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

15 **PEOPLE OF THE STATE OF CALIFORNIA, ex**
16 **rel. BILL LOCKYER, ATTORNEY GENERAL**

17 Plaintiff,

18 v.

19 **UNITED STATES DEPARTMENT OF**
20 **AGRICULTURE; MIKE JOHANNNS, Secretary of**
the Department of Agriculture; MARK REY, Under
21 **Secretary of the Department of Agriculture;**
UNITED STATES FOREST SERVICE; DALE
22 **BOSWORTH, Chief, United States Forest Service;**
and BERNARD WEINGARDT, Regional Forester,
23 **Pacific Southwest Region, United States Forest**
Service,

24 Defendants.
25

Case No. S 05-0211 MCE GGH

STATE OF CALIFORNIA'S
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT

Date: March 20, 2006
Time: 9:00 a.m.
Courtroom: 3, 15th Floor
Hon. Morrison C. England, Jr.

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27 ///
28 ///

Abbreviation Table

Document	Abbreviation
Herger-Feinstein Quincy Library Group Forest Recovery Act, Final Environmental Impact Statement, Record of Decision, U.S. Forest Service, August 1999	1999 Quincy ROD
Sierra Nevada Forest Plan Amendment, Draft Environmental Impact Statement, U.S. Forest Service, April 2000	2000 DEIS
Sierra Nevada Forest Plan Amendment, Final Environmental Impact Statement, U.S. Forest Service, January 2001	2001 FEIS
Sierra Nevada Forest Plan Amendment, Final Environmental Impact Statement, Record of Decision, U.S. Forest Service, January 2001	2001 ROD
Decision for the Appeals of the Record of Decision for the Sierra Nevada Forest Plan Amendment and its Final Environmental Impact Statement, Dale Bosworth, Reviewing Officer, November 16, 2001	2001 Appeal Decision
Sierra Nevada Forest Plan Amendment, Draft Supplemental Environmental Impact Statement, U.S. Forest Service, June 2003	2003 DSEIS
Sierra Nevada Forest Plan Amendment, Final Supplemental Environmental Impact Statement, U.S. Forest Service, January 2004	2004 FSEIS
Sierra Nevada Forest Plan Amendment, Final Supplemental Environmental Impact Statement, Record of Decision, U.S. Forest Service, January 2004	2004 ROD

Record Citation Format

1 2 3 4 5	SNFPA *****	corresponding to a document reproduced in hard copy in the eight-volume "Administrative Record / Sierra Nevada Forest Plan Amendment FEIS and SEIS – Pacific Southwest Region" for all related cases (<i>e.g.</i> , SNFPA 00235-236)
6 7 8 9 10	SNFPA *****, CD#*, *****	corresponding to the 2000 DEIS, 2001 FEIS, and supporting documents (<i>e.g.</i> , SNFPA 00957, 2001 FEIS, Vol. 3, ch. 3, at p. 2) for a document on one of the 2001 Framework CDs (CD#1-CD#15) and to the Herger-Feinstein Quincy Library Group CD#16 where clear from the text, subsequent short cites may cite only to the document (<i>e.g.</i> , 2001 FEIS, Vol. 3, ch. 3, at p. 2) (note: individual pages on the CD are not Bates numbered)
11 12 13	SNFPA CD#17, Doc. ** at p. *	corresponding to a document from CD#17, the 2001 FEIS Administrative Record Database (<i>e.g.</i> , SNFPA CD#17, Doc. 260 at p. 1.) for a document on CD 17 of the 2001 Framework CDs (note: individual pages on the CD are not Bates numbered)
14 15 16 17	SNFPA CD#SEIS*, SEIS_**_*****	corresponding to a document on 2004 Framework CDs, CD#SEIS1-CD#SEIS8 (<i>e.g.</i> , SNFPA CD#SEIS2, SEIS_02_002028) where clear from the text, subsequent short cites may cite only to the Bates number (<i>e.g.</i> , SEIS_02_002028)
18 19 20	SNFPA CD#SEIS**, Doc. ***** at p. **	corresponding to an appeal or comment letter on 2004 Framework CDs, CD#SEIS9 or CD#SEIS10 (<i>e.g.</i> , SNFPA, CD#SEIS10, Doc. SN-1454 at p. 10) (note: individual pages on the CD are not Bates numbered)
21 22 23	CA *****	corresponding to a document reproduced in hard copy in the one-volume "Administrative Record / Sierra Nevada Forest Plan Amendment FEIS and SEIS – Pacific Southwest Region" for <i>People v. USDA, et al.</i> , CIV-S-05-0211 MCE/GGH (<i>e.g.</i> , CA 00003)

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1 **I. INTRODUCTION**

2 After more than ten years of scientific study, meetings, discussions, planning sessions, public
3 comments, drafting and redrafting, the United States Forest Service ("Forest Service") issued the
4 final Sierra Nevada Forest Plan Amendment ("2001 Framework") governing management of eleven
5 national forests in the Sierra Nevada and millions of acres of some of the most scenic and
6 environmentally important land in California. The process required all participants to make difficult
7 choices and significant concessions, but, as a result, yielded a landmark management plan – one that
8 struck a reasoned balance of competing uses for the national forests while still protecting the Sierra
9 Nevada's unique natural resources.

10 The 2001 Framework allowed for "intense" fuels management near communities, but more
11 "cautious" fuels management in old forest areas to protect habitat and species.^{1/} The Regional
12 Forester in 2001 found that while he "could have selected an alternative that would produce higher
13 levels of measurable goods and service" such a decision would "pose greater uncertainty and higher
14 risks to ecosystem sustainability and species viability."^{2/} He further found that while he could have
15 selected an alternative that provided less regional consistency and more local "flexibility to
16 intensively manage fuels," those "alternatives pose[d] higher levels of uncertainty and risk for
17 sustaining old forest ecosystems."^{3/} The balance struck reflected the best thinking of hundreds of
18 scientists and forest planners, as well as significant public input.

19 The 2001 Framework, a decade in the making, did not last the year. At the end of 2001, before
20 the Forest Service had made any serious attempt to implement it, the newly-appointed Regional
21 Forester began an extensive "review" of the plan. From the outset, the intent of the new agency
22 officials was clear: to re-strike the multiple use balance, placing a hand on the scales in favor of
23 higher production of goods and services and discounting risk to sensitive habitat and species, and
24 to return to forest-by-forest and project-by-project "flexibility" at the expense of regional land

26 1. SNFPA 00234 (2001 ROD); SNFPA 00257 (2001 ROD).

27 2. SNFPA 00257 (2001 ROD)

28 3. *Id.*

1 planning and management.

2 Little more than two years after the Forest Service announced its review, the agency issued a
3 superseding Framework and Final Supplemental Environmental Impact Statement ("FSEIS") ("2004
4 Framework"). Although the Forest Service claimed that it was merely fine-tuning the 2001
5 Framework, the agency, in effect, revoked it, removing significant resource-protective Standards
6 and Guidelines, substantially increasing timber harvesting throughout the Sierra's forests and
7 loosening restrictions on grazing in sensitive habitat.

8 In reversing course, the Forest Service acted without the new information it stated justified its
9 review and reversal, without scientific study or insight gained from implementation, and without any
10 meaningful evaluation of alternatives and impacts. In short, the Forest Service acted arbitrarily and
11 capriciously in jettisoning the 2001 Framework, in violation of the Administrative Procedure Act
12 ("APA"), 5 U.S.C. §§ 702, 706, and failed to take an objective, "hard look" at the consequences of
13 its decision as required by the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-
14 4370f. The Court therefore should invalidate the 2004 Framework and reinstate the 2001
15 Framework.

16 **II. SUMMARY OF ARGUMENT**

17 In 2004, the Forest Service rejected the 2001 Framework's cautious approach to management
18 activities in wildlife habitat in favor of increased production of goods and services, and rejected
19 consistent, region-wide planning in favor of increased local "flexibility." Contrary to the
20 requirements of NEPA, the Forest Service considered only one proposed course of action in issuing
21 the superceding 2004 Framework – rejection of the 2001 Framework in its entirety. In failing to
22 consider any other alternative, the Forest Service fell far short of its obligation to consider a
23 reasonable range of alternatives.

24 The Forest Service's proffered justification for its abrupt change in course – undertaken
25 without any substantial attempt to implement the 2001 Framework – was asserted "new information"
26 and "changed circumstances." As set forth in detail below, none of the alleged new information or
27 circumstances justifies the Forest Service's reversal. Most of this purportedly new information
28 existed in 2001 and was fully considered by the agency in striking a balanced management plan.

1 Moreover, all evidence developed after 2001 suggests that substantially increasing timber harvesting
2 poses substantial risks to old forest dependent-species, and that lifting restrictions on grazing in
3 favor of local flexibility risks extirpation of sensitive aquatic and riparian species. The conclusion
4 of the U.S. Environmental Protection Agency ("USEPA") is apt: the 2004 Framework is "without
5 a clear technical and scientific rationale."^{4/} The Forest Service's rejection of the 2001 Framework
6 is not supported by a reasoned analysis and therefore is arbitrary and capricious in violation of the
7 APA.

8 The agency's decision is fundamentally defective under NEPA for several other reasons.
9 Because there was in fact no "new information" or "changed circumstances," the Forest Service's
10 statement of the purpose and need for revisiting the 2001 Framework was misleading. Moreover,
11 the agency failed to disclose and address opposing expert viewpoints; as discussed below, U.S. Fish
12 and Wildlife Service ("USFWS"), USEPA, several state agencies, the very scientists assembled by
13 the Forest Service to review the environmental documents, and the Forest Service's own expert staff
14 raised substantial concerns about the agency's abrupt change in course. This expert opposition was
15 not, however, adequately disclosed to the public or addressed by the Forest Service. In addition, the
16 Forest Service failed adequately to discuss the environmental impacts of jettisoning the 2001
17 Framework, *e.g.*, the impacts to old-forest dependent species in the short term as a result of
18 substantially increased timber harvesting, the impacts to sensitive aquatic species from increases in
19 grazing, and the uncertainty of the asserted long-term benefits on which the agency's analysis relies.
20 Any one of these NEPA violations, standing alone, requires the Court to void the 2004 Framework.

21 **III. LEGAL BACKGROUND**

22 The Forest Service engages in forest planning pursuant to, among other things, the
23 Multiple-Use Sustained-Yield Act, 16 U.S.C. §§ 528-531 ("MUSYA") and the Forest and Rangeland
24 Renewable Resources Planning Act, as amended by the National Forest Management Act, 16 U.S.C.
25 §§ 1600-1614 ("NFMA"), and supporting regulations. The Forest Service is required to "provide
26

27
28 4. SNFPA CD#SEIS2, SEIS_02_002028 (letter of March 15, 2004 commenting on Final Supplemental EIS).

1 for multiple use and sustained yield" of products and services, including "coordination of outdoor
2 recreation, range, timber, watershed, wildlife and fish, and wilderness[.]" 16 U.S.C. § 1604(e)(1).
3 In striking an appropriate management balance, the Forest Service is required to "provide for
4 diversity of plant and animal communities[.]" 16 U.S.C. § 1604(g)(3)(B). The supporting
5 regulations require the Forest Service to maintain viable populations of existing native and desired
6 non-native species. SNFPA 03011 (2004 ROD) (citing 36 C.F.R. § 219.19 (1982)). For designated
7 "sensitive species" such as the California spotted owl, willow flycatcher and Yosemite toad, the
8 agency's manual requires "special management emphasis to ensure their viability and to preclude
9 trends toward endangerment that would result in the need for Federal listing." Forest Service
10 Manual § 2672.1.

11 **IV. FACTUAL BACKGROUND**

12 A. The Forest Service takes a cautious, ecosystem-based approach to forest management in the 13 2001 Framework

14 1. Origins of the 2001 Framework: the birth of region-wide management

15 Region-wide forest planning for the Sierra Nevada had its origins in the seminal 1992 Forest
16 Service report by Dr. Jared Verner and others (the California Spotted Owl ("CASPO") Report) and
17 the 1996 report of the congressionally mandated Sierra Nevada Ecosystem Project. 2001 FEIS, Vol.
18 1, Summary at p. 1.^{5/} In November 1998, the Forest Service gave notice that it intended to prepare
19 an EIS for a comprehensive land management plan, the Sierra Nevada Forest Plan Amendment,
20 which would amend the individual forest plans for the eleven national forests in the Sierra. SNFPA
21 CD#17, Doc. 872. Together, these forests cover over 11 million acres and comprise over 60% of
22 the land in the Sierra Nevada. 2001 FEIS, Vol. 2, ch. 3 at p. 70, Table 3.1j. The "Purpose and Need
23 for Action," was "to improve national forest management direction for five broad problems: (1)
24 conservation of old-forest ecosystems, (2) conservation of aquatic, riparian, and meadow

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27 5. The 2001 FEIS is on SNFPA CD#6. Individual pages in the document are not Bates
28 numbered. Accordingly, this brief will cite to volume, chapter and page number.

1 ecosystems, (3) increased risk of fire and fuels buildup, (4) introduction of noxious weeds, and (5)
2 sustaining hardwood forests." SNFPA CD#17, Doc. 872. at p. 6.

3 In its Notice, the Forest Service acknowledged that formulating the Framework would require
4 the agency to balance potentially competing goals in the face of incomplete information. *Id.* at pp.
5 6-7, 9. The Forest Service vowed to be transparent about the risks and trade-offs involved,
6 contrasting past practice where "the lack of certainty has contributed to false expectations" about
7 the Sierra Nevada's ability to provide high levels of goods and services without adversely affecting
8 the environment and long-term biological diversity. *See id.* at p. 7.

9 On May 5, 2000, after significant public input and scientific review (2000 DEIS, Vol. 1, ch.
10 1 at pp.1-9–1-10), the Forest Service made its Draft Environmental Impact Statement ("DEIS")
11 available to the public. SNFPA CD #17, Doc. 1983. The DEIS presented and compared eight
12 different alternatives, including a "no action" alternative, for management of the Sierra's national
13 forests. DEIS, Vol. 1, Summary at pp. 1, 3.^{6/} Each alternative was comprised of a proposed network
14 of land allocations, *e.g.*, "old forest emphasis area" or "urban wildland intermix" (2000 DEIS, Vol.
15 1, ch. 2 at pp. 2-48, 2-49, Table 2.5) and a set of "Standards and Guidelines" for management
16 associated with each allocation, *e.g.*, in old forest emphasis areas, under Alternative 8, a requirement
17 to retain all live conifers on the westside of the Sierra that are 30 inches diameter at breast height
18 ("dbh") (*id.* at p. 2-154).

19 2. The Forest Service issues a Final EIS and a Record of Decision for the 2001 Framework,
20 selecting a cautious alternative to protect habitat and species while still allowing for
production of goods and services

21 On January 12, 2001, the Forest Service issued a six volume Final Environmental Impact
22 Statement ("FEIS") for the Sierra Nevada Forest Plan Amendments ("2001 Framework"). SNFPA
23 CD#17, Doc. 1984. "As a result of public comment, extensive scientific review, and consultation
24 with other agencies," the FEIS included a modified version of Alternative 8 from the DEIS. 2001
25 FEIS, Vol. 1, ch. 2 at p. 2. The Forest Service identified Modified Alternative 8 as the preferred

26 ///

27
28 6. The 2000 DEIS is on SFPFA CD#5. Individual pages in the document are not Bates
numbered. Accordingly, this brief will cite to volume, chapter and page number.

1 alternative, finding that it struck the most reasonable balance between mechanical fuels treatment,
2 resource extraction and wildlife values while adequately accounting for risk and uncertainty. The
3 Forest Service found, for example that "the alternatives that have greater potential of mechanical
4 treatment in old forests would have a greater uncertainty as to the effects [of such treatment] on the
5 function of old forests." 2001 FEIS, Vol. 2, ch. 3 at p. 160. The Forest Service had a "moderate to
6 high" degree of confidence that the level of mechanical fuel treatment authorized under Modified
7 Alternative 8 would not adversely effect old forest habitats. 2001 FEIS, Vol. 1, ch. 2 at p. 202. The
8 Forest Service's confidence that other alternatives authorizing more intensive mechanical fuels
9 treatment would similarly avoid adverse effect to old forest habitats, in contrast, was "low." *Id.*
10 Moreover, the Forest Service had "high" confidence that Modified Alternative 8's approach to fuels
11 treatment would reduce the extent and severity of wildfire. *Id.* The Forest Service also identified
12 Modified Alternative 8 as one of the alternatives "expected to pose the least risk of negatively
13 impacting riparian and aquatic ecosystems[.]" 2001 FEIS, Vol. 2, ch. 3 at p. 236.

14 In the Record of Decision for the 2001 Framework, the Regional Forester selected Modified
15 Alternative 8, concluding that it "best responds to multiple needs, including ensuring sustainable
16 forest ecosystems, responding well to the five problem areas, and providing a sustainable supply of
17 goods and services." SNFPA 00250 (2001 ROD). The balance struck by Modified Alternative 8
18 allowed "more intensive fuel treatments in urban wildland intermix zones"; elsewhere, fuel treatment
19 was "cautious, ensuring that treatments do not degrade habitat." SNFPA 00249 (2001 ROD); *see*
20 *also* SNFPA 00234, 00257 (2001 ROD). A goal of the selected approach was to move areas outside
21 of the urban wildland intermix "toward natural fire regimes." SNFPA 00234 (2001 ROD). The
22 Regional Forester decided that the 2001 Framework would apply, with some limited exceptions, to
23 the Herger-Feinstein Quincy Library Group Recovery Act Pilot Project ("Quincy Pilot Project" or
24 "HFQLG"), thereby reducing the amount of timber that could theoretically be harvested in that area.
25 SNFPA 00278 (2001 ROD).⁷ The Regional Forester found that "the entire level of management

27 7. The HFQLG Act directed the Forest Service to carry out a pilot project on the Lassen
28 and Plumas National Forests, and the Sierraville Ranger District of the Tahoe National Forest,
for a period of not more than five years. 2001 FEIS, Vol. 1, Summary at p. 6.

1 activity specified in the HFQLG legislation cannot be implemented without degrading owl habitat
2 [and] without increasing risk to owl viability." SNFPA 00279 (2001 ROD). More generally, the
3 Regional Forester found that while he could have selected an alternative allowing for higher levels
4 of goods and services and more local "flexibility," those alternatives posed higher levels of
5 uncertainty and risk for ecosystems and species viability. SNFPA 00257 (2001 ROD).

6 The 2001 Framework was not intended to be a static management plan; the agency
7 contemplated that change would come with time, grounded in information gained by implementation
8 and further study. Complementing its cautious approach, Modified Alternative 8 included an
9 "Adaptive Management Strategy." 2001 FEIS, Vol. 4, Appendix E. Adaptive management would
10 ensure that the agency could respond to new information and changed circumstances by, for
11 example, "allow[ing] for variances from the standards and guidelines ... to test hypotheses in a
12 scientifically structured manner." SNFPA 00243 (2001 ROD). In this way, the agency could
13 "continually adjust[] management in response to new information, knowledge or technologies."
14 2001 FEIS, Vol. 4, Appendix E at p. E-1.

15 B. The Chief of the Forest Service upholds the 2001 Framework on appeal

16 On November 16, 2001, the new Chief of the Forest Service affirmed the Regional Forester's
17 decision. SNFPA 00564 (Appeals Decision). The Chief expressly rejected the objections of various
18 appellants who argued that restrictions on grazing and timber harvesting to protect habitat and
19 species were not warranted, that fuel treatment options were too restrictive, and that the costs of
20 implementation were unreasonable. *See, e.g.*, SNFPA 00579, 00582, 00585, 00587-00588, 00591-
21 592, 00596, 00600, 00609, 00610, 00614, 00644, 00649, 00678, 00689, 00693, 00819, 00822,
22 00851, 00852, 00857.

23 Though affirming the 2001 Framework, the Chief directed the Regional Forester to undertake
24 a limited review to: (1) "re-evaluate the decision for possibilities of more flexibility in aggressive
25 fuels treatment while still providing short-term and long-term protection for wildlife and other
26 resource values"; (2) "re-evaluate the decision based on possible new information associated with
27 the National Fire Plan"; and (3) "review the [2001 Framework] to determine if additional
28 opportunities exist to harmonize the goals" of the Quincy Pilot Project and the 2001 Framework.

1 SNFPA 00566.

2 C. The Forest Service jettisons the 2001 Framework and issues the 2004 Framework allowing for
3 increased timber harvesting and grazing

4 Just a month after the 2001 Framework was affirmed on appeal, on December 31, 2001, the
5 newly-appointed Regional Forester for the Pacific Southwest Region, Jack Blackwell, announced
6 the beginning of "a broad review" of the 2001 Framework. SNFPA CD#SEIS1, SEIS_01_00693-
7 697. After the review began, the Forest Service for the most part did not implement projects under
8 the 2001 Framework. *See, e.g.*, SNFPA 01929 (2003 Management Review and Recommendations);
9 SNFPA 02442 (notes from owl scientist meeting, August 7, 2003); *see also* CA 00048-00050 (letter
10 from California Attorney General).

11 1. In the 2003 Draft Supplemental EIS, the Forest Service proposes to reject the 2001
12 Framework

13 In June 2003, the Forest Service issued a one-volume Draft Supplemental Environmental
14 Impact Statement ("DSEIS"). In the DSEIS, the Forest Service proposed a new, preferred
15 alternative, referred to as Alternative S2, and compared it to the 2001 Framework (Alternative S1
16 for purposes of its analysis). SNFPA CD#SEIS6, SEIS_06_000014-SEIS_06_000015. In contrast
17 to the 2001 Framework's region-wide approach, Alternative S2 would provide "greater flexibility
18 to local managers to design projects[.]" SEIS_06_000015. And in opposition to the 2001
19 Framework's "cautious" approach, the "active" approach of Alternative S2 would accept "the short-
20 term risks of temporarily changing some habitat for California spotted owls and other species with
21 similar needs to mitigate the longer-term risks associated with the impacts of large, severe wildland
22 fires on both wildlife habitats and communities." *Id.* Alternative S2 also would allow increased
23 "fuels and forest health treatments to generate revenues through commercial forest products to
24 increase the number of acres that can be treated with available appropriated funds." *Id.*; *see also*
25 SEIS_06_000242. Further, Alternative S2 would provide for *full* implementation of the Quincy
26 Pilot Project; in 1999, in contrast, the agency had required as mitigation that in the pilot project area,
27 there would be no "resource management" (mechanical fuel treatment and tree removal) in suitable
28 owl habitat. SEIS_06_000015; *see* SNFPA CD#16, 1999 Quincy ROD at p. 6.

1 The Forest Service's asserted need for the proposed change was to address purported new
2 information and changed circumstances. SEIS_06_000009-000010. According to the agency,
3 among other things, "[n]ew information was collected and compiled about species of concern as
4 additional research findings were published, conservation assessments were developed, and field
5 surveys were completed." *Id.* In addition, the agency noted that U.S. Fish and Wildlife Service
6 "released listing decisions for two species of concern" (the California spotted owl and Yosemite
7 toad). SEIS_06_000010. According to the Forest Service, the "insight gained" from implementing
8 the 2001 Framework combined with the agency's review, "highlighted the need for refinements[.]"
9 SEIS_06_000010. (The agency's proffered new information and changed circumstances are
10 discussed in detail in section IV.B., below.)

11 2. In response to the Draft Supplemental EIS, experts raise substantial concerns about the
12 risks to habitat and species posed by the Forest Service's plan to jettison the 2001
Framework^{8/}

13 As set forth below, the consensus among state and federal resource experts, and experts
14 employed and assembled by the Forest Service, was that the Forest Service's proposal to reject the
15 2001 Framework posed serious risk to ecosystems and species and was not justified by the evidence.

16 a. The U.S. Fish and Wildlife Service warns of risks related to local "flexibility"

17 In commenting on the DSEIS, USFWS expressed, among other concerns, that Alternative S2
18 would result in "declines in preferred [owl] nesting habitat within the first 20 years of
19 implementation[.]" SNFPA 03922. It also noted that local "flexibility in management" would
20 contribute "to a high risk that spotted owls will be extirpated from significant parts of their range."
21 SNFPA 03924. Concerning the Yosemite toad, USFWS stated that livestock have negative effects
22 on these species and that Alternative S2 was not sufficiently protective. SNFPA 03926-03927. And
23 as for the willow flycatcher, USFWS noted that Alternative S2's late season grazing would "expose
24 10% or more of nests to grazing impacts[.]" SNFPA 03927; *see also* SNFPA 02666-2971 (USFWS
25

26 8. Many of the concerns and questions noted in this section were also discussed by
27 experts associated with environmental groups, *e.g.*, the Sierra Nevada Forest Protection
28 Campaign ("SNFPC") (SNFPA CD#SEIS 10, Doc. SN-1467). The issues raised by SNFPC are
the subject of related case CIV-S-05-0205 and therefore will not be repeated in this brief.

1 Biological Opinion, December 11, 2003).

- 2
3 b. The U.S. Environmental Protection Agency finds that the Forest Service failed to explain its rationale for the abrupt change

4 USEPA also objected to the preferred alternative. SNFPA 03907. Among other problems,
5 USEPA found that the Forest Service had failed to explain its "rationale" for Alternative S2, for
6 example, "why existing guidance (*e.g.*, National Fire Plan, California State Fire Plan, existing
7 standards and guidelines in Modified Alternative 8 (S1)) does not sufficiently address the fire and
8 fuels issue." SNFPA 03911. USEPA also noted that Alternative S2's increased "habitat
9 fragmentation" and other adverse impacts to old growth forests "appear inconsistent with the
10 underlying [] purpose and need[.]" SNFPA 03911.

- 11 c. California resource protection agencies find risk to the survival of sensitive species, express concerns about the potential to degrade water quality, and note the Forest Service's failure to implement the 2001 Framework

12
13 The California Department of Fish and Game found that "preferred Alternative S2 has a high
14 probability of promoting a continued decline in abundance of the willow flycatcher population ...,
15 thus bring[ing] it closer to extirpation in California." SNFPA 03903. And the California Regional
16 Water Quality Control Board, Central Valley Region, stated its concern that, among other things,
17 the increased timber harvesting would have adverse impacts to water quality. SNFPA 03892. The
18 Water Board had "similar concerns with the forest health enhancement objective because it could
19 entail disturbance of millions of acres of forested lands, and the details of this new objective are
20 relatively undefined." SNFPA 03892.

21 The California Resources Agency submitted a lengthy comment letter opposing the change in
22 course, stating, among other things, that the need for the change remains unsubstantiated, that
23 harvesting as "forest health treatment" is open-ended, that the demographic picture for the California
24 spotted owl is at best "murky," noting that "not being able to prove a decline is not equivalent to
25 proving that populations are stable"; and that there are unexamined opportunities for funding fuel
26 treatment besides simply allowing for greater timber harvesting. SNFPA 03798-03802. The
27 Resources Agency further noted that the Forest Service had failed to avail itself of the fuel treatment
28 opportunities existing under the 2001 Framework. SNFPA 03799.

1
2 d. Science Consistency Review Team members raise substantial questions about the Forest Service's interpretation and presentation of the evidence

3 The Science Consistency Review Team was a group of "scientists with expertise in fire and
4 fuels management, forest ecology, and species viability" convened by the Regional Forester to
5 "evaluate the science consistency of the DSEIS." SNFPA 03255. This team also found significant
6 shortcomings in the document. *See, e.g.*, SNFPA 02511 (Science Consistency Review Report,
7 September 29, 2003) (table showing results of review). For example one reviewer commented that
8 "[a]llowing grazing and most recreational activities to continue in areas occupied or historically
9 occupied by any of these [sensitive aquatic] species is almost certainly incompatible with population
10 recovery and meadow restoration." SNFPA 02512. And still another commented that the 2003
11 willow flycatcher Conservation Assessment "does not support the development of local management
12 strategies" and that "alternative S2 has a high probability of promoting a continued decline in
13 abundance of this species' population in the Sierra Nevada." *Id.*; *see* SNFPA CD#SEIS5,
14 SEIS_05_03528 (Conservation Assessment) (concluding that existing data "reflect a consistent
15 decline across the Sierra Nevada").

16 A separate Science Consistency Review Report evaluated the DSEIS and a draft of the Final
17 Supplemental Environmental Impact Statement ("FSEIS") as it applied to the California spotted owl.
18 Both reviewers had several strong criticisms of the document, *see* SNFPA 02589 (table showing
19 results of review), noting the document's failure to analyze the short term effects (over the next 10
20 to 20 years) of the proposed alternative. SNFPA 02582. The reviewers also found substantial fault
21 in the agency's use of modeling, particularly its failure to provide confidence intervals or otherwise
22 disclose uncertainty in its projections. "Without accompanying measures of variation it is not
23 defensible to solely rely on a single deterministic projection.... In any case, without measures of
24 uncertainty on model projections the use of these results will remain controversial and their use for
25 projecting future conditions beyond 20-30 years is not defensible." SNFPA 02582-02583; *see also*
26 SNFPA 02549-2550, 02587.

27 The team concluded that in light of "continued concern regarding owl population trends" the
28 proposed alternative "likely incurs greater risk to owl persistence" because of its

1 (1) potential to treat more PACs [owl Protected Activity Centers] (51% of total PACs); (2)
2 canopy cover reduction in PACs[;] (3) more aggressive vegetation treatments compared to S1
3 (lower canopy cover retention, increased harvest of mid-sized trees <30" dbh); (4) full
implementation of HFQLG [the Quincy Pilot Project]; and (5) unquantified amounts of Forest
Health treatments.

4 SNFPA 02587. The reviewers found that the increased risk to habitat and species from Alternative
5 S2 "makes it critical that a defensible adaptive management program is an integral part of
6 implementation in order to address key uncertainties." *Id.* The reviewer noted, however, that
7 "[c]urrently, the adaptive management program is not defined and there is scientific uncertainty
8 regarding whether or not a valid program will be developed[.]" *Id.*; *see also* SNFPA 02496, 02551-
9 2552, 02557.

10 e. Leading owl scientists note the increased risk to the California spotted owl

11 In their August 2003 meeting, a group of leading owl scientists convened by the Forest Service
12 expressed significant concern about the Forest Service's intent to increase timber harvesting and
13 treatment in owl habitat and skepticism about the agency's justifications for jettisoning the 2001
14 Framework. Dr. R.J. Gutierrez, one of the authors of a "meta-analysis" cited by the Forest Service
15 as "new information" justifying its review,⁹ warned that the Forest Service was "going back to the
16 situation we had in 1980 for 20 years with lots of on the ground flexibility." SNFPA 02433. Dr.
17 Jared Verner, co-author of the 1992 CASPO Report, addressing Forest Service staff, stated bluntly:
18 "In my opinion, you are planning rather severe treatments of owl habitat in a population that may
19 be at risk, and there is no evidence that the population is expanding." SNFPA 02438-02439. Dr.
20 Verner also wrote a separate critical comment letter on the DSEIS. SNFPA CD#SEIS 10, SN-1032.
21 Among other things, Dr. Verner questioned the magnitude of the newly asserted threat of wildfire
22 to owls and the Forest Service's use of long-term modeling to predict improvement in owl habitat
23 under Alternative S2. *Id.* at pp. 4, 6 and 7. Dr. Verner flatly disagreed that Alternative S2 would
24 improve owl habitat in the long term. *Id.* at p 10; *see also* Letter from J. Verner to J. Blackwell,

25 ///

26 ///

27
28 9. *See* section VI.B.2.a.ii., below.

1 August 31, 2003.^{10/}

2
3 f. The willow flycatcher working group finds that the Forest Service's preferred alternative has a high probability of promoting the species' continued decline

4 The Willow Flycatcher Working Group "is comprised of experts on the ecology of the
5 flycatcher that represent state and federal agencies, non-governmental agencies ..., and private
6 consultants that meet periodically to discuss the status of the species in the Sierra and devise
7 strategies for its recovery." SEIS_02_001968. The Conservation Strategy Subgroup of the Willow
8 Flycatcher Working Group was asked to review the DEIS and submit comments. SNFPA
9 CD#SEIS2 001968-1973; *see also* CD#SEIS3 000703-707; CD#SEIS5 003915-3919. On reviewing
10 the DSEIS, the subgroup found that, because of increases in local flexibility and in grazing,
11 reductions in surveying, and a lack of emphasis on habitat restoration, the "consensus is that
12 alternative S2 has a high probability of promoting a continued decline in abundance of the willow
13 flycatcher population[.]" SNFPA CD#SEIS2, SEIS_02_001969; *see* SEIS_02_001970,
14 SEIS_02_1972.

15 g. The Forest Service's Watershed, Fish, Wildlife, Air and Rare Plants group expresses skepticism about the asserted new information and concern about impacts to sensitive species, especially in the short term

16
17 The Forest Service's own Watershed, Fish, Wildlife, Air and Rare Plants ("Forest Service WO-
18 WFW") group out of the agency's Washington, D.C. office expressed substantial skepticism about
19 the asserted "new information" and concern about impacts to sensitive species, especially in the
20 short term, from Alternative S2. The group noted, among other things, that: USFWS's decision not
21 to list the spotted owl was "based on implementation of conservation measures included in the
22 [2001] Framework"; new information about riparian and aquatic species "clearly affirms the
23 continued decline of these species"; the DSEIS failed to address short-term risk to habitat and
24 species; the modeling employed in the DSEIS failed to employ confidence intervals and thereby
25 "presents misleading information to the public"; and that the DSEIS's reliance on total acres burned
26

27
28 10. Dr. Verner's letter is attached as an exhibit to an environmental group's letter. SNFPA, CD#SEIS10, SN-1454. Inexplicably, it does not appear in the record in its own right.

1 in comparing alternatives "overestimates the impact of fire on ecological systems and
2 mischaracterizes the threat of wildfire to old forest and associated species." SNFPA 02468-2478.
3 The group questioned the Forest Service's assertion that the funds generated by increased timber
4 harvesting allowed under Alternative S2 would give the agency greater ability to engage in fuel
5 treatment, noting that "the projected acres mechanically treated under both alternatives in the first
6 20 years are essentially the same." SNFPA 02479.

7
8 3. The Forest Service issues a Final Supplemental EIS, and the Regional Forester adopts the
9 preferred alternative, rejecting the 2001 Framework in its entirety

10 In January 2004, the Forest Service issued the FSEIS, describing and comparing two courses
11 of action: Alternative S1, the "no action" alternative, described as "continu[ing] management in the
12 eleven Sierra Nevada national forests consistent with the [2001 Framework]" (SNFPA 03117); and
13 Alternative S2, the action proposed to be adopted as the 2004 Framework (SNFPA 03120). (The
14 elements of Alternative S2 are largely unchanged from DSEIS.) Some of the differences between
15 these two courses of action, as described in the FSEIS, are set forth below.

16 Under Alternative S2, timber harvesting would substantially increase – by 4.7-fold over
17 projected 2001 Framework levels in the first decade and 6.4-fold in the second decade, comparing
18 annual green timber harvest volume. SNFPA 03389 (Table 4.4.1b). Harvesting under the 2004
19 Framework could be even greater than projected in the FSEIS because there is no limit to harvesting
20 undertaken as "Forest Health Treatments." *See* SNFPA 03341. Focusing on modeled long-term
21 benefits, the Forest Service stated that, notwithstanding increased fuels treatment and timber
22 harvesting, both alternatives would "protect and maintain blocks of old forest." SNFPA 03167; *see*
23 *also* SNFPA 03268; SNFPA 03338-03339 (Tables 4.3.2.3d, 4.3.2.3e, 4.3.2.3f, and 4.3.2.3g); SNFPA
24 03348. The agency did not attempt to characterize its degree of confidence that in the short-term,
25 the level of fuel treatment authorized under Alternative S2 would not adversely effect old forest
26 habitats. *C.f.* 2001 FEIS, Vol. 1, ch. 2 at p. 202; *see* section IV.A.2, above.

27 Under Alternative S2 restriction on grazing in willow flycatcher habitat and potential habitat

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1 would be loosened. Where the 2001 Framework provided protection for currently and historically
2 occupied sites, Alternative S2 focused on currently occupied sites. SNFPA 03357-3358. Under
3 Alternative S2, at sites that are deemed only "historically" occupied, livestock would not be
4 automatically restricted to late season grazing, thus subjecting undetected nests to disturbance.
5 SNFPA 03357. Also, where the 2001 Framework gave priority to habitat restoration, SNFPA
6 03360, under Alternative S2, there is "no special emphasis" on sites that are deemed not currently
7 occupied, and, as a result, "actions to specifically restore willow flycatcher habitat would less likely
8 be taken." SNFPA 03358. In addition, even at occupied sites, under Alternative S2, local managers
9 would be given flexibility to allow grazing under a site-specific management strategy. SNFPA
10 03359. The magnitude of the risk to the willow flycatcher from these proposed changes is not
11 discussed in the 2004 FSEIS.

12 Similarly, for the Yosemite toad, the Forest Service rejected the cautious approach of the 2001
13 Framework, which applied grazing restrictions to meadows that contained suitable toad habitat
14 pending completion of required population surveys. In contrast, Alternative S2 extends the deadline
15 for completion of the surveys and, in addition, provides that "[r]estriction of grazing in unsurveyed
16 suitable habitat would not be required." SNFPA 03373. Even where toads are known to be present,
17 local managers would be given flexibility to allow grazing pursuant to "site-specific management
18 plans." SNFPA 03372. The Forest Service states that "livestock grazing in occupied meadows
19 where the species has not been discovered may contribute to local extirpations[.]" SNFPA 03374.
20 The Forest Service does not, however, disclose the likelihood of such extirpations.

21 The Forest Service's asserted need for the proposed change was largely unchanged from the
22 DSEIS, though the agency now cited, in addition to "new information" and "changed
23 circumstances," the "insight gained from almost three years of implementing" the 2001 Framework.
24 SNFPA 03074 (2004 FSEIS).

25 Concurrent with the release of the FSEIS, the Regional Forester issued the ROD, selecting
26 Alternative S2 (the 2004 Framework) over Alternative S1 (retaining the 2001 Framework).
27 According to the Regional Forester, the decision to authorize higher levels timber harvesting and
28 mechanical fuel treatment "accepts the risks of temporarily changing some habitat for California

1 spotted owls and other species to reduce the future risk of wildfire to habitat and human
2 communities." SNFPA 03006-3007.

3 4. The Chief of the Forest Service affirms the 2004 Framework on administrative appeal

4 The Chief denied all administrative appeals of the 2004 Framework and upheld the Regional
5 Foresters' decision on November 18, 2004. SNFPA 03998-04305. On March 15, 2004, USEPA
6 reiterated that "[t]he selected alternative (S2) changes the forest management practices that were
7 adopted in the original ROD without a clear technical and scientific rationale." SNFPA CD#SEIS2,
8 SEIS_02_002028. Six days later, on March 21, 2004, the Under Secretary affirmed the Chief of the
9 Forest Service's appeal decision. SNFPA 04317.

10 **V. JURISDICTION**

11 This Court has jurisdiction pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 701-706. An actual
12 controversy exists between the parties within the meaning of 28 U.S.C. § 2201(a). The Court may
13 grant declaratory relief, injunctive relief, and any additional relief pursuant to 28 U.S.C. §§ 2201 and
14 2202 and 5 U.S.C. §§ 705 and 706.

15 Plaintiff the People of the State of California, *ex rel.* Bill Lockyer, Attorney General
16 (hereinafter, "Attorney General"), has constitutional standing to pursue this action under the rule of
17 *City of Sausalito v. O'Neill*, 386 F.3d 1186 (9th Cir. 2004), as more fully set forth in the Attorney
18 General's Memorandum of Points and Authorities in Opposition to Federal Defendant's Motion to
19 Dismiss (June 2, 2004, Docket No. 40). With respect to "procedural" injuries such as occur when
20 a federal agency violates NEPA, the Ninth Circuit has held that to satisfy Article III, a plaintiff must
21 allege that (1) the agency violated certain procedural rules; (2) these rules protect a plaintiff's
22 concrete interests; and (3) it is reasonably probable that the challenged action will threaten those
23 concrete interests. *Id.* at p. 1197; *see also Citizens for Better Forestry v. U.S. Dept. of Ag.*, 341 F.3d
24 961, 969-970 (9th Cir. 2003).

25 In *City of Sausalito*, the Ninth Circuit held that the city had standing to sue the National Park
26 Service based on allegations that its EIS for a park management plan was deficient under NEPA and
27 the APA. The court held that the city had standing to sue to protect its "proprietary interests." *Id.*
28 at 1197-1198. The city's proprietary interests were not limited to protection of the city's real and

1 personal property, but extended to protect the city's "responsibilities, power, and assets." *Id.* at
2 1197. Such propriety interests included the city's interest in protecting its ability to enforce its land
3 use and health regulations and in preventing effects to its natural resources, its city-owned land, and
4 its "aesthetic appeal." *City of Sausalito*, 386 F.3d at 1198-1199.

5 The State of California has suffered an injury in fact. As described below, the Forest Service
6 violated specific procedural rules established by the APA and NEPA. These rules are designed to
7 ensure that federal agencies such as the Forest Service take a "hard look" at the potential
8 environmental consequences of their actions, that they evaluate alternatives, and that they refrain
9 from actions that are arbitrary, capricious, or otherwise unsupported.

10 In the context of this action, these procedural rules governing federal environmental decision
11 making protect California's concrete interests in, and responsibilities for preserving, the natural
12 resources of the State (*e.g.*, wildlife, water, and state-owned and public trust land), title to which is
13 held by the State of California in trust for the benefit of the People. *See, e.g., Betchart v. California*
14 *Department of Fish and Game*, 158 Cal.App.3d 1104, 1106-1107 (1984)^{11/} (wildlife); Cal. Water
15 Code § 102 (water); 43 U.S.C. § 1311(a) (state title of beds of naturally-navigable waters); 2001
16 FEIS, Vol. 2, ch. 3 at pp. 12-15 (listing state land in Sierra Nevada); SNFPA CD#6, Sierra Nevada
17 Vicinity Map (showing state-owned lands and lakes, rivers and streams). It is reasonably probable
18 that the Forest Service's violation of the APA and NEPA will threaten California's concrete,
19 proprietary interests. The Forest Service's rejection of the cautious approach established in the 2001
20 Framework, in favor of increased resource extraction contemplated by the 2004 Framework, risks
21 adversely affecting these State resource by destroying and degrading habitat for the State's wildlife,
22 impairing the State's water quality, and impacting states lands in and around the Sierra Nevada. *See*
23 *Citizens for Better Forestry*, 341 F.3d at 971 (noting "added risk to the environment that takes place
24 when governmental decisionmakers make up their minds without having before them an analysis
25 ... of the likely effects of their decision on the environment").

27 11. All state authorities and unpublished cases are contained in the Appendix of
28 Authorities, filed concurrently.

1 The procedural injuries set forth in this complaint are actual and imminent, not merely
2 speculative, and fairly traceable to the promulgation of the 2004 Framework, because the 2004
3 Framework is now the operative land management plan for all eleven Sierra Nevada national forests.
4 California's procedural injuries can be redressed by this action. If the 2004 Framework were
5 declared void, the more environmentally protective 2001 Framework would control, and the State's
6 natural resources would be better protected. Moreover, even if, after the invalidation of the 2004
7 Framework, the Forest Service chooses to revisit the 2001 Framework, its decision could be
8 influenced by the environmental considerations it failed to examine in 2004.

9 California may sue under the APA and NEPA because it falls within the APA's broad definition
10 of a "person ... adversely affected or aggrieved by agency action[.]" 5 U.S.C. § 702; *see also* 5
11 U.S.C. § 551(2). Moreover, the Attorney General is authorized under the common law to take action
12 to protect the interests at issue in this case. In this State, under the common law, "in the absence of
13 any legislative restriction" the Attorney General has the power to file any civil action directly
14 involving the rights and interests of the State. *D'Amico v. Board of Medical Examiners*, 11 Cal.3d
15 1, 14-15 (1974); *People v. Birch Sec. Co.*, 86 Cal.App.2d 703, 707 (1948); *People v. Stratton*, 25
16 Cal. 242, 248 (1864), *see also* Cal. Gov't Code §§ 12511, 12512.^{12/}

17 In approving the 2004 Framework and upholding it on administrative appeal, the Forest
18 Service has made a final administrative determination that is subject to review under the APA. 5
19 U.S.C. § 702. The procedural injuries described in this complaint fall within the zone of interests
20 that the APA and NEPA are designed to protect because the Attorney General brings this action to
21 protect the environment and natural resources of this State.

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26 12. Another California district court recently ruled that the California Attorney General
27 has common law authority to bring a NEPA action against the Forest Service in a factually
28 similar case, *People v. United States Forest Service, et al.* (C 04-02588, N.D. Cal.) (Breyer, J.).
See Memorandum and Order (attached to Appendix of Authorities) at pp. 8-9

1 **VI. ARGUMENT**

2 A. The Forest Service failed to evaluate feasible alternatives to the complete rejection of the 2001
3 Framework in violation of NEPA

4 1. An agency's failure to examine a reasonable range of alternatives renders an EIS
5 fundamentally defective

6 The alternatives analysis is considered the "heart" of an EIS. 40 C.F.R. § 1502.14. Given its
7 importance, where an agency fails in good faith to undertake a full alternatives analysis, the courts
8 are not reluctant to find the agency in violation of NEPA. For example, in *Muckleshoot Indian Tribe*
9 *v. U.S. Forest Service*, 177 F.3d 800 (9th Cir. 1999), the court held that the Forest Service's failure
10 to consider alternative methods of consolidating land ownership, other than through an unrestricted
11 land exchange, rendered the EIS inadequate. *Id.* at 813-814. And in *City of Tenakee Springs v.*
12 *Clough*, 915 F.2d 1308 (9th Cir. 1990), the court held that the Forest Service's failure to consider in
13 an SEIS an alternative that would amend a long-term contract to reduce the amount of timber made
14 available required the court to issue a preliminary injunction. *Id.* at 1312. As the case law makes
15 clear, an agency cannot choose simply to ignore a reasonable alternative: a viable but unexamined
16 alternative renders the environmental impact statement inadequate. *Muckleshoot*, 177 F.3d at 814.

17 2. The 2004 Final Supplemental EIS evaluates no alternative to the Forest Service's proposal
18 – the complete rejection of the 2001 Framework

19 The FSEIS describes in any detail only two courses of action: continuing with the 2001
20 Framework (Alternative S1) (SNFPA 03117); and dismantling the 2001 Framework in its entirety
21 (Alternative S2) (SNFPA 03120). The overwhelming majority of the qualitative and quantitative
22 discussion in Chapter 4 of the FSEIS, entitled "Environmental Consequences," centers only on these
23 two courses of action; for example, every figure and table except one (SNFPA 03394 (Table 4.4.3a))
24 evaluates only S2 and/or S1. This falls far short of the reasonable range of alternatives required by
25 NEPA.

26 The Forest Service attempts to circumvent this fatal deficiency by stating that, in addition, it
27 considered the "seven action alternatives from the [2001] FEIS (Alternatives F2-F8)." SNFPA
28 03078-3079. This attempt is improper and ineffective for at least two reasons. First, the alternatives
set forth in the 2001 FEIS were not designed to and do not squarely address the purposes and needs

1 that, in the Forest Service's stated view, require jettisoning the 2001 Framework. Stated another
2 way, while Alternatives F2-F8 are "alternative" methods of managing the national forests, they are
3 not alternative modifications to the 2001 Framework. The Forest Service was required to devise a
4 set of alternatives that might satisfy, in whole or in part, its current stated purposes and needs. Its
5 failure to do so violates NEPA.

6 Second, the Forest Service is not starting over again, reconsidering every option that was
7 available before the 2001 Framework was adopted. It is not credible, given the Forest Service's
8 purported reasons for review, that the agency would consider any option that would create "large
9 reserves where human management is very limited" (F2); preserve large unroaded areas that would
10 be "left to develop under natural processes" (F5); or emphasize "a cautious approach to treating fuels
11 in sensitive wildlife habitat" (F8). SNFPA 03080-3081. The Forest Service's suggestion that it is
12 revisiting all of the alternatives explored in the 2001 Framework is disingenuous. *See* SNFPA
13 CD#SEIS1, SEIS_01_00695 (December 31, 2001 letter) (noting that review would focus on
14 alternatives allowing more "aggressive" fuel treatment).

15
16 3. The Forest Service's failure to consider feasible alternatives cannot be remedied by
reference to the 2001 FEIS

17 Even if the Forest Service legitimately could have incorporated the range of alternatives
18 examined in the 2001 FEIS, the Forest Service has not compared these alternatives to Alternative
19 S1 (the 2001 Framework as analyzed in 2004) and Alternative S2 (the 2004 Framework). This is
20 because the analyses and information about Alternative S1 and Alternative S2 in the 2004 FSEIS
21 largely do not correspond to those for Alternatives F2-F8 in the 2001 FEIS.

22 The disconnect is reflected most clearly in the modeling. As the FSEIS notes in Appendix B,
23 in its modeling for Alternatives S1 (the 2001 Framework) and S2, the Forest Service used updated
24 forest inventories; updated and re-mapped Protected Activity Centers (PACs); a changed pattern and
25 location for fire treatments; updated "fire effects coefficients"; and "current" costs and values
26 relating to fuels treatment and timber harvest. SNFPA 03462-3463. As a result, a significant
27 number of the figures and tables in the 2001 FEIS are not comparable to those in the 2004 FSEIS.
28 For example, the "Effect on Wildfire" table appears in both documents. In the 2001 FEIS, the Forest

1 Service predicted that Modified Alternative 8 (which is supposed to be the same alternative as
2 Alternative S1) would result in a 15% decrease in annual wildfire acres in the first decade to the fifth
3 decade. 2001 FEIS, Vol. 1, Summary at p. 40. In the 2004 FSEIS, however, the Forest Service
4 predicts that S1 (the 2001 Framework) will result in only a 2% decrease. SNFPA 03083. The
5 numbers for F2-F8 remain unchanged from the 2001 FEIS because these alternatives were not run
6 through the Forest Service's 2004 modeling.

7 Similarly, many other comparative charts and tables in the 2004 FSEIS contain the same
8 information for Alternatives F2 through F8 as was contained in the 2001 FEIS, but *different*
9 information for Alternative S1 (the 2001 Framework) than was presented for the adopted alternative
10 in 2001 Framework (Modified Alternative 8). For example, the table that sets forth the annual
11 timber authorized for sale changes from the 2001 FEIS to the 2004 FSEIS, but only for Alternative
12 S1 (Modified Alternative 8, the 2001 Framework). In 2001, the Forest Service estimated that
13 Modified Alternative 8 (S1) would result in an offer of sale of 91 million board feet of salvage
14 timber and 96 million board feet of green timber in the first decade, for a total of 187 million board
15 feet. FEIS, Vol. 1, Summary at p. 41. In the 2004 FSEIS, however, these numbers drop to 30
16 million board feet of salvage timber and 70 million board feet of green timber, for a total of 100
17 million board feet. SNFPA 03091 (2004 FSEIS) (Table S5); *compare also* 2001 FEIS, Vol. 1,
18 Summary at p. 42 *with* SNFPA 03090 (Table S4) and SNFPA 03992 (average annual wage jobs);
19 2001 FEIS, Vol. 2, ch. 3 at p. 393, Table 5.1w *with* SNFPA 03090 (2004 FSEIS) (Table S4)
20 (average annual wages); 2001 FEIS, Vol. 1, Summary at p. 41 *with* SNFPA 03085 (2004 FSEIS)
21 (Table S3) (annual number of acres subject to mechanical fuels treatment). This makes it clear that
22 the Forest Service did not put Alternatives F2-F8 through the same modeling as Alternatives S1 and
23 S2.

24 But the disconnect between the FEIS and the SEIS is not limited to that caused by changes in
25 modeling and modeling inputs. In addition, the 2004 FSEIS does not conduct all of the same
26 comparisons for Alternative S2 that it conducted for the alternatives considered in 2001. For
27 example, in the Land and Resources Uses section of the 2004 FSEIS, most of the tables do not
28 correspond (in output measured and in time frames examined) to those that appear in the 2001 FEIS.

1 *Compare* 2001 FEIS, Vol. 2, ch. 3 at pp. 369-533 *with* SNFPA 03386-3397 (2004 FSEIS). And
2 unlike the 2001 FEIS, the 2004 FSEIS contains no table comparing the alternatives based on the
3 Forest Service's degree of confidence that (1) the fuels treatment will have the desired effect of
4 reducing wildfire extent and severity; and (2) the fuels treatment will have no adverse effects on old
5 forest habitats. *C.f.* 2001 FEIS, Vol. 1, Summary at p. 44. For these reasons, even if the Forest
6 Service legitimately could have considered Alternatives F2-F8 from the 2001 FEIS as alternatives
7 to jettisoning the 2001 Framework, the Forest Service did not compare these alternatives to
8 Alternatives S1 (the 2001 Framework as analyzed in 2004) and S2 (the 2004 Framework). The
9 Forest Service therefore had no reasoned basis to select Alternative S2 over any other alternative.

10
11 4. There were feasible alternatives to the complete rejection of the 2001 Framework that the
Forest Service failed to examine

12 Additional alternatives clearly were available to the Forest Service, as noted by various
13 reviewers and in numerous comment letters, including letters from the Attorney General's Office.
14 For example, addressing the claim:

15 • that the 2001 Framework is unworkable, the Forest Service could have identified specific
16 Standards and Guidelines that, in its view, impeded implementation and could have made changes
17 to address those specific problems. Or the Forest Service could have authorized specific projects
18 otherwise at variance with the 2001 Framework to test through adaptive management whether other
19 approaches are more efficient or practical.

20 • that the 2001 Framework unduly infringes on grazing rights, the Forest Service could have
21 implemented through adaptive management selected experiments to test whether the continued
22 viability of species such as the willow flycatcher and Yosemite toad is consistent with
23 relaxation of grazing standards, or the agency could have located other, less sensitive grazing land
24 to lessen impacts to permittees.

25 • that the 2001 Framework removes an opportunity to test alternative management strategies
26 offered by the Quincy Pilot Project, the Forest Service could have considered partial or limited
27 implementation of the Quincy Pilot Project, or designed a smaller scale project located elsewhere
28 to obtain similar information.

1 • that the 2001 Framework and adequate fuel treatment cannot be implemented because of
2 insufficient funding, the Forest Service could have considered options other than simply cutting
3 more and larger trees – *e.g.*, seeking a special appropriation in conjunction with the Healthy Forests
4 Initiative; shifting funding from other lower priority programs; altering or scaling back its proposed
5 fuel treatment program; or seeking foundation and state funding.

6 Viable alternatives to the wholesale rejection of the 2001 Framework clearly were
7 available to the Forest Service. But the Forest failed to consider seriously any alternative other than
8 its preferred – and predetermined – alternative. This failure renders the FSEIS inadequate as a
9 matter of law. *See Muckleshoot*, 177 F.3d at 813-814.

10 B. The Forest Service failed to provide a reasoned analysis to justify its wholesale rejection of the
11 2001 Framework in violation of the Administrative Procedure Act

12 In 2001, the Forest Service expressly found that the selected alternative, which allowed for
13 more commodity production than some alternatives and less than others, "best responds to multiple
14 needs, including ensuring sustainable forest ecosystems ... and providing a sustainable supply of
15 goods and services." SNFPA 00250 (2001 ROD). The Regional Forester found that while he "could
16 have selected an alternative that would produce higher levels of measurable goods and service ...
17 these options pose greater uncertainty and higher risks to ecosystem sustainability and species
18 viability." SNFPA 00257 (2001 ROD). He further found that while he could have selected an
19 alternative that provided less regional consistency and more "flexibility to intensively manage fuels,"
20 those "alternatives pose higher levels of uncertainty and risk for sustaining old forest ecosystems."
21 *Id.*

22 In 2004, the Forest Service abruptly changed course, substantially increasing timber harvesting
23 throughout the forests, loosening restrictions on grazing in sensitive habitat and increasing
24 "flexibility" in management at the expense of region-wide decision making. At no point has the
25 Forest Service suggested that the analyses or findings supporting the 2001 Framework were in error.
26 The Forest Service affirmed the 2001 Framework on appeal, and thereafter elected to supplement
27 and purported to rely on the 2001 FEIS. The sole justification offered by the Forest Service for its
28 reversal were asserted "changed circumstances" and "new information," which the agency placed

1 into the following four categories: (1) old forest ecosystems and associated species; (2) aquatic,
2 riparian and meadow ecosystems; (3) fire and fuels; and (4) implementation of the Quincy Library
3 Group Pilot Project. SNFPA 03074-3077 (subheadings under "Purpose and Need").

4 As discussed below, most of the information proffered as "new" actually already existed and
5 was in fact considered by the agency in 2001. And all of the truly new information, rather than
6 providing support for the agency's reversal, instead confirms that a return to an emphasis on high
7 levels of goods and services and local control over management poses serious risks to the continued
8 survival of the Sierra's sensitive species. In 2004, the Forest Service did not explain why the course
9 of action chosen in 2001 – intensive fuel treatment in the urban wildland interface zone and cautious
10 management in sensitive habitat, coupled with focused amendment to the plan over time based on
11 information gained from study and on-the-ground implementation of the 2001 Framework – is no
12 longer advised. The Forest Service's asserted reasons for its abrupt change in course fail to justify
13 its actions and are not supported by the record.

14 1. Where an agency changes course, it must provide a reasoned analysis

15 Where an agency revokes its former decision, its action "constitutes a reversal of the agency's
16 views as to the proper course." *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins.*
17 *Co.*, 463 U.S. 29, 41 (1983). "A settled course of behavior embodies the agency's informed
18 judgment that, by pursuing that course, it will carry out the policies committed to it by Congress.
19 There is, then, at least a presumption that those policies will be carried out best if the settled rule is
20 adhered to." *Id.* (quoting *Atchison, Topeka & Santa Fe R.R. Co. v. Wichita Bd. of Trade*, 412 U.S.
21 800, 807-808 (1973)). In light of this presumption, "[a]n agency changing its course ... is obligated
22 to supply a reasoned analysis for the change beyond that which may be required when an agency
23 does not act in the first instance." *Id.* at 42.

24 An agency's failure to supply a reasoned analysis for the change, consistent with the agency's
25 statutory mandate, renders the agency's action arbitrary and capricious. For example, in *State Farm*,
26 the Court held that the National Highway Traffic Safety Administration ("NHTSA") failed to present
27 an adequate basis for rescinding its passive restraint requirements. In 1977, NHTSA promulgated
28 a rule requiring automakers to install either automatic seatbelts or airbags. *State Farm*, 463 U.S. at

1 37. After a new Secretary of Transportation took office in 1981, the agency reopened the rule
2 making because of "changed economic circumstances" in the industry. *State Farm*, 463 U.S. at 38.
3 NHTSA maintained that it was no longer able to find, as it had four years previously, that the rule
4 would result in safety benefits because automakers overwhelmingly had elected to install automatic
5 seatbelts, and these belts were easily detached. *State Farm*, 463 U.S. at 38-39. The Court held that
6 the revocation was arbitrary and capricious because the agency "apparently gave no consideration
7 whatever to modifying the Standard to require that airbag technology be utilized." *Id.* at 46. In
8 addition, the Court noted that "there is no direct evidence in support of the agency's finding that
9 detachable automatic seatbelts cannot be predicted to yield a substantial increase in usage [of belts]."
10 *Id.* at 52-53. Under these circumstances, the agency's decision to revoke its passive restraint law
11 was not supported by the required "reasoned analysis." *Id.* at 57.

12 Similarly, in *The Fund for Animals v. Norton*, 294 F.Supp.2d 92 (D.D.C. 2003), the court found
13 that the National Park Service ("NPS"), failed to justify the reversal of the rule passed under the
14 previous administration that had required a phase-out of snowmobile use in Yellowstone to protect
15 resources and wildlife. The court held that "[t]his dramatic change in course, in a relatively short
16 period of time and conspicuously timed with the change in administrations, represents precisely the
17 'reversal of the agency's views' that triggers an agency's responsibility to supply a reasoned
18 explanation for the change." *Id.* at 105 (quoting *State Farm*, 463 U.S. at 41). The court first
19 reviewed the NPS's responsibilities under the Organic Act and other laws, noting the agency's
20 "conservation mandate." *The Fund for Animals*, 294 F.Supp.2d at 102-103. The court then
21 discussed the process leading to the original phase-out rule, noting that it was "promulgated after
22 almost a decade of study[.]" *Id.* at 105. Accordingly, the court found, "NPS is charged with fully
23 explaining the need for, and identifying the record evidence supporting, this change in course." *Id.*
24 The agency attempted to justify the reversal "based on the availability of 'cleaner, quieter
25 snowmobiles' [.]" *Id.* at 106. But, as the court pointed out, in the original phase-out rule, the agency
26 had found that "[c]leaner, quieter snowmobiles would do little, if anything, to reduce the most
27 serious impacts on wildlife." *Id.* The court concluded that the agency's explanation – "weak at
28 best" – was "quintessentially arbitrary and capricious." *Id.* at 108 (internal quotation omitted).

1
2 2. None of the Forest Service's proffered reasons for its abrupt change in course justify rejection of the 2001 Framework

3 a. Any new information about old forest ecosystems and associated species does not support the rejection of the cautious approach of the 2001 Framework in favor of increased timber harvesting and grazing

4
5 The agency's asserted "new information" and "changed circumstances" about old forest
6 ecosystems and associated species relate to (1) the USFWS's decision not to list the California
7 spotted owl as endangered; (2) an analysis of existing spotted owl population data and new
8 reproductive data for the 2002 breeding season; and (3) expected old forest habitat losses from
9 wildfire. SNFPA 03098-3099. As discussed below, there is no new information about the owl
10 suggesting that populations are sufficiently stable to withstand substantial increases in timber
11 harvesting. Moreover, the record does not support the Forest Service's new view that wildfire in old
12 forest should no longer be restored as a natural part of the ecosystem, but rather poses an undue risk
13 to owls sufficient to justify aggressive mechanical fuels treatment (timber harvesting) in this
14 sensitive habitat.

15
16 i. USFWS's decision not to list the spotted owl was based on the protections contained in the 2001 Framework

17 As discussed, the Forest Service has deemed the California spotted owl to be a Sensitive
18 Species. 2001 FEIS, Vol. 3, ch. 3 at pp. 1, 69. The spotted owl is listed by the California
19 Department of Fish and Game as a Species of Special Concern. SNFPA 01909. "This status applies
20 to animals that are not listed under the Federal or the California Endangered Species Act but which
21 appear to be vulnerable to extinction." *Id.*

22 On February 14, 2003, USFWS denied a petition to list the California spotted owl as a
23 threatened or endangered species. SNFPA 01884. USFWS's decision was based on the express
24 protections afforded under the 2001 Framework, such as retention of canopy cover, restrictions on
25 timber harvesting, and the Forest Service's continued commitment to protecting habitat in the
26 Quincy Pilot Project area. SNFPA 1902-1908. In its listing decision, USFWS acknowledged that
27 the 2001 Framework was then under review and expressed concern that the outcome "could
28

1 substantially affect California spotted owls[.]” SNFPA 01908.^{13/} USFWS's decision was *not* based
2 on a determination that owl populations are conclusively stable or on the increase, or are sufficiently
3 robust to withstand substantial increases in timber harvesting. Since, as the Forest Service must
4 concede, USFWS's decision not to list the spotted owl was based expressly on the protections set
5 forth in the 2001 Framework, *see* SNFPA 03218; SNFPA 02468 (Forest Service WO-WFW
6 comments), it cannot reasonably provide support for rejecting the 2001 Framework in favor of
7 increased timber harvesting.

8
9 ii. Recent spotted owl studies advise continued caution until more information can
be obtained

10 As further justification, the Forest Service cites (1) a new analysis of owl population data and
11 (2) a "pulse in reproduction" in 2002 that was not considered in 2001 (SNFPA 03074, 03099).
12 Rather than reflecting a change in population trends, however, the new analysis is the result of
13 applying a new analytical method (a "meta-analysis")^{14/} to data that already existed, and were used,
14 in formulating the 2001 Framework. *Compare* SNFPA 03214 (2004 FSEIS) *with* 2001 FEIS, Vol.
15 3, ch. 3 at p. 71; *see also* SEIS_05_003747 (meta-analysis Executive Summary). More importantly,
16 the meta-analysis does not establish that owls can withstand substantial increases in timber
17 harvesting. As the Forest Service itself must concede, the meta-analysis "still identifies a great deal
18 of uncertainty regarding rangewide population trends." SNFPA 03214. Accordingly, meta-analysis
19 advises "caution ... in planning conservation strategies ... until further analyses can be conducted[.]"
20 SNFPA CD#SEIS5, SEIS_05_003749. The best spin that the Forest Service can put on the meta-
21 analysis is that the rate of owl population decline "may not be as great as originally predicted."
22 SNFPA 03214. This hardly justifies substantially ramping up timber harvesting in owl habitat.

23 As for the 2002 owl reproduction data, the Forest Service itself notes that "[w]hile 2002 appears
24 to have been a good year for California spotted owl reproductive success, 2003 appears to be

26 13. Indeed, because the Forest Service has now rejected the 2001 Framework, USFWS is
revisiting its listing decision. 70 Fed. Reg. 35,607 (June 21, 2005).

27
28 14. The meta-analysis is located at SNFPA CD#SEIS5, SEIS_05_003745-
SEIS_05_003849 (A.B. Franklin, R.J. Gutierrez, J.D. Nichols, et al. (2003)).

1 relatively poor." SNFPA 03214. The agency acknowledges as it must that "reproductive success
2 from individual years cannot be used to indicate overall population trends as it is widely recognized
3 that the species has periodic breeding pulses." SNFPA 03214; *see also* SNFPA 01899; SNFPA
4 01912 (USFWS owl listing decision). This conclusion is consistent with that reached by USFWS
5 in its decision not to list (SNFPA 01895-1896), and of the Forest Service's own Management
6 Review Team, which rejected early on any conclusion that "this new information will eliminate
7 concern for the status and trend in owl population." SNFPA 01950. The population data, therefore,
8 cannot justify the agency's change in course.

9 iii. There is no new information suggesting that wildfire poses undue risks to old
10 forest and justifying an immediate, substantial increase in mechanical fuel
11 treatment in sensitive habitat

11 As additional "new information" about the owl, the Forest Service summarily asserts that
12 "habitat losses" from wildfires "are expected to increase on the average" if the Forest Services
13 continues under the 2001 Framework. SNFPA 03099; *see also* SNFPA 03268.

14 In 2001, the Forest Service recognized that some sensitive habitat would be lost due to wildland
15 fire; Modified Alternative 8 had a higher risk of fire in old forest than some other alternatives
16 because mechanical fuel treatment in old forest was to be avoided; prescribed fire was the
17 emphasized treatment in these areas. 2001 FEIS, Vol. 2, ch. 3 at pp. 161, Table 3.2u; *id.*, Vol. 2, ch.
18 3 at pp. 304; *see also* SNFPA 00234 (2001 ROD). In selecting Modified Alternative 8, the Regional
19 Forester balanced this risk of loss, however, against other considerations, including the known
20 damage that would occur to sensitive old forest habitat by implementation of aggressive mechanical
21 fuels treatment and the benefits of fire in the natural ecosystem. SNFPA 00251, 00249; *see* 2001
22 FEIS, Vol. 2, ch. 3 at pp. 161, Table 3.2u (displaying various old forest considerations and
23 likelihood given alternative would achieve desired result). As the Regional Forester stated in 2001,
24 an objective was to move owl habitat, fisher habitat and old forest emphasis areas (areas outside the
25 wildland urban intermix) "toward natural fire regimes, and return to fire-dependent ecosystems."
26 SNFPA 00234.

27 In 2004, the Forest Service did not attempt to quantify or characterize the risk to old forest
28 habitat from increased mechanical fuels treatment in the short term – even though the agency's own

1 owl experts informed it that the proposed course, with its "aggressive vegetation treatment" likely
2 would incur "greater risk to owl persistence" than continuing with the 2001 Framework. SNFPA
3 02587. Rather, the Forest Service focuses only on the modeled reductions in acres burned.^{15/} This
4 is only part of the equation, since if mechanical treatment destroys more habitat than would be
5 destroyed by wildfire, nothing has been gained. *See* SNFPA CD#SEIS10, SN-1032 at pp. 9-10
6 (letter from Dr. Verner disputing that S2 would lead to more owl habitat). And the Forest Service
7 does not explain why it has, apparently, abandoned the goal of returning fire to the Sierra Nevada
8 ecosystem. *See* SNFPA 02472 (Forest Service WO-WFW comments).

9 In the end, the Forest Service cannot say, based on the evidence, that any reductions in acres
10 burned under Alternative S2 will result in as much or more high quality habitat for owls and other
11 old-forest dependent species than would proceeding under the 2001 Framework. The Forest Service
12 acknowledge that it does not even know the extent to which wildfire adversely affects owl habitat;
13 "[i]t is unknown ... how much burning of PACs resulted in sufficient loss of live mature trees and
14 changed stand structure to eliminate or significantly diminish habitat suitability for spotted owls."
15 SNFPA 03215; *see also* SNFPA 02472 (Forest Service WO-WFW comments). The Forest Service
16 admits that "[i]t is uncertain whether the benefits of treating PACs to reduce their susceptibility to
17 wildfire will outweigh the potential negative effects of the treatments on owl occupancy and habitat
18 quality." SNFPA 03335. And, it predicts that in the first 20 years, Alternative S2 will lead to the
19 same number of PACs (protected owl activity centers) being "lost" due to wildfire (SNFPA 03348
20 (Table 4.3.2.3k)). By the Forest Service's own analysis, then, the fuel management element of
21 Alternative S2 thus is of no clear benefit to the owl. Under these circumstances, the Forest Service's
22 decision to move to a plan that indisputably guarantees adverse effects to owl habitat in the near
23 term is not supported by a reasoned analysis.

24 ///

25 ///

27 15. For a discussion of the defects in the Forest Service's long-term modeling, see
28 section VI.C.3.e., below.

- 1 b. Any new information about aquatic, riparian and meadow ecosystems does not
2 support the Forest Service's decision to loosen restrictions on grazing, but instead
3 weighs heavily in favor of retaining the 2001 Framework's cautious approach

4 In support of its reversal, the Forest Service cites the "assessment of the reduction in grazing
5 activity that would result from implementing FEIS standards and guidelines" produced during its
6 review of the 2001 Framework. SNFPA 03100. It also cites "new information ... concerning the
7 population status and distribution of Yosemite toad and willow flycatcher[.]" species that inhabit
8 riparian areas subject to grazing in the Sierra. SNFPA 03099-3100. The fact that the 2001
9 Framework's Standards and Guidelines would reduce opportunities for grazing was fully disclosed
10 and analyzed in 2001 and is not new information. The only information that is in fact new confirms
11 that the Yosemite toad and the willow flycatcher are at risk of extirpation and that grazing has
12 adverse impacts on these species. The Forest Service's decision to increase the opportunities for
13 grazing in these species' habitat is not supported by a reasoned analysis.

- 14 i. Impacts to grazing permit holders were fully disclosed and analyzed in the 2001
15 FEIS

16 During the review of the 2001 Framework, the Forest Service determined that under the 2001
17 Framework, 12 permittees would be "highly effected," while under Alternative S2, only nine
18 permittees would be "highly effected." SNFPA 03092 (Table S8). While the information about
19 impacts to grazing was not framed in this way in 2001, the Forest Service was fully aware when it
20 approved the 2001 Framework that it would reduce grazing opportunities. As the 2001 ROD states,
21 the new restrictions on grazing in meadows and riparian areas were "expected to reduce the number
22 of animal unit months (AUMs) ... by approximately 83,000 over the next ten years[.]" though "[o]ne
23 third of these reductions were already scheduled[.]" SNFPA 00256; 2001 FEIS, Vol. 2, ch. 3 at p.
24 407; *compare* SNFPA 03092 (2004 FSEIS) (Table S7). In 2001, the Forest Service forecasted that
25 because of the restrictions, "many permittees would give up their permits." 2001 FEIS, Vol. 2, ch.
26 3 at p. 406. The Forest Service's more recent ranking of the number of permittees that would be
27 highly effected is not new information or a changed circumstance, but simply another way to
28 characterize impacts that were fully acknowledged in 2001. *See* SNFPA 02468 (Forest Service WO-
WFW comments).

- 1 ii. All evidence concerning the population status and distribution of the Yosemite
2 toad and willow flycatcher suggests these species are at substantial risk and that
3 grazing has adverse impacts

4 According to the Forest Service, its change in course is also warranted by new information on
5 the population status and distribution of Yosemite toad and willow flycatcher. SNFPA 03099. The
6 most relevant piece of new information regarding the Yosemite toad is that in December 2002, after
7 a comprehensive survey of the existing literature, USFWS found that listing the Yosemite toad as
8 threatened is warranted but precluded by higher priority listings. SNFPA CD#SEIS5,
9 SEIS_05_003974. USFWS notes several Sierra field studies, all of which show substantial
10 population declines. *Id.* at SEIS_05_003977. USFWS identifies livestock grazing as one of the
11 principal factors affecting the species. *Id.* at SEIS_05_003977-SEIS_05_003978. USFWS's
12 findings about population status and risks are consistent with the information contained in the draft
13 Yosemite Toad Conservation Assessment, dated April 18, 2002.^{16/} This information, which
14 highlights the precarious state of the toad, cannot justify a return to increased levels of grazing and
15 local control over management.

16 Similarly, the only new information cited in the FSEIS about willow flycatchers supports the
17 finding in the 2001 Framework that grazing may have serious adverse impacts. The 2004 FSEIS
18 notes that well over half of the 124 known willow flycatcher sites are in or near active grazing
19 allotments (SNFPA 03221), making contact between livestock and flycatchers likely. As for
20 flycatcher populations, the 2004 FSEIS acknowledges that "[r]ecent data available from the
21 demographic and monitoring study in the north-central Sierra Nevada is not encouraging with regard
22 to willow flycatcher population trends." SNFPA 03222. The Forest Service's own citations to
23 recent studies (*e.g.*, Bombay and Morrison (2003)) undermine the Forest Service's conclusions. For
24 example, the 2004 FSEIS cites Bombay and Morrison for the proposition that the number of willow
25 flycatcher territories at 15 monitoring sites declined from 62 in 1998 to 37 in 2002, a downward

26 16. In the administrative record as originally produced, the Forest Service included only
27 8 pages of this document in the administrative record, redacting all references to risk factors.
28 SNFPA CD#SEIS 5B, SEIS_05_004854-4861. On plaintiffs' request, the Forest Service
 provided a complete copy. It is attached to this brief as Exhibit A.

1 trend that the Forest Service called "alarming" in the DSEIS – although that characterization of the
2 trend was cleansed from the FSEIS. *Compare* SNFPA 03222 (2004 FSEIS) *with* SNFPA CD#SEIS
3 6, SEIS_06_000127 (2003 DSEIS). Accordingly, the Forest Service concludes, as it must, that "the
4 willow flycatcher population in the Sierra Nevada appears to have continued to decline during the
5 past two decades." SNFPA 03220. There is, in short, no reasoned analysis that can support the
6 Forest Service's decision to now allow grazing in unsurveyed potential toad habitat, and allow late
7 season grazing in willow flycatcher habitat, thereby risking irreparable damage to these species,
8 where the only benefit is to lower the number of grazing permittees who are "highly effected" from
9 12 under the 2001 Framework, to nine under the 2004 Framework.

10 c. There is no new information or any changed circumstances relating to fire and fuels

11 In its "Purpose and Need" section, the Forest Service implies that there are changed
12 circumstances related to fire and fuels. It first cites the National Fire Plan, stating that "[t]he
13 Regional Forester is committed to achieving the goals" of the plan. SNFPA 03100. It next cites "the
14 prescriptive nature of the existing standards and guidelines" to be a "primary barrier" to effective
15 fuels treatment. SNFPA 03101. And finally it states the need to fund fuels treatment, observing that
16 "[i]ncreasing the economic value of fuels treatment byproducts would also improve the Forest
17 Service's ability to treat the desired acreage of hazardous fuels with available appropriated dollars."
18 SNFPA 03100. As discussed below, the Forest Service has cited no evidence that the 2001
19 Framework is inconsistent with the National Fire Plan; has made no attempt to implement the 2001
20 Framework or identify and address any real – as opposed to hypothetical – impediments to effective
21 fuel treatment; and has looked at no options for funding other than to substantially increase timber
22 harvesting.

23 i. There is no evidence that the 2001 Framework is inconsistent with the National
24 Fire Plan

25 In the 2004 FSEIS, the Forest Service *implies* that 2001 Framework must be changed to meet
26 the goals of the National Fire Plan, but it does not expressly state that implementing the 2001
27 Framework *precludes* meeting the goals of the National Fire Plan. *See* SNFPA 03100-3101; *see also*
28 SNFPA 03197 (discussing National Fire Plan). In fact, the Forest Service previously found that the

1 2001 Framework is consistent with the National Fire Plan. SNFPA 00259-00260 (2001 ROD);
2 SNFPA 00585 (2001 Appeals Decision). The Watershed, Fish, Wildlife, Air and Rare Plants group
3 in the Forest Service's Washington, D.C. office agreed, noting that there was no evidence of
4 inconsistency. SNFPA 02469. The Regional Forester Blackwell himself admitted well into the
5 review that "the FEIS is pretty good in conforming to the NFP [National Fire Plan]" SNFPA
6 CD#SEIS1, SEIS_01_000290 (Notes of Meeting with California Spotted Owl Scientists, June 28,
7 2002). In sum, neither the record nor the FSEIS establishes that the 2001 Framework is
8 nonconforming.

9
10 ii. There is no evidence that the 2001 Framework prevents effective fuels treatment

11 The Forest Service also contends that the resource-protective Standards and Guidelines would
12 in some instances preclude or reduce fuels treatment. The Forest Service itself admits that this is
13 not new information and was in fact discussed in the 2001 FEIS. In discussing the contention that
14 some of the 2001 Framework's protective Standards and Guidelines are an obstacle to meeting the
15 2001 Framework's fuels management objectives, the FSEIS states that "[t]he potential for this
16 problem was recognized in the FEIS with a statement that 'Modified 8 would have stand level
17 structural requirements that could preclude full implementation of the fuels strategy' (FEIS volume
18 1, 'Summary,' page 29)." SNFPA 03101. The only change is the agency's new emphasis on
19 mechanical fuel treatment and timber harvesting to the exclusion of other considerations; as
20 discussed, in 2001, the Forest Service struck a more resource-conservative balance, finding it
21 necessary to protect wildlife and habitat.

22 Moreover, there is no evidence that the 2001 Framework has substantially interfered or will
23 substantially interfere with necessary fuels treatment in the near term, or in the important wildland
24 urban interface. In 2001, the Forest Service noted that while the Standards and Guidelines designed
25 to retain habitat potentially could hinder full implementation of the fuels management strategy,
26 "[t]his is not a problem in the short term (first decade) given the number of acres needing treatment."
27 2001 FEIS, Vol. 2, ch. 3 at p. 305. Notwithstanding this backlog, the Forest Service made very little
28 attempt to implement the 2001 Framework. As the Management Review Team conceded in its 2003

1 report, there thus is "[l]ittle information relating to estimating actual program accomplishment."
2 SNFPA 01929; *see also* SNFPA 001927; SNFPA CD#SEIS10, Doc. SN-1454 (attachment) (e-mail
3 from D. Yasuda, Assistant Resource Officer/Wildlife Biologist to Sam Wilbanks, Feb. 21, 2003, FS
4 R5);^{17/} SNFPA 02442 (notes from owl scientist meeting, August 7, 2003); CA 00048-00050
5 (California Attorney General comments cataloguing limited implementation of 2001 Framework);
6 SNFPA 02469 (Forest Service WO-WFW comments) (noting that there was no evidence that
7 "implemented treatments have been ineffective in achieving fire and fuel objectives").

8 In 2001, the Forest Service contemplated that if problems arose during implementation,
9 adaptive management provided an adequate mechanism to address such problems and to make
10 required changes to the Framework. But the Forest Service admits that it made virtually no attempt
11 to implement the 2001 Framework and, therefore, had no direct evidence that it was unworkable.
12 The agency's conclusion that the 2001 Framework was unworkable came almost solely from the
13 opinions of district rangers who, not surprisingly, were resistant to change and reluctant to accept
14 reductions in local "flexibility." As agency staff acknowledged, "a lot of the concern from [District]
15 Rangers collectively seems to be based upon the hypothetical[.]" SNFPA CD#SEIS10, Doc. SN-
16 1454 (attachment) (e-mail from D. Yasuda, Assistant Resource Officer/Wildlife Biologist to Sam
17 Wilbanks, Feb. 21, 2003, FS R5). These Forest Service employee opinions, without supporting data,
18 are not substantial evidence. "NEPA does not allow an agency to rely on the conclusions and
19 opinions of its staff ... without providing both supporting analysis and data." *Sierra Club v.*
20 *Eubanks*, 335 F.Supp.2d 1070, 1076 (E.D. Cal. 2004) (citing *Idaho Sporting Congress v. Thomas*,
21 137 F.3d 1146, 1150 (9th Cir. 1998)).

22 Moreover, even if the Forest Service had evidence from implementation that the 2001
23 Framework was unworkable in certain respects, under the rule of *State Farm*, the response to any
24 such problems would be to identify the specific Standards and Guidelines and their specific
25 applications that were purportedly unworkable and to devise a revision that was specifically
26

27 17. For unexplained reasons, the Yasuda e-mail was not contained in the Administrative
28 Record in its own right, but only as an attachment to a comment letter on the DSEIS.

1 designed to address the problem. The fact that there may be unforeseen problems in implementing
2 certain Standards and Guidelines in specific parts of specific forests does not reasonably justify
3 revoking the 2001 Framework in its entirety. *See State Farm*, 43 U.S. at 47 (holding that fact that
4 automatic seatbelts can be detached "would not justify any more than an amendment" to disallow
5 "technology which will not provide effective passenger protection").

6
7 iii. There is no evidence that the 2001 Framework could not have been funded or
8 that funding could come only from increased timber harvesting

9 The remaining fire and fuel-related justification for the agency's about-face is the asserted need
10 to fund fuel treatment. The need to fund the elements of the Sierra Nevada Forest Plan
11 Amendments, including but not limited to fuels management, is not a new circumstance. In 2001,
12 the Forest Service set forth and compared the costs of implementing the various proposed
13 alternatives, including the alternative selected, and discussed the varied sources of funding and
14 assistance (including, but not limited to, timber harvesting), and the Regional Forester determined
15 that the costs of implementing the 2001 Framework were "realistic and reasonable." 2001 FEIS,
16 Vol. 1, ch. 2 at p. 200; *id.* at Vol. 2, ch. 3 at pp. 267-269, 300; *id.* at p. 302, Figure 3.5x and Table
17 3.5v; *id.* at p. 303, Table 3.5w; *id.* at p. 549; SNFPA 00258 (2001 ROD).

18 Granted, timber harvesting can generate agency funds without requiring the agency to lobby
19 Congress for a larger budget. 2001 FEIS, Vol. 2, ch. 3 at p. 268-269. While it may be expedient
20 for the agency to fund itself by timber harvesting, the Forest Service has not justified its decision
21 that timber harvesting be only source of funds that the agency should look to fund its activities.
22 Moreover, the Forest Service has not attempted to establish: that it anticipates a budget shortfall and
23 the extent of such shortfall; that, once placed in order of priority, essential management tasks will
24 be left undone; or that timber sales are cost effective and, on balance, profitable. *See* SNFPA 02471-
25 02472, 02479 (Forest Service WO-WFW comments). Without this analysis, the agency's exclusive
26 focus on timber harvesting as a funding source is arbitrary and capricious.

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- 1 d. There is no new information or changed circumstances about implementation of the
2 Quincy Pilot Project, only an increased willingness to risk irreparable losses to
3 species and habitat in exchange for short-term economic gains

4 As a final justification, the Forest Service states that the 2001 Framework results in a lost
5 opportunity to test the effects of mechanical fuels treatment and timber harvesting on old forest-
6 dependent species such as the spotted owl and will compromise the Quincy Pilot Project's "goal of
7 commodity production." SNFPA 03101. In 2001, in applying the 2001 Framework to the Quincy
8 Pilot Project area, the Forest Service made a purposeful decision based on the finding that "the entire
9 level of management activity specified" in the Quincy Pilot Project legislation could not "be
10 implemented without degrading owl habitat [and] without increasing risk to owl viability." SNFPA
11 00279 (2001 ROD). The Forest Service's decision to apply the protections of the 2001 Framework
12 to the Quincy Pilot Project area was fully consistent with the decision that the Forest Service made
13 in 1999 – that full implementation posed a serious risk to owl viability. SNFPA CD#16, 1999
14 Quincy ROD at p. 6. The Forest Service in 2004 has provided no evidence – indeed, has not even
15 attempted to show – that the cautious approach adopted for the Quincy Pilot Project area in 1999
16 and carried forward in the 2001 Framework was in error. Accordingly, the Forest Service has failed
17 to provide a reasoned analysis supporting its new decision to allow full implementation of the pilot
18 project in prime owl habitat.

19 In sum, the Forest Service has failed to identify any substantive new information or changed
20 circumstance that justifies jettisoning the 2001 Framework before any substantial implementation
21 in favor of increased mechanical fuel treatment, timber harvesting and grazing in sensitive habitat.
22 The issues identified by the Forest Service as "new" or "changed" were fully considered by the
23 Forest Service as part of its decision making in 2001. The Forest Service's abrupt change in course
24 therefore is arbitrary and capricious in violation of the APA.

- 25 C. The Forest Service violated NEPA in rejecting the 2001 Framework and replacing it with the
26 2004 Framework without taking a "hard look" at the environmental consequences

27 A court reviews an agency's compliance with NEPA pursuant to the APA, employing a "rule
28 of reason" to determine whether an EIS contains a "reasonably thorough discussion of the significant
aspects of the probable environmental consequences." *Ctr. for Biological Diversity v. U.S. Forest*

1 *Service*, 349 F.3d 1157, 1166 (9th Cir. 2003) (quotation omitted). Whether an agency has engaged
2 in an adequate discussion is determined in view of the Act's purposes and goals – to inform the
3 public and facilitate informed agency decision making. *Id.* "NEPA does not set out substantive
4 environmental standards, but instead establishes 'action-forcing' procedures that require agencies to
5 take a 'hard look' at environmental consequences." *Metcalf v. Daley*, 214 F.3d 1135, 1141 (9th Cir.
6 2000). While "NEPA does not require that agency officials be 'subjectively impartial,'" it does
7 require "that projects be objectively evaluated." *Id.* at 1142. The comprehensive, objective "hard
8 look" must be taken "in good faith, not as an exercise in form over substance, and not as a subterfuge
9 designed to rationalize a decision already made." *Id.* As discussed below, the agency did not take
10 the objective "hard look" required by NEPA in several significant respects. Each of these defects,
11 standing alone, requires invalidation of the 2004 FSEIS and the agency's decision to adopt
12 Alternative S2.

13
14 1. The Forest Service's statements of the purpose and need for jettisoning the 2001
Framework were misleading and merely served a predetermined outcome

15 An accurate and fair statement of the purpose of and need for a project is the starting point of
16 an adequate analysis under NEPA. *City of Carmel-by-the-Sea v. U.S. Dept. of Transp.*, 123 F.3d
17 1142, 1155 (1997). In this case, the Forest Service's statement of the purpose of and need for
18 revisiting the 2001 Framework was misleading and disingenuous. As demonstrated above, the
19 Forest Service's assertions of "new information" and "changed circumstances" were specious. The
20 absence of any external impetus for the abrupt change in course strongly suggests that the Forest
21 Service first arrived at its preferred alternative (one that substantially favored timber harvesting,
22 grazing and local "flexibility" to the detriment of other forest uses and management goals), and then
23 proceeded to cobble together colorable purposes and needs that would appear to justify the change.
24 Such predetermination contravenes NEPA's purposes. *Metcalf*, 214 F.3d at 1142.

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1 2. The 2004 Final Supplemental EIS failed to disclose and address opposing expert
2 viewpoints

3 In an EIS, an agency "shall discuss at appropriate points in the final statement any responsible
4 opposing view which was not adequately discussed in the draft statement and shall indicate the
5 agency's response to the issues raised." 40 C.F.R. § 1502.9(b). Where "commenters' evidence and
6 opinions directly challenge the scientific basis upon which the Final EIS rests and which is central
7 to it," the agency must "disclose and respond to such viewpoints in the final impact statement itself."
8 *Ctr. for Biological Diversity*, 349 F.3d at 1167.

9 In *Center for Biological Diversity*, for example, the Forest Service received comments from
10 the Arizona Game and Fish Department ("AGFD"), the New Mexico Department of Game and Fish
11 ("NMDGF"), a wildlife biologist employed by the Forest Service, and the Center for Biological
12 Diversity challenging the Forest Service's conclusion that the northern goshawk was a "habitat
13 generalist" – a conclusion that was central to the Forest Service's recommendations in the final
14 environmental impact statement. *Id.* at 1160, 1161. The court noted that in the Final EIS, the Forest
15 Service made some changes in response to the comments, modifying one alternative "to reflect
16 verbatim comments submitted" by the state agencies. *Id.* at p. 1164. The Final EIS also included
17 a comment section in which the agency categorized public comments into groups and responded to
18 each group of comments. *Id.* at 1164-65. In an appendix, the Forest Service included copies of
19 certain agency comments letters, including the joint letter of ADGF and NMDGF (from which it
20 redacted the attachment discussing the goshawk issue). The Forest Service did not include copies
21 of the wildlife biologist's or the Center for Biological Diversity's comments in the final EIS. *Id.* at
22 1165. On appeal, the Ninth Circuit held that the Forest Service's failure to disclose and respond to
23 "responsible opposing scientific viewpoints" violated NEPA. The court expressly rejected the Forest
24 Service's argument that its changes to one alternative to reflect the comments, its inclusion of the
25 redacted letter, or its response to the agency's comments in the record but outside of the final EIS
26 were sufficient to cure the defect. *Id.* at 1168-1169; *see also Seattle Audubon Soc'y v. Mosely*, 798
27 F.Supp. 1473, 1478 (W.D. Wash. 1992), *aff'd sub nom Seattle Audubon Soc'y v. Espy*, 998 F.2d 699
28 (9th Cir. 1993) (holding that in responding to concern of owl scientists about whether species could

1 survive near term loss of habitat, "agency may not rely on conclusory statements unsupported by
2 data, authorities, or explanatory information").

3 The 2004 FSEIS suffers from similar fatal defects. As discussed above, commenting on the
4 2003 DSEIS, USEPA and USFWS, California state resource agencies, the Science Consistency
5 Review Teams, owl scientists, the willow flycatcher Conservation Strategy Subgroup, and the
6 Watershed, Fish, Wildlife, Air and Rare Plants group expressed serious concerns about the risks
7 posed by the Forest Service's abrupt change in course and the agency's return to an emphasis on
8 resource extraction. These experts noted the risks to the California spotted owl in the short term
9 (year 0 to 20) from increased timber harvesting and the risks to the Yosemite toad and willow
10 flycatcher from the loosening of restrictions on grazing and decreased emphasis on surveying, and
11 the potential impacts to water quality from substantially increased land disturbance. These experts
12 also urged the Forest Service to employ confidence limits in modeling of long-term benefits, noting
13 that without them, "it is not defensible to solely rely on a single deterministic projection." SNFPA
14 02582; *see also* SNFPA 02471.

15 The Forest Service's response to these substantial and important objections and concerns was
16 minimal. The Forest Service did not attempt in the 2004 FSEIS to respond to the federal and state
17 resource agencies' comments. Instead, the Forest Service photocopied them and put them in a stack
18 behind its response to summarized public comments, mixing the critical agency comment letters in
19 with comments from counties and local agencies that, not surprisingly, favor a return to increased
20 timber harvesting and grazing and their resulting economic benefits. SNFPA 03564-3933 (2004
21 FSEIS, Vol. 2). The critical agency comment letters were not keyed in any way to the agency's
22 response to public comments, nor was the existence of substantial controversy on the part of these
23 resource agencies and experts disclosed to the public in the text of the FSEIS. *See, e.g.*, SNFPA
24 03103-3104 (discussing only "public concerns"). More importantly, there are very few substantive
25 changes from the DSEIS to the FSEIS. As USEPA took pains to note in its post-decision letter, the
26 Forest Service was not responsive to the serious scientific and technical concerns it expressed about
27 the DSEIS. SNFPA CD#SEIS2, SEIS_002028.

28 As for the three Science Consistency Review Team reports, the agency did not include these

1 in 2004 FSEIS, but instead merely summarized them. SNFPA 03503-3524. The agency made no
2 attempt to respond to the pointed concerns and criticisms of individual reviewers (*e.g.*, that the
3 Conservation Assessment for the willow flycatcher did not support the change in management
4 direction), but responded only to the summary of concerns at the outset of the report, which were
5 much more generalized. As for those parts of the Science Consistency Review Team reports that
6 the Forest Service did address, the agency's responses were generally terse and devoid of analysis.
7 For example, in response to the comment that short-term management activities are more relevant
8 to owl population persistence than long-term projections, the Forest Service responded, in full:

9
10 More emphasis was added for the potential short term effects within the document. The [2001]
11 FEIS discusses short-term impacts of the Alternatives on CASPO [the owl] and has considered
12 tradeoffs of treatments to protect and enhance long-term sustainability of resources, species
viability, and impacts on multiple resources. It is the responsibility of the Responsible Official
to weigh this information and select the alternative that best balances risk, uncertainty, effects
to resources, public welfare and safety.

13 SNFPA 03517. Similarly, in response to the Science Consistency Review Team's comment that the
14 agency's failure to include confidence limits and its use of models to project future conditions
15 beyond 20-30 years is "not defensible," the agency stated, in full: "The parameters and sensitivity
16 of models used in analysis for the FSEIS is [sic] discussed in Appendix B-3. Risk, uncertainty and
17 ambiguity is also analyzed and disclosed." *Id.*

18 Neither did the Forest Service disclose or respond in the FSEIS to the separate comments of
19 Dr. Verner (one of the authors of the 1992 CASPO report) questioning the Forest Services's
20 modeling and disputing the agency's assertion that PACs in fact are being "lost" to fire at an undue
21 rate. And the Forest Service did not include the willow flycatcher subgroup's or the Watershed,
22 Fish, Wildlife, Air and Rare Plants group's comments in the FSEIS, in full or in summary, and did
23 not mention these groups' substantial concerns. *See, e.g.*, SNFPA 03304 (stating only that a willow
24 flycatcher working group had been formed).

25 In short, the Forest Service has failed to disclose to the public and to address in any meaningful
26 way the chief concern of the resource agencies and well-respected experts who reviewed the 2004
27 Framework – namely, that there is a substantial likelihood that any potential long-term benefits do
28 *not* in fact outweigh the risks in the short term. While the Forest Service mentions in the 2004

1 FSEIS that there is short term risk to old forest-dependant and aquatic species such as the spotted
2 owl, willow flycatcher and Yosemite toad, the agency does so "without explaining the magnitude
3 of the risk or attempting to justify a potential abandonment of conservation duties imposed by law."
4 *See Seattle Audubon Soc'y*, 798 F.Supp. at 1483. "An EIS devoid of this information does not meet
5 the requirements of NEPA." *Id.*

6
7 3. The Forest Service failed adequately to discuss the environmental consequences of
8 replacing the 2001 Framework with the 2004 Framework

9 An agency in an EIS is required to discuss the project's environmental consequences. The
10 environmental consequences section "forms the scientific and analytic basis" for comparing the
11 alternatives. 40 C.F.R. § 1502.16. The EIS must examine

12 the environmental impacts of the alternatives including the proposed action, any adverse
13 environmental effects which cannot be avoided should the proposal be implemented, the
14 relationship between short-term uses of man's environment and the maintenance and
15 enhancement of long-term productivity, and any irreversible or irretreivable commitments of
16 resources which would be involved in the proposal should it be implemented.

17 40 C.F.R. § 1502.16. The environmental consequences section must also discuss, among other
18 things, "[m]eans to mitigate adverse environmental impacts[.]" 40 C.F.R. § 1502.16(h). Examples
19 of the 2004 FSEIS's shortcomings in evaluating impacts are set forth below.

20
21 a. The 2004 FSEIS failed to analyze the impacts of substantially increasing timber
22 harvesting

23 While the long-term benefits to species and wildlife from the 2004 Framework are speculative
24 at best, the disturbance that will occur in the short term is certain. Under the 2004 Framework,
25 timber harvesting will substantially increase – by 4.7-fold over projected 2001 Framework levels
26 in the first decade and 6.4-fold in the second decade, comparing annual green timber harvest
27 volume. Harvesting under the 2004 Framework could be even greater than projected because there
28 is no limit to harvesting undertaken as "Forest Health Treatments."

Notwithstanding the significant increase in timber harvesting, the FSEIS contains only limited
and very general discussions of the potential adverse environmental impacts scattered throughout
the document. *See, e.g.*, SNFPA 03281; SNFPA 03167; *see also* SNFPA 03338-39 (Tables 4.3.2.3d,
4.3.2.3e, 4.3.2.3f, and 4.3.2.3g); SNFPA 03348 (Table 4.3.2.3k). For example, the Forest Service

1 acknowledges that "[m]echanical treatments involve soil disturbance and biomass removal and
2 consequently may result in increased erosion and sedimentation, runoff, water temperatures, and
3 altered inputs of woody debris to stream channels." SNFPA 03281. The agency summarily
4 concludes, without any attempt to quantify effects, that "[t]hese risks are moderately higher under
5 Alternative S2 because of the higher intensity treatments and probable need for more skid trails,
6 landings, and other possible sources of sediment." *Id.*

7 In fact, at various points, the Forest Service trivializes the impacts that increased timber
8 harvesting will have. Perhaps the most egregious example is a pie chart showing that annual timber
9 harvesting under the Revised Framework will result in the removal of only 0.25% of the forests'
10 "current inventory." SNFPA 03390 (Figure 4.4.1c).^{18/} This chart provides no information about
11 potential impacts that could be useful to the public or the decision maker, but is merely an attempt
12 to cast the predetermined alternative in a favorable light. While one might expect this type of
13 presentation in a public relations campaign, it does not satisfy the public disclosure and informed
14 agency decision making purposes of NEPA.

15 b. The 2004 FSEIS failed to analyze impacts to old forest-dependent species, including
16 the spotted owl

17 In the 2001 Framework ROD, the Forest Service identified the long-term protection and
18 recovery of old forest-associated species, including the California spotted owl, as one of its greatest
19 concerns. The Forest Service undertook to address its concern through, among other things,
20 protection and management of spotted owl home range core areas and management of general forest
21 to maintain and increase the amount of suitable spotted owl habitat. In 2001, the Forest Service
22 rejected alternatives with higher outputs of goods and services because they posed greater
23 uncertainty and higher risks to ecosystem sustainability and species viability.

24 In the 2004 FSEIS, Alternative S2 authorizes increased timber harvest, leading to reduced
25

26 18. The pie chart, Figure 4.4.1c, did not appear in the DSEIS. *See* DSEIS, ch. 4 at pp.
27 231-235. It is very similar to the pie chart mailed out as part of the "Forests with a Future"
28 campaign stating that only 0.2% of the forests medium-sized trees will be removed each year.
SNFPA CD#SEIS2, SEIS_02_002192; *see id.* at SEIS_02_002116-2123. The "Forests with a
Future" slogan was added to the cover of both volumes of the 2004 FSEIS.

1 canopy cover, and the taking of larger trees that pose no fire danger, and allows for full
2 implementation of the Quincy Pilot Project in prime owl habitat. Nevertheless, Alternative S2 was
3 the agency's preferred, and ultimately its chosen, alternative. The Forest Service justified its
4 decision by summarily stating that the risk of "temporarily" changing habitat for the spotted owl and
5 other forest-dependent species is outweighed by the long term benefits of reduced fire. The FSEIS
6 focuses on future old forest habitat conditions, contending that in the long-term (*i.e.*, in the 5th and
7 13th decade), the differences between the 2001 Framework (S1) and the 2004 Framework (S2) are
8 small. For example, Table S1 states that the percentage change in numbers of large trees (+5.5%)
9 by year 20 is the same for both alternatives. SNFPA 03082 (Table S1); SNFPA 03167 (Table
10 2.5.1a). The Forest Service cites only the results of long-term modeling to support its statement that
11 "[a]ll alternatives are designed to protect and maintain blocks of old forest." SNFPA 03167; *see also*
12 SNFPA 03268; SNFPA 03338-03339 (Tables 4.3.2.3d, 4.3.2.3e, 4.3.2.3f, and 4.3.2.3g); SNFPA
13 03348.

14 The Forest Service's risk-benefit analysis for the owl and other old forest species is defective
15 for two reasons. First, there is no substantial evidence to support the Forest Service's conclusion that
16 impacts to the owl and other old forest species in the short term are merely "temporary" and
17 therefore may be wholly discounted.^{19/} As the expert noted, and the Forest Service itself
18 acknowledged, "[w]ith regard to owl population persistence, the short-term effects of management
19 activities are believed to be most relevant[.]" SNFPA 03337 (2004 FSEIS). The Forest Service at
20 the same time also acknowledges that "[o]ver a span of several decades, there are likely to be
21 subsequent revisions to planning efforts and unforeseen (and unpredictable) ecological events.
22 Thus, the analysis done in support of forest planning cannot be expected to yield a precise forecast
23 of the outcomes 50-100 years into the future." *Id.* And, as the Forest Service admits, "[i]n the short
24 term, Alternative S2 increases risk of continued declines in owl density within areas of concern due
25 to more intensive thinning based on application of forest-wide standards and guidelines from

27 19. As discussed above at section VI.A.3., in the 2004 FSEIS, unlike the 2001 FEIS, the
28 Forest Service was unwilling even to state its degree of "confidence" that the preferred
alternative would not adversely impact old forest habitat.

1 mechanical treatments in mature forest stands and HRCAs." SNFPA 03342; *see also* SNFPA 03340,
2 03079, 03112. But the magnitude of the risk in the near term is never disclosed or analyzed in the
3 2004 FSEIS. Rather, the Forest Service emphasizes that in years 20, 50 and 130, it predicts that the
4 number of large trees will be the same under the 2004 Framework as it would have been under the
5 2001 Framework and argues that in the future, there will be ample owl habitat under the selected
6 alternative.

7 The Forest Service chose to disclose the results of its habitat modeling at these future points
8 in time because they showed the newly selected alternative in a favorable light. While, ordinarily,
9 an agency has the discretion to determine how it will measure environmental impacts, its method
10 of analysis "must represent a reasoned decision and cannot be arbitrary." *Idaho Sporting Congress*
11 *v. Rittenhouse, Inc.*, 305 F.3d 957, 973 (9th Cir. 2002). In *Rittenhouse*, the court reviewed the
12 adequacy of the Forest Service's EIS for a timber sale. The court noted that "[i]n the face of its own
13 finding that there would be significant depletion of habitat, the Forest Service arbitrarily chose
14 'home range' as the scale of analysis The Forest Service ignored the detailed and well-supported
15 conclusions of its own scientists that cumulative effects analysis of the species at issue 'must be
16 addressed at a landscape scale (emphasis added).'" *Id.* at p. 973 (alteration in original). The
17 *Rittenhouse* court concluded that the Forest Service acted arbitrarily in employing the home range
18 for its analysis without justifying its decision in the face of contrary evidence. *Id.* at 974. Similarly,
19 in *Seattle Audubon Soc'y v. Mosely*, 798 F.Supp. at 1478, 1482-1483, the court rejected the Forest
20 Service's attempt to rely on projected long term gains in habitat for the northern spotted owl while
21 allowing further, near term loss because agency had failed to give a reasoned analysis and response
22 to the "chief concern of scientists" – "whether the owl can survive the near-term loss of another half-
23 million acres of its habitat."

24 Here, the Forest Service's decision to ignore short term impacts to the owl and other old forest
25 species does not represent a reasoned decision. If owls and other old forest-dependent species do
26 not survive the first 20 years of timber harvesting and fuels treatment as their habitat is
27 "temporarily" changed, they will not be present to benefit from any resulting improvements habitat
28 in years 20 and beyond. In short, habitat without surviving owls is not owl habitat.

1 Second, turning to the asserted long-term benefits, there is no evidence to support that
2 reductions in wildfire will lead to a net increase in suitable owl habitat. As discussed in section
3 VI.B.2.a.iii., above, the Forest Service admits that it does not know whether the benefits of treating
4 owl habitat to reduce its susceptibility to wildfire will outweigh the potential negative effects, and
5 it predicts that in the first 20 years, Alternative S2 will lead to the same number of PACs being
6 "lost" as would continuing under the 2001 Framework. SNFPA 03335, 03348 (Table 4.3.2.3k).
7 Accordingly, the Forest Service's discussion and analysis of the potential risks and benefits to the
8 California spotted owl are deficient under NEPA.

9
10 c. The 2004 FSEIS fails analyze the impacts of increased "flexibility" in controlling grazing

11 Shortly after the adoption of the 2001 Framework, but before any real attempt at
12 implementation, the Forest Service's concern shifted from the risk of irreparable impacts on aquatic
13 and riparian ecosystems and sensitive species to the economic impacts on grazing permit holders.
14 To lessen the impacts on a few permittees, the Forest Service will now, among other things, "allow
15 flexibility to design management practices to address local conditions." SNFPA 03284. The Forest
16 Service admits in passing that its revisions may increase risks to aquatic and riparian species. But
17 rather than describing and analyzing the magnitude of these potential adverse impacts, the Forest
18 Service merely implies or states – summarily and repeatedly – that Alternative S2's alternative
19 management strategies will provide sufficient protection. SNFPA 03171; *see also* SNFPA 0374;
20 SNFPA 03284; SNFPA 03359; SNFPA 03372-3373. The Forest Service does not cite any studies,
21 reports, or literature to support its view that increases in grazing and a return to local flexibility (a
22 practice that, according to the experts, has a very poor track record of protecting sensitive species)
23 will protect the Yosemite toad and willow flycatcher or contribute to their recovery. Indeed, the
24 Forest Service's own working group informed it that Alternative S2 would contribute to the willow
25 flycatcher's continued decline. Because the Forest Service has failed to disclose and analyze the
26 potential impacts to aquatic ecosystems and species of rejecting the 2001 Framework, the 2004
27 FSEIS does not satisfy NEPA.

28 ///

1 d. The 2004 FSEIS failed to analyze the impacts of fully implementing the Quincy Pilot
2 Project

3 Under the 2004 Framework, harvesting under the Quincy Pilot Project will proceed unimpeded;
4 even the mitigation adopted in 1999 to protect the spotted owl has been discarded. This is not a
5 small change. Much of the overall projected increase in timber harvesting that will occur in the
6 short term is due to the full implementation of the Quincy Pilot Project. SNFPA 03387 (Table
7 4.4.1a); SNFPA 03389 (Table 4.4.1b).

8 The Forest Service fails fairly to evaluate and disclose the potential impacts that
9 implementation of this large-scale project will have. Even a cursory examination of the 1999
10 Quincy FEIS and ROD shows that many such impacts (*e.g.*, impacts to water quality and sensitive
11 species and ecosystems) are likely. But the Forest Service has chosen to scatter discussion of the
12 impacts of implementing the Quincy Pilot Project throughout the FSEIS, making it difficult for a
13 reader to evaluate this aspect of the 2004 Framework.

14 In addition, the Forest Service has avoided drawing any conclusions about the impact of the
15 Quincy Pilot Project from the available data. Instead, the Forest Service simply recites isolated
16 facts. For example, focusing on the spotted owl, the Forest Service notes that 411 of the existing
17 1,321 California spotted owl PACs – over 30% of owl PACs – are located within the Quincy Pilot
18 Project area. *See* SNFPA 03334. The Forest Service acknowledges that "full implementation of [the
19 Quincy Pilot Project] under Alternative S2 is projected to result in roughly 65,000 fewer acres of
20 suitable owl habitat in 20 years than Alternative S1." SNFPA 03339. In the Quincy Pilot Project
21 area, "123,500 acres (8.7%) of stands currently in >50% canopy cover could be reduced to 40%
22 canopy cover." *Id*

23 While the Forest Service discloses these facts, the agency has completely failed to analyze their
24 significance and implication. This failure is a significant defect, especially since, as discussed, the
25 Forest Service had previously found in 1999 and 2001 that full implementation of the Quincy Pilot
26 Project "could pose a serious risk to the viability of the California spotted owl in the planning area."
27 SNFPA CD#16 (1999 Quincy ROD at p. 6); *see also* SNFPA 00278 (2001 ROD). The Forest
28 Service's failure to disclose and analyze the potential adverse impacts of full implementation of the

1 Quincy Pilot Project violates NEPA.

2 e. The 2004 FSEIS failed to analyze disclose the uncertainty of future asserted benefits

3 A central premise of the 2004 FSEIS is that short-term risks to sensitive species and ecosystems
4 are outweighed by long-term, future benefits. As discussed above, from the DSEIS to the FSEIS,
5 the Forest Service continued to rely almost solely on long-term modeling to show that in the future,
6 Alternative S2 was comparable to the 2001 Framework in terms of old forest habitat – that is, that
7 Forest Service could allow production of high levels of good and services while still protecting the
8 sensitive species and ecosystems of the Sierra Nevada.

9 The defects in the agency's use of long term modeling for impacts on old forest-dependent
10 species like the spotted owl are discussed above. The agency use of modeling to predict the
11 alternatives effects on wildfire is also illustrative. The Forest Service states that, on an annual basis,
12 12,000 fewer acres of forest (not restricted to old forest habitat) would be expected to burn under
13 Alternative S2 than under Alternative S1, which the Forest Service characterizes as a reduction of
14 20%. SNFPA 03266; SNFPA 03287. (This asserted difference is plotted as a line, rather than a
15 range. SNFPA 03287 (Figure 4.2.4a).) The Forest Service also predicts that in the 7th decade,
16 Alternative S2 will result in 6,539 fewer acres "lethally" burned (again not restricted to old forest
17 habitat). SNFPA 03288. But neither the FSEIS narrative nor the graphs disclose the confidence
18 interval or "error bar" for the results of modeling Alternatives S1 and S2, though the Forest Service
19 must concede that "[s]ignificant uncertainty surrounds projections of future wildfire acreage and
20 percentages burned at high severity." SNFPA 03286; *see also* SNFPA 03143.

21 The Forest Service's heavy reliance on modeled long-term benefits to support its conclusion
22 that higher levels of mechanical fuels treatment, timber harvesting and grazing are compatible with
23 robust and resilient populations of old forest and aquatic species does not square with its admission
24 that its modeling for all relevant benefits grows increasingly uncertain. *See Greenpeace Found. v.*
25 *Mineta*, 122 F.Supp.2d 1123, 1133 (Hawaii 2000) (holding that National Marine Fisheries Service's
26 determination that fisheries management plan was not likely to adversely affect monk seals "does
27 not square with NMFS's admission that the existing model grows increasingly uncertain"). This
28 problem is compounded by the agency's failure to employ error bars or confidence intervals, as it

1 was advised to do by experts including Dr. Verner and its own Washington staff. The lack of
2 confidence intervals is misleading, in that it creates an aura of certainty about the results. Had
3 confidence intervals been placed on the table and figures, it may have become apparent that in fact
4 the Forest Service could not predict whether the long term benefits of Alternative S2 were different
5 than those of the 2001 Framework, or that it could not make reliable predictions about relative
6 benefits beyond a certain time period (*e.g.*, up to year 20, but not beyond). Because modeling and
7 the existence of purported long-term benefits was central to the Forest Service's decision to jettison
8 the 2001 Framework and adopt the 2004 Framework, the Forest Service's failure to include
9 confidence intervals or error bars or otherwise disclose the magnitude of the models' uncertainty
10 over time violates NEPA. *See Lands Council v. Powell*, 395 F.3d 1019, 1032 (9th Cir. 2005)
11 (holding that agency's withholding of information on modeling's shortcomings, where agency made
12 "heavy reliance" on model, violated NEPA).

13
14 4. The Forest Service's inclusion of "Adaptive Management" does not fix the substantial
defects in the 2004 FSEIS

15 The Attorney General anticipates that the Forest Service's response to the many shortcomings
16 in its document will be to point to the "Adaptive Management" plan. In this case, there are several
17 reasons that adaptive management does not serve to fix the substantial defects in the FSEIS. Most
18 fundamentally, in the 2004 ROD, the Regional Forester acknowledged that there was no ready-to-
19 implement adaptive management plan. Rather, he directed the "Sierra Nevada implementation team
20 to complete an assessment of the cost of initiating the new work" set out in the FSEIS adaptive
21 management section. SNFPA 03003; *see also* SNFPA 03949 (letter from J. Blackwell to J. Verner
22 (June 7, 2004); SNFPA 4005 (appeal decision) (finding that 2004 FSEIS contains only "initial steps"
23 of an adaptive management plan).

24 In addition, in 2001, adaptive management was paired with a cautious approach that in some
25 circumstances restricted or disallowed timber harvesting and grazing until additional information
26 was gathered. Under the 2004 Framework, in marked contrast, these activities proceed even in the
27 face of uncertain impacts to sensitive habitat and species with potentially catastrophic consequences.
28 As one member of the Science Consistency Review team put it, the "change in focus" from 2001 to

1 2004 made inclusion of an effective adaptive management plan even more essential. SNFPA 02557.
2 But the 2004 Framework contains no discussion of what gaps in understanding must be filled. It
3 contains no discussion of how essential monitoring and surveying will be funded; rather, almost all
4 discussion of funding is focused on fuel treatment. And it contains no discussion of how the results
5 of monitoring will be translated into changes in management, *e.g.*, defining the circumstances that
6 would require reductions in allowed timber harvesting or elimination of grazing in certain
7 allotments.

8 While the Forest Service suggests that adaptive management will check any unanticipated
9 adverse impacts from increased timber harvesting and the loosening of restrictions on grazing, the
10 2004 FSEIS and the ROD do not support this sanguine view. Even the Regional Forester had to
11 admit that his plan for adaptive management "may be easier to promise than it is to deliver." SNFPA
12 03002. Where the environmental document "gives no reason for [the agency's] optimism" that
13 mitigation will protect species and habitat, the "agency's decision to proceed with a project is based
14 on unconsidered, irrational, or inadequately explained assumptions about the efficacy of mitigation
15 measures" and "the decision may be set aside as 'arbitrary and capricious.'" *Stein v. Barton*, 740
16 F.Supp. 743, 754 (D. Alaska 1990) (holding that Forest Service's FEIS gave "no reasons for the
17 Service's optimism" that monitoring and enforcement would protect salmon); *see also Seattle*
18 *Audubon Soc'y*, 798 F.Supp. at 1482 (noting that while Forest Service's expert recommended
19 proceeding with agency's proposed course of action and monitoring effects on owls, expert "did not
20 make clear how the situation could be rectified if the critics are correct").

21 VII. CONCLUSION

22 In 1998, when the Forest Service first gave notice of its intent to prepare a comprehensive
23 Sierra Nevada Forest Plan, the agency made a promise to the public. The agency would not
24 misuse uncertainty to create "false expectations" about the forests' ability to provide high levels
25 of goods and services without adverse impacts to ecosystems and species. In 2001, the Forest
26 Service found, based on expert advice and the available science, that it could not satisfy every
27 stakeholder. Especially dissatisfied with the Forest Service's new, more cautious approach to
28 resource management were those who felt that they had lost prerogatives previously enjoyed.

1 But the Forest Service determined that the new balance was required by its multiple use
2 mandate: "an alternative that would produce higher levels of measurable goods and service"
3 would "pose greater uncertainty and higher risks to ecosystem sustainability and species
4 viability."

5 Before the 2001 Framework could be implemented, the Forest Service abruptly changed
6 course. In the new Regional Forester's words, the Forest Service "doesn't want winners and
7 losers" – it "wants as many winners as possible to retain support for the work [it is] doing."
8 SNFPA 02436. The agency decided from the outset of its "review" that, notwithstanding what
9 the evidence showed, notwithstanding what the experts concluded, notwithstanding the
10 indisputable risk to species and ecosystems in the short term, notwithstanding the agency's
11 mandate to protect species and ecosystems, notwithstanding the existence of reasonable, more
12 measured alternatives, it would jettison the 2001 Framework to allow more mechanical
13 treatment, more timber harvesting, and more grazing. It would consider only this alternative.
14 And it would tell the public that the spotted owl, the Yosemite toad, the willow flycatcher would
15 be just fine, and perhaps better for it. The Forest Service's return to this false promise, without
16 consideration of any less drastic alternative, without evidence or reasoned analysis, and without
17 public disclosure of the magnitude of the risk to be incurred, violates NEPA and the APA.

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1 Dated: September 8, 2005

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