No. 12-623

In the Supreme Court of the United States

UNITED STATES FOREST SERVICE, ET AL., PETITIONERS

v.

PACIFIC RIVERS COUNCIL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether respondent Pacific Rivers Council (PRC) has Article III standing to challenge the Forest Service's 2004 programmatic amendments to the forest plans governing management of 11 Sierra Nevada Forests when PRC failed to establish that any of its members was imminently threatened with cognizable harm because he or she would come into contact with any parcel of forest affected by the amendments.

2. Whether PRC's challenge to the Forest Service's programmatic amendments is ripe when PRC failed to identify any site-specific project authorized under the amended plan provisions to which PRC objects.

3. Whether the National Environmental Policy Act required the Forest Service, when adopting the programmatic amendments, to analyze every type of environmental effect that any project ultimately authorized under the amendments throughout the 11 affected forests might have if it was reasonably possible to do so when the programmatic amendments were adopted, even though any future site-specific project would require its own appropriate environmental analysis before going forward.

PARTIES TO THE PROCEEDINGS

The petitioners are the United States Forest Service; Harris Sherman, Under Secretary of Agriculture; Tom Tidwell, Chief of the Forest Service; and Randy Moore, Regional Forester, Region 5, United States Forest Service.

The respondents are plaintiff Pacific Rivers Council and intervenor-defendants California Forestry Association, American Forest and Paper Association, Quincy Library Group, and Plumas County.

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The Solicitor General, on behalf of the United States Forest Service and various Forest Service officials, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-74a) is reported at 689 F.3d 1012. The opinion of the district court (App., *infra*, 75a-119a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 2012. A petition for rehearing was denied on June 20, 2012, and the court issued a slightly revised panel opinion on that date (App., *infra*, 1a-74a). On September 5, 2012, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to

and including October 18, 2012. On October 9, 2012, Justice Kennedy further extended the time to November 16, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in the appendix to this petition. App., *infra*, 124a-139a.

STATEMENT

1. a. The National Forest Management Act of 1976 (NFMA), 16 U.S.C. 1600 *et seq.*, requires the Secretary of Agriculture to "develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System." 16 U.S.C. 1604(a); see *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 728 (1998). The United States Forest Service develops such plans (also known as forest plans) to provide standards and guidelines for forest-resource management, taking into account both economic and environmental considerations, and to provide for multiple uses and sustained yield of forest resources. See 16 U.S.C. 1604(a), (e) and (g); 36 C.F.R. 219.1(c). Forest plans may be revised and amended as appropriate "in any manner whatsoever after final adoption after public notice." 16 U.S.C. 1604(a) and (f)(4).

Forest plans are broad planning documents that provide for the long-term management of National Forests. They generally do not authorize any particular on-the-ground action. Before proceeding with a site-specific project, the Forest Service must, *inter alia*, ensure that the proposed project is consistent with the applicable forest plan, conduct an environmental analysis pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, and provide notice and

an opportunity for comment to interested persons. See *Ohio Forestry*, 523 U.S. at 729-730.

b. Congress enacted NEPA to foster better decision-making by agencies. See 42 U.S.C. 4321; 40 C.F.R. 1500.1(c). NEPA requires that, whenever a federal agency proposes a "major Federal action[] significantly affecting the quality of the human environment," the agency must examine and inform the public about the reasonably foreseeable environmental effects of the proposed action. 42 U.S.C. 4332(2)(C); see 40 C.F.R. Pt. 1508; *Baltimore Gas & Elec. Co.* v. *NRDC*, 462 U.S. 87, 97 (1983). In so doing, the agency must prepare a "detailed statement" of the environmental impact of the proposed action—an "environmental impact statement" (EIS)—the requirements for which are set out in regulations issued by the Council on Environmental Quality (CEQ). 42 U.S.C. 4332(2)(C); 40 C.F.R. Pts. 1502, 1508.

2. The Sierra Nevada mountain range is one of the longest continuous mountain ranges in the contiguous United States, spanning more than 400 miles. App., *infra*, 4a. The Sierra Nevada region of California contains 11.5 million acres of National Forest System land. *Ibid.* This case involves amendments made in 2004 to the forest plans governing 11 National Forests in that region. *Id.* at 3a, 75a-76a.

a. Before the Sierra Nevada area was settled in the 1850s, wildfires of varying intensity were frequent. 1 USFS, *Sierra Nevada Forest Plan Amendment: Final Supplemental Environmental Impact Statement* 124 (Jan. 2004) (2004 EIS).[1] After European settlement, however, fire-suppression activities greatly reduced the

[1] Volume 1 of the 2004 EIS, reprinted in C.A. E.R. 125-627, is available at http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5350050.pdf.

incidence of mild- and moderate-severity fires in the Sierra Nevada. *Ibid.* The reduced role of fire in shaping that ecosystem contributed to denser forests and a substantial increase in the presence of live and dead fuels throughout the forests. *Ibid.* As a result, a much higher proportion of the fires that occur in the Sierra Nevada now are high-severity fires that burn much larger areas. *Id.* at 124-125.

Today, nearly eight million acres of the National Forests in the Sierra Nevada are at risk of wildfires that would cause the loss of key ecosystem components, including populations of sensitive wildlife species. 2004 EIS 44. The Forest Service has a significant interest in ameliorating that problem by, *e.g.*, thinning tree stands. USFS, *Sierra Nevada Forest Plan Amendment: Final Supplemental Environmental Impact Statement: Record of Decision* 60 (Jan. 2004) (2004 ROD)[2]; 2004 EIS 126-127. Because those forests are home to old-forest-dependent species (like the California spotted owl), management activities must balance the need for forest thinning to reduce fire risk with the habitat needs of wildlife (which will also benefit from the reduced fire risk associated with thinning). 2004 EIS 27, 141-145.

b. In the late 1980s, the Forest Service began developing a comprehensive strategy for managing natural resources and complex ecosystems in the Sierra Nevada in order to address fire risks. App., *infra*, 76a-77a. In 1998, Congress enacted the Herger-Feinstein Quincy Library Group Forest Recovery Act (HFQLG Act), Pub. L. No. 105-277, Div. A., § 1(e) [Tit. IV], 112 Stat. 2681-305 (16 U.S.C. 2104 note (2006 & Supp. V 2011)). The HFQLG Act directed the Forest Service to conduct a

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[2] The 2004 ROD, reprinted in C.A. E.R. 49-124, is available at http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsbdev3_046095.pdf.

pilot project on three Sierra Nevada National Forests to test and evaluate the effectiveness of specific resource-management techniques designed to provide for ecological restoration, fire-risk reduction, and improved economic stability in local communities. § 401(a), (b) and (d), 112 Stat. 2681-305 to 2681-306.[3] Subsequently, after its years of work, the Forest Service developed significant amendments in 2001 and 2004 to the plans for the 11 Sierra Nevada National Forests, and it prepared detailed programmatic EISs analyzing the potential effects of those amendments. App., *infra*, 77a-82a.

In January 2001, the Forest Service issued the first of the programmatic amendments, which is known as the 2001 Framework. See *Record of Decision: Sierra Nevada Forest Plan Amendment Environmental Impact Statement* (Jan. 2001) (2001 ROD), reprinted in C.A. E.R. 1071-1142. Among the stated purposes of the 2001 Framework were: (1) protecting, increasing, and perpetuating old-forest ecosystems; (2) protecting and restoring aquatic, riparian, and meadow ecosystems; and (3) managing fire, fuels, and forest health. 2001 ROD 1.

After receiving approximately 200 administrative appeals, the Forest Service affirmed the Framework's adoption, although it directed the Regional Forester to

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[3] Congress twice extended the HFQLG Act pilot project in five-year increments. See Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 6201(d)(5), 116 Stat. 419; and Department of the Interior, Environment, and Related Agencies Appropriations Act, 2008, Pub. L. No. 110-161, Div. F, § 434, 121 Stat. 2153. The HFQLG Act expired on September 30, 2012, though legislation that would extend the Pilot Project through 2022 is pending. See H.R. 3685, 112th Cong., 2d Sess. (June 15, 2012). Several projects remain to be implemented pursuant to the Forest Service's authority under the HFQLG Act. H.R. Rep. No. 524, 112th Cong., 2d Sess. Pt. I, at 2 (2012).

conduct further review of wildfire risks and the Forest Service's responsibilities under the HFQLG Act. App., *infra*, 79a. The review team conducted a year-long public review, concluding in 2003 that the 2001 Framework's "cautious approach" to active fuels reduction had limited its effectiveness. *Id.* at 79a-80a. The team noted that certain revisions to vegetation-management rules would simultaneously decrease flammable fuels in the forests and protect critical wildlife habitat by reducing the risk of stand-replacing wildfires. *Ibid.* The team further concluded that the 2001 Framework prevented the Forest Service from testing many of the resource-management activities that Congress directed it to test in the HFQLG Act. See Gov't C.A. Br. 5-7.

c. After considering various management strategies and preparing a supplemental EIS, the agency issued the 2004 Framework, which again amended the forest plans for the 11 Sierra Nevada National Forests. App., *infra*, 80a-82a. The 2004 Framework is designed to serve the same basic purposes as its 2001 predecessor, including balancing protection of old-forest-dependent species and the need to reduce fire risk. *Ibid.* The agency's decision adopting the 2004 Framework notes that the "thinning guidelines" under the 2001 Framework were "too meager" to protect "against devastating fires in the time frame needed." 2004 ROD 5. The Forest Service acknowledged that "[o]ne of the most difficult balancing tasks has been to find the best way to protect old forest dependent species and to increase and perpetuate old forest ecosystems, while [facing] a desperate need to intervene in the forest to reduce the fuel loads feeding catastrophic fires." *Ibid.* Informed by the Forest Service's three years of experience attempting to implement the 2001 Framework, and its conclusions that

that Framework's authorization of fuels management was inadequate to protect against catastrophic wildfires, the 2004 Framework authorized greater flexibility in designing fuels-reduction projects, including thinning to reduce forest density. *Id.* at 5-6, 8-9.

The 2004 Framework permits larger trees to be removed than the 2001 Framework did in some circumstances; but it still provides for future old-forest stands by requiring the retention of the largest trees and a minimum density of trees to protect old-forest stands from catastrophic wildfires. 2004 ROD 4-7. With respect to the protection of aquatic and riparian ecosystems, the 2004 Framework retains the key elements of the 2001 Framework. *Id.* at 10; App., *infra*, 81a.

3. In 2005, respondent Pacific Rivers Council (PRC), an environmental organization, filed suit in federal district court asserting a facial challenge to the 2004 Framework. App., *infra*, 3a, 14a. PRC alleged that the agency's decision adopting the 2004 Framework did not comply with NEPA and the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, because the supplemental EIS associated with the 2004 Framework did not adequately examine the effects of several aspects of the Framework on fish and amphibian species. App., *infra*, 14a.

The district court granted summary judgment to the Forest Service, holding that the analysis in the supplemental EIS was not arbitrary or capricious. App., *infra*, 75a-119a. The court explained that "[c]onsiderably less detail is required for a programmatic EIS [such as the 2004 Framework] than for a site-specific project." *Id.* at 93a. The court noted that a "programmatic forest plan like the 2004 Framework does not authorize the cutting of any trees or other on-the-ground activity. Instead, it

only establishes the standards and guidelines under which future projects permitting such harvest could occur." *Id.* at 94a (citing *Ohio Forestry*, 523 U.S. at 729). The court credited the EIS's conclusions that the Framework's effects on aquatic species could be minimal and that any effects that might result from specific projects could be analyzed more effectively in connection with those projects, given the variability both of aquatic habitats within the Sierra Nevada and of different project designs. *Id.* at 96a-104a.

4. The court of appeals reversed in part. App., *infra*, 1a-74a.

a. The court first rejected the government's argument that PRC had not established the requisite actual or imminent concrete injury to have Article III standing to challenge the 2004 Framework. App., *infra*, 15a-23a. The court relied on a declaration filed by PRC's chairman, Bob Anderson, which states, *inter alia*, that Anderson lives and "frequently hike[s] and climb[s] in the Sierra Nevada," that "some" of PRC's more than 750 members "live in California," and that many of its members "recreate in, fish throughout, and derive much satisfaction from the Sierra Nevada." *Id.* at 18a-19a (quoting declaration, which is reprinted at App., *infra*, 120a-123a). The court further believed that PRC would suffer aesthetic harms, not alleged in Anderson's declaration, as a result of the 2004 Framework. *Id.* at 19a-20a. In particular, the court hypothesized that timber harvesting on upper slopes would "likely be visible from great distances," and that significant harvesting would also take place near streams "where recreational users of forests spend much of their time." *Id.* at 20a.

The court rejected the government's contention that this Court's then-recent decision in *Summers* v. *Earth*

Island Institute, 555 U.S. 488 (2009), required the conclusion that respondent had failed to establish standing. App., *infra*, 17a-21a.[4] The court acknowledged that this Court in *Summers* found an environmental organization's assertion that its members would "visit national forests in the future and might come in contact with a parcel of" land affected by the challenged nationwide regulation to be insufficient to establish standing. *Id.* at 17a. The court of appeals nevertheless concluded that "*Summers* * * * [is] substantially different from this case." *Id.* at 18a. Although PRC did not identify any project that had been authorized by the 2004 Framework or would affect any of its members, the court reasoned that here, "[b]y contrast" to *Summers*, "[t]here is little doubt that members of [PRC] will come into contact with affected areas, and that implementation of the 2004 Framework will affect their continued use and enjoyment of the forests." *Id.* at 21a.

On the merits, the court of appeals rejected PRC's argument that the 2004 EIS's analysis of effects on amphibians was inadequate, App., *infra*, 41a-45a, but held that the EIS did not satisfy NEPA because it contained no discussion of the effects on particular fish species, *id.* at 25a-41a. The court held that "NEPA requires" both programmatic and project-specific EISs to analyze potential environmental consequences of a proposed plan "as soon as it is 'reasonably possible' to do so." *Id.* at 28a (quoting *Kern* v. *United States Bureau of Land Mgmt.*, 284 F.3d 1062, 1072 (9th Cir. 2002)). The court further held that it was reasonably possible for the 2004 Framework's supplemental EIS to analyze the effects on fish species because the EIS for the 2001 Framework

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[4] The government did not challenge PRC's standing in the district court.

"contained 64 pages of detailed analysis of environmental consequences of the 2001 Framework on individual fish species." *Id.* at 32a; see *id.* at 35a.

Judge N. Randy Smith dissented. App., *infra*, 46a-74a. Judge Smith did not address whether PRC had established standing, but he would have held that the 2004 EIS complied with NEPA. *Ibid.* Judge Smith rejected the majority's reliance on *Kern*'s "as soon as it can reasonably be done" standard, *id.* at 50a (quoting *Kern*, 284 F.3d at 1072), noting that that standard does not appear in NEPA or its implementing regulations and is contrary to the Ninth Circuit's longstanding rule that a full evaluation of effects need occur only when an agency proposes to make an irreversible and irretrievable commitment of resources at the project level (which the Forest Service had not done in issuing the forest plan amendments here), *id.* at 51a-56a. Judge Smith would have held that the 2004 EIS complied with NEPA because its general analysis of effects on aquatic habitat was sufficient to foster informed decision-making on a project-specific basis in the future. *Id.* at 56a-73a. Judge Smith credited the Forest Service's determination that a more detailed analysis of potential environmental effects on fish species should await project-level decisions. *Id.* at 68a-70a.

The court denied the government's petition for rehearing en banc, and the panel simultaneously issued a slightly revised opinion. See App., *infra*, 1a-74a.[5]

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[5] The 2004 Framework has been challenged (both facially and as applied to site-specific projects) in three other suits. The district court in those cases held that the Framework violated NEPA because the Forest Service did not adequately consider alternatives in preparing the 2004 Framework, and it ordered the Forest Service to prepare a supplemental EIS limited to remedy that problem. *Cali-*

REASONS FOR GRANTING THE PETITION

The Ninth Circuit held that PRC has standing to challenge the 2004 Framework, which amends the forest plans for 11 National Forests in the Sierra Nevada range, but does not itself authorize any site-specific project to proceed. Before the Forest Service may approve a particular project, it must issue a site-specific administrative decision that includes additional environmental analysis. PRC did not challenge any such site-specific decision rendered since the 2004 Framework was adopted, or indeed identify any specific location in the entire Sierra Nevada that has been or will be affected by the 2004 Framework in such a way as to threaten imminent harm to a specific PRC member. If PRC identifies such a project in the future and submits a declaration based on personal knowledge attesting to a resulting injury to a PRC member, PRC will have standing to challenge that project and the adequacy of the agency's associated environmental review, which would consist of both the agency's programmatic EISs and the site-specific EIS. But absent that showing, PRC does not have standing. The court of appeals' conclusion to the contrary directly conflicts with this Court's decision in *Summers* v. *Earth Island Institute*, 555 U.S. 488 (2009), and with decisions of several other courts of appeals. For similar reasons, PRC's challenge to the 2004 Framework is not ripe for

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fornia Forestry Ass'n v. *Bosworth*, No. 2:05-cv-00905-MCE-GGH, 2008 WL 4370074 (E.D. Cal. Sept. 24, 2008); *California* v. *United States Dep't of Agric.*, 2:05-cv-0211-MCE-GGH, 2008 WL 3863479 (E.D. Cal. Aug. 19, 2008), aff'd in part, 646 F.3d 1161 (9th Cir. 2011); *Sierra Nevada Forest Prot. Campaign* v. *Rey*, 573 F. Supp. 2d 1316 (E.D. Cal. 2008). The Ninth Circuit concluded that the district court had afforded too much deference to the Forest Service's experts and remanded for further proceedings on remedy. *Sierra Forest Legacy* v. *Sherman*, 646 F.3d 1161 (2011). Those proceedings are ongoing.

review independent of a challenge to a specific project approved in conformity with the Framework. The Ninth Circuit has repeatedly held that NEPA challenges to programmatic decisions are ripe even when they do not authorize any site-specific project. That rule conflicts with the rule applied in the District of Columbia Circuit and is in considerable tension with decisions of this Court.

Finally, the Ninth Circuit's holding that NEPA requires an agency to analyze every potential environmental effect at the first stage of a tiered decision-making process if it is reasonably possible to do so has no basis in NEPA or its implementing regulations. It is therefore contrary to this Court's repeated admonitions that courts may not impose NEPA obligations of their own making. The Ninth Circuit's decision imposes a new and unworkable burden on federal agencies that has the potential both to greatly increase the cost of complying with NEPA and to considerably slow federal action. Review by this Court is warranted.

A. The Court Of Appeals Erred In Holding That PRC Established Article III Standing

A straightforward application of this Court's decision in *Summers* requires the conclusion that PRC failed to establish Article III standing to challenge the 2004 Framework. The Ninth Circuit's decision has the effect of authorizing an environmental group to proceed with its request to enjoin a general framework affecting 11 different National Forests, as well as all site-specific projects within those forests, without identifying even one such project that would injure even one specific member.

1. PRC seeks to enjoin agency action that does not directly regulate its conduct or the conduct of its mem-

bers. "[W]hen the plaintiff is not [it]self the object of the government action or inaction [it] challenges, standing is not precluded, but is ordinarily 'substantially more difficult' to establish." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (quoting *Allen* v. *Wright*, 468 U.S. 737, 758 (1984)). PRC "can demonstrate standing only if application of the [2004 Framework] by the Government will affect" PRC in a way that threatens to impose an "'injury in fact' that is concrete and particularized." *Summers*, 555 U.S. at 493-494. "[T]he threat," moreover, "must be actual and imminent, not conjectural or hypothetical." *Id.* at 493. Indeed, an injury must be "'certainly impending' to constitute injury in fact." *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990) (quoting *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). That requirement "ensure[s] that the alleged injury is not too speculative for Article III purposes," *Defenders of Wildlife*, 504 U.S. at 565 n.2, and "that 'there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party,'" *Summers*, 555 U.S. at 493 (quoting *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974)).

In *Summers*, the Court applied these well-established standing principles to an environmental group's challenge to the Forest Service's adoption of regulations setting out general (non-project-specific) rules governing administrative review of some future projects. 555 U.S. at 490-491. The plaintiff organizations challenged both the regulations themselves and a particular application of the regulations to a timber sale known as the Burnt Ridge Project. *Id.* at 491. By the time the case came to this Court, the parties had settled their dispute concerning the Burnt Ridge Project, leav-

ing only the plaintiffs' challenge to the regulations in the abstract. *Id.* at 491-492, 494. The Court held that the plaintiff organizations did not have standing to challenge the regulations after the settlement because they failed to demonstrate that the government had applied the regulations to any other particular project that would imminently harm one of the plaintiffs' members. *Id.* at 492-500.

The Court held in *Summers* that the plaintiffs' affidavits were insufficient to establish an imminent injury. 555 U.S. at 492-500. Because the affidavit submitted in this case by PRC's chairman Bob Anderson is materially identical to the affidavits found insufficient in *Summers*, the court of appeals clearly erred in holding that PRC established standing. First, Anderson stated that he has "been injured by the knowledge that the aquatic species and watersheds of the Sierra Nevada will continue to be threatened with extirpation and degradation," as well as by "[c]urtailed fishing and recreational opportunities due to the loss of native species such as bull trout and salmon." App., *infra*, 122a. He did not allege that any such injuries were caused by the 2004 Framework, much less by a specific project. Such assertions are flatly insufficient under *Summers*, which held that a plaintiff's alleged past injury—particularly one that "was not tied to application of the challenged regulations" or to "any particular site"—was not sufficient to establish standing. 555 U.S at 495.

Second, Anderson stated that "some" of PRC's 750 members "live in California" and that an unspecified number of members "participate in recreational activities, such as fishing, hiking, backpacking, cross-country skiing, nature photography, and river and lake boating throughout the Sierra Nevada." App., *infra*, 121a. He

further stated that he has a "home at Lake Tahoe," from which he "frequently hike[s] and climb[s] in the Sierra Nevada Range"; and that he "plan[s] to continue" his hiking and climbing activities "as long as the management of the Sierra Nevada national forests does not prevent [him] from doing so." *Id.* at 121a-122a. But Anderson did not challenge or even identify a single project that would affect an area in which he or any other identified PRC member had immediate plans to hike or climb—although we are informed by the Forest Service that more than 450 projects for which the Service prepared an EIS or Environmental Assessment have been approved under the 2004 Framework, approximately 185 of which involved timber cutting. Nor, indeed, did Anderson allege that he or any other PRC member had plans to use any specific National Forest System lands within the Sierra Nevada range. The Court in *Summers* rejected similarly vague assertions of injury, pointing to the plaintiffs' "failure to allege that *any* particular timber sale or other project claimed to be unlawfully subject to the regulations will impede a specific and concrete plan of [the affiants'] to enjoy the National Forests." 555 U.S. at 495.

The Ninth Circuit further erred by hypothesizing aesthetic injuries that were not alleged in Anderson's declaration. Based on its calculation of the number of board feet of timber the Framework contemplated *could* be harvested over the next 20 years, the court believed it "likely" that the "result of that harvesting" would "be visible from great distances" and would "take place near streams, where recreational users of forests spend much of their time." App., *infra*, 20a. Quite aside from the fact that the Framework itself does not authorize any timber harvesting, the court's decision flatly ignores this

Court's admonition in *Summers* that a "statistical probability" or supposedly "realistic threat" that a plaintiff's members would be harmed in the "reasonably near future" cannot establish standing. 555 U.S. at 497, 499-500 (citation and emphasis omitted). Such "speculation does not suffice" for Article III purposes. *Id.* at 499.

PRC thus neither "identif[ied] members who have suffered the requisite harm," *Summers*, 555 U.S. at 499, "allege[d] that *any* particular * * * project claimed to be unlawfully subject to the [2004 Framework] will impede a specific and concrete plan of [any member's] to enjoy the National Forests," *id.* at 495, nor "establish[ed] that [PRC's] members will *ever* visit" a particular parcel of National Forest affected by a specific project subject to the Framework, *id.* at 500. The Ninth Circuit's conclusion that PRC nevertheless established standing because, in the court's view, there "is little doubt that members of [PRC] will come into contact with affected areas, and that the implementation of the 2004 Framework will affect their continued use and enjoyment of the forests," App., *infra*, 21a, directly conflicts with *Summers*. See also *Defenders of Wildlife*, 504 U.S. at 564 ("Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."); *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 889 (1990) (holding that the specificity requirement of standing "is assuredly not satisfied by averments" that an individual "uses unspecified portions of an immense tract of territory").

2. The Ninth Circuit's refusal to follow *Summers* conflicts with decisions of at least three other courts of appeals, all of which concluded in the environmental

context that a plaintiff lacked standing to challenge regulations or regulatory determinations applicable to a potentially broad geographic area when the plaintiff had not identified any particular application of the challenged rule that imminently threatened harm to the plaintiff.

In *Heartwood, Inc.* v. *Agpaoa*, 628 F.3d 261 (2010), the Sixth Circuit held that an organization lacked standing to challenge a forest plan and the implementation of the plan on a specific project because it had failed to establish that the Forest Service was "undertaking or threatening to undertake activities that cause or threaten harm to the plaintiff's protected interests." *Id.* at 267 (quoting *Center for Biological Diversity* v. *Lueckel*, 417 F.3d 532, 537 (6th Cir. 2005)). Although the affiants in that case had identified both the forest in which they recreated and the project they alleged would harm their recreational interests—neither of which PRC did in this case—the Sixth Circuit found the affidavits inadequate to establish standing because they had not specified a particular area within the 25,000-acre forest or within the 5000-acre project site "that they use and will continue to use, and that agency action will detrimentally affect." *Id.* at 268.

Similarly, the Seventh Circuit in *Pollack* v. *United States Department of Justice*, 577 F.3d 736 (2009), cert. denied, 130 S. Ct. 1890 (2010), held that the plaintiff did not have standing to challenge the United States military's discharge of lead bullets into an area of Lake Michigan covering 2975 acres. *Id.* at 737, 743. Applying *Summers*, the court held that the plaintiff's assertion that he drank water from one discrete area of Lake Michigan that was different from the area where the bullets had been discharged was insufficient to establish

standing because it was "not readily apparent that [the plaintiff] would be affected by the discharge of bullets." *Id.* at 742. The court also found insufficient the plaintiff's assertions that his recreational bird-watching activities would be harmed because the plaintiff had alleged only that he watched birds in the Great Lakes watershed, without alleging that he did so where the bullets were discharged. *Ibid.*

Finally, in *National Ass'n of Home Builders* v. *EPA*, 667 F.3d 6 (2011), the D.C. Circuit held that the plaintiff organization lacked standing to challenge EPA's determination that two reaches of the Santa Cruz River are traditional navigable waterways and therefore subject to regulation under the Clean Water Act (CWA). Noting that EPA had not designated any particular "watercourse" in the Santa Cruz River watershed as subject to CWA jurisdiction, the court concluded that the plaintiff's members "face[d] only the *possibility* of regulation, as they did before the [challenged] determination." *Id.* at 13. That increased risk of regulation, the court held, was not sufficient to confer standing because the organization had not asserted that any of its members planned to discharge contaminants into a watercourse likely to be subject to the CWA "anytime soon." *Id.* at 14-15.

Under the Sixth, Seventh, and D.C. Circuits' correct applications of *Summers*, the instant case would have been dismissed for lack of standing. The need for this Court to resolve the circuit split created by the decision below is particularly acute because the result of that decision is that an organization may seek broad injunctive relief against a general regulation or plan and all project-specific decisions relying upon it—without challenging or even identifying a specific project or member af-

fected by the rule—as long as it files suit within the Ninth Circuit.

3. The standing question presented here is of broad importance. Approximately 30% of the land in the United States is owned by the federal government[6] and most of that land is managed by the Forest Service[7] or the Bureau of Land Management (BLM).[8] Both agencies manage their lands through resource-management plans, see 16 U.S.C. 1604(a); 43 U.S.C. 1712, which are governed by agency rules, see 16 U.S.C. 1604(g); 43 U.S.C. 1712(f); 36 C.F.R. Pt. 219; 43 C.F.R. Pt. 1600. If the Ninth Circuit's decision were allowed to stand, the Forest Service and BLM would be substantially hampered in their ability to implement regulations and management plans because they would be open to immediate challenge regardless of what future decision-making concerning actual on-the-ground projects might occur that could prevent or minimize any potential harms the plaintiffs hypothesize.

Plaintiffs also would effectively be allowed to usurp the government's role in land management without demonstrating that they will be imminently injured by any governmental decision approving a particular project and without following the procedures for challenging a particular project. Indeed, in the eight years since the 2004 Framework was developed, PRC has not filed an administrative appeal of *any* project within its scope,

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[6] See http://www.gsa.gov/graphics/ogp/Annual_Report__FY2003-R4 _R2M-n11_0Z5RDZ-i34K-pR.pdf (over 671 million acres owned by the federal government).

[7] See http://www.fs.fed.us/land/staff/ (over 192 million acres managed by the Forest Service).

[8] See http://www.blm.gov/wo/st/en/prog/planning.html (over 245 million acres managed by BLM).

see Gov't Dist. Ct. Br. on Remedy, Ex. 5 (Decl. of Admin. Appeals Specialist for USFS Pac. Sw. Region), which is a prerequisite for seeking judicial review of the decision approving any such project. A single plaintiff that cannot identify any concrete and imminent injury should not be permitted to insert itself into the regulation of millions of acres of National Forest merely by filing a suit challenging the Forest Service's overall program at the highest level of generality.

The Ninth Circuit's departure from this Court's decision in *Summers* is so clear that the Court may wish to consider summary reversal of the judgment below on standing grounds.

B. Review Is Also Warranted Because PRC's Challenge To The 2004 Framework Is Not Ripe For Review

For reasons similar to those set out in Part A, *supra*, PRC's challenge to the 2004 Framework is not ripe for review. As this Court held in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), "[t]he injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution." *Id.* at 148. In the absence of a site-specific decision in which the 2004 Framework is applied, PRC's challenge to the Framework, whether on NEPA or other grounds, is an "abstract disagreement[] over administrative policies" that seeks "judicial interference [before] an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.* at 148-149. Other courts of appeals faced with comparable situations have declined to consider challenges such as PRC's on the ground that they were unripe.

1. a. In assessing whether a claim is ripe for judicial review, this Court examines both the "fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs.*, 387 U.S. at 149. In particular, the Court determines: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 733 (1998). Each of those factors demonstrates that PRC's NEPA challenge is not ripe.

First, postponing review until a site-specific project that threatens immediate injury to one of its members would not harm PRC because it will be able to raise its NEPA objection (like any other objection) to the 2004 Framework if it identifies such a project that is affected by a relevant provision of the Framework and PRC challenges that project through established channels for administrative and judicial review. In such a suit, the court could set aside the decision approving the particular project on the ground, *inter alia*, that the Forest Service did not comply with NEPA, either in the NEPA document accompanying the site-specific decision or the supplemental EIS accompanying the 2004 Framework insofar as it was relied upon in the site-specific decision.

The Framework itself, however, does not regulate the primary conduct of respondent or its members. Cf. *Abbott Labs*, 387 U.S. at 153. It "do[es] not command anyone to do anything or to refrain from doing anything." *Ohio Forestry*, 523 U.S. at 733. It similarly does not "grant, withhold, or modify any formal legal license, power, or authority"; "subject anyone to any civil or

criminal liability"; or "create [any] legal rights or obligations." *Ibid.* Nor does the Framework itself authorize any action to be taken within the National Forests in the Sierra Nevada or "abolish anyone's legal authority to object" to any such action in the future. *Ibid.* If the 2004 Framework ever causes harm to one of PRC's members through implementation of a particular project, PRC will be able to challenge the programmatic Framework at that time insofar as it affected the project. *Id.* at 734. Focusing challenges to the 2004 Framework in this manner will therefore not harm PRC.

Second, as was true of the NFMA claim in *Ohio Forestry*, allowing a facial NEPA challenge to the 2004 Framework to proceed at this point could "hinder agency efforts to refine its policies" either by revising the Framework (as it did between 2001 and 2004) or by adopting additional protective measures in connection with particular site-specific projects. 523 U.S. at 735. There is no way to know at this point whether the agency will mitigate or eliminate any potential harm of a particular project by restricting its location (*e.g.*, distancing it from a stream) or by tailoring or limiting its scope or effect. For example, it is possible that the agency would never approach a particular logging cap in a forest plan after examining site-specific projects in greater detail, or that the agency would impose protective measures on a project beyond what the plan might set out in general terms. The agency might also conduct more NEPA work at the programmatic or project level that would cure any alleged deficiencies before it takes a site-specific action. As this Court has explained, "[a] claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas* v. *United States*, 523 U.S.

296, 300 (1998) (quoting *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-581 (1985)).

Third, courts would benefit by deferring consideration of any challenge by PRC to the 2004 Framework, whether on NEPA or other grounds. Determining whether the programmatic EIS or other studies and materials associated with the 2004 Framework considered the correct range of possible future effects of projects that did not even exist at the time it was approved would require significant technical expertise and may ultimately turn out to be an unnecessary exercise. See *Ohio Forestry*, 523 U.S. at 736. Thus, because the Framework itself entails no commitment of resources having any on-the-ground effect, judicial consideration of the sufficiency of the Forest Service's NEPA analysis in connection with the 2004 Framework standing alone would be abstract and premature. See *National Park Hospitality Ass'n* v. *Department of the Interior*, 538 U.S. 803, 812 (2003) (concluding that facial challenge to regulations "should await a concrete dispute about a particular" application); *Texas*, 523 U.S. at 301 ("The operation of [a challenged] statute is better grasped when viewed in light of a particular application.").

b. Although this Court has never rendered a holding concerning the ripeness of a NEPA challenge to a programmatic action such as the 2004 Framework, the Court did state (in *dictum*) in *Ohio Forestry* that "a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get any riper." 523 U.S. at 737. The Court noted that NEPA, unlike the NFMA, "simply guarantees a particular procedure, not a particular result." *Ibid.* It is certainly true that many NEPA claims are ripe as soon as

the alleged NEPA violation occurs—if, for example, the associated agency action directly authorizes particular trees to be cut, a specific highway to be built, or any other specific activity that will have direct on-the-ground consequences. Thus, a regulation or forest plan would be subject to immediate challenge for failure to comply with NEPA if it directly authorized actions with real on-the-ground consequences. But this is not such a case. Here, all parts of the 2004 Framework challenged by PRC require a subsequent agency action before they could have any real-world effect on the environment. Thus, this Court's stray statement that a NEPA claim is ripe for judicial review as soon as it occurs should not be taken as applicable to every type of agency action.

Limiting the *dictum* in *Ohio Forestry* to NEPA analysis of agency action that authorizes particular actions with real-world consequences is also consistent with the rules governing APA challenges generally. As this Court explained in *National Wildlife Federation*, "[u]nder the terms of the APA, [a plaintiff] must direct its attack against some particular 'agency action' that causes it harm." 497 U.S. at 891. When, as here, the challenged provision does not regulate primary conduct and there is no statutory provision specifically authorizing direct judicial review of the regulation or other programmatic action "before the concrete effects normally required for APA review are felt * * *, [the measure] is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the [measure] to the claimant's situation in a fashion that harms or threatens to harm him." *Ibid.*

The rule that a plaintiff may not invoke the APA to seek judicial review of an agency regulation (or, here, a forest plan) unless and until it is applied in a concrete way is not, of course, limited to NEPA challenges. It is a rule of general applicability. See, *e.g.*, *Reno* v. *Catholic Soc. Servs., Inc.*, 509 U.S 43, 58 (1993) (reasoning in an immigration case that, when a regulation does not govern the plaintiff's primary conduct, "a controversy concerning a regulation is not ordinarily ripe for review under the [APA] until the regulation has been applied to the claimant's situation by some concrete action"). Even within the specific context at issue here—a challenge to a forest plan—there is no reason to apply different rules governing judicial review depending on whether the plaintiff alleges a NEPA violation or a violation of some other law (*e.g.*, NFMA). Each type of challenge is to the plan, and each should be asserted as part of a challenge to the plan's application to a site-specific project. Because judicial review of the programmatic provision in the context of a specific application is an "adequate remedy," see 5 U.S.C. 704, for any legal defect in the provision, a general challenge before that point is premature and unripe under the APA. The 2004 Framework, like the "regulation" referred to in *National Wildlife Federation*, is a broad provision of general applicability and should be subject to the same standards governing judicial review.

2. The Ninth Circuit's rule that NEPA challenges to programmatic decisions are always ripe when the decisions are made conflicts with the rule applied in the D.C. Circuit. In *Center for Biological Diversity* v. *United States Department of the Interior*, 563 F.3d 466 (2009), for example, plaintiffs challenged the Department of the Interior's decision to expand leasing areas within the

Outer Continental Shelf for offshore oil-and-gas development, arguing that the agency had not conducted a sufficiently robust NEPA analysis. The D.C. Circuit concluded that the plaintiff's "NEPA-based claims [were] not ripe due to the multiple stage nature of the Leasing Program." *Id.* at 480. The court adhered to its previous determination in *Wyoming Outdoor Council* v. *USFS*, 165 F.3d 43, 49 (D.C. Cir. 1999), that an "agency's NEPA obligations mature only once it reaches a critical stage of a decision which will result in irreversible and irretrievable commitments of resources to an action that will affect the environment." 563 F.3d at 480 (internal quotation marks and citation omitted). In the context of leasing programs, the court concluded that that point of maturity occurs when the leases are issued, and that any NEPA claim directed at a leasing program is not ripe until that point.

Applying the D.C. Circuit's rule in this case would require the conclusion that PRC's challenges to the 2004 Framework, whether on NEPA or other grounds, are not ripe. The 2004 Framework does not regulate the conduct of PRC or its members, make an irreversible and irretrievable commitment of any resources, or constitute a commitment to undertake any particular site-specific project.[9] The ripeness issue therefore warrants review by this Court.

3. As this Court has explained, "[t]he ripeness doctrine is 'drawn both from Article III limitations on judicial power and from prudential reasons for refusing to

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[9] The Seventh Circuit has adopted the same approach as the Ninth Circuit, relying on *Ohio Forestry* to hold that a plaintiff's challenge to a programmatic rule was ripe for review even in the absence of application of the rule to a site-specific project. *Heartwood, Inc.* v. *USFS*, 230 F.3d 947, 952-953 (7th Cir. 2000).

exercise jurisdiction.'" *National Park Hospitality Ass'n*, 538 U.S. at 808 (quoting *Catholic Soc. Servs., Inc.*, 509 U.S. at 57 n.18). The government did not raise ripeness in the district court or the court of appeals, in large part because the Ninth Circuit has repeatedly (though in our view incorrectly) held that challenges to regulations or other programmatic decisions are ripe even outside the context of a challenge to a site-specific project. See, *e.g.*, *Laub* v. *United States Dep't of the Interior*, 342 F.3d 1080, 1090 (2003) (citing cases). This Court has concluded, however, that "even in a case raising only prudential concerns, the question of ripeness may be considered" when no party has raised it. *National Park Hospitality Ass'n*, 538 U.S. at 808. The government's failure to raise ripeness below is therefore no bar to this Court's consideration of that issue.

C. The Court of Appeals Erred In Holding That NEPA Requires Agencies To Analyze All Potential Environmental Effects "As Soon As It Is Reasonably Possible To Do So"

On the merits, the court of appeals erred in holding that an agency must analyze every environmental consequence of future agency actions that may occur under an agency plan "as soon as it is reasonably possible to do so." App., *infra*, 28a (internal quotation marks and citation omitted). Although that holding does not squarely conflict with the decision of another court of appeals, it is contrary to this Court's admonition that courts must not impose on federal agencies obligations that are not found in a governing statute or its implementing regulations. The flaws in the court of appeals' merits holding are, moreover, of a piece with the flaws in its justiciability analysis. If allowed to stand, the decision will impose significant negative consequences on federal

agencies. The court of appeals' NEPA holding therefore warrants this Court's review.

a. This Court has stated plainly that courts may not add obligations to NEPA that are not contained in the statute. See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 548 (1978). The "only procedural requirements imposed by NEPA are those stated in the plain language of the Act." *Ibid.* Courts may not use the occasion of an APA suit to "engraft[] their own notions of proper procedures on agencies entrusted with substantive functions by Congress." *Id.* at 525. But that is precisely what the Ninth Circuit has done in this case.

Nothing in NEPA or its implementing regulations supports the Ninth Circuit's rule that an agency should give complete consideration to every environmental implication of a general agency plan—one that does not itself authorize any specific action—as soon as it is reasonably possible to do so. It is true, as the panel majority noted, see App., *infra*, 30a, that CEQ's NEPA regulations direct agencies to "integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts." 40 C.F.R. 1501.2. But the direction to "integrate" the NEPA process as early as possible is not tantamount to a requirement that an agency complete every possible aspect of an environmental analysis at the earliest stage of planning, rather than later when the nature of a particular project is fleshed out.

On the contrary, the NEPA regulations expressly permit agencies to engage in tiered decision-making and "encourage[]" agencies to tailor their NEPA analysis accordingly. See 40 C.F.R. 1502.20. The regulations

explain that tiering "refers to the coverage of general matters in broader environmental impact statements * * * with subsequent narrower statements or environmental analyses * * * incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared." 40 C.F.R. 1508.28. The regulations specifically note that tiering is appropriate "when the sequence of statements or analyses is * * * [f]rom a program, plan, or policy environmental impact statement to a * * * site-specific statement or analysis." 40 C.F.R. 1508.28(a). The regulations' embrace of the tailoring of NEPA analysis to the relevant stage of a tiered decision-making process would make little sense if the agency were required to do the entire analysis up front. Such a front-loading requirement would also conflict with CEQ's instruction that agencies should "concentrate on relevant environmental analysis" in their EISs rather than "produc[ing] an encyclopedia of all applicable information." CEQ, Exec. Office of the President, *Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act* 5 (Mar. 6, 2012), http://ceq.hss.doe.gov/current_developments/docs/ImprovingNEPA_Efficiencies_06Mar2012.pdf (citing 40 C.F.R. 1500.4(b), 1502.2(b)); see 40 C.F.R. 1500.1(c) ("NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action."); 40 C.F.R. 1502.2(a) ("Environmental impact statements shall be analytic rather than encyclopedic."). That is exactly what the Forest Service attempted to do in this case.

The court of appeals faulted the Forest Service for not providing sufficiently detailed analysis of the effects of the 2004 Framework on specific species of fish in the

Sierra Nevada. App., *infra*, 32a. But the EIS—which was a supplement to the 2001 EIS—specifically noted that "[p]rotection of most fish would * * * be similar" to the approach taken under the 2001 Framework. 2004 EIS 416; *id.* at 417-418, 423. Moreover, as dissenting Judge Smith concluded, the EIS provided suitable standards to guide future NEPA analysis of the effect of particular projects on particular fish species. App., *infra*, 67a-73a. The EIS weighed the short-term negative consequences for fish that might flow from the fuel management activities contemplated in the Framework against the long-term benefits that fish would enjoy from reducing wildfires (one of the primary goals of the 2004 Framework). *Id.* at 69a-70a. And the EIS stated that the agency intended to reduce short-term threats to fish species by applying various strategies (including its "Aquatic Management Strategy") during "project level analysis." *Id.* at 69a (citation omitted). As the EIS explained, "[p]otential treatment effects on aquatic * * * ecosystems are largely a function of the amounts, types, intensities, and locations of treatments and the standards by which they are implemented." *Id.* at 70a (brackets in original).

This is a classic case for tiered environmental analysis, and it was appropriate for the agency to defer more detailed analysis of potential effects on fish until the agency considered a site-specific project that posed specific threats to specific species of fish. None of the activities contemplated in the 2004 Framework will occur in fish habitat; any effects on fish that may result from projects that are ultimately approved will therefore be indirect. Partly for that reason, the range of possible effects is very broad. Moving a proposed logging project half a mile further from a stream could significantly

change the extent to which such a project will affect fish in that area. The agency will have to conduct the required NEPA analysis before it can approve such a project. It makes little sense to require the agency to anticipate and account for all of the variables that could affect the relevant outcomes. Judicial review of agency action under the APA is deferential, particularly when (as here) an agency's scientific expertise is implicated. See *Baltimore Gas & Elec. Co.* v. *NRDC,* 462 U.S. 87, 103 (1983); see also *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 377 (1989). The court of appeals, however, turned the required deference on its head: instead of asking whether it was an abuse of discretion for the agency to defer some NEPA analysis until it considered a particular project, the court took it upon itself to determine when, in its view, would have been the preferable time to undertake some aspects of that analysis. That is not the proper role of a federal court in this context.

b. Although the court of appeals' decision does not directly conflict with the decision of another court of appeals,[10] review is nevertheless warranted because the

[10] The Ninth Circuit's decision is in tension with the D.C. Circuit's decision in *Center for Biological Diversity*, 563 F.3d at 480, which held (in the context of concluding that the plaintiff's NEPA claims were not ripe) that an agency's obligation under NEPA to analyze environmental effects matures only when the agency is at the point of making an irreversible or irretrievable commitment of resources. It is also in tension with the Tenth Circuit's decision in *San Juan Citizens Alliance* v. *Stiles*, 654 F.3d 1038, 1055 (2011), which rejected the plaintiff's argument that a programmatic-level EIS related to coal bed methane projects should have undertaken a more extensive analysis of mitigation measures because the plaintiff had "utterly failed to explain why it was unreasonable for the EIS to leave further detail to environmental analyses tied to specific site approvals." A previous

Ninth Circuit's "as soon as reasonably possible" standard would prove to be unworkable for federal agencies like the Forest Service that use multi-tiered management or decision-making processes. NEPA affords agencies the freedom to determine, by applying their expertise, when it makes sense to analyze different types of environmental effects—as long as they do so before taking any action that will irretrievably set those effects in motion. When an agency engages in tiered decision-making, NEPA is satisfied as long as the programmatic EIS is sufficient "to insure a fully informed and well-considered decision," *Vermont Yankee Nuclear Power Corp.*, 435 U.S. at 558, on the part of the federal agency at the programmatic stage and when it makes later project-specific commitments.

The Ninth Circuit's rule would also likely function as a one-way ratchet, imposing increasing (and increasingly premature) burdens on agencies as courts built on each others' subjective determinations of what is reasonably possible at a particular stage of a decision-making process. Because agencies would have difficulty anticipating what analysis a court might determine was "reasonably possible," they would feel pressure to undertake ever more speculative analysis earlier and earlier. NEPA was not intended to make agency decision-making "intractable" in that way. See *Marsh*, 490 U.S. at 373. The substantial importance to federal agencies of the substantive NEPA issue presented in this case warrants this Court's granting the petition for a writ of certiorari.

Tenth Circuit decision, however, had relied on the Ninth Circuit's decision in *Kern* in stating that "[a]ll environmental analyses required by NEPA must be conducted at 'the earliest possible time.'" *New Mexico* v. *BLM*, 565 F.3d 683, 707 (10th Cir. 2009).

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal of the judgment below on the ground that respondent has failed to establish its standing.

Respectfully submitted.

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NOVEMBER 2012

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-17565

PACIFIC RIVERS COUNCIL, PLAINTIFF-APPELLANT

v.

UNITED STATES FOREST SERVICE; MARK REY, IN HIS OFFICIAL CAPACITY AS UNDER SECRETARY OF AGRICULTURE; DALE BOSWORTH, IN HIS CAPACITY AS CHIEF OF THE UNITED STATES FOREST SERVICE; JACK BLACKWELL, IN HIS OFFICIAL CAPACITY AS REGIONAL FORESTER, REGION 5, UNITED STATES FOREST SERVICE, DEFENDANTS-APPELLEES

AND

CALIFORNIA FORESTRY ASSOCIATION; AMERICAN FOREST & PAPER ASSOCIATION; QUINCY LIBRARY GROUP; PLUMAS COUNTY; CALIFORNIA SKI INDUSTRY ASSOCIATION, DEFENDANTS-INTERVENORS-APPELLEES

Filed: June 20, 2012

Before: STEPHEN REINHARDT, WILLIAM A. FLETCHER and N. RANDY SMITH, Circuit Judges.

Opinion by Judge WILLIAM A. FLETCHER; Dissent by Judge N.R. SMITH.

ORDER

This court's opinion filed on February 3, 2012, and reported at 668 F.3d 609 (9th Cir. 2012), is withdrawn, and is replaced by the attached Opinion and Dissent.

With the filing of the new opinion, Judges Reinhardt and W. Fletcher vote to deny the petition for rehearing and the petition for rehearing en banc. Judge N.R. Smith votes to grant the petition for rehearing and the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc, filed on April 18, 2012, are DENIED.

No further petitions for rehearing or rehearing en banc will be accepted.

OPINION

W. FLETCHER, Circuit Judge:

The national forests of the Sierra Nevada Mountains ("the Sierras") are home to a rich array of fauna, including at least 61 species of fish and 35 species of amphibians. The Sierra Nevada Ecosystem Project, a study commissioned by Congress, concluded in 1996 that their environment has been severely degraded: "The aquatic/riparian systems are the most altered and impaired habitats in the Sierra."

The national forests in the Sierras are managed under eleven Forest Plans ("the Forest Plans"). In January 2001, the United States Forest Service

("Forest Service") issued a Final Environmental Impact Statement ("2001 EIS") recommending amendments to the Forest Plans in the Sierras. The amendments were intended, among other things, to conserve and repair the aquatic and riparian ecosystems. In January 2001, under the administration of President Clinton, the Forest Service adopted a modified version of the preferred alternative recommended in the 2001 EIS. The parties refer to this as the 2001 Framework.

In November 2001, under the administration of newly elected President Bush, the Chief of the Forest Service asked for a review of the 2001 Framework. In January 2004, the Forest Service issued a Final Supplemental Environmental Impact Statement ("2004 EIS") recommending significant changes to the 2001 Framework. The Forest Service adopted the preferred alternative in the 2004 EIS. The parties refer to this as the 2004 Framework.

Plaintiff-Appellant Pacific Rivers Council ("Pacific Rivers") brought suit in federal district court challenging the 2004 Framework as inconsistent with the National Environmental Protection Act ("NEPA") and the Administrative Procedure Act ("APA"). The gravamen of Pacific Rivers' complaint is that the 2004 EIS does not sufficiently analyze the environmental consequences of the 2004 Framework for fish and amphibians. On cross-motions for summary judgment, the district court granted summary judgment to the Forest Service.

Pacific Rivers timely appealed the grant of summary judgment. For the reasons that follow, we conclude that the Forest Service's analysis of fish in the

2004 EIS does not comply with NEPA. However, we conclude that the Forest Service's analysis of amphibians does comply with NEPA. We therefore reverse in part, affirm in part, and remand to the district court.

I. Background

Stretching along a north-south axis for more than 400 miles, the Sierra Nevada Mountains form one of the longest continuous mountain ranges in the lower 48 states. The Forest Service manages nearly 11.5 million acres of land under the Forest Plans. Each Forest Plan is a Land and Resource Management Plan ("LRMP") formulated and promulgated pursuant to the National Forest Management Act ("NFMA"). *See* 16 U.S.C. § 1604. NFMA requires the Forest Service to provide for and to coordinate multiple uses of the national forests, including "outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness." 16 U.S.C. § 1604(e)(1). An LRMP adopted pursuant to NFMA guides all management decisions within the forests subject to that LRMP. Individual projects are developed according to the guiding principles and management goals expressed in the LRMP. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 729-31, 118 S. Ct. 1665, 140 L. Ed. 2d 921 (1998).

The Forest Plans govern the eleven national forests that run the length of the Sierras from Southern California to the California–Oregon border—the Sequoia, Inyo, Sierra, Stanislaus, Humboldt–Toiyabe, Eldorado, Tahoe, Plumas, Lassen, and Modoc National Forests, and the Lake Tahoe Basin Management Unit. The area encompassed by the Plan amounts to more than 5% of the total forest land managed by the Forest

Service. *See* http://www.fs.fed.us/r5/sierra/about/ (National Forests encompass 191 million acres). The forests support substantial economic activity, including logging and grazing, as well as recreation. The forests comprise dozens of complex ecosystems. They include iconic natural landmarks such as Mt. Whitney, Mono Lake, Lake Tahoe, and giant sequoia trees.

As part of its mandate to manage the national forests, the Forest Service took major steps in the 1990s to improve the ecological health of the Sierras. In November 1998, the Forest Service published a Notice of Intent to prepare an Environmental Impact Statement ("EIS") analyzing a number of proposed changes to the Forest Plans for the Sierras. The Forest Service cited the need to "improve national forest management direction for five broad problems: (1) conservation of old-forest ecosystems, (2) conservation of aquatic, riparian, and meadow ecosystems, (3) increased risk of fire and fuels buildup, (4) introduction of noxious weeds, and (5) sustaining hardwood forests."

In 2000, after nearly a decade of study, the Forest Service proposed a number of changes to the Forest Plans to ensure "the ecological sustainability of the entire Sierra Nevada ecosystem and the communities that depend on it." The Forest Service issued a Draft EIS evaluating eight alternatives for implementing the objectives outlined in the Notice of Intent. Following public comment, scientific review and consultation with other agencies, the Forest Service released a Final EIS in January, 2001.

The 2001 EIS designated the "Modified Alternative 8" as the preferred alternative. In a Record of Deci-

sion issued January 12, 2001, the Forest Service adopted this alternative. This is the "2001 Framework."

The Forest Service received over 200 timely administrative appeals. The Chief of the Forest Service, newly appointed by the incoming administration, did not respond directly to the appeals. Rather, he directed the Regional Forester to reevaluate the 2001 Framework with respect to three fire-related issues. First, the Chief directed him "to re-evaluate the decision for possibilities of more flexibility in aggressive fuels treatment." Second, he directed him "to re-evaluate the decision based on possible new information associated with the National Fire Plan," a ten-year strategy developed by Congress, federal agencies, Indian Tribes and western States to restore fire-adapted ecosystem health. Third, he directed him to re-evaluate limitations placed by the 2001 Framework on the Herger–Feinstein Quincy Library Group Forest pilot project dealing with fire prevention.

In December 2001, the Regional Forester appointed an Amendment Review Team. The Regional Forester added nonfire-related issues to the issues identified by the Chief. In addition to the fire-related issues, he asked the Review Team to "identify opportunities" in three areas: first, to "reduce the unintended and adverse impacts [of the 2001 Framework] on grazing permit holders"; second, to "reduce the unintended and adverse impacts [of the 2001 Framework] on recreation users and permit holders"; and, third, to "reduce the unintended and adverse impacts [of the 2001 Framework] on local communities."

In June 2003, the Forest Service issued a Draft Supplemental EIS, based on the work of the Review Team. The Draft focused on a comparison of two alternatives. "Alternative S1" was the 2001 Framework. "Alternative S2" was the "preferred alternative." Alternative S2 proposed substantially more logging and associated activities than the 2001 Framework. It also proposed to reduce restrictions on grazing by commercial and recreational livestock.

The Draft was criticized by the staff of the Forest Service's Washington Office for Watershed, Fish, Wildlife, Air and Rare Plants. The staff wrote a letter complaining that there was no discussion of the effects of the logging and logging-related activities on fish:

> **Aquatic and Riparian**: *There needs to be a discussion of the effects of the new alternatives on riparian ecosystems, streams and fisheries.* It is not sufficient to dismiss these effects as within the range of impacts discussed in the [2001] framework . . . without further analysis, given the activities proposed in Alternative S2. *If the treatments [proposed in Alternative S2] will be sufficient to have their intended effect, there is a high likelihood that there will be significant and measurable direct, indirect and cumulative effects on the environment, which need to be analyzed and disclosed in this document.*

(Emphasis added.) The letter also raised concerns that the Draft did not adequately analyze the impact of changed grazing standards on riparian environments, streams and fisheries.

The Forest Service issued the 2004 EIS in January 2004 without adding the discussion of "riparian ecosystems, streams and fisheries" that the staff letter had said was needed. The Regional Forester adopted Alternative S2 shortly afterwards in a Record of Decision. Over 6,000 administrative appeals were filed objecting to the Record of Decision. The Forest Service Chief approved the Record Of Decision without change in November 2004. This is the "2004 Framework."

Both the 2001 and 2004 Frameworks are written in general terms, rather than addressing specific sites at which the logging and logging-related activities will take place. But there are substantial differences between the 2001 and 2004 Frameworks. Relevant to this appeal are changes in authorized logging and logging-related activities, and changes in grazing standards for commercial and recreational livestock.

The most substantial changes are in logging and logging-related activities. The 2004 Framework allows the harvesting of substantially more timber than the 2001 Framework. The 2001 Framework allowed the harvesting of 30 million board feet of salvage timber per year during the Framework's first and second decades. By contrast, the 2004 Framework allows the harvesting of three times that amount of salvage timber—90 million board feet per year during its first and second decades. The 2001 Framework allowed the harvesting of 70 million board feet of green timber per year during its first decade and 20 million board feet per year during its second decade. By contrast, the 2004 Framework allows the harvesting of 4.7 and 6.6 times that amount of green timber—329 million

board feet per year during its first decade and 132 million board feet per year during its second decade. The totals for salvage timber for the two decades are 600 million board feet under the 2001 Framework, and 1.8 billion board feet under the 2004 Framework. The totals for green timber for the two decades are 900 million board feet under the 2001 Framework, and 4.6 billion board feet under the 2004 Framework. Stated differently, compared to the 2001 Framework, the 2004 Framework allows the harvesting of an additional 4.9 billion board feet of timber—1.2 billion board feet of salvage timber and 3.7 billion board feet of green timber—during its first two decades.

The 2004 Framework also allows the harvesting of larger trees than the 2001 Framework. For example, under the 2001 Framework, trees up to 30 inches in breast-height-diameter could be harvested in the wetter west side of the Sierras, but only up to 24 inches in the drier east side. Under the 2004 Framework, trees up to 30 inches in breast-height-diameter can be harvested on both the west and east sides.

The 2004 Framework substantially increases the total acreage to be logged. Under the 2004 Framework, about 15% fewer acres will be subject to prescribed burns than under the 2001 Framework, but about 250% more acres will be logged "mechanically." Further, under the 2004 Framework, more logging will be conducted close to streams than under the 2001 Framework. The 2004 EIS states, with more than the usual amount of obfuscating bureaucratese:

> The spatial location of strategically placed area treatments[1] under Alternatives S1 [the 2001 Framework] and S2 [the 2004 Framework] are the same, but they are different than previously considered. For example, analysis in the [2001 EIS] was based on the assumption that the area treatments would be placed[2] primarily on the upper two-thirds of slopes, thus minimizing overlap with RCAs[3] associated with perennial, intermittent, and ephemeral streams. However, this assumption is no longer valid. Consequently, under Alternatives S1 and S2, treatments are not limited to any geographic position.[4] As a result, more treatments

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[1] There is no definitions section in the 2004 EIS. From usage in the EIS, it is apparent that "treatments" means logging and/or prescribed burns.

[2] In standard English, "placed" means "conducted."

[3] "RCAs" are Riparian Conservation Areas. *See* January 2004 Record Of Decision approving the 2004 EIS, at 114 ("riparian conservation area (RCA)").

> In its brief to this court, the Forest Service misstates the meaning of the acronym. It indicates that RCAs are *Resource* Conservation Areas. *See* Response Brief at 33 ("Resource Conservation Areas ('RCAs')"). In the context of this case, the difference between "riparian" and "resource" is important. "Riparian" is a precise term, meaning something related to the bank of a river, stream, or other body of water. "Resource" is a general term, meaning anything from a natural resource such as trees to a financial resource such as a bank account.

[4] This sentence is misleading. "Treatments" (*i.e.,* logging and burning) under Alternative S1 (the 2001 Framework) are more geographically limited than "treatments" under Alternative S2 (the 2004 Framework).

> within RCAs are expected.[5] Alternative S1 requires that portions of treatment areas be left in an untreated condition.[6] It is likely that riparian areas would be priorities for retention to meet this requirement.[7] Alternative S2 does not require retention of untreated areas within treatment units so that fire behavior and fire effects are effectively reduced within the entire unit.[8]

The 2001 Framework limited soil "compaction" in project areas close to streams to 5% of the area, but the 2004 Framework places no limit on "disturbances" in such areas.

The 2004 Framework allows substantially more construction of new, and reconstruction of existing, logging roads than the 2001 Framework. Under the 2001 Framework, 25 miles of new roads were to be

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[5] This sentence translated into standard English: "As a result, more logging and burning close to streams are expected under the 2004 Framework."

[6] This sentence translated into standard English: "The 2001 Framework requires that certain areas not be logged or burned."

[7] This sentence translated into standard English: "It is likely that under the 2001 Framework riparian areas would not be logged or burned."

[8] This sentence translated into standard English: "The 2004 Framework allows logging and burning close to streams in order to eliminate trees everywhere in a given 'treatment unit' as a means of reducing the risk of fire."

We remind the Forest Service: "Environmental impact statements shall be written in plain language . . . so that decisionmakers and the public can readily understand them. Agencies should employ writers of clear prose or editors to write, review, or edit statements[.]" 40 C.F.R. § 1502.8.

constructed, and 655 miles of existing roads were to be reconstructed, during the first decade. Under the 2004 Framework, 115 miles of new roads are to be constructed, and 1,520 miles of existing roads reconstructed, during the first decade. However, under the 2001 Framework, 950 miles of roads were to be decommissioned, compared with 1,175 miles of old roads that are to be decommissioned under the 2004 Framework. The 2004 Framework also allows an additional 215 miles of temporary roads (43 miles of temporary roads per year for 5 years) and slates an additional 3,200 miles of roads for maintenance (640 miles per year for five years).

Finally, grazing restrictions under the 2001 Framework are reduced in the 2004 Framework. Under the 2001 Framework, commercial livestock (cattle and sheep), as well as recreational livestock (pack and saddle stock used by commercial outfitters) were to be excluded from meadows known to be occupied by Yosemite Toads during the toads' breeding and rearing seasons, as well as from meadows where surveys to determine the presence (or absence) of Yosemite Toads had not yet been performed. The 2004 Framework allows commercial livestock to graze in meadows where surveys to determine the presence of Yosemite Toads have not yet been performed. Further, the 2004 Framework eliminates the categorical exclusion of recreational pack stock and saddle stock from toad-occupied meadows during the breeding and rearing season, and allows managers to develop project-based plans to mitigate effects on the toad.

Other restrictions on grazing have also been reduced. The 2004 Framework divides habitat-

protecting restrictions on grazing into several categories based on the adverse impacts on the grazing permittee: the greater the adverse impact, the more habitat-protecting effort is required on the part of the permittee. The 2004 EIS describes the effect of the 2004 Framework on 47 grazing permittees (amounting to 11% of the "active allotments"). Under the 2001 Framework, the regulations had "no adverse impact" on any permittee. The regulations had a "low adverse impact" on 11 permittees, a "medium adverse impact" on 17, a "high adverse impact" on 12, and a "very high adverse impact" on 7. Under the 2004 Framework, those numbers are, respectively, 14 (no adverse impact), 7 (low), 10 (medium), 9 (high), and 7 (very high). That is, a total of 14 grazing permittees who had been adversely impacted by habitat-protecting regulations under the 2001 Framework are not adversely impacted at all under the 2004 Framework. For 3 of those 14 permittees, the change effected by the 2004 Framework is to move from a high adverse impact to no impact at all—that is, to move from regulations requiring "substantial" habitat-protective effort by the permittee to regulations requiring no effort whatsoever.

The 2004 EIS predicts that the 2004 Framework will reduce the annual acreage burned by wildfires. Under the 2001 Framework, the estimated annual acreage of wildfires was 64,000 acres during the first decade, and 63,000 acres during the fifth decade. Under the 2004 Framework, the estimated annual acreage of wildfires is 60,000 acres during the first decade, and 49,000 acres during the fifth decade, resulting in a total reduction of 18,000 acres over two decades.

Pacific Rivers filed suit in May 2005, alleging that the 2004 Framework was adopted in violation of NEPA and the APA. On appeal, Pacific Rivers contends that the 2004 EIS fails to take a "hard look" at the environmental impact of the 2004 Framework on fish and amphibians. We conclude that the 2004 EIS does not comply with NEPA with respect to fish, but does comply with respect to amphibians.

II. Standard of Review

We review de novo questions of Article III justiciability, including standing. *Porter v. Jones*, 319 F.3d 483, 489 (9th Cir. 2003). We also review de novo a district court's decision on summary judgment that an agency complied with NEPA. *Or. Natural Desert Ass'n v. Bureau of Land Mgmt.*, 531 F.3d 1114, 1130 (9th Cir. 2008). Judicial review of an agency's compliance with NEPA is governed by the APA, which requires this court to set aside the agency's action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* (quoting 5 U.S.C. § 706(2)(A)).

"[W]e will reverse a decision as arbitrary and capricious only if the agency relied on factors Congress did not intend it to consider, 'entirely failed to consider an important aspect of the problem,' or offered an explanation 'that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *The Lands Council v. McNair (Lands Council II)*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc) (quoting *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1156 (9th Cir. 2006)), *overruled on other*

grounds by Winter v. Natural Res. Def. Council, 555 U.S. 7, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008).

"In reviewing the adequacy of an EIS, we employ a rule of reason to determine whether the EIS contains a reasonably thorough discussion of the significant aspects of probable environmental consequences." *Kern v. Bureau of Land Mgmt.*, 284 F.3d 1062, 1071 (9th Cir. 2002) (internal quotation marks omitted). "Once an agency has an obligation to prepare an EIS, the scope of the analysis of environmental consequences in that EIS must be appropriate to the action in question . . . . If it is reasonably possible to analyze the environmental consequences in an EIS . . . , the agency is required to perform that analysis." *Id.* at 1072.

III. Discussion

A. Standing

The Forest Service argues for the first time on appeal that Pacific Rivers lacks standing under Article III of the Constitution. Questions of Article III jurisdiction can be raised at any time. *See Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d 701, 707 (9th Cir. 2009).

To have standing under Article III, a plaintiff must establish that

> (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to

> merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000). To have standing to seek injunctive relief under Article III

> a plaintiff must show that he is under threat of suffering "injury in fact" that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury.

Summers v. Earth Island Inst., 555 U.S. 488, 129 S. Ct. 1142, 1149, 173 L. Ed. 2d 1 (2009). An organization may sue on behalf of its members

> when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Laidlaw, 528 U.S. at 181, 120 S. Ct. 693.

The Forest Service contends that because Pacific Rivers challenges amendments to Land and Resource Management Plans rather than a specific project under an LRMP, it has failed to allege a threat of a "concrete and particularized" injury that is "actual or imminent." The Forest Service also contends that Pacific Rivers' members have not specified which parts of the national forests in the Sierras they use.

The Forest Service relies heavily on the Supreme Court's decision in *Summers*. The plaintiffs in *Summers* challenged nationwide regulations promulgated by the Forest Service that exempted sales of salvage timber of 250 acres or less from NEPA requirements to prepare an EIS or an Environmental Assessment ("EA"). *Id.* at 1147. The plaintiffs initially challenged a specific sale of salvage timber. After the district court issued a preliminary injunction, the parties settled the dispute over that sale. *Id.* at 1148. On appeal, both before the Ninth Circuit and before the Supreme Court, the plaintiffs continued to challenge the validity of the exemption for 250 acres or less, though now there was no specific sale at issue. They could make only a general statement that they would visit national forests in the future and might come in contact with a parcel of 250 acres or less on which a salvage-timber sale had been conducted without an EIS or an EA. *Id.* at 1149-50.

The Supreme Court concluded that there was only a remote chance, "hardly a likelihood," that such visits would bring plaintiffs into contact with land affected by the challenged regulations. *Id.* at 1150. The Court noted that the regulation at issue applied to all national forest land (190 million acres) and that the size of the affected parcels was small (250 acres or less). *Id.* "Accepting an intention to visit the National Forests as adequate to confer standing to challenge any Government action affecting any portion of those forests would be tantamount to eliminating the requirement of concrete, particularized injury in fact." *Id.*

One year after *Summers,* we held in *Wilderness Society, Inc. v. Rey*, 622 F.3d 1251 (9th Cir. 2010), that a plaintiff organization lacked standing to challenge the same nationwide Forest Service regulations at issue in *Summers*. A member of the plaintiff organization expressed a general intention to return to the Umpqua National Forest for recreational use. *Id.* at 1256. We held that *Summers* demands more than a showing of a general intention of returning to a national forest. The member must "show[ ] that he is likely to encounter an *affected* area of the Umpqua National Forest in his future visits." *Id.* (emphasis in original). In addition, the member feared that the Ash Creek Project in the Umpqua National Forest might threaten the plaintiff-organization's interests in protecting wilderness lands. *Id.* But the court found this fear insufficient to obtain standing: The member did not "allege that *his* future enjoyment is in any way threatened by the Ash Creek Project." *Id.* (emphasis added).

Summers and *Wilderness Society* are substantially different from this case. Pacific Rivers introduced into evidence in the district court a declaration of its Chairman, Bob Anderson. Anderson declares that he lives in South Lake Tahoe, that he and his wife own property at Mono Lake, and that they "frequently hike and climb in the Sierra Nevada Range." Anderson declares further that Pacific Rivers has over 750 members, some of whom live in California. He states:

> My first Sierra Nevada backpacking trip was to the Mineral King area in 2000, during which time I also fished. I plan to continue these activities as long as the management of Sierra Nevada national for-

> ests does not prevent me from doing so. I have garnered great personal solace in the knowledge that Sierra Nevada native species and the watersheds that support them persist despite over a century's worth of impacts from grazing, mining, logging, road building, dam construction, and related activities. The same is true for the membership of [Pacific Rivers], many of whom recreate in, fish throughout, and derive much satisfaction from the Sierra Nevada.

He writes specifically with respect to members:

> [Pacific Rivers] members participate in recreational activities, such as fishing, hiking, backpacking, cross-county skiing, nature photography, and river and lake boating throughout the Sierra Nevada.

The Forest Service challenged Pacific Rivers' Article III standing for the first time in this court. If the Forest Service had objected to standing in the district court, Pacific Rivers could easily have supplemented Anderson's declaration with declarations of individual members who use and enjoy the Sierras, specifying particular national forests and particular patterns of use. Given the timing of the Forest Service's objection to standing, if we were to hold on the current record that Pacific Rivers has not sufficiently established threats of harm to its members who use the Sierras for recreation, we would remand to the district court to allow further development of the record. But we think such additional development is unnecessary. Anderson has clearly stated that he and a number of Pacific Rivers' members have used, and will continue to use, the national forests in the Sierras in a variety of places and in a variety of ways.

During the first two decades, the 2004 Framework allows the harvesting of approximately 4.6 billion board feet of green timber and approximately 1.8 billion board feet of salvage timber. This harvesting will take place in every one of the 11 national forests in the Sierras. The smallest amount of green timber harvesting during the two decades—35 million board feet—will take place in the Lake Tahoe Management Basin. The Lake Tahoe basin is relatively small and is subject to the most intensive recreational use of the 11 national forests covered by the 2004 Framework. Anderson lives in the Lake Tahoe basin. The greatest amount of harvesting—1.4 billion board feet—will take place in Plumas National Forest. Harvesting in quantities between these two amounts will take place in each of the other nine national forests covered by the 2004 Framework.

Under the 2004 Framework, much of the timber harvesting will be in the upper two thirds of slopes. The result of that harvesting will therefore likely be visible from great distances. Significant timber harvesting will also take place near streams, where recreational users of forests spend much of their time. The 2004 Framework authorizes the construction of 115 miles of new roads and the reconstruction of 1,520 miles of existing roads during the first decade. Grazing restrictions on commercial and recreational livestock will be reduced throughout the Sierras.

There is a concrete connection between the interests of Pacific Rivers' members in enjoying the forests of the Sierras and the effect of the 2004 Framework. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-64, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

There is little doubt that members of Pacific Rivers will come into contact with affected areas, and that the implementation of the 2004 Framework will affect their continued use and enjoyment of the forests. By contrast, the regulation at issue in *Summers* affected only small and widely scattered parcels of land throughout the entire United States, and the plaintiffs had not shown any realistic likelihood that they would come into contact with those parcels.

There are two relevant cases in this circuit, both controlling. In *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346 (9th Cir. 1994), we held that an environmental organization had standing to bring a challenge under NEPA to an LRMP that applied to 6 million acres of national forest land in the Sierras. *Id.* at 1349-55. The challenged LRMP allowed the "use of all methods to treat competing vegetation . . . [in order] to meet the timber yield objectives," and delegated the decision to use herbicides to the district foresters. *Id.* at 1351.

The Forest Service's standing argument in *Salmon River* was essentially the same as its standing argument here—that plaintiff lacked standing because it failed "to demonstrate that the members would be harmed by a specific project using herbicides." *Id.* at 1352. Members of the organization lived next to or within the boundaries of the area where herbicides had previously been banned but would now be permitted, and they frequently used the area for recreation. *Id.* at 1353. These members contended that their health and recreational interests were adversely affected by the Forest Service's decision to permit herbicide use. *Id.* We characterized the members' injury as the risk

"that environmental consequences" of herbicide use "might be overlooked[ ] as a result of deficiencies in the government's analysis under environmental statutes." *Id.* at 1355 (internal quotation marks omitted). That risk constituted a concrete, specific and imminent injury sufficient to challenge an EIS because "unfettered use of herbicides . . . in the absence of NEPA compliance will cause harm to visitors' recreational use and enjoyment, if not to their health." *Id.*

We specifically held that the plaintiffs did not have to "wait to challenge a specific project when their grievance is with an overall plan." *Id.* We explained why:

> [I]f the agency action only could be challenged at the site-specific development stage, the underlying programmatic authorization would forever escape review. To the extent that the plan predetermined the future, it represents a concrete injury that plaintiffs must, at some point, have standing to challenge. That point is now, or it is never.

Id. (quoting *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1516 (9th Cir. 1992)). *See also Res. Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1303 (9th Cir. 1993) (rejecting, in a challenge to a forest plan, the argument that plaintiffs must "point to the precise area of the park where their injury will occur").

Another Ninth Circuit panel has recently addressed a separate NEPA challenge to the same 2004 Framework at issue in our case. In *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161 (9th Cir. 2011), we held that an environmental organization had standing to chal-

lenge the 2004 Framework. *Id.* at 1179-80. We noted *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 118 S. Ct. 1665, 140 L. Ed. 2d 921 (1998), in which the Supreme Court held that the Sierra Club's challenge to an LRMP under the National Forest Management Act was unripe as a prudential matter, but did not hold that the Sierra Club lacked Article III standing. *Ohio Forestry*, 523 U.S. 726, 118 S. Ct. 1665. The Court in *Ohio Forestry* specifically noted that despite the "considerable legal distance between the adoption of the Plan and the moment when a tree is cut, the Plan's promulgation nonetheless makes logging more likely in that it is a logging precondition; in its absence logging could not take place." *Id.* at 730, 118 S. Ct. 1665. We held in *Sierra Forest Legacy* that the harm flowing from a failure to comply with NEPA in formulating the 2004 Framework was sufficient to confer standing on plaintiff "to bring a facial NEPA challenge to the 2004 Framework, independent from specific implementing projects." 646 F.3d at 1179.

We therefore conclude that Pacific Rivers has Article III standing to challenge the 2004 Framework under NEPA.

B. NEPA

"The National Environmental Policy Act has 'twin aims. First, it places upon [a federal] agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process.'" *Kern*, 284 F.3d at 1066 (quoting *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97, 103 S. Ct. 2246, 76

L. Ed. 2d 437 (1983)) (internal quotations and citations omitted, alteration in original). NEPA is not substantive. It does not require that agencies adopt the most environmentally friendly course of action. *Kern*, 284 F.3d at 1066. Rather, "[t]he sweeping policy goals . . . of NEPA are . . . realized through a set of 'action-forcing' procedures that require that agencies take a 'hard look at environmental consequences.'" *Robertson v. Methow Valley Citizens Counci*l, 490 U.S. 332, 350, 109 S. Ct. 1835, 104 L. Ed. 2d 351 (1989) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.20, 96 S. Ct. 2718, 49 L. Ed. 2d 576 (1976)).

Taking a "hard look" at environmental consequences of major federal actions includes "considering all foreseeable direct and indirect impacts. Furthermore, a 'hard look' should involve a discussion of adverse impacts that does not improperly minimize negative side effects." *N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 975 (9th Cir. 2006) (internal quotation marks and citations omitted); *see also Or. Natural Res. Council Fund v. Brong*, 492 F.3d 1120, 1133 (9th Cir. 2007) ("[G]eneral statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided.") (internal quotation marks omitted).

Pacific Rivers alleges that the 2004 EIS does not take a hard look at environmental consequences of the 2004 Framework on fish and amphibians. For the reasons that follow, we agree with Pacific Rivers with respect to fish, but disagree with respect to amphibians.

1. Fish

The 2001 EIS contained a 64-page detailed analysis of environmental consequences of the 2001 Framework for individual species of fish. In stark contrast to the 2001 EIS, the 2004 EIS contains no analysis whatsoever of environmental consequences of the 2004 Framework for individual species of fish. The 2004 EIS incorporates by reference the analysis contained in the 2001 EIS, but contains no analysis of additional or different environmental consequences of the 2004 Framework even though the new framework authorizes substantially more environment-altering activities than the old framework. Of particular importance, the 2004 Framework allows an additional 4.9 billion board feet of green and salvage timber harvesting during the first two decades, much of it conducted nearer streams, compared to the 2001 Framework. The 2004 EIS also incorporates by reference two biological assessments ("BAs") of the consequences of the 2001 and 2004 Frameworks on listed fish under the Endangered Species Act. But it neither summarizes the findings of the BAs nor includes them in an appendix.

The Forest Service contends that the 2004 EIS takes a sufficiently hard look at environmental consequences of the 2004 Framework on fish. It makes two arguments. First, it points out that the 2004 Framework is an amendment to each of the Forest Plans in the Sierras. The Forest Service argues that because the Forest Plans are LRMPs, it is not reasonably possible for the 2004 EIS to provide an analysis of environmental consequences of the 2004 Framework on individual species. Second, it argues that the 2004

EIS's incorporation by reference of the BAs concerning environmental consequences of the 2001 and 2004 Frameworks on listed fish satisfies the hard look requirement. We consider these arguments in turn.

a. Level of Required Analysis in the 2004 EIS

During the time frame at issue here, federal law required preparation of an EIS in conjunction with the preparation of a programmatic-level plan such as an LRMP. *See* 36 C.F.R. § 219.10(b) (1983) ("A draft and final environmental impact statement shall be prepared for the proposed plan according to the NEPA procedures."); *see also* 36 C.F.R. § 219.5(a)(2)(i) (2012) ("A new plan or plan revision requires preparation of an environmental impact statement."). The 2004 Framework is not, in itself, an LRMP; rather, it is an amendment to the LRMPs for the Sierras. Some amendments to LRMPs may be so insignificant that they do not require preparation of an EIS. But the 2004 Framework is a fundamental revision of the Forest Plans in the Sierras. *See* 36 C.F.R. § 219.10(f) (1983) (requiring Forest Service, when making a "significant change in the plan," to "follow the same procedure as that required for development and approval of a forest plan"); *see also* 36 C.F.R. § 219.5(a)(2)(ii) (2012) ("The appropriate NEPA documentation for an amendment may be an [EIS], an [EA], or a categorical exclusion, depending on the scope and scale of the amendment and its likely effects."). The Forest Service does not argue that an EIS was not required. But the Forest Service does argue that, because of the programmatic nature of the 2004 Framework, it was not required in its EIS to

perform an analysis of environmental consequences for the individual species of fish.

The required level of analysis in an EIS is different for programmatic and site-specific plans. We wrote in *Friends of Yosemite Valley v. Norton*, 348 F.3d 789 (9th Cir. 2003):

> An agency's planning and management decisions may occur at two distinct administrative levels:
>
> > (1) the "programmatic level" at which the [agency] develops alternative management scenarios responsive to public concerns, analyzes the costs, benefits and consequences of each alternative in an [EIS], and adopts an amendable [management] plan to guide management of multiple use resources; and (2) the implementation stage during which individual site specific projects, consistent with the [management] plan, are proposed and assessed.
>
> *Ecology Ctr., Inc. v. United States Forest Serv.*, 192 F.3d 922, 923, n.2 (9th Cir. 1999). An EIS for a programmatic plan . . . must provide 'sufficient detail to foster informed decision-making,' but "site-specific impacts need not be fully evaluated until a critical decision has been made to act on site development." *N. Alaska Envtl. Ctr. v. Lujan*, 961 F.2d 886, 890-91 (9th Cir. 1992). . . .
>
> Although NEPA requires that the [agency] evaluate the consequences of its action at an early stage in the project's planning process, that requirement is tempered by (1) 'the statutory command that [a reviewing court] focus upon a proposal's parameters as the agency defines them,' and

> (2) 'the preference to defer detailed analysis until a concrete development proposal crystallized the dimensions of a project's proba-ble environmental consequences.' [*California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982)].

Id. at 800-01.

Regardless of whether a programmatic or site-specific plan is at issue, NEPA requires that an EIS analyze environmental consequences of a proposed plan as soon as it is "reasonably possible" to do so. *Kern*, 284 F.3d at 1072. At issue in *Kern* were two things: an EIS for a Resource Management Plan ("RMP") for the Coos Bay District in Oregon, and an Environmental Assessment ("EA") for a site-specific project in that district. The RMP in *Kern* was a programmatic plan, like the LRMP in the case before us. We wrote:

> An agency may not avoid an obligation to analyze in an EIS environmental consequences that foreseeably arise from an RMP merely by saying that the consequences are unclear or will be analyzed later when an EA is prepared for a site-specific program proposed pursuant to an RMP. "[T]he purpose of an [EIS] is to evaluate the possibilities in light of current and contemplated plans and to produce an informed estimate of the environmental consequences. . . . Drafting an [EIS] necessarily involves some degree of forecasting." *City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975) (emphasis added). If an agency were to defer analysis . . . of environmental consequences in an RMP, based on a promise to perform a comparable analysis in connection with later site-

specific projects, no environmental consequences would ever need to be addressed in an EIS at the RMP level if comparable consequences might arise, but on a smaller scale, from a later site-specific action proposed pursuant to the RMP.

Once an agency has an obligation to prepare an EIS, the scope of its analysis of environmental consequences in that EIS must be appropriate to the action in question. NEPA is not designed to postpone analysis of an environmental consequence to the last possible moment. Rather, it is designed to require such analysis as soon as it can reasonably be done. See Save Our Ecosystems v. Clark, 747 F.2d 1240, 1246 n.9 (9th Cir. 1984) ("Reasonable forecasting and speculation is . . . implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry,'" quoting *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973)). If it is reasonably possible to analyze the environmental consequences in an EIS for an RMP, the agency is required to perform that analysis. The EIS analysis may be more general than a subsequent EA analysis, and it may turn out that a particular environmental consequence must be analyzed in both the EIS and the EA. But an earlier EIS analysis will not have been wasted effort, for it will guide the EA analysis and, to the extent appropriate, permit "tiering" by the EA to the EIS in order to avoid wasteful duplication.

Id. at 1072 (emphasis added). *See also* 40 C.F.R. § 1501.2 ("Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts."); *New Mexico ex rel. Richardson v. Bur. of Land Mgmt.,* 565 F.3d 683, 707-08, 716 (10th Cir. 2009) (relying on *Kern* to find NEPA violation with respect to programmatic EIS).

Our dissenting colleague contends that we overruled *Kern* with respect to programmatic-level plans in our en banc decision in *Lands Council II,* 537 F.3d 981. We do not believe that *Lands Council II* overruled the "reasonably possible" requirement of *Kern.* At issue in *Lands Council II* was an EIS for a site-specific project. In our en banc opinion, we specifically overruled *Ecology Center, Inc. v. Austin*, 430 F.3d 1057 (9th Cir. 2005), *cert. denied sub nom. Mineral County v. Ecology Ctr., Inc.*, 549 U.S. 1111, 127 S. Ct. 931, 166 L. Ed. 2d 702 (2007). Our holding in *Lands Council II* was that the analysis in the site-specific EIS at issue was sufficiently supported by studies and on-the-ground analysis. Our opinion nowhere mentioned *Kern,* nowhere mentioned a programmatic EIS, and nowhere suggested that environmental consequences need not be analyzed in a programmatic EIS if it is "reasonably possible" to perform that analysis.

Nor does the Forest Service believe that *Lands Council II* overruled the "reasonably possible" requirement of *Kern.* The Forest Service nowhere contends that we wrongly decided *Kern,* or that *Lands Council II* overruled *Kern's* "reasonably possible" re-

quirement. The Forest Service recognizes in its brief that *Kern* requires it to perform reasonably possible analyses of environmental consequences in a programmatic EIS. *See* Appellee's Br. at 25 ("Pacific Rivers correctly notes that this Court has held [in *Kern*] that a programmatic EIS should analyze environmental consequences where 'reasonably possible.'"). The Forest Service argues under *Lands Council II* that a court owes deference to its determination of what is reasonably possible because, in its view, "[w]hat scientific analysis is 'reasonably possible' at the programmatic stage is a methodological question within the expertise of the agency." *Id.* But the Forest Service nowhere argues that it need not comply with *Kern.*

The 2004 EIS at issue in this case recommends extensive changes to the 2001 Framework and even more extensive changes to the underlying Forest Plans in the Sierras. We have described the principal changes above. Briefly, they include harvesting 4.9 billion more board feet of timber than under the 2001 Framework (6.4 billion more than under the unamended Forest Plans). They include logging and burning near streams that would not have been permitted under the 2001 Framework. They include the construction of 90 more miles of new roads than under the 2001 Framework (115 more miles than under the unamended Forest Plans), and reconstruction of 855 more miles of existing roads than under the 2001 Framework (1,520 more miles than under the unamended Forest Plans). And they include reduction of restrictions on grazing by commercial and recreational stock.

The 2004 EIS contains no analysis whatsoever of environmental consequences of these changes on individual fish species in the Sierra. The 2004 EIS promises, in Section 4.2.3 ("Aquatic, Riparian, and Meadow Ecosystems"), that it will provide such an analysis. The EIS states, "Effects of the alternatives on species dependent on *aquatic,* riparian, and meadow habitats are explained elsewhere in this [EIS] (Section 4.3.2)." (Emphasis added.). But that promise is not fulfilled. Section 4.3.2 contains 67 pages of analysis of the environmental consequences of the framework for a number of individual species of mammals, birds and amphibians who are dependent on riparian and meadow habitats in the Sierras. But nowhere in that section (or anywhere else in the 2004 EIS) is there any analysis of individual species of fish. The explicit promise to analyze effects "on species dependent on aquatic . . . habitats" in Section 4.3.2, and the absence of any such analysis in that section (or anywhere else), is puzzling. It is possible that the absence of the promised analysis is nothing more than a simple mistake. But if a mistake, it was a mistake that was specifically brought to the attention of the Forest Service in the letter written by its Washington staff. As described above, that letter stated, "There needs to be a discussion of the effects of the new alternatives on riparian ecosystems, streams and fisheries."

In striking contrast to the 2004 EIS, the 2001 EIS contained 64 pages of detailed analysis of environmental consequences of the 2001 Framework on individual fish species. The 2001 EIS devoted 28 pages to individualized analyses of nine "federally threatened

and endangered fish species"—the Little Kern Golden Trout, the Paiute Cutthroat Trout, the Lahontan Cutthroat Trout, the Modoc Sucker, the Warner Sucker, the Shortnose and Lost River Suckers, the Central Valley Chinook Salmon, and the Central Valley Steelhead Trout. It then devoted 21 pages to individualized analyses of 11 "sensitive fish species"—the Goose Lake Lamprey, the Fall Run Chinook Salmon, the Eagle Lake Rainbow Trout, the Volcano Creek Golden Trout, the Goose Lake Redband Trout, the Warner Valley Redband Trout, the Goose Lake Sucker, the Lahontan Lake Tui Chub, the Goose Lake Tui Chub, and the Hardhead. Finally, it devoted 13 pages to individualized analyses of 14 "moderate and high vulnerability fish species"—the Kern Brook Lamprey, the Pacific Lamprey, the Kern River Rainbow Trout, the Owens Sucker, the Mountain Sucker, the Eagle Lake Tui Chub, the Pit River Tui Chub, the Sacramento Hitch, the Owens Speckled Dace, the Pit River Roach, the San Joaquin Roach, and the Rough Sculpin.

The 2001 EIS analyzed the environmental consequences to fish of each of the eight alternatives identified in the EIS. *See, e.g.*, 2001 EIS, vol. 3, ch. 3, at 262 ("Timber harvesting may be conducted in riparian areas, following different guidelines, under Alternatives 3, 4, 6, 7, and Modified 8. Alternatives 3 and 5 prohibit road building in riparian zones; Alternative 5 further addresses negative effects of roads on streams by requiring that failed road crossings and culverts be identified and have priority for rehabilitation."); *see also id.* at 63, 122 (same). The 2001 EIS also described the environmental consequences of grazing. *See, e.g., id.* ("One of the greatest risk factors, within

the control of the Forest Service, to Forest Service sensitive fish species in the western United States has been the degradation of the aquatic environment, especially those resulting from long term livestock grazing."); *see also id.* at 63, 122 (same).

The 2001 EIS also analyzed particular environmental risks for individual species of fish. For example, for both Paiute and Lahontan Cutthroat Trout, "risk factors" included "the immediate loss of individual fish . . . specific habitat features such as undercut banks use[d] for cover, increases in sedimentation leading to changes in spawning bed capacity, and the loss of riparian vegetation necessary to maintain adequate temperature regime[s]." For Shortnose and Lost River Suckers, risk factors included "[d]ecreases in water quality resulting from timber harvest, dredging activities, removal of riparian vegetation, and livestock grazing." For Central Valley Steelhead, "habitat destruction" was listed as a "risk factor." The 2001 EIS noted that "timber harvest, road building, agriculture, livestock grazing, and urban development" all "affect[ ] steelhead habitat." For Volcano Creek Golden Trout, risk factors included "increases in sedimentation leading to changes in spawning bed capacity, and the loss of riparian vegetation necessary to maintain adequate temperature regime. The risk factors identified are primarily a result of historic and current grazing practices." For Goose Lake Suckers, risk factors included the fact that "many of the streams have experienced some habitat loss due to the effects of logging, grazing and other factors that can degrade watersheds."

The adequacy of the 2001 EIS with respect to fish is not at issue. What is at issue is the adequacy of the 2004 EIS. Whether or not the analysis in the 2001 EIS was adequate (a question that is not before us), the 2001 EIS shows that an analysis of environmental consequences of the 2004 Framework for individual species of fish was "reasonably possible." There is no explanation in the 2004 EIS of why it was not reasonably possible to provide any analysis whatsoever of environmental consequence for individual species of fish, when an extensive analysis had been provided in the 2001 EIS. There is also no explanation in the 2004 EIS of why it was "reasonably possible" to provide an extensive analysis of environmental consequences to individual species of mammals, birds, and amphibians in 2004, but not reasonably possible to provide any analysis whatsoever of environmental consequences to individual species of fish in 2004.

An agency has flexibility in deciding when to perform environmental analyses. But an environmental analysis must "provide 'sufficient detail to foster informed decision-making,'" *Friends of Yosemite Valley,* 348 F.3d at 800 (citation omitted), and so cannot be unreasonably postponed. In 2002, the Council on Environmental Quality ("CEQ") established a Task Force to review agency practices under NEPA. The Task Force wrote in its September 2003 report to CEQ, "Reliance on programmatic NEPA documents has resulted in public and regulatory agency concern that programmatic NEPA documents often play a 'shell game' of when and where deferred issues will be addressed, undermining agency credibility and trust." THE NEPA TASK FORCE, MODERNIZING NEPA

IMPLEMENTATION 39 (2003), available at *http://ceq.hss.doe.gov/ntf/report/frontmats.pdf*. An agency's compliance with the "reasonably possible" requirement in a programmatic EIS, resulting in an appropriate level of environmental analysis, ensures that a "shell game" or the appearance of such a game is avoided. Judicial review under the arbitrary and capricious standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), in turn ensures that an agency does not improperly evade its responsibility to perform an environmental analysis when such an analysis is "reasonably possible."

In some cases, the appropriate level of environmental analysis in a programmatic EIS is fairly debatable. In such cases, our obligation is to defer to the expertise of the agency. But in this case the Forest Service has largely resolved the debate for us. In its 2001 EIS, the Forest Service performed an extensive analysis of the likely environmental impact of the 2001 Framework, including 64 pages of detailed analysis of the likely impact on individual fish species. In stark contrast, the Forest Service performed no analysis whatsoever in its 2004 EIS of the likely impact of the 2004 Framework on fish. The Forest Service provided no analysis despite the fact that the 2004 Framework allows much more logging, burning, road construction, and grazing than the 2001 Framework, and despite the fact that it had provided a detailed analysis in a programmatic EIS only three years earlier.

We do not require the Forest Service to provide in the 2004 EIS precisely the same level of analysis as in its 2001 EIS. We recognize that it may be appropri-

ate to have fewer than 64 pages of detailed analysis of environmental consequences for individual species of fish in the 2004 EIS. Indeed, if the Forest Service had explained its reasons for entirely omitting any analysis of the impact of the 2004 Framework on individual species of fish, it might have been able to show that it is reasonable to postpone such analysis until it makes a site-specific proposal. But the Forest Service has provided no explanation. *Compare* 40 C.F.R. § 1502.22 (requiring that an agency "always make clear" if it lacks information to conduct environmental analysis). The Forest Service has provided almost the opposite of an explanation, for it promised such an analysis and then failed to provide it. As we noted above, Section 4.2.3. of the 2004 EIS promises an analysis of the "[e]ffects of the alternatives on species dependent on aquatic, riparian, and meadow habitats" in Section 4.3.2. Section 4.3.2 contains a detailed analysis of the environmental effects on individual species of mammals, birds and amphibians. But Section 4.3.2. contains no analysis whatsoever of individual species of fish, even though fish are the quintessential "species dependant on aquatic . . . habitat[ ]."

In light of the extensive analysis of the environmental consequences on individual fish species in the 2001 EIS, and of the extensive analysis of the environmental consequences on individual species of mammals, birds, and amphibians in the 2004 EIS, we conclude, contrary to the Forest Service's contention, that it was "reasonably possible" to provide some analysis of the environmental consequences on individual fish species in the 2004 EIS. The failure of the

2004 EIS to provide any such analysis is a failure to comply with the hard look requirement of NEPA.

b. Incorporation by Reference of the Biological Assessment

The Forest Service's fall-back argument is that even if an analysis of environmental consequences of the 2004 Framework for individual fish species was "reasonably possible," the hard-look requirement is satisfied by two Biological Assessments ("BAs"), incorporated by reference in the 2004 EIS. We disagree.

Section 7 of the Endangered Species Act requires a federal agency to consult with the U.S. Fish and Wildlife Service ("USFWS") if a proposed action by that agency "may affect" a "listed" species or its critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Pursuant to Section 7, the Forest Service sent two BAs to the USFWS to initiate the consultation process. The first BA, sent in December 2000, indicated that the alternatives considered in the 2001 EIS "may affect" the Little Kern Golden Trout, California Golden Trout, Lahontan Cutthroat Trout, Paiute Cutthroat Trout, Owen's Tai Chub, Modoc Sucker, Lost River Sucker, Shortnose Sucker, and Warner Sucker. The second BA, sent in July 2003, indicated that the alternatives considered in the 2004 EIS "may affect" all of the species listed in the 2000 BA except the California Golden Trout.

The 2004 EIS does not include the texts of the BAs, but it refers to them twice, once in the text and once in an appendix. First, Section 4.3.1 discusses "Threat-

ened, Endangered, and Proposed Species." With respect to the BAs, it states, in its entirety:

> [T]he biological assessment[s] for the [2001 EIS] and for the [2004 EIS] contain a more thorough analysis of effects and was [sic] used in evaluating effects on each species. They are hereby incorporated by reference.

The text does not identify the individual species of fish included in the BAs.

> Second, Appendix C of the 2004 EIS is a "Consistency Review" that compares the 2001 and 2004 Frameworks to determine whether a supplemental environmental analysis is needed in the 2004 EIS. With respect to "Endangered, Threatened, and Proposed Species" of fish, the Consistency Review concluded:
>
> > Implementing the proposed changes considered in the [2004 EIS] would not be expected to produce appreciably different results. Effects on these species are documented in the *Biological Assessment for the [2004 EIS], July 30, 2003.*

The Appendix identifies the species of fish covered by the 2003 BA.

The Forest Service's argument fails for three independently sufficient reasons.

First, depending on its nature, material should be in the text of an EIS, should be in an appendix to the EIS, or should be incorporated by reference in the EIS. In descending order of importance: (1) Discussion of significant environmental impacts must appear in the text of an EIS. 40 C.F.R. § 1502.1.

(2) Material that "substantiates any analysis fundamental to the [EIS]" may appear in an appendix. *Id.* § 1502.18. (3) Material may be incorporated by reference so long as its omission from the EIS does not "imped[e] agency and public review." *Id.* § 1502.21; *see also* Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed.Reg. 18026, 18033-34 (March 17, 1981) ("FAQs"). If the BAs were intended to serve as the analysis of the environmental consequences of the 2004 Framework for fish, the 2004 EIS needed to do more than incorporate them by reference. They should have been described and analyzed in the text of the 2004 EIS, and the BAs themselves should have been included in an appendix.

This is not a mere formality. The purpose of an EIS is to inform decisionmakers and the general public of the environmental consequences of a proposed federal action. That purpose would be defeated if a critical part of the analysis could be omitted from an EIS and its appendices. The EIS is circulated to the general public. "If at all possible," the appendices are also circulated to the public. *Id.* at 18034 (FAQ 25a). The material that is incorporated by reference is not circulated to the public; it need only be "made available." *Id.* Material that is incorporated by reference must be "briefly described" in the body of the EIS, 40 C.F.R. § 1502.21, but a brief description cannot fulfill the purpose of the EIS if the substance of what is incorporated is an important part of the environmental analysis.

Second, even if they had been fully described and analyzed in the 2004 EIS, the BAs could not have sat-

isfied the "hard look" requirement. The BAs functioned as a trigger to the consultation process required under Section 7 of the Endangered Species Act. They merely enumerated the several species of "listed" fish that may have been affected by the alternatives considered in the 2001 and 2004 EISs. There was no analysis in either of the BAs of the manner or degree to which the alternatives may have affected these fish. To the degree that any analysis was performed, it was performed by the Fish and Wildlife Service when it prepared Biological Opinions in response to the BAs. The 2004 EIS makes no reference, in any form, to either of the Biological Opinions.

Third, even if the BAs could have satisfied the hard look requirement, they applied to only one group of fish species. As described above, the 2001 EIS analyzed the environmental consequences for three groups: (1) "federally threatened and endangered fish species" (9 species); (2) "sensitive fish species" (11 species); and (3) "moderate and high vulnerability fish species" (14 species). The BAs analyzed only the individual species in the first group. They said nothing about the individual species in the second and third groups.

2. Amphibians

The 2004 EIS contains an extensive analysis of individual amphibians. It specifically analyzes six species of amphibian: the California Red-legged Frog, the Foothill Yellow-legged Frog, the Mountain Yellow-legged Frog, the Northern Leopard Frog, the Cascades Frog and the Yosemite Toad. For each species, the 2004 EIS identifies changes between the 2001 and the 2004 Frameworks that are likely to affect

that species. The 2004 EIS discusses the impact of livestock grazing, prescribed fire, mechanical fuels treatments and road maintenance.

One of the major differences between the 2001 and 2004 Frameworks is the latter's emphasis on logging, rather than prescribed burning, as a means of reducing the risk of wildfires. The 2004 EIS describes the impact of the changed emphasis on the Foothill Yellow-legged Frog. It states that the 2001 Framework posed some risk to the frog because prescribed burning often results in the destruction or dispersal of coarse woody debris that the frog uses for shelter. By decreasing the amount of prescribed burning, the 2004 Framework will provide some benefit to the frog. However, the 2004 EIS also identifies the use of mechanical logging as a risk. For example, the frogs sometimes seek shelter beneath parked vehicles. When logging operations begin on any particular day, the vehicles may crush frogs sheltered beneath the tires.

Similarly, the 2004 EIS considers the impact of changed grazing standards on the Yosemite Toad. It states that risk factors to the Yosemite Toad from grazing include

> decreased growth rate of tadpoles as a result of increased bacteria from livestock fecal matter; mortality from being buried by livestock feces; reduced vegetative hiding cover for metamorphs, juveniles, and adults, which increases their vulnerability to predation by snakes and birds; and the collapse of rodent burrows from livestock hoof punching, thereby entrapping or burying individuals that use burrows for hiding cover.

The 2004 EIS notes that allowing grazing in meadows that have not yet been surveyed for Yosemite Toads "may contribute to localized extirpations."

The 2004 EIS also discusses a number of mitigation strategies to minimize the environmental consequences of the 2004 Framework. For example, the Forest Service will use "Best Management Practices" for road construction and maintenance. These practices include designing stream crossings and replacement stream crossings for a 100-year flood; designing stream crossings to minimize the diversion of natural stream flow; and avoiding road construction in wetlands and meadows. The Forest Service will also continuously monitor grazing allotments if site-specific changes around Yosemite Toad breeding sites are authorized. The 2004 EIS states that such monitoring will allow the Forest Service to identify and mitigate threats to the Yosemite Toad.

Pacific Rivers contends that the Forest Service is required to provide further analysis of the changes that are authorized under the 2004 Framework. Pacific Rivers' contention stems in part from the Forest Service's decision under the 2004 Framework to delegate significant decisionmaking authority to local managers of amphibian habitats. For example, in a portion of Section 4.2.3 discussing livestock grazing on meadows, the 2004 EIS notes that the new framework makes changes designed to "allow flexibility to design management practices [to] address local conditions." However, we are satisfied that the Forest Service's analysis was sufficient, at this stage of the process, given that the EIS provides significant analysis of the

environmental effects on amphibians, and that site-specific projects are not yet at issue.

The Forest Service has repeatedly committed itself to complying with NEPA for site-specific projects that will be proposed under the 2004 Framework. For example, in its brief in this court, it states that "additional NEPA analysis will occur at the project-level." *See* Appellee's Br. at 22. It states, further, that "because on-the-ground activities such as timber harvest and road, skid trail, and log landing construction would not occur prior to a future site-specific decision, the Forest Service will analyze the site-specific effects of those activities before allowing them." *Id.* at 24. The brief states, still further, that "[w]hen the Forest Service makes a decision to authorize or reauthorize grazing on an allotment, it conducts a detailed NEPA analysis, where it can examine the effects of the particular proposed grazing, considering . . . the allotment's location . . . , [and] the timing, scope, and intensity of proposed grazing." *Id.* at 40 (emphasis deleted). The Forest Service makes similar commitments in the 2004 EIS. For example, the 2004 EIS states, "Site-specific decisions will be made on projects in compliance with NEPA . . . following applicable public involvement and administrative appeal procedures." The 2004 EIS states further, "Any site-specific actions taken to implement direction in the Forest Plan Amendment would require compliance with NEPA." We are confident that when the Forest Service proposes to build, reconstruct or decommission roads; to conduct a logging or a prescribed burning operation for fuels management; to allow pack stock and/or saddle stock into Yosemite

Toad-occupied meadows; to permit commercial livestock to graze near Yosemite Toad breeding and rearing sites; or to use pesticides in a riparian conservation area, that it will fully comply with the NEPA requirements applicable to such site-specific projects.

Conclusion

In *Lands Council II,* we wrote that we will hold that an agency has acted in an arbitrary and capricious manner in preparing an EIS when it has "'entirely failed to consider an important aspect of the problem.'" 537 F.3d at 987. In this case, the Forest Service "entirely failed to consider" environmental consequences of the 2004 Framework on individual species of fish. Given the detailed 64-page analysis of the likely impact on individual species of fish in the 2001 EIS, the complete lack of such analysis of the likely impact on individual species of fish in the 2004 EIS, and the lack of any explanation in the 2004 EIS why it is not "reasonably possible" to perform some level of analysis of such impact, we have no choice but to conclude that the Forest Service failed to take the requisite "hard look" at environmental consequences of the 2004 Framework for fish.

We hold that the Forest Service failed to take a hard look at environmental consequences on fish in the 2004 EIS, in violation of NEPA. We hold that the Forest Service did take a hard look at environmental consequences on amphibians in the 2004 EIS, in compliance with NEPA. We therefore reverse in part and affirm in part, and remand to the district court.

REVERSED in part, **AFFIRMED** in part, and **REMANDED**. Costs to Plaintiff–Appellant.

N.R. SMITH, Circuit Judge, dissenting:

The majority "conclude[s], contrary to the Forest Service's contention, that it was 'reasonably possible' to provide some analysis of the environmental consequences on individual fish species in the 2004 EIS," and thus that the agency's decision not to provide this analysis "as soon as it [was] 'reasonably possible' to do so" was arbitrary and capricious. Maj. Op. 1026, 1030. In doing so, the majority makes two fundamental errors: First, it reinvents the arbitrary and capricious standard of review, transforming it from an appropriately deferential standard to one freely allowing courts to substitute their judgments for that of the agency. In doing so, the majority disregards our circuit's long-standing precedent holding that an agency's timing of analysis required by the National Environmental Policy Act (NEPA) is not arbitrary and capricious if it is performed before a critical commitment of resources occurs. The majority instead creates an unclear rule based on "reasonable possibility" that imposes additional procedures not required by NEPA on the Forest Service. Such a rule "leave[s] the agencies uncertain as to their procedural duties under NEPA, . . . invite[s] judicial involvement in the day-to-day decisionmaking process of the agencies, and . . . invite[s] litigation." *Kleppe v. Sierra Club*, 427 U.S. 390, 406, 96 S. Ct. 2718, 49 L. Ed. 2d 576 (1976).

Second, the majority ignores the tiering framework created by NEPA. Because the majority ignores such framework, it fails to differentiate between a site-specific environmental impact statement ("EIS") and a programmatic EIS that focuses on high-level

policy decisions. Under NEPA regulations on tiering and Ninth Circuit precedent, a programmatic EIS requires less detailed analysis than a site-specific EIS. Therefore, agencies are allowed to defer in-depth analysis until site-specific projects have been identified. Furthermore, agencies are given wide latitude in the tiering methodology they choose to implement, so long as the programmatic EIS allows for informed decision-making. As a result, courts owe a high level of deference to the methodological choices of the agency.

Because the majority's opinion amounts to an inappropriate and substantial shift in our NEPA jurisprudence, I must dissent.

I. STANDARD OF REVIEW

Congress enacted NEPA to require agencies to produce an EIS whenever they engage in a major action that could significantly affect the environment. 42 U.S.C. § 4332(2)(C). However, Congress also enacted the Administrative Procedure Act (APA), which governs our review of an agency's actions. Under the APA, we must employ a highly deferential standard of review when reviewing the Forest Service's actions in this case. 5 U.S.C. § 706(2)(A). Unless the Forest Service's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," we may not set it aside. *Id.*

In *Lands Council II,* a unanimous en banc decision, we explained that "[r]eview under the arbitrary and capricious standard 'is narrow, and we do not substitute our judgment for that of the agency.'" *Lands Council v. McNair (Lands Council II)*, 537 F.3d 981,

987 (9th Cir. 2008) (en banc) (alteration in original omitted) (quoting *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1156 (9th Cir. 2006), *abrogated on other grounds by Winter v. Natural Res. Def. Council*, 555 U.S. 7, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)). We also noted that our circuit's "environmental jurisprudence ha[d], at times, shifted away from the appropriate standard of review," prior to 2008. *Id.* at 988.

Although *Lands Council II* only explicitly overruled *Ecology Center, Inc. v. Austin*, 430 F.3d 1057 (9th Cir. 2005), explaining that *Ecology Center* was a case illustrative of this error, our correction extended beyond that solitary case. We referred to the shift in our jurisprudence occurring "in recent years," which clearly alludes to multiple incorrect decisions. *Lands Council II*, 537 F.3d at 988. Our correction also dealt with the deference owed to agencies under our "appropriate standard of review" in general, *id.*, rather than just regarding studies and on-the-ground analysis, as the majority argues, Maj. Op. 1027. We observed that previous decisions committed "key errors" by imposing on agencies additional "requirement[s] not found in any relevant statute or regulation" and by showing insufficient deference to agencies and "their methodological choices." *Lands Council II*, 537 F.3d at 991.

Therefore, we renounced this incorrect jurisprudence where we engaged in "fine-grained" assessments of agency action. *Id.* at 993. We instead observed that this was not the proper role for courts. *Id.* Rather, "our proper role is simply to ensure that the Forest Service made no 'clear error of judgment'

that would render its action 'arbitrary and capricious.'" *Id.* (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989)). The majority relies on cases decided prior to 2008 that suggest a less deferential role for courts. However, *Lands Council II* has irrevocably changed the legal landscape by setting forth the high level of deference owed by courts to agency action.

Accordingly, an agency's decision can be set aside "*only if* the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* at 987 (internal quotation marks omitted) (emphasis added); *see also Sierra Club v. U.S. Envtl. Prot. Agency*, 346 F.3d 955, 961 (9th Cir. 2003).

The majority argues that "the Forest Service 'entirely failed to consider' environmental consequences of the 2004 Framework on individual species of fish." Maj. Op. 1034. But "[w]hether an agency has overlooked 'an important aspect of the problem,' . . . turns on what a relevant substantive statute makes 'important.'" *Or. Natural Res. Council v. Thomas,* 92 F.3d 792, 798 (9th Cir. 1996) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut.,* 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983)). As discussed below in Part II, NEPA is the relevant statute. NEPA does not require site specific analysis be considered at the programmatic EIS stage. Rather, NEPA encourages the deferral of such analysis until the issues are ripe and analyzing them will be most meaningful.

Thus, the Forest Service cannot have failed to consider an aspect of the problem required by NEPA by following NEPA's tiered analysis structure and deferring specific analysis.

In addition, though the majority pays lip service to *Lands Council II's* deferential standard of review, the majority relies on *Kern v. U.S. Bureau of Land Management,* 284 F.3d 1062 (9th Cir. 2002) to engage in the same type of "fine-grained" analysis that was rebuked in *Lands Council II*.[1] Specifically, the majority demands that the agency provide whatever analysis the majority determines is "reasonably possible" "as soon as it can reasonably be done." *Id.* at 1072. However, the majority is unable to provide any support for this rule for at least two reasons.

First, relying on *Kern* to require a programmatic EIS to include reasonably possible site-specific analy-

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[1] The majority attempts to argue that the Forest Service recognizes that *Kern* is the correct rule. Maj. Op. 1027-28 (citing Appellee's Br. at 25). However, the Forest Service merely admitted that Pacific Rivers was "correct[ ]" in how it articulated the holding of *Kern*. In the same paragraph, the Forest Service argues that the determination of what analysis should be given in a programmatic EIS is "a methodological question within the expertise of the agency." Appellee's Br. at 25. Furthermore, even if the Forest Service did make a concession about a question of law, there is "no reason why we should make what we think would be an erroneous decision, because the applicable law was not insisted upon by one of the parties." *United States v. Miller,* 822 F.2d 828, 832 (9th Cir. 1987) (quoting *Smith Engineering Co. v. Rice,* 102 F.2d 492, 499 (9th Cir. 1938)). "The rule has been repeated in a variety of circumstances. Even if a concession is made by the government, we are not bound by the government's 'erroneous view of the law.'" *Id.* (quoting *Flamingo Resort, Inc. v. United States,* 664 F.2d 1387, 1391 n.5 (9th Cir. 1982)).

sis as soon as reasonably possible stretches the language from *Kern* far beyond the facts of the case.[2] *Kern* did deal with a programmatic EIS. However, the agency actions at issue there were site-specific timber sales, constituting a critical commitment of resources. *Id.* at 1069 ("A 'concrete plan,' a 'specific undertaking,' and a 'site-specific program' incorporating the Guidelines, such as we anticipated in [a previous case], are now before us."). The programmatic EIS in *Kern* had specifically deferred analysis of specific actions to future NEPA analysis. *Id.* at 1074. Rather than strike down this deferral as necessarily arbitrary and capricious, the *Kern* court merely looked to the subsequent EA to see whether the EA had sufficiently analyzed the site-specific action. *Id.* ("The second sentence [in the programmatic EIS] is not an analysis, but rather a promise of a later site-specific analysis to be performed in connection with specific projects 'within the range of the Port-Orford-cedar.' The revised EA for the Sandy-Remote Analysis Area is such a site-specific analysis. The adequacy of that

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[2] It is also worth noting that the "as soon as it can reasonably be done" language appears to have been created whole cloth by the court in *Kern*. *Id.* at 1072. This is also true of *Kern's* language, with no citation, asserting that "[i]f it is reasonably possible to analyze the environmental consequences in an EIS . . . , the agency is required to perform that analysis." *Id.* Until now, this language has yet to be quoted by a subsequent Ninth Circuit appellate case. Indeed, the only case the majority is able to "dig up" that applies *Kern's* rule is from the Tenth Circuit. *See* Maj. Op. 1026-27 (citing *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 707-08, 716 (10th Cir. 2009)). Even in the context of the facts of *Kern*, then, this "reasonably possible" rule appears to be a departure from our established precedent.

EA has also been challenged by ONRC. We now turn to that question.").

Thus, *Kern* does not support the proposition that a programmatic EIS must include *any* site-specific analysis as soon as reasonably possible if no critical commitments of resources have occurred. *Kern* is rather inapposite to such a rule. Thus, applying the "reasonably possible" rule to a programmatic EIS that does not contemplate critical commitments of resources is not only unsupported by *Kern's* holding, it also eviscerates the NEPA tiering framework discussed in Part II.

Second, such a rule, particularly when applied to a programmatic EIS, constitutes a dramatic departure from this circuit's precedent regarding arbitrary and capricious review. Our long-standing rule has always been that "NEPA requires a full evaluation of site-specific impacts *only when* a 'critical decision' has been made to act on site development—*i.e.,* when 'the agency proposes to make an irreversible and irretrievable commitment of the availability of resources to [a] project at a particular site.'" *Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 801 (9th Cir. 2003) (quoting *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982)). Until that "threshold" point, we are required to defer to the methodological choices of the agency regarding the timing of when site-specific analysis can reasonably be done. *Block,* 690 F.2d at 761.

The majority is correct that NEPA regulations encourage agencies to "integrate the NEPA process with other planning at the earliest possible time . . . ." Maj. Op. 1027 (quoting 40 C.F.R.

§ 1501.2). But "this court has interpreted these regulations as requiring agencies to prepare NEPA documents, such as . . . an EIS, 'before any irreversible and irretrievable commitment of resources.'" *Metcalf v. Daley*, 214 F.3d 1135, 1143 (9th Cir. 2000). This rule is derived from the text of NEPA itself. *See Conner v. Burford*, 848 F.2d 1441, 1446 n.13 (9th Cir. 1988) ("The 'irreversible and irretrievable commitment of resources' criterion is derived from [NEPA], which requires an EIS to include a statement of 'any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.'"). This rule has also proved useful, as explained by environmental law scholars, because "without inside knowledge, [courts] really cannot know the status of various initiatives under consideration. . . ." James Salzman and Barton H. Thompson, Jr., *Environmental Law and Policy* 328 (3d ed. 2010). Thus, "to provide a bright line standard" for "challenging the timing of EIS preparation . . . courts have required that preparation of an EIS commence 'before [an] irreversible and irretrievable commitment of resources.'" *Id.* at 328-29 (quoting *Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848, 852 (9th Cir. 1979)).

Consequently, in multiple cases, we have explained that an agency's timing of its analysis becomes arbitrary and capricious only if the NEPA documents are prepared after an irreversible and irretrievable commitment of resources has occurred. *See, e.g., Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 893 (9th Cir. 2002) ("[T]he issue we must decide here is whether the Federal Defendants prepared the EA too

late in the decision-making process, i.e., after making an irreversible and irretrievable commitment of resources." (quoting *Metcalf,* 214 F.3d at 1143)). On the other hand, we have held that an agency is "free to decide *not* to [provide NEPA analysis] up until the time it issued its Decision Notice for the" specific commitment of resources. *Id.* at 893 (emphasis in original). In other words, an agency cannot have entirely failed to consider an aspect of a problem before a critical commitment of resources has taken place, because the agency still has an opportunity up to that point to provide the necessary analysis. Accordingly, whether analysis is "reasonably possible" and was provided "as soon as it is reasonably possible" is *wholly irrelevant* to the inquiry of whether the timing of the agency's analysis was arbitrary and capricious.

The majority cites, but ignores, precedent upholding this critical commitment of resources threshold. *See, e.g.,* Maj. Op. 1025-26 (citing *Friends of Yosemite Valley*, 348 F.3d at 800). The majority instead requires its own preferred timing for NEPA analysis. Essentially, the majority misunderstands that there is a wide range of permissible agency action between what courts hope for as ideal agency actions, and actions that fall below a much lower threshold, becoming arbitrary and capricious. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 129 S. Ct. 1800, 1810, 173 L. Ed. 2d 738 (2009) (under arbitrary and capricious review, courts "should 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'" (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286, 95 S. Ct. 438, 42 L. Ed. 2d 447 (1974))); *Texas Clinical*

Labs, Inc. v. Sebelius, 612 F.3d 771, 775 (5th Cir. 2010) ("An agency's decision need not be ideal or even, perhaps, correct so long as not arbitrary or capricious and so long as the agency gave at least minimal consideration to the relevant facts as contained in the record." (internal quotation marks omitted)). The majority's proposed rule would turn arbitrary and capricious review on its head and allow courts to keep agencies on a tight leash, directing agencies based on what courts view as best, as illustrated by the majority's decision in this case. While there are certainly times when I would disagree with quality or timing of an agency's analysis and would enjoy dictating my own agenda, arbitrary and capricious review simply provides courts with no warrant to do so.

In the present case, it is undisputed that the Forest service has not made a critical commitment of resources regarding any site-specific projects. The 2004 Framework "do[es] not provide final authorization for any activity,"[3] and "subsequent and full environmental review [of these site-specific projects] is contemplated," *Friends of Yosemite Valley*, 348 F.3d at 801.[4] It only establishes the standards and guidelines under which future projects permitting such ac-

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[3] United States Dept. of Agriculture, Forest Service, *Record of Decision, Sierra Nevada Forest Plan Amendment, Final Supplemental Environmental Impact Statement* 24 (January 2004) [hereinafter Record of Decision].

[4] *See also WildWest Inst. v. Bull*, 547 F.3d 1162, 1168 (9th Cir. 2008) (holding that NEPA analysis need only be performed before there is "any irreversible and irretrievable commitment of resources," and thus the Forest Service's decision to pre-mark trees did not irretrievably commit the Forest Service to a specific course of action and was not arbitrary and capricious).

tions must occur. Thus, the Forest Service's timing of analysis has not reached the bright-line threshold upheld by our precedent, and the Forest Service's decision to defer more specific analysis regarding fish cannot be arbitrary and capricious.

II. THE FOREST SERVICE APPROPRIATELY UTILIZED A TIERED ANALYSIS STRUCTURE

Because it is irrelevant whether the Forest Service provided a reasonably possible amount of analysis as soon as reasonably possible, the appropriate issues to review are actually 1) whether the agency's use of a tiered analysis structure was arbitrary and capricious, and 2) whether the amount of high-level analysis in the current programmatic EIS was sufficient to engage in informed decision-making regarding broad policies affecting all species, including fish.

A. The agency's use of a tiered analysis structure to defer in-depth analysis until concrete, site-specific projects were planned was not arbitrary and capricious.

The agency's methodological decision to utilize a tiered EIS approach and defer in-depth analysis of site-specific projects was not only reasonable, but it is also encouraged by the Council on Environmental Quality's[5] (CEQ) regulations for implementing NEPA. These regulations explain that "[a]gencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same

[5] The CEQ was established under Title II of NEPA and is charged with the task of "formulat[ing] and recommend[ing] national policies to promote the improvement of the quality of the environment." 42 U.S.C. § 4342.

issues and to focus on the *actual issues ripe for decision at each level of environmental review.*" 40 C.F.R. § 1502.20 (citations omitted) (emphasis added). The term "tiering" refers to "the coverage of general matters in broader environmental impact statements (such as national program or policy statements)" subsequently followed by "narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared." 40 C.F.R. § 1508.28. These regulations explain that tiering is appropriate when the sequence of analysis moves from "a program, plan, or policy environmental impact statement . . . to a site-specific statement or analysis." § 1508.28(a).

Agencies have a wide range of discretion in determining how to implement their tiering strategy. In a 2001 memorandum, Frederick Skaer, Director of the Office of NEPA Facilitation, explained that "we have deliberately stayed away from prescriptive guidelines on how to apply tiering so that each tiered process can be custom designed to the specific situation. You therefore have considerable latitude in the specific tiering approach you utilize to implement the NEPA policy mandate of informed decision-making." Office of NEPA Facilitation, Memorandum on Tiering of the I–70 Project, Kansas City, Missouri to St. Louis, June 18, 2001 (citation omitted); *see also Ecology Ctr., Inc. v. Austin,* 430 F.3d 1057, 1072 (9th Cir. 2005) (McKeown, J., dissenting) ("The limited nature of this inquiry underscores the latitude in implementation

and interpretation that Congress intended for its agents."), *overruled on other grounds by Lands Council II,* 537 F.3d at 991.

Because the 2004 Framework is a programmatic EIS, that focuses on broad policies and general goals and does not make critical commitments of resources (as discussed in Part I), the Forest Service's decision to utilize a tiered approach and defer more in-depth analysis was clearly a reasonable choice within the agency's discretion. Thus, so long as the programmatic EIS provides sufficient guidelines to foster informed decision-making (as discussed in Part II.B), nothing more can be required of the agency at this stage.

The majority acknowledges this NEPA tiering framework. Maj. Op. 1026. Then the majority promptly disregards our precedent and argues that "[r]egardless of whether a programmatic or site-specific plan is at issue, NEPA requires that an EIS analyze environmental consequences of a proposed plan as soon as it is 'reasonably possible' to do so." *Id.* at 1026. The majority also argues that the agency was required to perform an "appropriate level of environmental analysis" based on what the majority determines was "reasonably possible." *Id.* at 1029. The majority observes that the 2001 Framework provided more analysis of specific aquatic species. *Id.* at 1024-25, 1029-30. The majority also claims that the agency failed to explain why it provided less analysis of fish in the 2004 Framework. *Id.* at 1030. As a result, the majority asserts that this proves the agency was able to provide more in-depth analysis than it did. *Id.* Consequently, the majority holds that the agen-

cy's lesser amount of analysis of fish in the 2004 Framework was arbitrary and capricious. *Id.* at 1033-34. The majority's arguments suffer from at least four flaws.

First, this is a classic example of courts imposing additional procedures on agencies that have no basis in statutory or regulatory law. Nowhere in the text of NEPA, or its regulations, is an agency required to provide a similar amount of analysis in the current EIS as was performed in a previous EIS. Both the 2001 and the 2004 Frameworks were programmatic environmental impact statements. The Forest Service voluntarily chose to provide more in-depth analysis in the 2001 Framework than was necessary, but nothing in NEPA requires an agency to provide an equivalent level of analysis for a subsequent EIS. As long as the agency's analysis falls within the wide zone of reasonability, the agency need not provide the most *ideal* analysis in order to avoid having its decision struck down as arbitrary and capricious. *See Dombeck*, 304 F.3d at 892 ("We will uphold the Forest Service's decision not to [provide NEPA analysis until a later date] unless that decision was unreasonable."). While it may irritate the majority that the Forest Service did not provide as much detailed analysis in the 2004 EIS as in the 2001 EIS, there is no precedent for the majority's decision to strike down the Forest Service's decision to defer more in-depth analysis until more concrete projects have been identified.

NEPA also does not impose a blanket requirement on agencies to provide as much analysis as the majority determines is reasonably possible "as soon as it can reasonably be done." Maj. Op. 1026 (quoting *Kern*,

284 F.3d at 1072). To the contrary, the NEPA regulations about tiering clearly indicate that delayed analysis is not only allowed, but even preferable in some instances. 40 C.F.R. § 1502.20; *see also Block*, 690 F.2d at 761 (noting that the analysis is more meaningful when a "concrete development proposal crystallizes the dimensions of a project's probable environmental consequences"); *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1166 (9th Cir. 2003) (NEPA's purpose is "to ensure informed decision-making to the end that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.").

The majority is correct that NEPA is designed to encourage agencies to "integrate the NEPA process with other planning at the earliest possible time." Maj. Op. 1027 (quoting 40 C.F.R. § 1501.2). But, in *Friends of Yosemite Valley* and other cases, we have recognized that NEPA's encouragement of early analysis is "tempered by (1) 'the statutory command that [a reviewing court] focus upon a proposal's parameters as the agency defines them,' and (2) 'the preference to defer detailed analysis until a concrete development proposal crystallizes the dimensions of a project's probable environmental consequences.'" 348 F.3d at 800 (quoting *Block*, 690 F.2d at 761). The majority ignores this tempering effect. Instead, it essentially demands as much analysis for fish as the majority determines is reasonably possible as soon as the agency can provide it, irrespective of the Forest Service's methodological choices and decision to utilize a tiered analysis structure.

Second, the majority's argument comparing the volume of analysis between the 2001 and 2004 Frameworks suffers from the proverbial comparison of apples to oranges. The 2001 Framework contained many more broad-based rules and clear-cut policies that made for easier identification of issues. The 2004 Framework *by design* calls for a flexible approach based on specific conditions,[6] and it leaves critical decisions to be made when site specific projects are identified. For example, under the previous 2001 EIS, the "spacial location of strategically-placed area treatments" was specifically limited in geographic location to the "upper two-thirds of slopes," whereas the 2004 EIS contains no such geographic limitations. 1 SEIS at 210. Similarly, the 2001 EIS limited compaction in riparian conservation areas to "less than 5% of project activity areas," whereas the 2004 Framework provides "[n]o firm numeric standard[s] . . . , thus allowing for site-specific evaluations." *Id.* As a result, it is not surprising that the 2001 Framework more easily lent itself to more extensive analysis up front.

Third, the majority's insistence on requiring the agency to provide the amount of analysis the majority thinks is appropriate as soon as reasonably possible illustrates a misunderstanding of the tiering frame-

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[6] "In general, the changes proposed in [the 2004 Framework] are designed to meet the intent of the standards and guidelines in [the previous Framework], but allow flexibility to design management practices [to] address local conditions." United States Dept. of Agriculture, Forest Service, *Sierra Nevada Forest Plan Amendment, 1 Final Supplemental Environmental Impact Statement* 214 (January 2004) [hereinafter 1 SEIS] (emphasis added) (citation omitted).

work set forth in the CEQ regulations. These regulations balance the public's need to receive analysis quickly with the public's competing need to receive analysis regarding "actual issues ripe for decision." 40 C.F.R. § 1502.20. To achieve this balance, agencies are given "wide latitude" in choosing the scope of analysis that will occur at different stages of the tiered analysis structure. Office of NEPA Facilitation, Memorandum on Tiering of the I-70 Project, Kansas City, Missouri to St. Louis, June 18, 2001.

The majority correctly observes that the level of analysis may differ depending on the scope of the agency action. Maj. Op. 1020, 1026, 1029-30. But then the majority incorrectly takes it upon itself to determine the scope of the project, based on the quantity and timing of analysis that the majority determines is "reasonably possible." *Id.* at 1028-30. This approach not only ignores the wide latitude the NEPA regulations accord agencies in determining how to structure their tiered analysis methodology, it directly contradicts Supreme Court and Ninth Circuit precedent. *See Kleppe*, 427 U.S. at 413, 96 S. Ct. 2718 (agencies have discretion to "intelligently determine the scope of environmental analysis and review specific actions [they] may take"); *Friends of Yosemite Valley,* 348 F.3d at 800 ("[A] reviewing court [must] focus upon a proposal's parameters as the agency defines them" (alteration in original omitted) (quoting *Block,* 690 F.2d at 761)).

As the majority observes, it is true that the CEQ's Task Force has expressed concern that the use of a tiering structure can result in a "shell game" regarding "when and where deferred issues will be

addressed." Maj. Op. 1029-30 (citing The Nepa Task Force, *Modernizing Nepa Implementation* 39 (2003), available at http://ceq.hss.doe.gov/ntf/report/finalreport.pdf). But the majority ignores that, in the same paragraph discussing this potential "shell game," the Task Force recommends that the CEQ address the problem by creating requirements whereby programmatic documents would "provide a roadmap, explaining where and when deferred issues raised by the public and/or regulatory agencies will be addressed." This potential regulatory solution of requiring a simple roadmap for programmatic analysis is markedly different than the majority's approach of imposing a novel and unclear judicial requirement, destroying an agency's methodological flexibility and requiring whatever analysis the majority thinks is "reasonably possible" to be performed "as soon as it can reasonably be done."

The majority seems to suggest that the Forest Service inappropriately participated in such a "shell game" in this case by providing a "puzzling" and unfulfilled promise to perform specific analysis of individual fish species. Maj. Op. 1028. But, even assuming that the Forest Service was required to follow through on any promises made in the EIS, the Forest Service did not break any promises. As the majority acknowledges, the Forest Service never explicitly promised to analyze individual fish species; it merely explained that the "[e]ffects of the alternatives on species dependent on aquatic, riparian, and meadow habitats" would be "explained elsewhere in th[e] SEIS." 1 SEIS at 207; *see also* Maj. Op. 1030. The Forest Service clearly delivered on this promise. Specifical-

ly, as to aquatic habitats, Part II.B highlights the Forest Service's extensive analysis regarding how various alternatives would affect aquatic habitats and the corresponding dependent species in general. Moreover, as the majority also notes, the 2004 Framework incorporates by reference two different biological assessments analyzing the consequences of the 2004 EIS on individual fish species. Maj. Op. 1030-31. While the analysis from the biological assessments is likely insufficient for site-specific NEPA analysis regarding a potential critical commitment of resources affecting fish, it further illustrates that the Forest Service did not break its promise to provide at least some analysis of aquatic species in the programmatic EIS.

Fourth, the majority incorrectly asserts that there is "no explanation" for the Forest Service's decision to defer more in-depth analysis of individual fish species. *See, e.g.,* Maj. Op. 1029-30. However, the Forest Service clearly *did* explain its reasons for deferring in depth analysis until more site-specific projects were identified. Specifically, in its Record of Decision, the Forest Service stated,

> Our ability to strategically place fuel treatments for optimum effectiveness has been compromised by the set of complicated rules in the [2001 Framework]. The standards and guidelines in that [Framework] are applied at the stand level, rather than by land allocations. . . . Some of the rules are so detailed that they prescribe down to one acre what is allowed, and require measuring change in canopy to ten percent increments, which is not consistently *practical* with existing meas-

> urement tools. *This fine-scale approach limits our ability to make significant progress.* . . . [O]ur ability to strategically place fuels treatments on the landscape has been *compromised by the complexity of rules* [which allows] . . . more habitat [to be] lost to wildfire. . . . This decision is intended to reverse that trend.

Record of Decision at 8–9; *see also* Appellee's Br. at 6. As a result, the agency explained that the 2004 EIS was being implemented to "assure the most efficient and appropriate use of government resources. . . ." Record of Decision at 23-24. The Forest Service primarily argued not that providing more analysis would be entirely impossible, but rather that "there was insufficient information and analytic tools for a *meaningful* analysis. . . ." Appellee's Br. at 48 (emphasis added). Therefore, the majority should have concluded that it was well within the Forest Service's discretion to determine that the benefits of deferring in-depth analysis of aquatic species to provide more meaningful analysis outweighed any delays in information.

If the Forest Service commits to a site-specific project in the future, without engaging in the required level of NEPA analysis, then Pacific Rivers might have a viable NEPA claim. Indeed, it is likely that "[t]he deficiencies noted by the" majority opinion (regarding analysis of fish) "are precisely the omissions the Forest Service will need to correct in order to comply fully with NEPA" at a later time. *Block*, 690 F.2d at 763; *see also N. Alaska Envtl. Ctr. v. Lujan*, 961 F.2d 886, 891 (9th Cir. 1992) (approving a programmatic EIS that deferred detailed analysis until an application for

a mining permit was submitted, but noting that "judicial estoppel precludes the Park Service from later arguing that it has no further duty to consider mitigation measures . . .").

Not only has the Forest Service affirmed many times that they plan to engage in further detailed analysis when specific projects are identified,[7] but we have a legal duty to assume that the agency will perform that analysis. In *Salmon River Concerned Citizens v. Robertson,* we observed that courts should "assume that government agencies will . . . comply with their NEPA obligations in later stages of development." 32 F.3d 1346, 1358 (9th Cir. 1994) (quoting *Conner*, 848 F.2d at 1448).

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[7] *See, e.g.,* Record of Decision at 20 ("This [Record of Decision] does not authorize timber sales or any other specific activity on the Sierra Nevada national forests. Site-specific decisions will be made on projects in compliance with NEPA, ESA, and other environmental laws following applicable public involvement and administrative appeal procedures."); United States Dept. of Agriculture, Forest Service, *Sierra Nevada Forest Plan Amendment, 2 Final Supplemental Environmental Impact Statement, Response to Public Comments* 66, 67 (January 2004) [hereinafter 2 SEIS] ("Actual locations and miles of roadwork would be determined through project-level planning and analysis."); *Id.* at 124, 125 ("Any site-specific actions taken to implement direction in the Forest Plan Amendment would require compliance with NEPA. An environmental analysis would be completed to assess the potential impacts of proposed activities on water quality and aquatic and riparian systems. The analysis would also include an assessment of cumulative watershed effects relative to thresholds of concern established for watersheds in the project analysis area."); Appellee's Br. at 49 ("At the project-level, the Forest Service will consider both the synergistic effects of actions proposed within a project, where applicable, as well as the cumulative effects of multiple projects conforming to the Framework, again where applicable.").

B. The amount of programmatic, high-level analysis was sufficient to engage in informed decision-making regarding broad policies affecting all species, including fish.

The majority claims that the Forest Service "entirely failed to consider an important aspect of the problem" by not providing in-depth analysis regarding how the 2004 programmatic Framework would affect specific species of fish. Maj. Op. 1033-34 (citing *Lands Council II*, 537 F.3d at 987). But here, because the Forest Service chose to utilize a tiered NEPA analysis structure and implement a programmatic EIS, the relevant scope of "the problem" is whether the Forest Service "provide[d] 'sufficient detail to foster informed decisionmaking.'" *Friends of Yosemite Valley*, 348 F.3d at 800 (quoting *Lujan*, 961 F.2d at 890-91). As discussed above, the majority is *only* able to claim otherwise by ignoring the proper standard of review and refusing to defer to the Forest Service's discretion in determining the scope of its analysis. *See Kleppe*, 427 U.S. at 413, 96 S. Ct. 2718 (agencies have discretion to "intelligently determine the scope of environmental analysis and review specific actions [they] may take"); *Friends of Yosemite Valley,* 348 F.3d at 800 ("[A] reviewing court [must] focus upon a proposal's parameters as the agency defines them") (alteration in original omitted) (quoting *Block,* 690 F.2d at 761). The scope of analysis in a programmatic EIS can include considerably less detail than in an EIS analyzing a site-specific project. *See, e.g., Res. Ltd., Inc. v. Robertson,* 35 F.3d 1300, 1306 (9th Cir. 1993); *Salmon River*, 32 F.3d at 1357-58; *Block*, 690 F.2d at 761.

Thus, under the Forest Service's tiered-analysis approach, the 2004 EIS provides sufficient high-level standards to guide future on-the-ground decisions affecting fish. These standards generally contemplate the relevant range of potential agency action and the consequences on various habitats in the Sierra Nevada. The 2004 Framework "begins by explaining that cumulative effects were analyzed in detail for the eight alternatives considered in the 2001 Framework." Appellee's Br. at 50. "It then identifies activities that have occurred" since the 2001 Framework, "including soil and water resource improvements, hazardous fuels reductions, wildfire suppression," and road construction. *Id.*

Specifically regarding aquatic habitats (home to fish species), the Framework notes that these are one of the most "degraded of all habitats in the Sierra Nevada," though much of the original problem was related to "lower elevation dams and diversions." 1 SEIS at 3. The EIS observed that "[t]he greatest effects on the [a]quatic, [r]iparian and [m]eadow [e]cosystems will generally be from either mechanical fuel treatments or catastrophic wildfires." *Id.* at 12, 96. "Fires can have extraordinary effects on watershed processes and, as a consequence, significantly influence aquatic organisms and the quality of aquatic habitats in many ways." *Id.* at 208 (citation omitted). These effects include "reductions in riparian shading and altered streamflows [that] can increase stream temperatures to extreme levels," "[f]looding, surface erosion, and mass wasting . . . due to vegetation loss," and "increases in sedimentation, debris flows,

and wood inputs may occur" as well as "[c]omplete channel reorganization." *Id.*

The Forest Service weighed "tradeoffs between potential aquatic ecosystem and water quality impacts from fuel management activities (mechanical treatment and prescribed fire) and risks associated with high severity wildfires." *Id.* (citation omitted). It recognized that "with respect to aquatic ecosystems, there are arguments for and against the use of fuels treatments to reduce the extent and severity of future fires." *Id.* (citation omitted). After providing this analysis, the EIS determined "alternatives that lower the risk of fire and have medium levels of treatment pose the least risk to aquatic and riparian system." *Id.* at 12. Therefore, by allowing increased fuels treatments, the 2004 Framework would reduce the anticipated acres burned by just over 15% from the 2001 Framework. *Id.* at 98.

The Forest Service recognized that this approach "pose[d] higher short-term risks to aquatic resources because it prescribes larger amounts of mechanical treatments and greater treatment intensities." *Id.* at 12, 97, 215. But the Forest Service concluded that this was mitigated by the expected long-term benefits to aquatic habitats resulting from reducing wildfires. *Id.* The Forest Service also asserted its intent to reduce any short-term threats through objectives listed in its "Aquatic Management Strategy," best management practices, and goals related to "landscape-level conditions" and "land allocations" that would be applied during "project level analysis." *Id.* at 12, 97, 207, 210, 215. It was reasonable for the Forest Service to defer more specific analysis of the proposal's

effect on aquatic species, because "[p]otential treatment effects on aquatic, riparian and meadow ecosystems are largely a function of the amounts, types, intensities, and locations of treatments and the standards by which they are implemented." *Id.* at 210.

Although the majority correctly notes that the 2004 Framework anticipates considerably more logging in the forests, the majority ignores the fact that much of that logging may never occur. For example, 214 million board feet were offered for sale on average between FY 2000-2002, but only 118 million were actually sold—approximately 55%. *Id.* at 174-75. Similarly, only 58% of the fuel treatments projected under the 2001 Framework were carried out in the first three years of the Framework. *Id.;* Appellee's Br. at 22-23. Therefore, the Forest Service reasonably concluded that it would be inefficient to perform a detailed analysis of the impact of activities that may never take place, and the 2004 EIS contains sufficient analysis of the probable consequences of increased fuel management at the programmatic level.

The 2004 Framework identified roads as another "critical component" of the risk and benefit "tradeoffs" to aquatic species, which include fish. 1 SEIS at 209. The EIS explained that roads are just behind wildfires in their potential effect on "aquatic ecosystems and water quality in forested environments." *Id.* The EIS cited studies discussing how "roads can deliver more sediment to streams than any other human disturbance in forested environments." *Id.* (citation omitted). However, the studies also indicated that "surface erosion from roads can be reduced through improved design, construction, and maintenance prac-

tices," and "[p]roper road location, drainage, surfacing, and cut slope and fill slope treatments are important in limiting effects." *Id.* (citation omitted). The Forest Service explained that the proposed "modest reduction in overall road miles, and improved road conditions," subsequently adopted in the 2004 Framework, were some of "the most important aspects of reducing risks to aquatic resources." *Id.* at 215.

The Forest Service determined that, because many details of actual on-the-ground activities were yet unknown, a more detailed analysis would be appropriately conducted when specific projects were identified. For example, the EIS explained that "actual locations and miles of roadwork [will] be determined through project-level planning and analysis." 2 SEIS at 66. Changing the location of a proposed road by just a few hundred feet could make a substantial difference in the impact it had on riparian areas and on fish. A different location might have significantly different vegetation, soil type, and topography. Changing the location could even place a road in a completely different drainage basin, potentially impacting entirely different species of fish. *See, e.g.*, Biological Assessment for SNFPA SEIS 146, July 30, 2003 (Paiute cutthroat trout found only in 14.5 miles of streams).

The EIS explained that "road management does not vary substantially between [the 2001 Framework and the 2004 Framework]. Under both alternatives, the . . . biological effects of roads, as previously described, would be *reduced* across the bioregion. . . ." 1 SEIS at 212. The EIS further noted that, under the 2004 Framework, there would be a decrease in the net miles of roads. *Id.* (under the 2004

Framework, "1175 miles would be decommissioned and 115 miles of new road would be constructed"). Although the miles of reconstructed roads would almost double and may have short-term impacts, reconstructed roads would be expected to "improve water quality and aquatic habitat. . . ." *Id.*

The 2004 EIS also provided analysis of the effects to watersheds from on-the-ground activity that the Forest Service might permit under the Framework. The Framework explained that, as a broad-based policy, future projects should remain protective of wildlife but strive for more effective reduction of hazardous fuels. *See, e.g.,* Appellee's Br. at 6, 9, 36, 54. It also identified activities that have occurred since the 2001 Framework, including soil and water resource improvements, hazardous fuels reductions, wildfire suppression, and road construction. *Id.* at 50. Based on this information, it analyzed combined or synergistic effects of the elements of the 2004 Framework on aquatic ecosystems and species, explaining that the 2001 and 2004 Frameworks are expected to have similar effects, because both alternatives are required to meet soil quality standards. *Id.* at 47-48.

Similarly, the EIS addressed the impacts of grazing with sufficient detail to satisfy NEPA on a programmatic level. As with logging and road construction, the Framework calls for a flexible approach based on specific conditions, rather than a full-scale analysis at this stage. The same 2001 standards will continue to be in effect and "are expected to reduce erosion of meadows and improve aquatic habitat conditions by facilitating the growth of stabilizing vegetation along streams." 1 SEIS at 214. The 2001 and the 2004

Frameworks primarily differ in that changes to utilization and stubble heights may be allowed in the 2004 Framework when current range conditions are "good to excellent" (and after "rigorous[ ] evaluat[ion]"). *Id.* Monitoring requirements under this flexible approach will "minimize[ ] differences in effects on aquatic . . . ecosystems between the [2001 and 2004 Frameworks]." *Id.*

Thus, after recognizing the general impact that various proposals could have on the environment and the measures that could mitigate those effects in the programmatic EIS, the Forest Service reasonably deferred the detailed analysis of future site-specific projects. Based on this analysis, the Forest Service clearly did not "entirely fail[ ]" to consider an important aspect of the programmatic analysis required to provide informed decision-making. The majority may have preferred more specific analysis about individual fish species, but such preference is not a justifiable reason under NEPA to disregard the agency's analysis as arbitrary and capricious.

III. CONCLUSION

The agency clearly did not "rel[y] on factors Congress did not intend it to consider" when it utilized the tiered methodology encouraged by the CEQ regulations for implementing NEPA. *Lands Council II*, 537 F.3d at 987. The Forest Service also did not "entirely fail[ ] to consider an important aspect" of the high level policies set forth in their programmatic EIS. *Id.* Lastly, the agency clearly did not offer an explanation for their programmatic EIS that is "so implausible" that it cannot "be ascribed to a difference in view or the product of agency expertise." *Id.* Be-

cause *we can only* overturn an agency's action if the agency committed one of these arbitrary and capricious errors, and because no such error occurred in this case, I would appropriately defer to the Forest Service's reasonable decision and affirm.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. 2:05-cv-00953-MCE-GGH

PACIFIC RIVERS COUNCIL, PLAINTIFF

v.

UNITED STATES FOREST SERVICE; MARK REY, IN HIS OFFICIAL CAPACITY AS UNDER SECRETARY OF AGRICULTURE, DALE BOSWORTH, IN HIS CAPACITY AS CHIEF OF THE UNITED STATES FOREST SERVICE, JACK BLACKWELL, IN HIS OFFICIAL CAPACITY AS REGIONAL FORESTER, REGION 5, UNITED STATES FOREST SERVICE, DEFENDANTS
AND
CALIFORNIA FORESTRY ASSOCIATION, ET AL., QUINCY LIBRARY GROUP, AN UNINCORPORATED CITIZENS GROUPS; PLUMAS COUNTY; AND CALIFORNIA SKI INDUSTRY ASSOCIATION,
DEFENDANT-INTERVENORS

Sept. 18, 2008

MEMORANDUM AND ORDER

MORRISON C. ENGLAND, JR., District Judge.

Through this lawsuit, Plaintiff Pacific Rivers Council ("Plaintiff") challenges the 2004 Sierra Nevada Forest Plan Amendment ("SNFPA"), commonly known as the 2004 Framework, on grounds that it vio-

lates the National Environmental Policy Act of 1969 ("NEPA") by failing to adequately analyze the direct, indirect, and cumulative impacts entailed by implementation of the Framework. Plaintiff additionally contends that the 2004 Framework runs counter to the provisions of the Administrative Procedures Act ("APA"), claiming that the changes it makes in management of the forests contained within the Sierra Nevada region are not supported by the record. Defendants are the United States Forest Service and several federal officials who had roles in promulgating the 2004 Framework and adjudicating Plaintiff's appeal (hereinafter collectively referred to as "Defendants"). Presently before the Court are cross motions for summary judgment filed on behalf of both the Plaintiff and Defendants.

FACTUAL BACKGROUND

The Sierra Nevada region contains approximately 11.5 million acres of National Forest Service land with eleven National Forests. Within that region, there are "dozens of complex ecosystems each with numerous, inter-connected social, economic and ecological components." SNFPA 1920. Those ecosystems include numerous watersheds supporting diverse habitats—rivers, streams, lakes, ponds, wetlands and riparian areas that are home to a rich array of native aquatic species.

In the late 1980s, the Forest Service began developing a comprehensive strategy for managing the myriad resources found within the region. In 1995, the Regional Forester for the Pacific Southwest Region of the Forest Service issued a draft Environmental Impact Statement ("EIS") outlining its manage-

ment proposal. SNFPA 229.[1] Additionally, in 1996, the United States Congress sponsored a comprehensive scientific and socioeconomic analysis of the Sierra Nevada which culminated in the so-called Sierra Nevada Ecosystem Report ("SNEP Report").

After extensive public participation and the preparation of a Final EIS which responded to public concerns, the Regional Forester issued, in 2001, a Record of Decision ("ROD") which adopted management objectives in five major areas: old forest ecosystems; aquatic, riparian, and meadow ecosystems; fire and fuels; noxious weeds; and hardwood ecosystems on the lower westside of the Sierras. *Id.* at 231-35. Among the more difficult issues confronted by the ROD was striking the appropriate balance between excessive fuel buildups as a result of decades of fire repression and conserving key habitat for wildlife species dependent on old forest environments. The 2001 ROD included a network of "old forest emphasis areas" which consisted of approximately 40 percent of all the national forest land in the Sierra Nevada region. The purpose was to provide a contiguous network of old forest ecosystems which were conducive to species preferring such habitat such as the California Spotted Owl, the American Marten and the Pacific Fisher. SNFPA 236. Aside from other areas slated for specific treatment (such as the limited "urban wildland intermix" which was designed to create a buffer between developed areas and the forest), the 2001 Framework specified a "general forest" land allocation intended to increase the density of large old trees and

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[1] Documents found within the first eight-volume record are cited as SNFPA, followed by the Bates-stamp number.

the continuity and distribution of old forests across the landscape. SNFPA 236-37.

The 2001 Framework also included a comprehensive Aquatic Management Strategy ("AMS") which consisted of a set of management goals, standards and guidelines to improve aquatic habitats throughout the Sierra Nevada. SNFPA 00292. Riparian Conservation Objectives ("RCOs")[2] were identified for purposes of evaluating whether proposed activities were consistent with desired conditions described by AMS goals. SNFPA 00295-00296. Additionally, two land allocations, Riparian Conservation Areas ("RCAs") and Critical Aquatic Refuges ("CARs") were reserved for purposes of preserving, restoring and or enhancing aquatic, riparian and meadow ecosystems in order to protect habitat for species using those areas. SNFPA 00292-00296.

In order to protect old forest conditions within its specific areas of emphasis, the 2001 Framework generally prohibited logging that would remove trees over 12 inches in diameter or logging that would reduce canopy cover by more than 10 percent. SNFPA 328. Even within the "general forest" areas, the 2001 Framework prohibited logging of trees over 20 inches in diameter. SNFPA 336. It was only within the intermix zones that no canopy restrictions were imposed and logging of trees up to 30 inches was permitted. SNFPA 333, 315.

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

Although the Forest Service ultimately affirmed adoption of the 2001 ROD despite receipt of approximately 200 administrative appeals, it nonetheless directed the Regional Forester to conduct an additional review with respect to specific concerns like wildfire risk and the Forest Service's responsibilities under the Herger-Feinstein Quincy Library Group Forest Recovery Act ("HFQLG Act"), a congressional mandate which established a Pilot Program for fire suppression through a combination of fire breaks, group selection logging and individual logging. SNFPA 1918. A management review team was assembled by the Regional Forester for this purpose.

In March 2003, the team concluded that the 2001 ROD's "cautious approach" to active fuels management had limited its effectiveness in many treatment areas. The management review team further found that revisions to vegetation management rules would decrease flammable fuels while protecting critical wildlife habitat by guarding against the risk of stand-replacing wildfire. See SNFPA 1918, 1926. Moreover, with respect to the California Spotted Owl ("CASPO" or "owl"), the team felt that the 2001 ROD had unnecessarily "took a worst case approach to estimating effects" on the owl. SNFPA 1968.[3] In addition to citing recent research indicating that habitat

[3] The 2001 Framework's CASPO analysis was largely predicated on a July 1992 report (the "CASPO Report") that recommended establishment of a 300-acre Protected Activity Center ("PAC") around all known owl nest sites, a complete prohibition of logging within the PACs, more limited logging prohibition of trees over 30 inches in diameter in all habitat suitable for owl nesting and foraging, and a prohibition on logging that would reduce canopy cover below 40 percent in owl nesting habitat. SNFPA 1037-40.

losses resulting from fuel treatments were less than previously believed, the team further found that the 2001 ROD's extensive reliance on maintaining extensive canopy cover was impracticable to implement.

Following receipt of the team's findings, the Regional Forester ordered that management strategy alternatives in addition to those considered in the 2001 FEIS be considered. A draft supplemental environmental impact statement ("DSEIS") was thereafter released to the public in January 2004. While the same five areas of concern were targeted in the DSEIS as in its 2001 predecessor, in 2004 a new action alternative was identified (Alternative S2), in addition to the alternative selected by the 2001 Framework (Alternative S1) and the seven alternatives that had previously been considered before adoption of the 2001 Framework (Alternatives F2-F8).[4] Following the public comment period after dissemination of the DSEIS, the SEIS in final form also included responses to various issues raised, including comments by the United States Fish and Wildlife Service, by the United States Environmental Protection Agency, by California resources protection agencies, and by the Science Consistency Review ("SCR") team.[5]

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[4] The DSEIS also considered seven additional alternatives in addition to those considered in detail but eliminated the seven from extensive consideration because they were found to be inconsistent with the purpose and need of the DSEIS. SNFPA 3163-65.

[5] The SCR consisted of eleven scientists convened by the Pacific Southwest Research Station in Davis, California, and included experts in fire and fuels management, forest ecology, and species viability. SNFPA 3503.

With respect to aquatic species, the 2004 ROD employ the same Aquatic Management Strategy as the 2001 Framework, with a few exceptions as explained in the SEIS. SNFPA 3277-3285; SNFPA 3000 (the 2004 ROD retains "Critical Aquatic Refuges, the Riparian Conservation Areas, and the goals of the Aquatic Management Strategy"); SNFPA 3052-3056 (describing standards and guidelines). Similar to the 2001 Framework, the comprehensive AMS of the 2004 Framework requires management of RCAs to "preserve, enhance and restore habitat for riparian and aquatic-dependent species; ensure that water quality is maintained or restored; enhance habitat conservation for species associated with the transition zones between upslope and riparian areas; and provide greater connectivity with watersheds." SNFPA 3280.

The 2004 Framework also specifies that road construction and reconstruction must meet several best management practices ("BMPs") in order to protect watersheds: 1) design new stream crossings and replace stream crossings to withstand at least a 100-year flood; 2) design stream crossings to minimize the diversion of streamflow out of the channel and down the road in the event of a crossing failure; 3) design stream crossings to minimize disruption to natural hydrologic flow paths, including the diversion of streamflow and interception of surface and subsurface water; 4) avoid wetlands or minimize effects to natural flow patterns in wetlands; and 5) avoid road construction in meadows. SNFPA 3049. The 2004 Framework further outlines management standards and guidelines for fire and fuels management, SNFPA 3039-3040, mechanical thinning treatments, SNFPA

3040-41, salvage harvest, SNFPA 3042-3043, and hardwood management, SNFPA 3043.

By adopting the SEIS on January 21, 2004, the Regional Forester replaced the 2001 ROD with its 2004 successor and amended the forest plans for all eleven national forests situated in the Sierra Nevada. SNFPA 2987-3061. The 2004 ROD reasoned that the 2001 Framework "prescribed technical solutions that do not produce needed results, or offered methods we often dare not attempt in the current Sierra Nevada." SNFPA 2995. The 2004 Framework reasoned that the methods as adopted in 2001 fail to reverse the damage, and growing threat, of catastrophic fires quickly enough. *Id.*

The Chief of the Forestry Service ultimately affirmed the 2004 ROD,[6] with the direction that details of the ROD's adaptive management be submitted to him within six months. SNFPA 3997-4305. The Regional Forester submitted that supplemental information to the Chief on March 31, 2005.

Through the present lawsuit, Plaintiff alleges that the 2004 Framework as ultimately adopted runs afoul of both the APA and NEPA on a programmatic basis. Specifically, Plaintiff contends that the 2004 Framework violates the APA because it failed to include a reasoned analysis for changing the approach advocated by its predecessor, the 2001 Framework. Moreover, Plaintiff also argues that the 2004 Framework runs afoul of NEPA because it was adopted without

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[6] In so affirming, Forest Service Chief Dale Bosworth denied 6,241 separate administrative appeals of the 2004 Framework. SNFPA 3998.

adequate disclosure of its significant environmental impacts.

PROCEDURAL FRAMEWORK

Congress enacted NEPA in 1969 to protect the environment by requiring certain procedural safeguards before an agency takes action affecting the environment. The NEPA process is designed to "ensure that the agency . . . will have detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger [public] audience." *Blue Mountains Biodiversity Project v. Blackwood,* 171 F.3d 1208, 121 (9th Cir. 1998). The purpose of NEPA is to "ensure a process, not to ensure any result." *Id.* "NEPA emphasizes the importance of coherent and comprehensive upfront environmental analysis to ensure informed decision-making to the end that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Center for Biological Diversity v. U.S. Forest Serv.,* 349 F.3d 1157, 1166 (9th Cir. 2003). Complete analysis under NEPA also assures that the public has sufficient information to challenge the agency's decision. *Robertson v. Methow Valley Citizens,* 490 U.S. 332, 349 (1989); *Idaho Sporting Cong. v. Thomas,* 137 F.3d 1146, 1151 (9th Cir. 1998).

NEPA requires that all federal agencies, including the Forest Service, prepare a "detailed statement" that discusses the environmental ramifications, and alternatives, to all "major Federal Actions signifycantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c). An agency must take a "hard look" at the consequences, environmental

impacts, and adverse environmental effects of a proposed action within an environmental impact statement ("EIS"), when required. *Kleppe v. Sierra Club,* 427 U.S. 390, 410, n.21 (1976).

Given its status as a statutory scheme intended to safeguard procedure rather than substance,[7] NEPA does not mandate that an EIS be based on a particular scientific methodology, nor does it require a reviewing court to weigh conflicting scientific data. *Friends of Endangered Species, Inc. v. Jantzen,* 760 F.2d 976, 986 (9th Cir. 1985). An agency must be given discretion to rely on the reasonable opinions of its own qualified experts, even if the court might find contrary views more persuasive. *See, e.g., Kleppe,* 427 U.S. at 420, n.21. NEPA does not allow an agency to rely on the conclusions and opinions of its staff, however, without providing both supporting analysis and data. *Idaho Sporting Cong.,* 137 F.3d at 1150. Credible scientific evidence that contraindicates a proposed action must be evaluated and disclosed. 40 C.F.R. § 1502.9(b).

Because NEPA itself contains no provisions allowing a private right of action (*see Lujan v. National Wildlife Federation,* 497 U.S. 871, 882 (1990)), a party can obtain judicial review of alleged violations of NEPA only under the waiver of sovereign immunity contained within the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. *Earth Island Institute*

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[7] The National Forestry Management Act ("NFMA"), 16 U.S.C. § 1600 et seq., provides for substantive, as opposed to procedural protection with regard to actions that affect the environment. Plaintiff has not alleged any violation of the NFMA through this lawsuit.

v. U.S. Forest Serv., 351 F.3d 1291, 1300 (9th Cir. 2005).

Under the APA, the court must determine whether, based on a review of the agency's administrative record, agency action was "arbitrary and capricious," outside the scope of the agency's statutory authority, or otherwise not in accordance with the law. *Salmon River Concerned Citizens v. Robertson,* 32 F.3d 1346, 1356 (9th Cir. 1994). Review under the APA is "searching and careful." *Ocean Advocates,* 361 F.3d at 1118. However, the court may not substitute its own judgment for that of the agency. *Id.* (citing *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402 (1971), overruled on other grounds by *Califano v. Sanders,* 430 U.S. 99 (1977)).

In reviewing an agency's actions, the standard to be employed is decidedly deferential to the agency's expertise. *Salmon River,* 32 F.3d at 1356. Although the scope of review for agency action is accordingly limited, such action is not unimpeachable. The reviewing court must determine whether there is a rational connection between the facts and resulting judgment so as to support the agency's determination. *Baltimore Gas and Elec. v. NRDC,* 462 U.S. 87, 105-06 (1983), citing *Bowman Trans. Inc. v. Arkansas-Best Freight Sys. Inc.,* 419 U.S. 281, 285-86 (1974). An agency's review is arbitrary and capricious if it fails to consider important aspects of the issues before it, if it supports its decisions with explanations contrary to the evidence, or if its decision is either inherently implausible or contrary to governing law. *The Lands Council v. Powell,* 395 F.3d 1019, 1026 (9th Cir. 2005).

STANDARD

Summary judgment is an appropriate procedure in reviewing agency decisions under the dictates of the APA. *See, e.g., Northwest Motorcycle Assn. v. U.S. Dept. Of Agric.,* 18 F.3d 1468, 1471-72 (9th Cir. 1994). Under Federal Rule of Civil Procedure 56, summary judgment may accordingly be had where, viewing the evidence and the inferences arising therefrom in favor of the nonmovant, there are no genuine issues of material fact in dispute." *Id.* at 1472. In cases involving agency action, however, the court's task "is not to resolve contested facts questions which may exist in the underlying administrative record", but rather to determine whether the agency decision was arbitrary and capricious as defined by the APA and discussed above. *Gilbert Equipment Co., Inc. v. Higgins,* 709 F. Supp. 1071, 1077 (S.D. Ala. 1989); *aff'd, Gilbert Equipment Co. Inc. v. Higgins,* 894 F.2d 412 (11th Cir. 1990); *see also Occidental Eng'g Co. v. INS,* 753 F.2d 766, 769 (9th Cir. 1985). Consequently, in reviewing an agency decision, the court must be "searching and careful" in ensuring that the agency has taken a "hard look" at the environmental consequences of its proposed action. *Ocean Advocates v. U.S. Army Corps of Engineers,* 402 F.3d 846, 858-59 (9th Cir. 2005); *Or. Natural Res. Council v. Lowe,* 109 F.3d 521, 526 (9th Cir. 1997).

ANALYSIS

I. NEPA CLAIMS

A. Plaintiff has preserved its NEPA Claims by adequately raising them in the administrative review process.

Defendants first take issue with Plaintiff's NEPA claims on grounds that Plaintiff failed to raise many of the objections it now asserts to the 2004 Framework during the public comment period prior to the Framework's adoption. Defendants are correct in asserting that a failure to raise specific objections during that period results in a waiver of objections subsequently made. *See Dep't of Public Transp. v. Pub. Citizen,* 541 U.S. 752, 764-765 (2004) (the failure to raise "particular objections" in a parties comments results in a forfeiture of those objections); *Vermont Yankee Nuclear Power v. NRDC,* 435 U.S. 519, 553-54 (1978). Moreover, "persons challenging an agency's compliance with NEPA must 'structure their participation so that it . . . alerts the agency to the [parties'] position and contentions,' in order to allow the agency to give the issue meaningful consideration. *Pub. Citizen,* 541 U.S. at 764 (quoting *Vermont Yankee,* 435 U.S. at 553).

Defendants allege that while Plaintiff properly submitted comments in response to the 2004 Framework Draft SEIS, it failed to include any discussion of direct and indirect effects on fish and amphibian species from logging and prescribed burning activities, deficiencies it now raises here as NEPA violations in the First Cause of Action. Defendants consequently claim that because the Forest Service's opportunity to

examine and respond to Plaintiff's objections was thereby eliminated, the objections it raises now with respect to fish and amphibian species must be forfeited. In addition, Intervenor-Defendant California Forestry Association alleges that Plaintiff did not meaningfully alert decisionmakers to the alleged NEPA inadequacies concerning timber harvesting/ thinning, grazing and mitigation.

A review of both Plaintiff's 2004 Framework comments and its administrative appeal reveals these contentions are misplaced. First, in its initial response to the draft SEIS, Plaintiff expressed the concern that logging, fuels treatments, and road construction/use will all have adverse impacts to aquatic and riparian systems and ecosystems, thereby alerting the Forest Service to Plaintiff's concerns. *See* SNFPA 3596, Public Concern 4.19. Plaintiff's administrative appeal also addresses concerns regarding the effect on both fish and amphibians from logging grazing, fuels treatment and road construction on watersheds and riparian areas. PRC 55, 113-14.[8] As Plaintiff points out, it even submitted a 28-page review of published scientific papers and journal articles that address logging, prescribed burning and the impact of these activities on aquatic ecosystems, including stream temperatures. PRC 118-46.

Significant, too, is the fact that Plaintiff's Framework comments and appeal both incorporate by refer-

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[8] References to "PRC", followed by a bates-stamped number, refer to portions of Plaintiff's comments and appeal submitted in connection with both the 2004 and 2001 Frameworks and are attached as Ex. "A" to Plaintiff's Excerpts of Record filed with this Court.

ence earlier commentary submitted by Plaintiff during the process which ultimately adopted the 2001 Framework, and offered to resubmit hard copies of any of those comments at the Forest Service's request. The previous commentary also addressed the Forest Service's purported failure to adequately analyze the impacts of logging, prescribed burning and road construction on aquatic and riparian habitat. PRC at 51-59. Finally, despite California Forestry Association's arguments to the contrary, Plaintiff did specifically discuss Defendants' alleged failure to consider mitigation measures through incorporation by reference in its administrative appeal. PRC 52, 102-103.

Given this participation at various stages of administrative review, the Court finds that the Forest Service was provided adequate notice as to the nature of the NEPA claims Plaintiff presently makes in this lawsuit. Consequently Defendants' procedural challenge in that regard is rejected.

The Court is, however, persuaded by another procedural argument advanced with regard to the admissibility of the postdecisional litigation declaration of Jonathan J. Rhodes offered by Plaintiff in support of its Motion. While the Framework was adopted in a January 1, 2004 ROD, the Rhodes declaration is dated October 1, 2005 and cites to materials dating from late 2004. The APA, however, which provides for review under NEPA, limits the scope of judicial review to the record before the agency at the time it made its decision. 5 U.S.C. § 706. Because the Rhodes Declaration was not part of that initial record, it cannot be considered in determining whether the Framework is arbitrary. *Southwest Ctr. For Biological Diversity v.*

U.S. Forest Serv., 100 F.3d 1443, 1450 (9th Cir. 1996). Instead, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts,* 411 U.S. 138, 142 (1973).

While Plaintiff argues that the Rhodes Declaration provides further support for its contention that the FSEIS failed to adequately analyze the impacts of the 2004 Framework on aquatic ecosystems and associated species, particularly through road construction, it fails to show why it could not have submitted such information earlier. *See United States v. LA Tucker Truck Lines, Inc.,* 344 U.S. 33, 37 (1952). Consequently the Rhodes Declaration will be disregarded.

B. The Forest Service did take the requisite "hard look" at the direct and indirect effects to aquatic ecosystems for purposes of complying with NEPA.

In its First Cause of Action, Plaintiff alleges that the Forest Service's adoption of the 2004 Framework violated NEPA by inadequately analyzing the direct and indirect impacts of contemplated logging, prescribed burning, skid trails and log landing construction on fish, aquatic and amphibian species. Pl.'s Compl., ¶¶ 81, 83, 84. Similarly, in the Third Cause of Action, Plaintiff asserts the Forest Service neglected to adequately consider the effects of the entire road system and road management actions proposed under the 2004 Framework. Pl.'s Compl, ¶¶ 106, 111.

As indicated above, NEPA only requires that federal agencies like the Forest Service establish a consistent process for considering environmental impacts,

and take a "hard look" at the consequences of such impacts. *Vermont Yankee Nuclear Power v. NRDC,* 435 U.S. at 558. So long as "the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Id.*

While NEPA requires an evaluation of environmental effects, it imposes no substantive constraints on the Agency's decision making. *Robertson v. Methow Valley Citizens,* 490 U.S. at 350 (So long as "the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs"); *Salmon River Concerned Citizens v. Robertson,* 32 F.3d 1346, 1356 (9th Cir. 1994) NEPA "does not dictate a substantive environmental result"). NEPA even presumes that agencies will have a preferred action, requiring only that impacts be evaluated objectively and in good faith. *See* 40 C.F.R. § 1502.14(3) (requiring identification of agency's preferred alternative); *Metcalf v. Daley,* 214 F.3d 1135, 1142 (9th Cir. 2001) ("NEPA assumes as inevitable an institutional bias within an agency proposing a project . . . .").

Judicial review under NEPA cannot extend to the substantive need for, or desirability of, a particular policy like increased protection against wildfires or heightened protection for wildlife. *See Mobil Oil Expl. & Prod. Southeast, Inc. v. United Dist. Cos.,* 498 U.S. 211, 230-31 (1991); *Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. at 541-48; *Personal Watercraft Ass'n v. Dept. of Commerce,* 48 F.3d 540,

544-56 (D.C. Cir. 1995). The Constitution reserves such policy decisions for assessment and determination by the Executive and Legislative branches of government.

Here, Plaintiff has identified NEPA violations grounded on allegations that the increased logging and fuels management activities contemplated by the 2004 Framework will adversely affect aquatic and riparian species. Plaintiff points to the fact that such activities can increase erosion and runoff, elevate sedimentation levels, adversely affect water temperatures and riparian microclimate, and alter stream structure and fish habitat. While the FSEIS recognizes these potential dangers (see SNFPA 3281-82), Plaintiff nonetheless argues that the 2004 Framework still fail to take the "hard look" at such effects required by NEPA.

Specifically, Plaintiff claims that the effects upon native fish species, some of which are listed are listed as endangered or threatened, is not analyzed. Plaintiff further contends that the Framework fails to address how increased construction and use of log skid trails and landings—"the primary potential sources for sediment"—will directly or indirectly impact aquatic ecosystems and associated species. *See* SNFPA 3281. According to Plaintiff, the FSEIS fails to provide adequate quantification of the risks involved in this regard. Finally, Plaintiff maintains that the 2004 Framework fails to sufficiently consider the effects of increased grazing upon aquatic/riparian dependent species.

In weighing the viability of these claims, the Court must first consider the extent of analysis required

given the 2004 Framework's unquestioned status as a programmatic, rather than site-specific, EIS.[9] The level of "detail that NEPA requires depends upon the nature and scope of the proposed action." *California v. Block,* 690 F.2d 753, 761 (9th Cir. 1982); *Northwest Coalition for Alternatives to Pesticides v. Lyng,* 844 F.2d 588, 592 (9th Cir. 1988). Considerably less detail is required for a programmatic EIS than for a site-specific project. *See Resources Ltd., Inc. v. Robertson,* 35 F.3d 1300, 1306 (9th Cir. 1994) ("We are convinced that such specific analysis is better done when a specific development action is to be taken, not at the programmatic level."). Whether or not an EIS is part of a multi-level planning process is also relevant, since the level of detail required depends on what stage is involved. *See, e.g., Tribal Village of Akutan v. Hodel,* 869 F.2d 1185, 1192 (9th Cir. 1988. Forest planning and implementation are properly considered as multi-staged processes. *See Ohio Forestry Ass'n, Inc. v. Sierra Club,* 523 U.S. 726, 729-730 (1998).

In assessing land use management plans like the 2004 Framework, the Ninth Circuit has repeatedly recognized that the level of detail required for a programmatic EIS accompanying such plans is not as great as that required for the analysis of effects for site-specific actions. *See Friends of Yosemite Valley v. Norton,* 348 F.3d 789 (9th Cir. 2003); *Resources Ltd., Inc. v. Robertson,* 35 F.3d at 1306; *Salmon River Concerned Citizens v. Robertson,* 32 F.3d 1346 (9th Cir. 1994); *California v. Block,* 690 F.2d at 761, 765. While a programmatic EIS has to include enough de-

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[9] Plaintiff concedes the programmatic nature of the 2004 Framework SEIS in its Opposition to Defendants' Motion, 1:5-6.

tail to foster informed decision-making, "site-specific impacts need not be fully evaluated until a critical decision has been made to act on site development." *Friends of Yosemite Valley,* 348 F.3d at 800., quoting *N. Alaska Envtl. Ctr. v. Lujan,* 961 F.2d 886, 890-91 (9th Cir. 1992). As a programmatic decision, the 2004 Framework does not make a "critical decision" involving the irretrievable commitment of resources. *Resources Ltd., Inc. v. Robertson,* 789 F. Supp. at 1540.

A programmatic forest plan like the 2004 Framework does not authorize the cutting of any trees or other on-the-ground activity. Instead, it only establishes the standards and guidelines under which future projects permitting such harvest could occur. *See Ohio Forestry Ass'n, Inc. v. Sierra Club,* 523 U.S. at 729. This is consistent with the terms of the 2004 Framework, which plainly indicates that it does not authorize any actual timber harvest, road construction, log landing or skid trail construction, or grazing. *See* SNFPA 3014 (the amended plans "do not provide final authorization for any activity"). The Framework also unequivocally provides that future site-specific authorization of actual timber harvest would have to comply with NEPA, where effects would be analyzed in more detail according to site-specific factors. *See* SNFPA 3010, 3690, 4019.

With respect to road construction, the Forest Service's response to public commentary on the 2004 Framework made this programmatic/site-specific distinction abundantly clear, stating that "actual locations and miles of roadwork will be determined through project-level planning and analysis". SNFPA 3631. The Forest Service went on to explain:

> The SNFPA FEIS and the FSEIS are programmatic documents and therefore do not propose specific roads. When site-specific projects are proposed, the roads analysis process would analyze the need for public, administrative, and commercial access with the economic costs and environmental concerns of the road system. The project level environmental document would display the direct, indirect, and cumulative costs of any road proposals.

SNFPA 3630.

Moreover, the effects of timber harvest in general are simply too site-specific to be meaningfully analyzed at the regional scale of the 2004 Framework. Impacts stemming from the delivery of coarse woody debris ("CWD") to streams following logging, for example, which is important for stabilizing stream channels and furnishing cover for fish, "is difficult at the bioregional scale due to the extreme variability in the condition of [riparian conservation areas] and the relative importance of CWD in maintaining stream channel structure and function." SNFPA 3282. Such effects are more meaningfully evaluated in landscape and project-level analyses using individual watershed and site-specific parameters such as "stream width, tree heights, distances from streams, slope steepness", and other factors. *Id.* In addition, hydrological effects from timber harvesting are subject to further evaluation and appropriate mitigation on a future project basis. SNFPA 3281.

The 2004 Framework also recognizes that where timber harvesting effects are too variable or site-specific to lend themselves to detailed, quantitative analysis at the bioregional scale, individual effects are

nonetheless subject to scrutiny on a project-by-project basis. *See* SNFPA 3010, 3690, 4019 (noting that future decisions to authorize timber harvest would have to comply with NEPA).

The Court consequently rejects as unwarranted and unworkable the level of detail Plaintiff advocates as being required in the 2004 Framework. Instead, Plaintiff's desire to address environmental impacts "at an early stage" must be "tempered by the preference to defer detailed analysis until a concrete development proposal crystallizes the dimensions of a project's probable environmental consequences." *California v. Block,* 690 F.2d at 761. Having found that only more general analysis of environmental impacts is required in the Framework as a programmatic document, the Court now turns to the specific areas of concern identified by Plaintiff to determine whether NEPA's overall mandate has been satisfied.

1. Effects from timber harvest activities.

As the FSEIS recognizes, recent fire seasons illustrate the risks from inaction as the number and severity of acres burned in wildfires continues to increase, with tragic losses to communities, their people and resources, as well as to wildland firefighters. In terms of acreage, over the last 30 years wildfire in the Sierra Nevada has burned an average of 43,000 acres per year, whereas in the last ten years, that average has risen to 63,000 acres per year. SNFPA 3083. To the extent that forests are overstocked and drought conditions are present, an overall lack of sufficient moisture makes the forest drier and not only more susceptible to fire but also prone to insect and disease damage. SNFPA 2996. The Forest Service has the unenviable

task of attempting to simultaneously weigh these significant competing considerations with the risks, both long and short term, on fish and animal species.

Contrary to Plaintiff's contention, the FSEIS does describe the increased timber harvesting and thinning contemplated by the 2004 Framework, along with its likely impacts on aquatic and riparian species and environments. SNFPA 3120-3151, 3277-85; 3305-11, 3356-62; 3366-78, 3386-97. Possible impacts from timber harvest are discussed, including runoff water temperatures as well as sedimentation which can result from skid trails and log landings. SNFPA 3281. Effects of fuel treatments on the supply of CWD, which is important for stabilizing stream channels and providing cover for fish, is also analyzed. SNFPA 3282. As indicated above, the Framework is also clear in specifying that further analysis would be conducted at the site-specific project level. SNFPA 3281 (observing that "[l]andscape and project analysis would be used to further evaluate and mitigate possible hydrologic effects on a local scale").

Impacts of timber harvest activities on individual aquatic, riparian and meadow species is also addressed. The Framework's analysis is properly limited to those species likely to be affected by the framework. Because the Yosemite toad's habitat is found in mountain meadow ecosystems, for example, and because logging is not expected to occur in meadows, the SEIS did not specifically evaluate impacts of logging and skid trails to the toad. *See* SNFPA 3373 (most Yosemite toad populations are found in areas where to

road use occurs).[10] Additionally, while Plaintiff contends that the Framework fails to consider its potential impact on a single fish species, an analysis of Framework effects on ten species of fish is found in a July 2003 Biological Assessment ("BA") incorporated by reference into the FSEIS. See generally SNFPA 2095-2430; see also SNFPA 3304 (incorporating by reference BAs for SEIS and EIS); SNFPA 3487-3488 (referencing 2000 EIS and July 2003 BA for documentation of effect to fishes). The ten fish species analyzed include the Little Kern golden trout, SNFPA 22322238; the Lahontan cutthroat trout, SNFPA 2239-2245; the Paiute cutthroat trout, SNFPA 2246-2251; the Central Valley steelhead, SNFPA 2252-2257; the Central Valley spring-run chinook salmon, SNFPA 2258-2264; the Modoc sucker, SNFPA 2265-2266; the Lost River sucker and Shortnose sucker, SNFPA 2267-2269; the Warner sucker, SNFPA 2270-2277; and the Owen's tui club. SNFPA 2231-2235. The July 2003 BA discusses these species' general distribution, status, reproductive biology and breeding habitat, diet, general habits use, and further analyzes the Framework's likely direct, indirect and cumulative effect on

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[10] Significant, too, is the fact that the Yosemite toad is not known to exist in the HFQLG Project area, where much of the logging contemplated by the Framework will take place. Impacts on other toad species also appear to be minimal. The mountain yellow-frog's habitat overlaps with the Yosemite toad, SNFPA 3369, populations of the Northern leopard frog are not known to exist within the national forest lands covered by the Framework, SNFPA 3370, and reproducing populations of Cascades frogs are only documented to exist at specific locations in the Lassen National Forest. *See* SNFPA 3237, 3377. Consequently the level of impact analysis (SNFPA 3371-78) to these species appears appropriate.

the species. While the BA is incorporated by reference, such incorporation is deemed adequate by NEPA. *See* 40 C.F.R. §§ 1500.4, 1502.21; *Sierra Club v. Clark,* 774 F.2d 1406, 1411 (9th Cir. 1985) ("By specifically referring to prior BLM studies and supporting materials, the FEIS fulfilled its informational purpose"). Consequently Plaintiff's contention that the Framework wholly ignored fish species is misplaced and unsupported by the record.

To the extent that aquatic species are affected, the Framework contemplates that risks will be reduced through the Application of the . . . Aquatic Management Strategy" or AMS. SNFPA 3169. The Framework directs that projects will include Best Management Practices, or "BMPs, certified by the State Water Resources Control Board and certified by [EPA] to achieve compliance with applicable provisions of water quality plans." SNFPA 3281. According to a scientific study cited by the Framework (MacDonald and Stednick 2003), fuel "treatments could have minimal adverse effects on aquatic ecosystems and water quality if they are carefully designed and implemented according to [BMPs]"). SNFPA 3278. Sediment sources would also be minimized by application of Soil Quality Standards and BMPs, both of which have been demonstrated to be effective. *Id.*

Moreover, the SEIS contains a thorough discussion of the tradeoffs between potential aquatic ecosystem and water quality impacts from fuel management activities and the considerable risks associated with high severity wildfire. *See* SNFPA 3278-85. Although Plaintiff may disagree with the Forest Service's decision to proceed with 2004 Framework in light of those

tradeoffs, that kind of policy disagreement does not give rise to a NEPA violation. *See, e.g, Northwest Coalition for Alternatives to Pesticides v. Lyng,* 844 F.2d 588, 591 (9th Cir. 1988). The effects of timber harvesting and fuels treatment are adequately addressed for NEPA purposes in the programmatic 2004 Framework.

2. Road Impact Claims.

Plaintiff takes particular aim at the 2004 Framework's consideration of impacts from increased road construction and overall road use occasioned by increased logging and fuels treatments, pointing out that roads can deliver more sediment to streams than any other human disturbance in forested environments. SNFPA 3279.

Although Plaintiff may be correct that the volume of potential road construction is considerably more in the 2004 Framework than its 2001 predecessor, the overall numbers are still relatively small in light of the vast area of forest involved. Over a ten-year period, the 2004 Framework contemplates 115 miles of roads spread out over 11.5 million acres in 11 national forests, in addition to reducing road miles than would be constructed or reconstructed. SNFPA 3084, 3282-83, 3394-95. Therefore, the net impact on road and aquatic ecosytems would appear to be minor.

Even more significantly, however, the 2004 Framework, like most forest plans, does not itself make final decisions on constructing or reconstructing roads. *See Ohio Forestry Ass'n, Inc. v. Sierra Club,* 523 U.S. at 738-39. At the time the 2004 Framework was promulgated the location and construction methods for

particular road remained unclear, and that uncertainty as to location made it also unclear just how any potential roads would effect specific environmental concerns like stream proximity. Road construction needs as articulated by the programmatic Framework are nothing more than estimates. *See* SNFPA 3368 ("It has been estimated that up to 100 miles of new road construction may be needed. . . .").

NEPA compliance with respect to road construction is best deferred to the site-specific point at which timber sales and road construction decisions are made, as recognized by the Framework. *See* SNFPA 3010, 3690, 4019. The SEIS complies with NEPA's "rule of reason" by generally describing road construction and use impacts at a level reasonable for the programmatic Framework. *See* SNFPA 3278-85, 3394-97.

C. Cumulative Impacts.

In its Second Cause of Action, Plaintiff alleges that road use, road construction and timber harvest "cause cumulative effects that must be analyzed in the SEIS." Pl.'s Compl. ¶ 95.

Plaintiff's err in contending that these separate components of the 2003 Framework must be analyzed as cumulative impacts. The regulation implementing NEPA define a cumulative impact as "the impact on the environment which results from the incremental impact of the action when added to *other* past, present, and reasonably foreseeable actions. . . . ." 40 C.F.R. § 1508.7 (emphasis added). This makes it clear that cumulative impacts necessarily involve consideration of the effects of other actions, and not those caused by activities contemplated within the proposed

action itself. *See Blue Mountains Biodiversity Project v. Blackwood,* 161 F.3d at 1215 (considering claim that environmental assessment for post-fire salvage sail "fails to address. . . . three of the four *other* salvage sales proposed for the Tower Fire area") (emphasis added); *Resources Ltd. v. Robertson,* 35 F.3d at 1305 (rejecting claims that forest plan EIS did not consider "cumulative impact of non-Federal actions on . . . . grizzly bears").

In this case, then, the actions that have to be considered in a cumulative effects analysis are those that are outside the scope of actions contemplated by the Framework: examples would include actions on private lands and past or future timber harvest or grazing activities. Plaintiff has not identified any such "other" actions, aside from road construction and timber harvest activities encompassed within the Framework itself which are properly analyzed as direct and indirect, and not cumulative, effects of the Framework.

To the extent that the 2004 Framework does envision road construction and logging activities, those activities and their associated impacts are in fact addressed as direct and indirect effects. *See, e.g.,* SNFPA 3279, 3282-83, 3307 (impacts of roads); 3280-82 (impacts of fuel treatments), 3283-84 (timber salavage; 3304-85 (impacts to individual species). The SEIS also includes separate discussions of the effects of livestock grazing upon affected species, including the willow flycatcher (SNFPA 3356-62, the foothill yellow-legged frog, SNFPA 3366-69, the mountain yellow-legged frog, SNFPA 3369, the Yosemite toad, SNFPA 3371-75, the northern leopard frog, SNFPA 3375-76, and the cascades frog, SNFPA 3376-78. Additionally,

as indicated above, the July 2003 BA incorporated by reference into the 2004 Framework also includes discussion of the potential direct and indirect effects of the Framework upon ten different fish species. *See* SNFPA 2232-2277. As a whole, this discussion is sufficiently thorough to meet the requirements of NEPA. *See Resources Ltd. Inc. v. Robertson,* 35 F.3d at 1306. To the extent additional analysis is necessary when specific site-specific projects are proposed, that discussion should occur then and not at the programmatic level represented by the 2004 Framework.

In order to support its claim that a cumulative effects analysis was triggered by the activities encompassed in the Framework itself, Plaintiff argues that because the HFQLG Pilot Project was a separate project from the overall 2004 Framework, full implementation of that project, as contemplated by the Framework, was sufficient to trigger a cumulative effects analysis. *See* Pl.'s Opp'n to Defs.' Mot. for Summ. J., 18:9-12. That contention is misplaced. The HFQLG Pilot Project is part of, and controlled by, the 2004 Framework decision. *See, e.g.,* SNFPA 3001 ("This decision provide for implementation of the HFQLG Forest Recovery Pilot Project").

Plaintiff also alleges that road construction and logging are connected actions that require a cumulative effects analysis, citing *Thomas v. Peterson,* 753 F.2d 754 (9th Cir. 1985). *See* Pl.'s Opening Points and Authorities, 31:5-7. *Thomas,* however, is inapposite. In that case, the court properly considered the cumulative impacts of two separate actions: one that contemplated timber sales and the other to proposed building a road. *Id.* at 756-57. As the Ninth Circuit

explained, these were separate actions that could have cumulative effects because the road construction and timber sales were not part of the same proposed action. *Id.* at 759. In other words, because the proposed road connection assessed by *Thomas* was outside the proposed action for the timber sale, cumulative impacts had to be considered. Here, on the other hand, the 2004 Framework entails both road construction and logging activities. As such the need for the cumulative effects analysis considered by *Thomas* is not present.

D. The 2004 Framework also contains an adequate analysis of mitigation measures for a programmatic EIS.

In its Fourth Cause of Action, Plaintiff alleges that 2004 Framework does not contain an adequate analysis of mitigation measures. Pl.'s Compl. ¶¶ 113-117. The level of detail advocated by Plaintiff, however, is not required by a programmatic EIS like the 2004 Framework. A fully developed mitigation plan is not necessary. Instead, NEPA requires only that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fully evaluated. *Laguna Greenbelt, Inc. v. U.S. Dep't of Transp.*, 42 F.3d 517, 528 & n.11 (9th Cir. 1994). The Forest Service is not prohibited from waiting until site-specific actions are developed before analyzing mitigation measures in more detail. *See N. Alaska Envtl. Ctr. v. Lujan*, 961 F.2d at 891 ("The detailed analysis of mitigation measures . . . demanded by [Plaintiff] is unwarranted at this stage. The alleged failure of the EISs to consider mitigation measures . . . . does not foreclose later analysis of [those] factors .").

As indicated above, the 2004 Framework authorizes no ground-disturbing activities and Plaintiff has not shown that more detailed mitigation measures are not better reserved such activities are commenced.

Mitigation measures are in fact adequately disclosed by the 2004 Framework as a programmatic document. The SEIS describes, for example, how the use of BMPs, soil protection strategies and the AMS have been proved effect in the past and would mitigate significant adverse effects to aquatic resources. See SNFPA 3278, 3281. The SEIS considered ten years of monitoring data for road-related BMPs, which found that such measures adequately protected water quality. SNFPA 3279. In addition, mitigation measures for aquatic and riparian ecosystems are described in greater detail in Appendix A of the SEIS. See SNFPA 3407-21 and 3428-29. With respect to livestock grazing, mitigation measures discussed include 1) the exclusion of grazing from areas with standing water or saturated soils in wet meadow/riparian areas with associated species habitat; 2) site-specific management of the movement of livestock around and in wet areas; and 3) species surveys in suitable unoccupied habitat. See SNFPA 3046 (for the Yosemite toad). This contrasts with the circumstances present in *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372 (9th Cir. 1998), a case relied upon by Plaintiff, where the "Forest Service did not even consider mitigation measures." *Id.* at 1381. Instead, the description and analysis of mitigation measures present here satisfies NEPA's "rule of reason" for fairly evaluating environmental consequences.

II. CLAIMS UNDER THE APA THAT DEFENDANTS FAILED TO PROVIDE THE REQUISITE "REASONED ANALYSIS" FOR ADOPTION OF THE 2004 FRAMEWORK

Plaintiff's independent APA challenge (as set forth in the Fifth Cause of Action) is predicated on the contention that the Forest Service summarily rejected the 2001 Framework without identifying any sufficient new information or changed circumstances and without reconciling its abrupt change of course with previous findings to the effect that permitting more flexibility for fuel treatments in old-growth forests posed an unacceptable risk to the long-term sustainability of the Sierra Nevada's habitat, wildlife, and ecosystems.

In response to Plaintiff's claim that the Bush Administration promptly jettisoned the 2001 Framework developed by the prior administration after assuming office, Defendants correctly point out that "a change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part). In *National Cable & Tel. Ass'n v. Brand X Internet Servs.* ("Brand X"), 545 U.S. 967 (2005), the Supreme Court again reiterated that a new administration may lawfully elect to modify its predecessor's policies:

> An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . . must consider varying interpretations and the wisdom of its policy on a continuing basis,

> [citation omitted], for example, in response to changed factual circumstances or a change in administration . . .

Id. at 981 (internal quotations and citations omitted); *see also Gorbach v. Reno,* 179 F.3d 1111, 1123-24 & n.16 (6th Cir. 1999) (federal agencies have "inherent authority to reconsider their own decisions," as the power to decide includes the power to reach a different conclusion). Moreover, as counsel for the California Forestry Association points out, "there is no objective reason why the 2001 Framework, adopted in the last days of one Administration, deserves special sanctity" from the next. (Cal. Forestry Ass'n Brief, 17, n.13).

Nonetheless, to the extent that the 2004 Framework represented a significant departure from the policies embodied by its 2001 predecessor, the rationale for that change must be adequately articulated. As long as the agency provides a procedural explanation for the change of course, the APA is satisfied. *Brand X,* 545 U.S. at 981; *Springfield Inc. v. Buckles,* 292 F.3d 813, 819 (D.C. Cir. 2002). An agency changing its course must "supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *See Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. at 42. "[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the decision made." *Id.* at 43. The standard of review to be employed is not whether an agency's decision is supported by substantial evidence; instead, the Court must uphold a decision for which an administrative hearing is not required unless

it is arbitrary or capricious because the requisite reasoned analysis is lacking. *See* 5 U.S.C. § 706(2)(A); *Wilderness Soc'y v. Thomas,* 188 F.3d 1130, 1136 (9th Cir. 1999).

In analyzing the propriety of the 2004 Framework, it should also be noted that claims under the APA must be viewed in light of the substantive statutory authority under which the agency acts. The National Forest Management Act ("NFMA"), which establishes criteria for stewardship of the nation's forests, allows the Forest Service to adopt an amendment to a forest plan at any time. 16 U.S.C. § 1604(f)(4). Significantly, too, the NFMA goes on to require that the Forest Service "provide for multiple use and sustained yield" of products and services, including "coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness." 16 U.S.C. § 1604(e)(1). In striking the appropriate balance of resources the Forest Service is also expected to "provide for diversity of plant and animal communities (1604(g)(3)(B), and to maintain viable populations of species. *See* 36 C.F.R 219.19 (1982); SNFPA 3011. The case law confirms that forest planning statutes incorporate considerations of multiple use. *Sierra Club v. Espy,* 38 F.3d 792, 795 (5th Cir. 1994).

The burden is on Plaintiff to demonstrate that the Forest Service's action is flawed; otherwise, the agency's action is given a presumption of regularity. *See Clyde K. v. Puyallup School Dist., No. 3,* 35 F.3d 1396, 1398 (9th Cir. 1994). This confers broad discretion to the Forest Service in its balancing of different resource uses, including timber and wildlife. Such discretion permits the Forest Service to determine the

mix of uses that best suits the public interest. *See* 16 U.S.C. § 529 (directing Secretary of Agriculture to administer the National Forest Service for multiple uses and sustained yield); *Perkins v. Bergland,* 608 F.2d 803, 806 (9th Cir. 1979) (the mandate to manage for multiple uses "'breathe[s] discretion at every pore.'" (citation omitted); *Intermtn. Forest Ass'n v. Lyng,* 683 F. Supp. 1330, 1337-38 (D. Wyo. 1988).

Discretion in managing for multiple use is reflected in pertinent forest management statutes and is also incorporated into the forest planning. Where the factual issue concerns an opinion or judgment on some environmental or silvicultural matter, on such a "scientific determination. . . . a reviewing court must generally be at its most deferential." *Baltimore Gas & Elec. Co. v. Natural Resources Def. Council,* 462 U.S. 87, 103 (1983). An "agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh v. Oregon,* 490 U.S. 360, 378 (1989).

Having determined that considerations of multiple use may be reweighed by the Forest Service, we now turn to specific resource considerations in assessing whether the Forest Service provided the requisite "reasoned analysis" in adopting the provisions of the 2004 Framework.

A. Fire and Fuels Management

Contrary to Plaintiff's contention, the record does contain support for the Forest Service's conclusion that the 2004 Framework would better address fire and fuels concerns than its predecessor. The Man-

agement Review Team (assembled by the Regional Forester to address specific concerns raised by the Forest Service following adoption of the 2001 Framework) evaluated the fuels strategy encompassed in the 2001 Framework and identified three critical areas meriting improvement. SNFPA 3100-3101. First, the Team identified the need for fuel treatments to be strategically placed across the landscape. Secondly, the group recommended that enough material be removed to ensure that wildfires burn at lower intensities and slower speeds in treatment areas. Finally, the Management Review Team recognized the need for cost efficient reduction measures that would allow program goals to be accomplished within the confines of appropriated funds. *Id.*

The 2004 Framework, in response to those suggestions, provides more flexibility to strategically locate treatments across the landscape. SNFPA 3290, 3291. Because the 2004 Framework does not restrict the location of mechanical treatments as much as the 2001 ROD, fire behavior can more effectively be modified than under the 2001 Framework, which dramatically limited such treatments in many areas. See SNFPA 2995; 3290, 3291 (comparing rate of spread, flame length, scorch height, and projected mortality). The 2004 Framework also results in the removal of more hazardous fuels, making mechanical treatment more effective. *See* SNFPA 3290 (noting that the effectiveness of mechanical treatments under the 2001 ROD was "greatly compromise[d]" by the fact that 30 percent of the acreage treatment was limited to removing trees less than six inches in diameter). Finally, the increased cost efficiency of the 2004 Framework is illustrated by the fact that while its more comprehensive

treatment objectives would be higher and cost more to implement, it would also generate 3.5 times more revenue annually to offset the higher costs necessary to more effectively reduce fire risk to the landscape. *See* SNFPA 3293-94. The fact that the 2004 Framework addressed the concerns voiced by the Management Review Team with regard to its 2001 predecessor provides a reasoned basis for changing the Forest Service's approach to fire and fuels management, thereby satisfying the APA.

In addition, it was reasonable for the Forest Service to choose a treatment option that, after a decade of implementation, would result in fewer acres experiencing stand-replacing[11] wildfires. *See* SNFPA 3287, 3288. Significantly, too, the management review team also identified numerous practical difficulties in implementing the 2001 Framework. It identified difficulties in classifying vegetation at the small (one-acre increment) scale required by the 2001 ROD that made it subject to inconsistent classification. *See* SNFPA 1947, 3290-01, 3612. It further found that the 2001 Framework relied upon relatively small discrepancies in canopy cover that were difficult to consistently measure with any precision. SNFPA 1946-48. Importantly, also, more than 80 percent of district rangers responding to a survey reported that 2001 Framework standards and guidelines prevented effective treatment. SNFPA 1928, *see also* SNFPA 2995.

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[11] A stand-replacing fire is one where most or all vegetation is killed, thereby destroying associated habitat for existing species. See SNFPA 3287.

It must further be emphasized that there is adequate support in the record for the proposition that the 2004 Framework would better meet the Forest Service's goal of moving forest landscapes towards a natural fire regime which, in the long run, would result in more effective fuels treatment. *See* SNFPA 3287, 3288 (Table 4.2.4a, Figure 4.2.4b). The Sierra Nevada faces a situation where nearly 8 million of the 11.5 million acres that comprise national forests in the region are in vegetation condition classes that pose moderate to high risks from wildland fires. SNFPA 2998.[12] The proliferation of smaller, less fire-resistant tree species (which under natural conditions had in kept in check by widespread, low severity fires) has created a highly-combustible fuel bed, as well as a fire ladder serving to carry ground fire into the crowns of larger trees. Given that potential tinderbox, it was reasonable for the Forest Service to explore and adopt measures to more effectively address fire danger by reducing the understory of smaller and less desirable vegetation. The 2004 Framework points out that the magnitude of this increasing danger has been borne out by devastating fires throughout the Western United States in recent years that has occasioned an "unacceptable loss of life, property and critical habitat" calling out for a more effective alteration of current forest conditions. *Id.*

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[12] This acreage has been denoted as falling within Classes 2 and 3, which represent areas where fire regimes have been so altered from their historic range of fire return interval that they are at "moderate risk of losing key ecosystem components" due to wildland fire (Class 2) and areas which are at "greatest risk of ecological collapse" because it has been so long since fire operated as a process in the ecosystem. *Id.*

Given such conditions, it was understandable that the current Administration felt less comfortable with the 2001 approach of fighting "fire with fire", which relied more heavily on prescribed burning to reduce overly-dense forests with the hope those fires did not get out of control. This constituted a rational basis for moving, as the 2004 Framework did, to greater reliance on mechanical methods for thinning overly dense forests. SNFPA 2995.

At the same time, much of the increased fuel treatments entailed within the 2004 Framework were attributable to full implementation of the HFQLG Act Pilot Project, which, as stated above, represented a congressional mandate to test the efficacy of improved fires suppression through a combination of fire breaks, group selection logging and individual logging. SNFPA 1918. The Management Review Team found that the 2001 ROD "severely limit[ed]" implementation of the HFQLG Pilot Project, as it did not allow the full extent of group selection envisioned by the HFQLG Act. SNFPA 1967, 1970. Experimentation with such techniques is a valuable tool in refining adaptive management techniques, whereas the 2001 Framework's more passive approach reduced the ability to experiment and obtain information. *See* SNFPA 3001-02, 3139-43. Such experimentation is anticipated by the provisions of the NFMA (16 U.S.C. § 1604(g)(3)(C), and the management review team concluded that a new direction could more thoroughly test group selection and better fulfill the goals of the HFQLG Act. SNFPA 1967, 1970; *see also* SNFPA 3002.

In addition to finding that the impacts to the California spotted owl occasioned by full implementation of the Pilot Project were less than originally believed (as discussed in more detail, *infra*), the Team also found that the community stability goals of the HFQLG Act were not being met. *See* SNFPA 1967, 1968 (a "key component" of the Pilot Project is to "provide socio-economic benefit through timber and biomass production, and therefore enhance community stability in the project area."); SNFPA 1969, 1970 ("the community stability, and socio-economic aspects of the Pilot Project are not being implemented"); SNFPA 3001. *See* SNFPA 3386, 3697 ("Alternative S2 is designed to better meet[] the goals envisioned by the Pilot Project and will contribute toward producing socio-economic benefits of enhancing community stability in the pilot project area."). Timber production is a legitimate objective in national forest management and is one of the competing resources the Forest Service is responsible for managing.

Because the record contains adequate support for the conclusion that the 2004 Framework would more effectively reduce landscape fuels, would better protect communities from the risk of catastrophic wildfire, and would further permit fulfillment of the legitimate objectives of the congressionally mandated HFQLG Act, the change in resource use and emphasis represented by the 2004 Framework's provisions concerning fuels and fire managements well within the agency's statutory discretion and consequently do not run afoul of the provisions of the APA. By revisiting the unnecessary assumptions of the 2001 Framework and by better providing for community stability, the Forest Service decided upon a different resource balance that

would address both the needs of wildlife and the duty under the HFQLG Act to fully implement the Pilot Project. *See* SNFPA 3338-39, 3608-09.

B. Grazing Impacts

In enacting changes to grazing opportunities available under the 2004 Framework, Plaintiff also argues that no changed circumstances were present to justify any change from the grazing direction mandated by the 2001 Framework. According to Plaintiff, the Forest Service was aware at the time it enacted the 2001 Framework that it was reducing opportunities for grazing on national forest lands. In changing the standards for permissible grazing under the 2004 Framework, Plaintiff contends that absent altered circumstances and a corresponding "reasoned analysis", the Forest Service's actions contravened the mandate of the APA.

The 2004 Framework makes it clear, however, that the full impact upon grazing of the 2001 Framework was not made clear until after its enactment. The 2004 SEIS points out that grazing effects were considered only "in very general terms" in 2001, with information at that time still lacking about the distribution of occupied habitat for species like the Yosemite toad. SNFPA 3392. Critical survey information for the willow flycatcher, a bird species depending on habitat where grazing occurs, was also absent. *Id.* That dearth of information had been corrected by the time the 2004 Framework was adopted. *See id.* ("Much of the field survey work has since been done and this new information provides a better foundation from which to evaluate effects.").

After collecting additional survey data, the Management Review Team found that at least two grazing allotments would go to non-use based on a restriction to late season grazing at unoccupied sites. SEIS __01_00063-65.[13] The Team also found that the 2001 ROD actually provided a disincentive for grazing permittees to facilitate species recovery. Grazing permittees, for example, had worked with the Forest Service to develop protections for nesting willow flycatchers in certain areas with concentrated flycatcher territories. Those affirmative protections had ceased with adoption of the 2001 Framework with only a passive meadow closure and non-use mandates in effect. *Id.*

Under the 2004 Framework, on the other hand, change was initiated that improved the ability to develop site-specific plans tailored to address conservation at a local level while still permitting grazing. While 2004 ROD still requires surveys and protections for occupied sites, it permits grazing on occupied sites where the Agency has developed a site-specific management strategy. SNFPA 3048. That strategy focuses on "protecting the nest site and associated habitat during the breeding season and the long-term sustainability of suitable habitat at breeding sites." *Id.* This comports with the Review Team's observation that impacts from grazing (such as flycatcher nest bumping) could be addressed by working with permittees to adjust the timing, location, and intensity of

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[13] This designation refers to materials contained on CDs within the administrative record, with the first designation referring to the CD volume and the second designation the bates-stamped number on the bottom of the cited page.

grazing to keep livestock out of willow flycatcher territories during the bird's breeding period. SEIS_01_00067.

Similarly, for the toad, the 2004 Framework excludes grazing from occupied habitat except where an interdisciplinary team has developed a site-specific plan to successfully manage livestock around those areas. SNFPA 3001.

The 2004 FSEIS candidly acknowledges that over half of the 124 known willow flycatcher sites are in or near active grazing allotments, making contact between livestock and flycatchers likely. SNFPA 3221. The FSEIE further recognizes data suggesting that population trends for the willow flycatcher in the north-central Sierra Nevada are not encouraging. SNFPA 3322. Nonetheless, by allowing site-specific plans that permit grazing during periods not apt to significantly impact either the flycatcher or the toad, and thereby increasing the use of certain allotments, the Forest Service's actions are neither arbitrary or capricious for purposes of the APA. This decision to strike a different multiple use balancing between habitat protection and grazing is supported by the record, and amounts to a reasonable exercise of the Forest Service's discretion, as articulated above, to emphasize a different mix of the resources it is entrusted to manage.

In addition, with regard to grazing, it must be pointed out that the 2004 Framework does not eliminate environmental protections. The 2004 Framework retains numerous components of the 2001 ROD that are important to the protection of riparian and aquatic habitat. *See* SNFPA 3000 (2004 ROD retains

"Critical Aquatic Refuges, the Riparian Conservations Areas, and the goals of the Aquatic Management Strategy ["AMS"]"). The 2004 ROD also built upon two years of field surveys for the Yosemite toad and willow flycatcher, as well as a conservation assessment for the flycatcher, by requiring an interagency conservation strategy for the flycatcher that will incorporate input from the State of California and the FWS. *Id.*

In sum, whether looking at the 2004 Framework's treatment of fuels and fire, its protection to wildlife, or the balance struck between competing interests like grazing and community protection, the Forest Service had the policy discretion to change the Framework to provide more or less emphasis to any given resource or interest, so long as essential protections were afforded. In managing forests, every decision involves tradeoffs among competing use values and the competing interests of different species. *Sierra Club v. Espy,* 38 F.3d 792, 800-02 (5th Cir. 1994). Such determinations involve the weighing of both technical policy concerns and scientific methodologies, functions in which this Court should ordinarily not interfere. *See, e.g., The Lands Council v. McNair*, 537 F.3d 981, 988 (9th Cir. 2008) (explaining that choosing between competing scientific approaches is not a "proper role" for the court). Instead, deference should be afforded to the Forest Service, and its methodological choices, in making the hard choices necessary for forest management. *Id.* at 991.

Under this standard, the policy values the Forest Service emphasized to a greater extent in the 2004 Framework were not arbitrary or capricious so as to

violate the APA. Those policy choices were within the Forest Service's "wide discretion to weigh and decide proper" multiple uses under the NFMA and the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C § 528 et seq. *Big Hole Ranchers Ass'n v. U.S. Forest Serv.,* 686 F. Supp. 256, 264 (D. Mont. 1988).

CONCLUSION

Based on the foregoing, and following careful review and consideration of the parties' Cross Motions for Summary Judgment in this matter, the Court GRANTS Defendants' Motion for Summary Judgment and consequently DENIES the corresponding Cross Motion for Summary Judgment filed on behalf of Plaintiff.[14] The Clerk is hereby directed to close this file.

IT IS SO ORDERED.

Dated: Sept. 18, 2008

/s/ MORRISON C. ENGLAND, JR.
MORRISON C. ENGLAND, JR.
United States District Judge

[14] Because oral argument will not be of material assistance, the Court orders this matter submitted on the briefs. E.D. Cal. Local Rule 78-230(h).

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

Case No. CIV-S-05-0953 MCE/GGH

Related Cases: CIV-S-05-0211 MCE/GGH
CIV-S-05-0905 MCE/GGH
CIV-S-05-0205 MCE/GGH

PACIFIC RIVERS COUNCIL, PLAINTIFF

v.

UNITED STATES FOREST SERVICE ET AL., DEFENDANTS

CALIFORNIA FORESTRY ASSOCIATION ET AL., QUINCY LIBRARY GROUP, AN UNINCORPORATED CITIZENS GROUP; PLUMAS COUNTY; AND CALIFORNIA SKI INDUSTRY ASSOCIATION, DEFENDANTS

Oct. 12, 2005

DECLARATION OF BOB ANDERSON IN SUPPORT OF PACIFIC RIVERS COUNCIL'S MOTION FOR SUMMARY JUDGMENT

HON. MORRISON C. ENGLAND, JR., Judge

I, BOB ANDERSON, declare as follows:

1. I am the Chairman of the Board of Directors for the Pacific Rivers Council (PRC). I have been on the Board of PRC for eight years and a member and supporter for eight years. Currently I am a resident of South Lake Tahoe, California.

2. Pacific Rivers Council is a non-profit corporation dedicated to the protection and restoration of rivers, watersheds, and the native aquatic species they support. With offices in Oregon and Montana, PRC has over 750 members nationwide, some of whom live in California.

3. For over fifteen years PRC has developed substantial scientific, legal, economic, and policy support for ecologically sound land management standards for national forest system lands in general and the Sierra Nevada in particular.

4. PRC members participate in recreational activities, such as fishing, hiking, backpacking, cross-country skiing, nature photography, and river and lake boating throughout the Sierra Nevada.

5. My enjoyment of the Sierra Nevada dates back to childhood trips with my family that took us across the mountain range. I currently reside in the Sierra Nevada and have recreated in the region for several years. My wife and I have property at Mono Lake, on the east side of the Sierra Nevada. From there and from our home at Lake Tahoe we frequently hike and climb in the Sierra Nevada Range. My first Sierra Nevada backpacking trip was to the Mineral King area in 2000, during which time I also fished. I plan to continue these activities as long as the management of Sierra Nevada national forests does not prevent me

from doing so. I have garnered great personal solace in the knowledge that Sierra Nevada native species and the watersheds that support them persist despite over a century's worth of impacts from grazing, mining, logging, road building, dam construction, and related activities. The same is true for the membership of PRC, many of whom recreate in, fish throughout, and derive much satisfaction from the Sierra Nevada.

6. Other PRC members and I are harmed by the current management direction of Sierra Nevada national forests as directed by the 2004 Framework. I have witnessed dramatic declines in native aquatic species, such as salmon and steelhead, due to harmful past management practices. The 2004 Framework does not redress this legacy but rather builds on the mistakes of the past. First and foremost, I have been injured by the knowledge that the aquatic species and watersheds of the Sierra Nevada will continue to be threatened with extirpation and degradation. Curtailed fishing and recreational opportunities due to the loss of native species such as bull trout and salmon have also injured me. I am concerned that I will be unable to share the experience of observing and delighting in these and other species in the Sierra Nevada if current trends in land management continue.

7. The United States Forest Service (Forest Service) has failed to protect many Sierra Nevada aquatic species and their habitats from harm. In the Biological Assessment for the 2004 Framework, the Forest Service made "likely to adversely affect" determinations for Little Kern golden trout (*Oncorhynchus mykiss whitei*), Lahontan cutthroat trout (*O. clarki henshawi*), Paiute cutthroat trout (*O. c. seleniris*),

California red-legged frog (*Rana aurora draytonii*), Yosemite toad (*Bufo canorus*), and mountain yellow-legged frog (*Rana muscosa*). Further declines of these rare native species harms my continued enjoyment of the Sierra Nevada

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 12th day of Oct., 2005.

/s/ BOB ANDERSON
(original signature retained by attorney)

APPENDIX D

1. 16 U.S.C. 1604 provides:

National Forest System land and resource management plans

(a) Development, maintenance, and revision by Secretary of Agriculture as part of program; coordination

As a part of the Program provided for by section 1602 of this title, the Secretary of Agriculture shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning processes of State and local governments and other Federal agencies.

(b) Criteria

In the development and maintenance of land management plans for use on units of the National Forest System, the tSecretary shall use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences.

(c) Incorporation of standards and guidelines by Secretary; time of completion; progress reports; existing management plans

The Secretary shall begin to incorporate the standards and guidelines required by this section in plans for units of the National Forest System as soon as practicable after October 22, 1976, and shall attempt to complete such incorporation for all such units by no later than September 30, 1985. The Secretary shall report to the Congress on the progress of such incor-

poration in the annual report required by section 1606(c) of this title. Until such time as a unit of the National Forest System is managed under plans developed in accordance with this subchapter, the management of such unit may continue under existing land and resource management plans.

(d) Public participation in management plans; availability of plans; public meetings

The Secretary shall provide for public participation in the development, review, and revision of land management plans including, but not limited to, making the plans or revisions available to the public at convenient locations in the vicinity of the affected unit for a period of at least three months before final adoption, during which period the Secretary shall publicize and hold public meetings or comparable processes at locations that foster public participation in the review of such plans or revisions.

(e) Required assurances

In developing, maintaining, and revising plans for units of the National Forest System pursuant to this section, the Secretary shall assure that such plans—

(1) provide for multiple use and sustained yield of the products and services obtained therefrom in accordance with the Multiple-Use Sustained-Yield Act of 1960 [16 U.S.C. 528-531], and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness; and

(2) determine forest management systems, harvesting levels, and procedures in the light of all

of the uses set forth in subsection (c)(1) of this section, the definition of the terms "multiple use" and "sustained yield" as provided in the Multiple-Use Sustained-Yield Act of 1960, and the availability of lands and their suitability for resource management.

(f) Required provisions

Plans developed in accordance with this section shall—

(1) form one integrated plan for each unit of the National Forest System, incorporating in one document or one set of documents, available to the public at convenient locations, all of the features required by this section;

(2) be embodied in appropriate written material, including maps and other descriptive documents, reflecting proposed and possible actions, including the planned timber sale program and the proportion of probable methods of timber harvest within the unit necessary to fulfill the plan;

(3) be prepared by an interdisciplinary team. Each team shall prepare its plan based on inventories of the applicable resources of the forest;

(4) be amended in any manner whatsoever after final adoption after public notice, and, if such amendment would result in a significant change in such plan, in accordance with the provisions of subsections (e) and (f) of this section and public involvement comparable to that required by subsection (d) of this section; and

(5) be revised (A) from time to time when the Secretary finds conditions in a unit have significantly changed, but at least every fifteen years, and (B) in accordance with the provisions of subsections (e) and (f) of this section and public involvement comparable to that required by subsection (d) of this section.

(g) Promulgation of regulations for development and revision of plans; environmental considerations; resource management guidelines; guidelines for land management plans

As soon as practicable, but not later than two years after October 22, 1976, the Secretary shall in accordance with the procedures set forth in section 553 of title 5, promulgate regulations, under the principles of the Multiple-Use Sustained-Yield Act of 1960 [16 U.S.C. 528-531] that set out the process for the development and revision of the land management plans, and the guidelines and standards prescribed by this subsection. The regulations shall include, but not be limited to—

(1) specifying procedures to insure that land management plans are prepared in accordance with the National Environmental Policy Act of 1969 [42 U.S.C. 4321 et seq.], including, but not limited to, direction on when and for what plans an environmental impact statement required under section 102(2)(C) of that Act [42 U.S.C. 4332(2)(C)] shall be prepared;

(2) specifying guidelines which—

(A) require the identification of the suitability of lands for resource management;

(B) provide for obtaining inventory data on the various renewable resources, and soil and water, including pertinent maps, graphic material, and explanatory aids; and

(C) provide for methods to identify special conditions or situations involving hazards to the various resources and their relationship to alternative activities;

(3) specifying guidelines for land management plans developed to achieve the goals of the Program which—

(A) insure consideration of the economic and environmental aspects of various systems of renewable resource management, including the related systems of silviculture and protection of forest resources, to provide for outdoor recreation (including wilderness), range, timber, watershed, wildlife, and fish;

(B) provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives, and within the multiple-use objectives of a land management plan adopted pursuant to this section, provide, where appropriate, to the degree practicable, for steps to be taken to preserve the diversity of tree species similar to that existing in the region controlled by the plan;

(C) insure research on and (based on continuous monitoring and assessment in the field) evaluation of the effects of each management system to the end that it will not produce sub-

stantial and permanent impairment of the productivity of the land;

(D) permit increases in harvest levels based on intensified management practices, such as reforestation, thinning, and tree improvement if (i) such practices justify increasing the harvests in accordance with the Multiple-Use Sustained-Yield Act of 1960, and (ii) such harvest levels are decreased at the end of each planning period if such practices cannot be successfully implemented or funds are not received to permit such practices to continue substantially as planned;

(E) insure that timber will be harvested from National Forest System lands only where—

(i) soil, slope, or other watershed conditions will not be irreversibly damaged;

(ii) there is assurance that such lands can be adequately restocked within five years after harvest;

(iii) protection is provided for streams, streambanks, shorelines, lakes, wetlands, and other bodies of water from detrimental changes in water temperatures, blockages of water courses, and deposits of sediment, where harvests are likely to seriously and adversely affect water conditions or fish habitat; and

(iv) the harvesting system to be used is not selected primarily because it will give the greatest dollar return or the greatest unit output of timber; and

(F) insure that clearcutting, seed tree cutting, shelterwood cutting, and other cuts designed to regenerate an evenaged stand of timber will be used as a cutting method on National Forest System lands only where—

(i) for clearcutting, it is determined to be the optimum method, and for other such cuts it is determined to be appropriate, to meet the objectives and requirements of the relevant land management plan;

(ii) the interdisciplinary review as determined by the Secretary has been completed and the potential environmental, biological, esthetic, engineering, and economic impacts on each advertised sale area have been assessed, as well as the consistency of the sale with the multiple use of the general area;

(iii) cut blocks, patches, or strips are shaped and blended to the extent practicable with the natural terrain;

(iv) there are established according to geographic areas, forest types, or other suitable classifications the maximum size limits for areas to be cut in one harvest operation, including provision to exceed the established limits after appropriate

public notice and review by the responsible Forest Service officer one level above the Forest Service officer who normally would approve the harvest proposal: *Provided,* That such limits shall not apply to the size of areas harvested as a result of natural catastrophic conditions such as fire, insect and disease attack, or windstorm; and

(v) such cuts are carried out in a manner consistent with the protection of soil, watershed, fish, wildlife, recreation, and esthetic resources, and the regeneration of the timber resource.

(h) Scientific committee to aid in promulgation of regulations; termination; revision committees; clerical and technical assistance; compensation of committee members

(1) In carrying out the purposes of subsection (g) of this section, the Secretary of Agriculture shall appoint a committee of scientists who are not officers or employees of the Forest Service. The committee shall provide scientific and technical advice and counsel on proposed guidelines and procedures to assure that an effective interdisciplinary approach is proposed and adopted. The committee shall terminate upon promulgation of the regulations, but the Secretary may, from time to time, appoint similar committees when considering revisions of the regulations. The views of the committees shall be included in the public information supplied when the regulations are proposed for adoption.

(2) Clerical and technical assistance, as may be necessary to discharge the duties of the committee, shall be provided from the personnel of the Department of Agriculture.

(3) While attending meetings of the committee, the members shall be entitled to receive compensation at a rate of $100 per diem, including traveltime, and while away from their homes or regular places of business they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, for persons in the Government service employed intermittently.

(i) Consistency of resource plans, permits, contracts, and other instruments with land management plans; revision

Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans. Those resource plans and permits, contracts, and other such instruments currently in existence shall be revised as soon as practicable to be made consistent with such plans. When land management plans are revised, resource plans and permits, contracts, and other instruments, when necessary, shall be revised as soon as practicable. Any revision in present or future permits, contracts, and other instruments made pursuant to this section shall be subject to valid existing rights.

(j) Effective date of land management plans and revisions

Land management plans and revisions shall become effective thirty days after completion of public partic-

ipation and publication of notification by the Secretary as required under subsection (d) of this section.

(k) Development of land management plans

In developing land management plans pursuant to this subchapter, the Secretary shall identify lands within the management area which are not suited for timber production, considering physical, economic, and other pertinent factors to the extent feasible, as determined by the Secretary, and shall assure that, except for salvage sales or sales necessitated to protect other multiple-use values, no timber harvesting shall occur on such lands for a period of 10 years. Lands once identified as unsuitable for timber production shall continue to be treated for reforestation purposes, particularly with regard to the protection of other multiple-use values. The Secretary shall review his decision to classify these lands as not suited for timber production at least every 10 years and shall return these lands to timber production whenever he determines that conditions have changed so that they have become suitable for timber production.

(*l*) Program evaluation; process for estimating long-term costs and benefits; summary of data included in annual report

The Secretary shall—

(1) formulate and implement, as soon as practicable, a process for estimating longterms[1] costs and benefits to support the program evaluation requirements of this subchapter. This process shall include requirements to provide information

[1] So in original. Probably should be "long-term".

on a representative sample basis of estimated expenditures associated with the reforestation, timber stand improvement, and sale of timber from the National Forest System, and shall provide a comparison of these expenditures to the return to the Government resulting from the sale of timber; and

(2) include a summary of data and findings resulting from these estimates as a part of the annual report required pursuant to section 1606(c) of this title, including an identification on a representative sample basis of those advertised timber sales made below the estimated expenditures for such timber as determined by the above cost process; and[2]

(m) Establishment of standards to ensure culmination of mean annual increment of growth; silvicultural practices; salvage harvesting; exceptions

The Secretary shall establish—

(1) standards to insure that, prior to harvest, stands of trees throughout the National Forest System shall generally have reached the culmination of mean annual increment of growth (calculated on the basis of cubic measurement or other methods of calculation at the discretion of the Secretary): *Provided,* That these standards shall not preclude the use of sound silvicultural practices, such as thinning or other stand improvement measures: *Provided further,* That these standards shall not preclude the Secretary from salvage or sanitation harvesting of timber stands which are

[2] So in original. The "; and" probably should be a period.

substantially damaged by fire, windthrow or other catastrophe, or which are in imminent danger from insect or disease attack; and

(2) exceptions to these standards for the harvest of particular species of trees in management units after consideration has been given to the multiple uses of the forest including, but not limited to, recreation, wildlife habitat, and range and after completion of public participation processes utilizing the procedures of subsection (d) of this section.

2. 42 U.S.C. 4321 provides:

Congressional declaration of purpose

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

3. 42 U.S.C. 4332 provides:

Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations,

and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal

land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in

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[1] So in original. The period probably should be a semicolon.

the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.