosystems and
6 associated species, nor does the FSEIS discuss the indirect impacts that will result from the 2004
7 Framework’s increased high intensity logging, which, in turn, will increase log skid trail and log
8 landing construction and use. For these reasons, the FSEIS fails to comply with NEPA.
9

10
11 **D. The FSEIS Fails to Adequately Analyze the Direct and Indirect Impacts to**
12 **Aquatic Ecosystems and Associated Species Resulting From the Substantial**
13 **Increase in the Use of the Existing Road System**

14 Despite the wealth of information in the administrative record addressing the environmental
15 impacts of road use on aquatic ecosystems, the FSEIS fails to analyze the impacts to aquatic
16 ecosystems and associated species from the 2004 Framework’s increased use of the existing road
17 system in the Sierra Nevada national forests.⁹ The construction of over 100 miles of new roads, the
18 decommissioning of 1175 miles of existing road, the reconstruction of 1520 miles of road,
19 and—following the first decade—the extension of the existing road system will all require
20 increased use of the *existing* roads. SNFPA 03093. “Existing roads constitute current and potential
21 sources of sediment.” 2001DEIS, 3-127. Moreover, higher road densities translate to higher
22 potential for adverse effects to aquatic and riparian habitats. *Ibid.* Yet, the FSEIS entirely fails to
23 provide any meaningful analysis of the direct and indirect impacts that the increased use of existing
24 roads will have on aquatic species.
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28 ⁹ “[T]wice as many miles of roads would be reconstructed under [the 2004 Framework] than [under the 2001 Framework].”
SNFPA 03282. Much of this construction results from full implementation of the QLG pilot project, which allows “substantial
amounts of road reconstruction.” *Ibid.*

1 The sole discussion in the FSEIS regarding the impact of existing roads on aquatic
2 ecosystems and associated species states: “[a]pplication of the AMS and SAT guidelines will guide
3 managers to identify existing roads that may be adversely affecting [the Foothill Yellow-Legged
4 Frog].” SNFPA 03368. While acknowledging that there are likely adverse effects, the FSEIS fails to
5 discuss the impacts of existing roads on the Foothill Yellow-Legged Frog; it only promises that the
6 AMS and SAT guidelines will subsequently guide managers to identify those existing roads
7 adversely affecting the species. This deferral of analysis is not permitted. “NEPA requires
8 consideration of the potential impact of an action before the action takes place.” *Cuddy Mountain at*
9 *, 1380, quoting City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1313 (9th Cir. 1990); “NEPA is
10 not designed to postpone analysis of an environmental consequence to the last possible moment.
11 Rather, it is designed to require such analysis as soon as it can reasonably be done.” *Kern*, 284 F.3d
12 at 1072. Accordingly, the FSEIS violated NEPA by deferring the analysis of the direct and indirect
13 impacts caused by existing roads to a later date. *Id.*

14 Moreover, there is no discussion of the impact of increased use of existing roads on the
15 California Red-Legged Frog, Mountain Yellow-Legged Frog, Yosemite Toad, Cascades Frog or
16 Northern Leopard Frog. The 2001 DEIS, in its Riparian Conservation Standards and Guidelines
17 Section, emphasizes “minimizing effects from the existing road network.” SNFPA 00344. The
18 FSEIS contains no such emphasis.

19 The FSEIS violated NEPA because it failed to discuss the direct and indirect impacts on
20 aquatic ecosystems and associated species from the increased use of existing roads.

21 **E. The FSEIS Fails to Adequately Discuss the Change from definite and precise**
22 **guidelines in the 2001 Framework to vague and flexible guidelines in the 2004**
23 **Amendments.**

24 The 2004 Framework replaces many of the precise and mandatory standards and guidelines

1 contained in the 2001 plan with ones that are vague and “flexible”. For example, the 2001 plan
2 limited soil compaction in the RCAs to 5% of the project activity area. SNFPA 3280. The 2004
3 amendments remove this restriction, and instead provide only for post-approval “project-level
4 analysis” and “site-specific evaluations.” *Ibid.* The FSEIS completely fails to assess the extent to
5 which replacing the mandatory language and specific restrictions of the 2001 Framework with
6 vague and flexible guidelines and post-approval analysis in the 2004 amendments will result in
7 adverse direct, indirect and cumulative impacts to aquatic species and their habitat.
8

9 In fact, numerous changes to the 2001 Framework are not even mentioned in the SEIS at all.
10 For example, in order to achieve the goal of improving aquatic habitats, the 2001 Framework
11 contained the following guideline:
12

13 Determine if the age class, structural diversity, composition and cover of
14 riparian vegetation are within the range of natural variability for the
15 vegetative community. If outside the range of natural variability, implement
restoration actions that will result in an upward trend. . . . (emphasis added).

16 SNFPA 3412. The 2004 amendments replace the mandatory directive to ‘implement’ restoration
17 actions with the following language: “If outside the rage of natural variability, consider
18 implementing mitigation and/or restoration actions . . .” *Ibid.* (Emphasis added.)
19

20 Likewise, the 2001 plan’s prohibition against the application of pesticides to livestock
21 within RCAs and CARs is eliminated in the 2004 amendments (SNFPA 3408), yet this change is
22 not even mentioned in the text of the FSEIS. The SEIS does not contain a reference to these changes
23 in the standards and guidelines, and therefore fails to discuss and analyze the direct, indirect and
24 cumulative impacts of these and other changes to the 2001 plan. Nevertheless, the SEIS claims that
25 2004 amendments’ greater impacts to aquatic and riparian habitats will be “greatly reduced through
26 the application of the same Aquatic Management strategy with **similar** standards and guidelines.”
27 (Emphasis added.) SNFPA 3084. Though the standards and guidelines proposed by the 2004
28

1 amendments are in some sense ‘similar’ to those proposed by the 2001 plan, in many significant
2 respects, they are not similar. As we have shown above, the 2004 changes to standards and
3 guidelines places greater flexibility and decision making authority in the hands of the local
4 managers and decision-makers. Accordingly, the SEIS’s claim that as a result of the
5 implementation of the standards and guidelines contained in the 2004 amendments, “short-term
6 risks associated with S2 will be greatly reduced” is not supported by the evidence in the record.
7

8 **F. The FSEIS Violated NEPA Because it Overstates the Potential Benefit From the**
9 **Increased Logging**

10 The FSEIS violates NEPA because it overstates the anticipated benefits from the additional
11 fuel treatment that it claims will result from the implementation of the 2004 amendments. In fact,
12 the SEIS’ predictions suggest that the trade off between short-term impacts, (i.e. significant adverse
13 impacts to aquatic habitat that will result from the additional logging and related activities), is much
14 greater in magnitude as compared to the long-term gains in decrease potential for wild fires. The
15 total area that will be treated mechanically under the 2004 amendments is about 250% greater as
16 compared to the 2001 SNF. Yet the SEIS admits that “annual wildfire acreage burned under
17 Alternative S2 [2004 amendments] would be about 20% less than under Alternative S1 [2001
18 SNF].” SNFPA 3287. Thus, the FSEIS argument that greater logging permitted under the 2004
19 amendments is justified by the reduction in the threat of future wildfires is arbitrary and capricious.
20
21

22 **V. The 2004 FRAMEWORK VIOLATES NEPA BY FAILING ADEQUATELY TO**
23 **DISCLOSE AND ANALYZE IMPACTS TO AQUATIC SPECIES AND THEIR**
24 **HABITATS CAUSED BY CHANGES TO GRAZING GUIDELINES AND**
25 **STANDARDS.**

26 The 2004 Framework will likely result in the continued degradation of the aquatic, meadow
27 and riparian habitats in the Sierra Nevada Forests. Because of the already degraded state of these
28 habitat types, and their importance to the overall ecological balance of the Sierra Nevada range,
“[t]here needs to be a discussion [in the FSEIS] of the effects of the new alternatives [S2] on

1 riparian ecosystems, stream and fisheries. It is not sufficient to dismiss these as within the range of
2 impacts discussed in the framework them *sic*. without further analysis, given the activities proposed
3 in Alternative S2.” (Comments by U.S. Department of Agriculture) SNFPA 2474. The FSEIS
4 does not contain such a discussion.
5

6 As discussed above, the 2004 Framework will result in a massive increase in the extraction
7 of timber from the Sierra Nevada National Forests. See, table S5, at SNFPA 3091. As explained
8 above, the extraction of timber will necessitate and result in correspondingly greater land
9 disturbance and road use. The 2004 Framework will also result in significant impacts on aquatic
10 habitat and species by relaxing or eliminating many of the standards and guidelines that govern
11 grazing in meadows and other significant riparian habitats. In combination, these activities will
12 result in significantly greater impacts on aquatic habitat, including streams and riparian areas.
13

14 The FSEIS downplays these “short-term” impacts (up to twenty years) by claiming that they
15 will be offset by the allegedly “expected long-term effects associated with wildfire.” SNFPA 3084.
16 The FSEIS also claims that “short-term” risks associated with the 2004 Framework “will be greatly
17 reduced through the application of the same Aquatic Management Strategy with similar standards
18 and guidelines.” *Ibid*. This claim is problematic for at least two reasons: First, the FSEIS does not
19 adequately analyze how and to what extent these short-term risks will be reduced. In fact, the
20 administrative record does not support the conclusion that the significant “short-term” risk posed by
21 S2 to aquatic habitat will be significantly reduced with the application of the Aquatic Risk
22 Management Strategy.
23
24

25 Second, as we will demonstrate below, the 2004 amendments significantly weakens the
26 protective standards and guidelines that were intended to reduce or mitigate the impacts from
27 grazing and threats to aquatic habitat and species. As a result of these changes, the 2004 standards
28

1 and guidelines are similar to the 2001 regulations in name only; in practice, implementation of the
2 2004 standards and guidelines will result in significant adverse impacts to streams and other aquatic
3 habitat.

4
5 **A. The FSEIS Fails Adequately to Analyze the Short-term Risks to Aquatic
6 Habitat and Special Status Aquatic Species.**

7 The FSEIS admits that the 2004 Framework poses higher short-term risks to aquatic
8 resources because it prescribes larger amounts of mechanical logging and greater treatment
9 intensities. SNFPA 3169. Grazing and recreational activities also pose a significant risk to aquatic
10 resources, both habitat and species. The evidence in the ROD makes it clear that a significant
11 number of special status species are affected directly and indirectly by the additional grazing that is
12 permitted by the 2004 Framework. In addition to the Yosemite toad, discussed below, other
13 amphibian species that are adversely affected by grazing include the Mountain yellow-legged frog
14 (SNFPA 407) and red-legged frog, (SNFPA 403). As such, increased grazing under the 2004
15 Framework will have direct and indirect impact on these species, which are inadequately discussed
16 in the FSEIS.

17
18
19 There is no question that the 2004 Framework will permit more grazing than would have
20 been permitted under the 2001 plan. Although the FSEIS fails to make the point clearly, it
21 nevertheless admits that “the SEIS considers changes to management direction that would require
22 the development of site-specific grazing strategies, **to allow more economic benefits to be**
23 **retained** while continuing to minimize risks to sensitive species.” SNFPA 3101. (Emphasis
24 added.) “More economic benefit” amounts to more grazing. In this regard, the U.S. Department of
25 Agriculture commented that “if the treatments will be sufficient to have their intended effect [i.e.
26 more grazing], there is a high likelihood that there will be significant and measurable direct, indirect
27 and cumulative effects on the environment, which need to be analyzed and disclosed.” SNFPA
28

1 2474. The “Grazing” section in the SEIS supports the conclusion that the implementation of the
2 changes in the 2004 Framework will result in a net increase in grazing. SNFPA 3392-3. The
3 FSEIS explains that fewer grazing permit holders will be adversely affected by the 2004
4 Framework, yet, it never actually discloses or quantifies this net increase in grazing.
5

6 The Science Consistency Review Team who reviewed the 2004 amendments noted that
7 “allowing grazing and most recreational activities to continue in areas occupied by or historically
8 occupied by any of these species [including Yosemite toad and mountain yellow-legged frog] is
9 almost certainly incompatible with population recovery and meadow restoration.” SNFPA 2512.
10 Yet, rather than curtailing grazing and recreational activities in meadows, the 2004 amendments
11 will result in an increase in these activities. The SEIS was required, but failed to assess the
12 environmental impact of implementing this change in policy.
13

14 **B. The FSEIS Fails Adequately to Discuss the 2004 Amendments’ impacts on**
15 **Yosemite Toad**

16 The Yosemite toad lives in the meadow habitats of the high Sierra Nevada. SNFPA 3926.
17 The toads breeding habitat includes edges of wet meadows and slow flowing streams (Jennings and
18 Hayes 1994). *Ibid.* Although the SEIS claims “little information exists about the effects of land
19 management activities on the Yosemite toad” (SNFPA 3371), it is well-settled that livestock
20 negatively effects Yosemite toad habitat and have been documented to cause direct mortality of the
21 species. (67 FR 75834). SNFPA 3926. The U.S. Fish and Wildlife Service (“FWS”) has
22 determined that habitat degradation from grazing is a significant factor in the decline in the
23 distribution and abundance of the Yosemite toad. SNFPA 3371. Further, “metamorphs, juveniles
24 and adult toads are highly exposed to direct trampling mortality as a result of livestock grazing
25 anywhere in meadows after the breeding and rearing season has ended.” SNFPA 3372. The
26 Service has determined that listing the Yosemite toad as threatened with extinction under the ESA
27 is warranted because of the decline in the known populations but precluded because of budget
28

1 constraints. *Ibid.*

2 The FSEIS' analysis of the direct and indirect effects of the Alternatives (SNFPA 3372)
3 deceptively begins with the claim that "S1 and S2 are designed to provide protection for toads
4 during the breeding season (with dates determined locally) by excluding livestock grazing . . ."
5 This statement implies that because both alternatives are "designed" to protect the toad, they are
6 equally effective. In fact, the 2004 amendments, embodied in alternative S2, were designed to
7 allow more grazing in Yosemite toad habitat. SNFPA 3101.

8
9 Many of the changes in the 2004 Framework will result in significant adverse impact on
10 Yosemite toad. For example, the 2004 Framework replaces the 2001 plans' requirement that
11 livestock be excluded from standing water and or saturated soils with the option of allowing
12 livestock in these areas provided that a site-specific plan is implemented to "minimize" impact to
13 the toad and its habitat. SNFPA 3372. Without any definitive threshold, this change in the 2001
14 grazing standards can potentially open up all Yosemite toad habitat to grazing. Yet, the SEIS does
15 not contain any discussion of the potential impact from this change.
16
17

18 Likewise, whereas the restrictions and directions contained in the 2001 Framework applied
19 to pack and saddle stock under commercial permits, the 2004 Framework contains no specific
20 direction for management of pack and saddle stock in occupied or suitable habitat. SNFPA 3372.
21 Again, the FSEIS does not analyze the impact from this change.
22

23 The 2001 Framework provided that if Yosemite toad habitat surveys were not completed by
24 2004, grazing restrictions applied to all unsurveyed suitable habitat. The 2004 Framework changed
25 this standard by granting an additional two years to complete the surveys, but did not analyze the
26 impact on aquatic species. Moreover, the 2004 Framework would allow unrestricted grazing in
27 unsurveyed suitable habitat. But again, the potential aquatic impacts from these changes are not
28 analyzed in the FSEIS, which fails to discuss or analyze the impact that continued grazing in

1 unsurveyed suitable habitat will have on Yosemite toad or its habitat.

2 The data collected by the FWS clearly establishes that grazing causes degradation of toad
3 habitat and direct mortality of the species. SNFPA 3926. The FSEIS acknowledges that “the direct
4 effect on the potential trampling of some egg masses and tadpoles in shallow portions of ponds,
5 causing mortality by livestock that unintentionally drift into breeding areas.” SNFPA 3372. Yet,
6 despite the fact that, as shown here, alternative S1 contains stricter grazing guidelines to benefit the
7 toad, the SEIS disingenuously concludes that “population outcomes would be similar for both
8 alternatives.” SNFPA 3372. The FSEIS violates NEPA because it makes no attempt to accurately
9 compare the alternatives and to disclose the impacts that would result under each alternative.
10
11

12 **VI. THE 2004 FRAMEWORK FSEIS VIOLATES NEPA AND THE APA BECAUSE IT**
13 **FAILS TO ADEQUATELY ANALYZE THE CUMULATIVE IMPACTS OF THE**
14 **2004 FRAMEWORK**

15 NEPA requires that agencies consider the cumulative impacts of the project. A cumulative
16 impact is "the impact on the environment which results from the incremental impact of the action
17 when added to other past, present, and reasonably foreseeable future actions. . . . Cumulative
18 impacts can result from individually minor but collectively significant actions taking place over a
19 period of time." 40 C.F.R. § 1508.7. In determining whether a project will have a "significant "
20 impact on the environment, an agency must consider "[w]hether the action is related to other actions
21 with individually insignificant but cumulatively significant impacts." 40 C.F.R. § 1508.27(b)(7). If
22 several actions have a cumulative environmental effect, “this consequence must be considered in an
23 EIS.” *Cuddy Mountain* 137 F.3d at 1378.
24

25 As with direct and indirect impacts, the consideration of the cumulative impact to the
26 environment must amount to a "hard look". *Marsh*, 490 U.S. at 374. Proper consideration of the
27 cumulative impacts of a project requires “some quantified or detailed information; . . . [g]eneral
28 statements about possible effects and some risk do not constitute a hard look absent a justification

1 regarding why more definitive information could not be provided.” , 361 F.3d 1108, 1128 (9th Cir.
2 2004), quoting *Cuddy Mountain*, 137 F.3d at 1379-80. The analysis "must be more than
3 perfunctory; it must provide a useful analysis of the cumulative impacts of past, present, and future
4 projects." *Kern*, 284 F.3d at 1075.

6 The 2004 Framework FSEIS does not adequately analyze the cumulative impacts to aquatic
7 ecosystems and associated species of the whole project. First, the FSEIS does not consider the
8 cumulative impacts to aquatic habitats and species that will result from the 2004 Framework’s
9 substantial increase in logging together with the substantial increase in road construction and road
10 reconstruction needed to achieve that increase in logging.
11

12 Second, the FSEIS fails to take the “hard look” required by NEPA when analyzing the
13 cumulative impacts on aquatic ecosystems and associated species, including the cumulative impacts
14 resulting from (1) increased use of existing roads together with the substantial increase in road
15 construction; (2) increased intentional burning and fuel management logging together with livestock
16 grazing in RCAs; and (3) the permitted activities across the whole of the project area of the Sierra
17 Nevada national forests.
18

19 **A. The FSEIS Does Not Consider the Cumulative Impacts to Aquatic Species and**
20 **Their Habitat of Increased Logging Together With the Substantial Increase in**
21 **Road Construction and Road Reconstruction Needed to Achieve That Increase**
22 **in Logging**

23 In *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985), the Ninth Circuit held that road
24 construction and logging are connected actions that have cumulative impacts.¹⁰ There, the Forest
25 Service prepared an EA discussing the environmental impacts from road construction and use, but
26 did not also consider the attendant impacts of the logging that the road was designed to facilitate.

27 ¹⁰ “Connected Actions” are actions that (I) automatically trigger other actions which may require
28 environmental impact statements: (ii) cannot or will not proceed unless other actions are taken
previously or simultaneously; (iii) are interdependent parts of a larger action and depend on the larger
action for their justification. 40 C.F.R. § 1508.25(a)(1)(i)–(iii).

1 *Thomas*, 753 at 757. The court determined that NEPA required the Forest Service to analyze the
2 combined environmental impacts of both the road construction and the logging. The court held that
3 the road construction and logging were “inextricably intertwined” connected actions because the
4 logging cannot proceed without the road construction, and the road would not be built but for the
5 contemplated logging. *Id.* at 759. The court further held that “[t]he record in this case contains
6 considerable evidence to suggest that the road and the [logging] will have cumulatively significant
7 impacts,” and therefore, the Forest Service was required to analyze such impacts. *Id.* See, also, *Save*
8 *the Yaak Committee v. Block*, 840 F.2d 714 (9th Cir. 1988), (“there is an inextricable nexus between
9 the road reconstruction and the logging operations.... [and] the cumulative impact of these actions
10 raises material issues of fact concerning the project’s effect upon the human environment.” *Id.*

13 Likewise, in the present case, the cumulative effect of the increase in logging and road
14 construction and reconstruction (collectively hereinafter “road construction”) that is mandated by
15 the 2004 Framework should have been analyzed. SNFPA 03176, Table 2.5.7b. Most of the short-
16 term increase in logging and road construction allowed by the 2004 Framework is due to the full
17 implementation of the QLG pilot project. SNFPA 03387 (Table 4.4.1a); SNFPA 03388 (Table
18 4.4.1b). The 2004 Framework “is projected to construct more miles of road than [the 2001
19 Framework], primarily due to almost 43,000 more acres of area thinning within the Sierras and full
20 implementation of the HFQLG pilot.” SNFPA 03395. The logging and road construction are thus
21 “inextricably intertwined” connected actions because the logging cannot proceed without the road
22 construction, and the road construction would not be mandated but for the contemplated logging.
23 *Thomas*, 753 at 759. In fact, the 2001 Final Environmental Impact Statement (“2001 FEIS”)
24 concluded that logging is “directly related to road construction levels, since most new roads are
25 built to access landings for timber harvest.” 2001 FEIS Vol.2, Chp.3, part 5.5, p. 449.

28 Despite the clear requirement of NEPA, the FSEIS fails to analyze the cumulative impacts to
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1 aquatic species and their habitat from the increased logging together with the substantial increase in
2 related road construction needed to achieve such logging. Notably, the “Cumulative Effects”
3 section of the FSEIS fails to include any discussion of the cumulative impacts caused by logging
4 and related road construction. *See* SNFPA 03256–03262, 03308.

6 The “Cumulative Effects” section for specific species found in aquatic ecosystems (*i.e.*,
7 “The Species of the Sierra Nevada,” Chp. 4, section 3) does not contain analysis of the cumulative
8 effects of logging together with road construction. *See, e.g.*, SNFPA 03308 (California Red-Legged
9 Frog), 03370 (Mountain Yellow-Legged Frog), 03374–75 (Yosemite Toad).

11 Likewise, although the 2001 FEIS discusses road construction, it does not analyze the
12 cumulative impacts of logging and road construction together. 2001 FEIS, Vol. 2, Chp. 3, part 1.3,
13 p. 18.¹¹ Rhodes Dec. ¶51. The omission of the cumulative effects analysis is particularly glaring
14 given the FSEIS’s acknowledgment that erosion associated with postfire logging increases “with
15 increased road building, use of ground-based logging systems, steep slopes, and sensitive soils.”
16 SNFPA 03283. Similar to *Thomas*, the record here contains considerable evidence to suggest that
17 the logging and the road construction will have cumulatively significant impacts. As was the case
18 in *Thomas*, the SEIS violated NEPA by failing to analyze the cumulative effects of logging and road
19 construction. 2001 FEIS, vol. 2, ch.3., part 1.3 at p.3, 2001 FEIS, vol.2, ch.3, part 3.4, at pp. 227-
20 237.

23 **B. The FSEIS Does Not Take the “Hard Look” Required by NEPA When**
24 **Analyzing the Cumulative Impacts on Aquatic Ecosystems and Associated**
25 **Species**

25 An EIS must take a "hard look" at the cumulative environmental effects. *Marsh*, 490 U.S. at

26
27 ¹¹/ Even if the 2001 FEIS did discuss the cumulative impacts of logging and road construction, this discussion would be
28 insufficient because the 2001 Framework does not mandate full implementation of the QLG pilot project, and many of the
short-term increases in logging and related road construction are due to full implementation of the QLG pilot project. SNFPA
03387 (Table 4.4.1a); SNFPA 03389 (Table 4.4.1b). Under the 2001 Framework, the group selection in the QLG pilot project
area was limited to 4,000 acres per year, but the 2004 Framework allows for 8,700 acres of group selection per year. SNFPA
03387.

1 374. Proper consideration of the cumulative impacts of a project requires “some quantified or
2 detailed information; . . . [g]eneral statements about possible effects and some risk do not constitute
3 a hard look absent a justification regarding why more definitive information could not be provided.”
4
5 *Ocean Advocates*, 361 F.3d 1108, 1128 (9th Cir. 2004), *quoting Cuddy Mountain*, 137 F.3d at 1379-
6 80. The FSEIS violates NEPA because it does not take a “hard look” at the cumulative impacts of
7 (1) increased use of existing roads together with the substantial increase in road construction; (2)
8 increased intentional burning, fuel management logging, together with livestock grazing in RCAs;
9 and (3) the permitted activities across the whole of the project

10 **1. The FSEIS Does Not Take a “Hard Look” at the Cumulative Impacts of**
11 **the Increased Use of Existing Roads Together With the Substantial**
12 **Increase in Road Construction**

13 As previously discussed (*see* Part II, Section A), the 2004 Framework substantially increases
14 the amount of road use, road construction and road reconstruction from that required by the 2001
15 Framework. SNFPA 03282. The 2004 Framework more than quadruples the miles of road
16 construction during the first decade (from 25 miles to 115 miles) and more than doubles the miles
17 of road reconstruction (from 655 miles to 1520 miles), primarily from implementation of the QLG
18 pilot project, which proposed substantial amounts road construction. *Ibid.* Compared to the 2001
19 Framework, the 2004 Framework is projected to result in an additional 86 miles of road
20 construction, 43 miles of temporary road construction, and 640 miles of road maintenance per year
21 during the period of full HFQLG implementation. SNFPA 03395. The FSEIS recognizes that the
22 2004 Framework will result in an increase in the use of the existing road system (*i.e.*, the “forest
23 development collector system and local road system”). SNFPA 03093.

24
25 Roads “have the greatest effects on aquatic ecosystems and water quality in forested
26 environments.” SNFPA 03279. Roads deliver sediment to streams, disrupt hydrologic processes,
27 adversely affect water temperature, increase the risk of landslides and cause widespread and
28 persistent fragmentation of aquatic ecosystems. SNFPA 03279 & 03907; Rhodes Dec. ¶¶16-21.

1 Just as the FSEIS fails to take a “hard look” generally at the cumulative impacts of the increased use
2 of the existing roads taken together with the substantial road construction mandated by the 2004
3 Framework, it also fails to take a “hard look” at the cumulative effect on specific species found in
4 aquatic ecosystems. *See, e.g.*, SNFPA 03308, 03370, 03374–78. The effect of this failure is
5 compounded by the fact that the 2001 FEIS does not analyze the cumulative effects of the road
6 construction and road reconstruction contemplated by the QLG pilot program or the significant
7 increase in existing road use that is required to implement that program. 2001 FEIS Vol. 2, chp. 3,
8 part 1.3, pgs. 10, 18-20, & 29.
9

10
11 The FSEIS and 2001 FEIS provide only the most general information about the negative
12 effects roads have on aquatic ecosystems, but do not include any analysis of the cumulative effects
13 of road use and construction and logging. *See, e.g.*, 2001 FEIS, Vol. 2, Chp. 3, part 1.3, p. 18
14 (“Roads are also a significant contributor to impact in aquatic, riparian, and meadow ecosystems.
15 Roads have an important influence on sediment transport to streams . . .). “General statements
16 about possible effects and some risk do not constitute a hard look.” *Klamath-Siskiyou Wildlands*
17 *Ctr.*, 387 F.3d at 993. The perfunctory cataloging of the adverse effects on aquatic ecosystems and
18 associated species caused by roads does not arise to the “hard look” at cumulative impacts required
19 by NEPA. *Id.*; *see also Kern*, 284 F.3d at 1075. Here, the only discussion of cumulative effects in
20 the FSEIS for aquatic, riparian and meadow habitats is a one-sentence conclusory statement that
21 “[t]he combined work across ownerships will lead to improved aquatic, riparian, and aquatic habitat
22 conditions in the future.” SNFPA 03261.¹²
23
24

25
26 ^{12/} This comment dovetails with the overriding theme of the FSEIS, which is that highly speculative, uncertain long-term
27 benefits to ecosystems and wildlife excuse the failure to analyze clearly adverse short-term environmental impacts. *See, e.g.*,
28 SNFPA 03084 (The 2004 Framework “may pose higher short-term risks to aquatic resources because it prescribes larger
amounts of mechanical treatments and greater treatment intensities. However, these are expected to reduce long-term effects.
. . .”), 03083 (“Alternatives having the most restrictive measures within old forests (e.g. [the 2001 Framework]) would
probably result in the greatest protection for old forest conditions in the immediate future. However . . . [the 2004 Framework]
would result in large reductions in wildfires, which may provide greater benefit in terms of the amount of old forest conditions
available in the long run.), 03285 (The 2004 Framework “may pose higher short-term risks to aquatic resources because it
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1 The FSEIS may not rely on a conclusory assertion without analysis or citation to data to
2 support its conclusion. Such cursory “analysis” is helpful neither to the decision-maker, nor to the
3 public or reviewing courts. *Idaho Sporting Congress*, 137 F.3d at 1150; *see also Getty v. Fed. Sav.*
4 *& Loan Ins. Corp.*, 805 F.2d 1050, 1057 (D.C. Cir. 1986). The failure of the FSEIS to discuss the
5 cumulative impacts of existing road use together with road construction and reconstruction is
6 particularly egregious since the increase in road use is a reasonably foreseeable result of the massive
7 increase in road construction and road reconstruction contemplated by the FQLG pilot program.
8 Thus, the FSEIS does not take the “hard look” required by NEPA.
9

10
11 **2. The FSEIS Does Not Take a “Hard Look” at the Cumulative Impacts to**
12 **Riparian Conservation Areas Resulting From Increased Intentional and**
13 **Livestock Grazing**

14 What the SEIS refers to as “fuel treatment” consists of deliberate burning, fuels management
15 logging, or a combination of the two. SNFPA 03280. More fuels treatment in Riparian
16 Conservation Areas (RCAs) are allowed by the 2004 Framework than by the 2001 Framework,
17 mainly as a result of the full implementation of the QLG Pilot project. *Ibid.* Also, the intensity of
18 fuels management logging allowed by the 2004 Framework is significantly greater than that
19 contemplated by the 2001 Framework. *Ibid.* Likewise, the 2004 Framework loosens many of the
20 2001 Framework’s restrictions on livestock grazing, permits increased livestock grazing in sensitive
21 habitats, and lifts the 2001 Framework’s prohibition of application of pesticides to livestock within
22 RCAs and Critical Aquatic Refuges (CARs). SNFPA 03092, 03392–03394, 03408.
23

24 Thus, the 2004 Framework will result in more intentional burnings, more intense fuels
25 management logging, and increased grazing in and around sensitive Riparian Conservation Areas.
26 There is credible evidence in the FSEIS and the record that each of these activities, by themselves,
27

28 _____
prescribes larger amounts of mechanical treatments and greater treatment intensities.”), and 03167 (clear short-term environmental damage is trumped by speculative long-term gain).

1 have significant adverse environmental impacts on aquatic species and their habitat. Fuels
2 treatments in RCAs disturb soil, increase erosion and sedimentation, adversely affect water
3 temperatures, and alter stream channels. SNFPA 03281. Fuels treatments in RCAs will also result in
4 the removal of canopy cover, which affects stream temperatures, fish habitat, and riparian
5 microclimate. SNFPA 03282. Further, difficulties in grazing implementation may increase impacts
6 to amphibians, including the Yosemite toad. SNFPA 02512. Taken together, the cumulative
7 impacts of these activities could result in catastrophic damage to Riparian Conservation Areas.
8 Increased logging and grazing in sensitive aquatic and riparian habitat are actions that have
9 collectively significant adverse environmental impacts. 40 C.F.R. § 1508.7.

12 Despite the reasonably foreseeable significant cumulative impacts from fuels treatments and
13 grazing in Riparian Conservation Areas that will occur under the 2004 Framework, the FSEIS fails
14 to analyze the cumulative impacts of these activities on aquatic species and their habitat. The
15 analysis provided by the FSEIS addresses some of the negative impacts associated with fuels
16 treatments, but it never examines the cumulative impacts in RCAs of fuels treatments together with
17 grazing. SNFPA 03280–82. In fact, the FSEIS’ discussion of the “environmental effects” of the
18 increased opportunities for grazing focuses on the effects of grazing restrictions on grazing
19 permittees, not on the well-documented adverse environmental effects of grazing on the biological
20 environment of the Sierra Nevada or the species the aquatic species. SNFPA 03392–94. Not
21 surprisingly, the FSEIS never analyzes the cumulative impacts in RCAs of fuels treatments together
22 with grazing. Therefore, the FSEIS does not take the “hard look” at reasonably foreseeable
23 cumulative impacts required by NEPA.

26 **VII. THE 2004 FRAMEWORK FSEIS FAILS TO ADEQUATELY DISCUSS**
27 **MITIGATIONS FOR ALL SIGNIFICANT ADVERSE ENVIRONMENTAL**
28 **IMPACTS TO AQUATIC ECOSYSTEMS AND ASSOCIATED SPECIES.**

NEPA requires discussion of measures “to mitigate adverse environmental impacts.” 40

1 C.F.R. § 1502.16(h); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989) (“To
2 be sure, one important ingredient of an EIS is the discussion of steps that can be taken to mitigate
3 adverse environmental consequences.” “Mitigation must “be discussed in sufficient detail to ensure
4 that environmental consequences have been fairly evaluated.”” *City of Carmel-by-the-Sea v. United*
5 *States Dep’t of Transp.*, 123 F.3d 1142, 1154 (9th Cir. 1997), quoting *Methow Valley*, 490 U.S. at
6 353. In the absence of a discussion of mitigation measures, “neither the agency nor other interested
7 groups and individuals can properly evaluate the severity of the adverse effects.” *Methow Valley*,
8 490 U.S. at 352. Moreover, “mere listing of mitigation measures is insufficient to qualify as the
9 reasoned discussion required by NEPA.” *Northwest Indian Cemetery Prot. Ass’n v. Peterson*, 795
10 F.2d 688, 697 (9th Cir. 1986), *rev’d on other grounds*, 485 U.S. 439 (1988).

13 The Ninth Circuit’s decision in *Cuddy Mountain* is particularly instructive here. In *Cuddy*
14 *Mountain*, “[w]hile acknowledging that the [timber] sale would negatively impact the redband trout
15 by increasing sedimentation levels, the Forest Service did not discuss which (or whether) mitigating
16 measures might decrease the increased sedimentation in the three creeks affected by the timber
17 sale.” 137 F.3d at 1381. The Ninth Circuit held that the FSEIS’s description of mitigation
18 measures was insufficient as a matter of law: “[t]he Forest Service’s broad generalizations and
19 vague references to mitigation measures in relation to the streams affected by the Grade/Dukes
20 project do not constitute the detail as to mitigation measures that would be undertaken, and their
21 effectiveness, that the Forest Service is required to provide.” *Id.* The Court concluded that “broad
22 generalizations and vague references to mitigation measures in relation to the streams affected by
23 the [logging and road construction] do not constitute the detail as to mitigation measures that would
24 be undertaken, and their effectiveness, that the Forest Service is required to provide.” *Id.*

28 Likewise, having determined that logging and road construction would adversely impact
aquatic and riparian habitat, the FSEIS was required to describe the mitigating efforts it could

1 pursue to off-set the adverse impacts that would result from these two activities. *Id.*; 40 C.F.R. §
2 1502.16(h).

3 The 2004 Framework FSEIS fails to adequately discuss mitigations for the project’s
4 significant direct, indirect and cumulative adverse impacts to aquatic ecosystems and associated
5 species. Specifically, the FSEIS is deficient as (1) the FSEIS’s allusions to mitigation measures are
6 general and vague, rather than the reasoned, detailed discussion required by NEPA, (2) the FSEIS
7 completely fails to analyze mitigations for the significant adverse environmental impacts from
8 livestock grazing permitted by the 2004 Framework, and (3) to the extent that the Forest Service
9 intends its Standards and Guidelines for the 2004 Framework road system to act as mitigations, the
10 FSEIS impermissibly defers the required discussion of mitigations.

11
12
13 **A. The Allusions to Mitigation Measures Contained in the FSEIS Do Not Amount**
14 **to the Reasoned, Detailed Discussion Required by NEPA.**

15 The FSEIS acknowledges that the 2004 Framework requires “mitigation of project effects
16 on erosion, soil quality, and dependent species,” but does not include any meaningful discussion of
17 mitigations designed to lessen these effects. SNFPA 03307. The FSEIS’s broad generalizations and
18 vague references to mitigation measures do not amount to the “reasoned discussion” that NEPA
19 requires. For example, with respect to the impact that fuels treatments will have on aquatic
20 ecosystems and associated species, the FSEIS vaguely promises that the 2004 Framework will
21 implement “mitigation to ensure that treatments within RCAs meet riparian conservation objectives,
22 including protection of water quality and aquatic habitats,” but entirely fails to explain what this
23 mitigation might entail. SNFPA 03280. This clearly is not the detailed discussion the Forest Service
24 was required to undertake. *Cuddy Mountain*, 137 F.3d at 1381.

25
26
27 The FSEIS repeatedly asserts that “[l]andscape and project analysis would be used to further
28 evaluate and mitigate possible hydrologic effects” SNFPA 03281–82 & 03284. However, the

1 FSEIS does not provide any specific details or clarifying explanation for how or why the listed
2 measure would mitigate environmental impacts. *Id.* Nor does the FSEIS discuss the effectiveness of
3 the “landscape and project analysis.” *Id.*
4

5 Similarly, the truncated FSEIS discussion of the road construction impacts on the California
6 Red-Legged Frog includes the assertion that “mitigation measures to avoid adverse impacts would
7 be incorporated into projects, as a part of project planning or in response to consultation with the
8 FWS.” SNFPA 03308. Incredibly, the FSEIS does not provide any further elaboration. Likewise,
9 with regard to the Foothill Yellow-Legged Frog, Mountain Yellow-Legged Frog and Cascades Frog,
10 the FSEIS references the establishment of Critical Aquatic Refuges and summarily
11 concludes—without analysis or explanation—that adverse effects to these species will be
12 “mitigated to the extent possible.” SNFPA 03366, 03369, & 03376. This does not even rise to the
13 level of “mere listing” of mitigations; it constitutes such a vague promise of mitigation that neither
14 the Forest Service, nor the public or this Court can properly evaluate the effectiveness of the
15 suggested mitigation measure at reducing the project’s impacts. *Methow Valley*, 490 U.S. at 352.
16
17

18 The FSEIS’s discussion of Standards and Guidelines is likewise constrained by broad
19 generalizations and vague references to mitigations.¹³ Although the 2004 Record of Decision states
20 that “[m]itigation measures are an integral part of the standards and guidelines,” the Standards and
21 Guidelines themselves do not provide any meaningful discussion of mitigation measures.¹⁴ SNFPA
22 03010. The FSEIS acknowledges the need for development of mitigations within designated
23 Riparian Conservation Areas and Critical Aquatic Refuges, yet fails to provide any explanation as
24
25

26 ^{13/} It should be noted that “[a]ll standards and guidelines from the 2001 [Framework] are replaced by the standards and
27 guidelines in [the 2004 Framework FSEIS].” SNFPA 03005. Also, the Standards and Guidelines’ broad generalizations and
vague references to mitigations are repeated in the 2004 Record of Decision. *See* SNFPA 03052–55.

28 ^{14/} When the Standard and Guidelines lists a specific mitigation measure, it is to point out that the
mitigation measure is potentially harmful. SNFPA 03415 (“In determining which mitigation measures
to adopt, weigh the potential harm of mitigation measures, for example fire lines, against the risks and
benefits of prescribed fire entering riparian vegetation”).

1 to what these mitigation measures might entail, how they would be undertaken, or how effective
2 they might be. *Cuddy Mountain*, 137 F.2d at 1381. SNFPA 03410. The FSEIS includes a laundry
3 list of impacts that should be mitigated:

4
5 “Ensure that appropriate mitigation measures are enacted to (1) minimize the risk of
6 activity-related sediment entering aquatic systems, and (2) minimize impacts to habitat for
7 aquatic- or riparian-dependent plant and animal species. . . . [and] consider implementing
8 mitigation and/or restoration actions that will result in an upward trend.”

8 SNFPA 03410 & 03412. What the FSEIS lacks is an actual description of the mitigation measures.

9 Furthermore, while the 2001 Record of Decision (“2001 ROD”) included a Standards and
10 Guidelines section for implementing soil quality standards for soil loss, detrimental soil
11 compaction, and organic matter retention to minimize risk of sediment delivery to aquatic
12 ecosystems from management activities, as well as to identify and prevent sediment delivery to
13 aquatic ecosystems, the FSEIS included no such Standards and Guidelines. SNFPA 00345–46.

14
15 The FSEIS does not engage in a “reasoned discussion” of mitigation measures. *Cuddy*
16 *Mountain*, 137 F.3d at 1381. In some instances, the FSEIS obliquely mentions mitigation measures
17 when discussing the project’s adverse environmental effects on aquatic ecosystems and associated
18 species, but it does not explain what these mitigation measures might entail, how they would be
19 undertaken, or how effective they might be. At no point does the FSEIS discuss mitigation “in
20 sufficient detail to ensure that environmental consequences have been fairly evaluated.” *City of*
21 *Carmel-by-the-Sea*, 123 F.3d at 1154. In fact, the FSEIS provides no detail concerning specific
22 mitigation measures, except to point out that some potential mitigation measures may be harmful.

23
24
25 The few references in the FSEIS to mitigation measures consist of one-sentence
26 generalizations that are either haphazardly scattered throughout the body of the FSEIS or buried in
27 the Standards and Guidelines. Since the FSEIS does not include a detailed, reasoned discussion of
28 mitigations “neither the agency nor interested groups and individuals can properly evaluate the

1 severity of the adverse effects” to aquatic ecosystems and associated species. *Methow Valley*, 490
2 U.S. at 352. The FSEIS’s discussion of mitigation violated NEPA.

3 **B. The FSEIS Does Not Analyze Mitigation Measures for the Significant Adverse**
4 **Environmental Impacts to Aquatic Ecosystems and Associated Species**
5 **Resulting from Increased Livestock Grazing Permitted by the 2004 Framework.**

6 As previously discussed (Part II.B.2., *supra*), the 2004 Framework allows more intensive
7 livestock grazing than contemplated in the 2001 Framework. SNFPA 03092, Table S8; *contrast*
8 *with 2001 FEIS Vol.2, Chp. 3, Part 5.3, p. 406. As has been shown, the 2004 Framework allows*
9 *environmentally damaging livestock grazing in highly sensitive aquatic species habitat, and*
10 *increases the acreage grazed above what was allowed under the 2001 Framework. The 2004*
11 *Framework also allows application of pesticides to livestock within Riparian Conservation Areas*
12 *and Critical Aquatic Refuges, whereas the 2001 Framework prohibited pesticides in these sensitive*
13 *areas. SNFPA 03408; see also 2001 ROD, p. 54 (Appendix A). More specifically, the 2004*
14 *Framework’s changes in grazing management strategies increase the risk of significant adverse*
15 *impacts to the Mountain Yellow-Legged Frog and the Yosemite Toad. SNFPA 03089 & 03090.*

18 Despite these alterations in grazing management strategies—each of which has significant
19 adverse environmental impacts for aquatic ecosystems and associated species—the FSEIS fails to
20 discuss measures to mitigate the adverse impacts of the 2004 Framework livestock grazing. In the
21 Standards and Guidelines, the only time the FSEIS mentions grazing is when it states that the 2004
22 Framework will “[l]ocate new livestock handling and management facilities outside meadows and
23 RCAs [and] [p]rior to reissuing grazing permits, assess the compatibility of livestock management
24 facilities with the Riparian Conservation Objectives of the RCA.” SNFPA 03418. This hardly
25 amounts to a “reasoned discussion” of mitigation measures. Given that the 2004 Framework allows
26 environmentally damaging livestock grazing in highly sensitive aquatic species habitat, increases
27 the acreage grazed above what was allowed under the 2001 Framework, provides for application of

1 pesticides to livestock within RCAs and CARs, and supports weighing economic benefits against
2 adverse environmental impacts on sensitive species, this list of mitigation measures is insufficient.

3
4 Furthermore, the mitigation discussion with respect to the Mountain Yellow-Legged Frog
5 and the Yosemite Toad is also insufficient. Under the 2001 Framework, livestock and pack would
6 be excluded from occupied or essential habitat for the Yosemite Toad. SNFPA 03372. Conversely,
7 the 2004 Framework includes an option for managers to either exclude livestock from occupied or
8 essential Yosemite Toad habitat or develop a site-specific management plan to minimize impacts.

9
10 *Ibid.* The FSEIS concedes that “the intent of [this alternative management strategy] is to provide for
11 and protect habitat . . . [but] some difficulties in implementation may increase the risk of success in
12 avoiding impacts to Yosemite toads.” SNFPA 03090. The FSEIS determines that “[a]lthough
13 direction for pack and saddle stock grazing is not provided in [the 2004 Framework], effects must
14 still be evaluated during biological evaluations prepared during the project analysis.” *Ibid.* This is
15 the full extent of the FSEIS’s mitigations discussion with respect to the adverse impacts that grazing
16 will have on the Yosemite Toad.

17
18 The Standards and Guidelines provide a brief discussion of the site specific management
19 plan, but this discussion focuses on the affirmative decision to allow grazing in Yosemite Toad
20 habitat rather than on mitigation measures that may offset the adverse environmental impacts that
21 result from that decision. SNFPA 03418. Likewise, with the Mountain Yellow-Legged Frog, the
22 FSEIS states that “the effects of pack stock use would be analyzed during project planning and
23 effects mitigated based on site specific conditions.” SNFPA 03369. The FSEIS contains no further
24 mitigation discussion with respect to the Mountain Yellow-Legged Frog. Given that the 2004
25 Framework’s changes in grazing management strategies increase the risk of significant adverse
26 impacts to the Mountain Yellow-Legged Frog and the Yosemite Toad, the FSEIS’s failure to
27 provide an adequate discussion of mitigation measures for these two species is particularly
28

1 troubling. SNFPA 03089 & 03090. Neither mitigation discussion amounts to the “reasoned
2 discussion” required by NEPA. _____
3

4 **VIII CONCLUSION**

5 For all these reasons, Plaintiff respectfully urge this Court to grant the Motion for Summary
6 Judgment.

7 Respectfully Submitted on October 14, 2005

/s/ Babak Naficy

BABAK NAFICY

BRIAN GAFFNEY

DEANNA SPOONER

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10 For Plaintiff, Pacific Rivers Council
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