UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KLAMATH FOREST ALLIANCE, et al.,

Plaintiffs,

v.

UNITED STATES FOREST SERVICE,

Defendant.

Case No. 23-cv-03601-RFL

**ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT**

Re: Dkt. Nos. 39, 41

After a series of wildfires that burned through millions of acres of national forest land in California in 2020 and 2021, many trees were left damaged or dead from the fires. Falling trees posed safety risks to those passing on nearby roads or using nearby facilities, and the dead and dying trees risked becoming fuel that would intensify the next wildfire. The U.S. Forest Service proposed projects in nine affected National Forests[1] to remove dead and dying trees next to roads, trails, and facilities in the National Forest System ("NFS") ("Region 5 Post-Disturbance Hazardous Tree Management Projects," or the "Projects"). The Forest Service prepared three Environmental Assessments ("EAs"), each corresponding to a geographic region.[2] As laid out in the EAs, the Forest Service determined that the Projects would not have significant environmental impacts and thus would not require the preparation of Environmental Impact Statements ("EISs"). Plaintiffs, who are seven local and regional conservations organizations, challenge approval of the Projects for failure to comply with the National Environmental Policy

[1] The nine National Forests are the Klamath, Mendocino, Shasta-Trinity, Six Rivers, Lassen, Plumas, Inyo, Sequoia, and Sierra. They are all located in Region 5, the Pacific Southwest Region, of the Forest Service.

[2] The Forest Service prepared a separate EA for the North Zone (Klamath, Mendocino, Shasta-Trinity, and Six Rivers National Forests), the Central Sierra Zone (Lassen and Plumas National Forests), the Southern Sierra Zone (Inyo, Sequoia, and Sierra National Forests).

Act. Both parties moved for summary judgment. The Forest Service's motion is **GRANTED**, and Plaintiffs' motion is **DENIED**. The record shows that the Forest Service considered a reasonable range of alternatives, took a hard look at potential impacts of the Projects, and reasonably determined that the Projects could proceed without significant environmental impact. This ruling assumes the reader is familiar with the facts and the arguments made by the parties.

## I. LEGAL STANDARD

The Administrative Procedure Act controls judicial review of an agency's compliance with NEPA. *Bark v. U.S. Forest Serv.*, 958 F.3d 865, 869 (9th Cir. 2020). Under the APA's deferential standard of review, an agency action may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The party challenging the agency's action carries the burden of persuasion. *Ctr. for Cmty. Action & Env't Just. v. Fed. Aviation Admin.*, 18 F.4th 592, 599 (9th Cir. 2021).

## II. DISCUSSION

### A. Range of Alternatives Considered (Count Two)

NEPA requires agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal[.]" 42 U.S.C. § 4332(H). Because "[t]he range of alternatives that an agency must consider under NEPA is based on the purpose and need of the proposed agency action[,]" courts first determine whether or not the purpose and need statement was reasonable before assessing whether the agency considered a reasonable range of alternatives based on its purpose and need. *City of Los Angeles v. Fed. Aviation Admin.*, 63 F.4th 835, 843 (9th Cir. 2023) (cleaned up). Plaintiffs contend that the Forest Service failed to comply with NEPA's requirement regarding consideration of alternatives for three reasons: (1) the EAs' purpose and need statement was unreasonably narrow; (2) the Forest Service failed to consider a reasonable range of alternatives; and (3) the EAs did not separately evaluate which trees would constitute a "hazard"; instead the Forest Service impermissibly "tiered" to its Hazard Tree

Guidelines for the risk assessment. (Dkt. No. 28-1 ("Pl. MSJ") at 16–22.)[3] The Forest Service did not err.

**1. Scope of Purpose and Need Statement**

The purpose and need statement was not unreasonably narrow. An agency's purpose and need statement must "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13 (2022).[4] Agencies have discretion in drafting the purpose and need statement, *Env't Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 876 (9th Cir. 2022), but the statement must not "unreasonably narrow[ ] the agency's consideration of alternatives so that the outcome is preordained," *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1084 (9th Cir. 2013). In evaluating the reasonableness of a purpose and need statement, courts consider the relevant statutory context, including the agency's statutory authorization to act and other congressional directives. *See City of Los Angeles*, 63 F.4th at 844 ("It is appropriate for an agency to draft a purpose and need statement with reference to the agency's statutory mandates."). "Courts review purpose and need statements for reasonableness giving the agency considerable discretion to define a project's purpose and need." *Alaska Survival*, 705 F.3d at 1084.

The Forest Service stated in the final EAs that its purpose and need were to: (1) reduce safety hazards adjacent to roads, trails, and facilities; (2) maintain the integrity and utility of NFS roads, trails, and facilities; (3) reduce fuel loading associated with dead, dying, fire-damaged, and already fallen hazard trees adjacent to roads, trails, and facilities; (4) promote economic and operational efficiency; and (5) provide for the recreational and ecological values associated with hazard trees to the extent that doing so would not substantially undermine the first three objectives. (Administrative Record ("AR") at 20–23, 342–45, 698–701.) As Plaintiffs acknowledge, "the purpose and need statement itself is general, covering five principle

[3] Page numbers refer to ECF pagination.

[4] Amended Council on Environmental Quality ("CEQ") regulations went into effect on July 1, 2024. Citations and references to the CEQ regulations in this order are to those that were in effect when the EAs were issued.

objectives[.]" (Pl. MSJ at 17.) The statement is broadly defined and does not mandate any particular outcome.

The purpose and need statement is also consistent with relevant statutory directives and goals. Congress mandated the creation of the NFS road system, declaring in the Multiple-Use and Sustained Yield Act that "the construction and maintenance of an adequate system of roads and trails within and near the national forests and other lands administered by the Forest Service is essential if increasing demands for timber, recreation, and other uses of such lands are to be met." 16 U.S.C. § 532. Under the Forest Service Organic Administration Act of 1987, the Forest Service has the authority to "make provisions for the protection against destruction by fire and depredations upon the public forests and national forests" and to regulate the "occupancy and use" of National Forests. 16 U.S.C. § 551.

Plaintiffs' primary issue with the purpose and need statement appears to be the "policy choice" that the Forest Service made. (Pl. MSJ at 17.) Specifically, the Forest Service decided to "take a conservative approach to hazard tree abatement, erring in favor of being overinclusive in identifying and removing trees rather than being underinclusive and risking injury or death to forest users." (AR 20, 342, 698.) An agency, however, can consider policy objectives in a purpose and need statement, and the Forest Service's policy choice here to focus on safety risks posed by hazard trees was well within its considerable discretion. *See California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982) ("The focal point of our inquiry must be the underlying environmental policy, and whether the agency's proposed action comports with that policy."). The Forest Service explained that it "decided to heavily weight the scales in favor of safety, given the potential for injury or death to forest visitors[,]" because "it is impossible to accurately predict whether and when a particular tree will strike a road, trail, or facility[.]" (AR 20, 342, 698.) The Forest Service's concern for public safety is not arbitrary and capricious, and inclusion of the policy choice based on that reason does not render the purpose and need statement impermissibly narrow.

**2. Alternatives Considered**

Given its stated purpose and need, the Forest Service considered a reasonable range of alternatives. "The agency must at least consider a 'preferred' alternative and a 'no action' alternative, and 'give full and meaningful consideration to all *reasonable* alternatives.'" *Earth Island Inst. v. U.S. Forest Serv.*, 87 F.4th 1054, 1065 (9th Cir. 2023) (quoting *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1050 (9th Cir. 2013)). A "reasonable" alternative is one that advances the agency's purpose and need. *See id.* The agency must also "briefly discuss" the reasons why it eliminated any alternatives from detailed study. 40 C.F.R. § 1502.14(a) (2020). The Forest Service did just that here.

The EAs addressed five alternatives in total: the proposed action, no action, the proposed action with a different geographic scope, the proposed action with reduced treatment intensity, and the proposed action with suggested road, trail, or facility closures. (AR 23–30, 345–52, 701–08.) The Forest Service considered the proposed action and no action alternatives in detail and briefly addressed the remaining three alternatives, eliminating them as inconsistent with the purpose and need statement. The EAs explained, for example, that those alternatives—all of which would leave some hazard trees near NFS roads unabated and at risk of falling—would not meet the second goal "to retain a safe system of roads, trails, and facilities that the public, Forest Service staff, firefighters, emergency personnel, and others can trust and rely upon." (AR 28–30, 350–52, 706–08.) Those alternatives were thus not "reasonable" and did not require more detailed consideration. *See Westlands Water Dist. v. Dep't of Interior*, 376 F.3d 853, 871–72 (9th Cir. 2004) ("It would turn NEPA on its head to interpret the statute to require that an agency conduct in-depth analyses of alternatives that are inconsistent with the agency's policy objectives." (cleaned up)).

The "touchstone" for the Court's review of a challenge under NEPA is whether the agency's "selection and discussion of alternatives fosters informed decision-making and informed public participation." *Westlands Water Dist.*, 376 F.3d at 872 (quoting *Block*, 690 F.2d at 767). The Forest Service fostered informed public participation in the Projects.

Commentators proposed alternatives, and the Forest Service considered and addressed those proposals. Indeed, the Forest Service adopted suggestions that were not incompatible with its purpose and need. (*See* AR 28, 351, 707 ("Based on public comment and internal review, we constrained the scope of the geographic area to be treated (for example, by not treating in wilderness and inventoried roadless areas) to the extent that is feasible while still maintaining consistency with the central objectives.").)

Plaintiffs contend that the Forest Service should have considered in detail an alternative that would have treated fewer maintenance level 2 ("ML 2") roads—defined as roads "maintained for high-clearance vehicles" (AR 44919); specifically, ML 2 roads "essential for accessing recreational sites or private inholdings" would be treated, but "non-essential" ML 2 roads would be removed from the Projects. (Pl. MSJ at 18–19.) However, Plaintiffs, as the party challenging an agency's failure to consider an alternative, have not carried their burden "to show that the alternative is viable." *Alaska Survival*, 705 F.3d at 1087. As discussed above, the Forest Service reasonably rejected alternatives with a different geographic scope as inconsistent with the goal of maintaining the integrity and utility the NFS road system. Even if certain ML 2 roads are lower use, those roads are still open to the public. The determination of which roads are available for motor vehicle use was previously subject to NEPA review,[5] and the Forest Service has a legitimate interest in ensuring that the entirety of the road system is accessible for regular use, and especially for emergency use. *See* 36 C.F.R. § 212.52(a) (requiring that the designation of NFS roads be subject to the NEPA process).[6] The Forest Service was thus not required to consider an alternative based on reduced treatment of ML 2 roads in detail.

[5] The Forest Service raised this point, which Plaintiffs did not contest, during the hearing on the summary judgment motions on April 30, 2024. (*See* Dkt. No. 36.)

[6] "The public shall be allowed to participate in the designation of National Forest System roads, National Forest System trails, and areas on National Forest System lands and revising those designations pursuant to this subpart. Advance notice shall be given to allow for public comment, consistent with agency procedures under the National Environmental Policy Act[.]" 36 C.F.R. § 212.52(a).

**3. Tiering**

The Forest Service did not impermissibly "tier" to the Hazard Tree Guidelines. "'Tiering' is a term of art in the NEPA context, referring to the practice of incorporating by reference previously conducted environmental analyses into a subsequent environmental analysis." *Earth Island Inst. v. Muldoon*, 82 F.4th 624, 637 n.11 (9th Cir. 2023). "[T]iering to a document that has not itself been subject to NEPA review is not permitted, for it circumvents the purpose of NEPA." *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1073 (9th Cir. 2002). To the extent an agency "tiers" to non-NEPA documents, "they cannot be considered to determine whether the analysis is sufficient." *W. Watersheds Proj. v. Bureau of Land Management*, 552 F. Supp. 2d 1113, 1133 (D. Nev. 2008) (citing *Kern*, 284 F.3d at 1073).

Plaintiffs argue that the Forest Service impermissibly "tiered" its analysis in the EAs by relying on non-NEPA documents, the Hazard Tree Guidelines, to assess which trees constitute hazards. (Pl. MSJ at 15.) NEPA's implementing regulations encourage agencies to incorporate materials into environmental assessments by reference to "cut down on bulk," so long as the materials are "reasonably available for inspection by potentially interested persons within the time allowed for comment." 40 C.F.R. § 1501.12 (2020). The EAs satisfied those requirements by linking to the Hazard Tree Guidelines, which were publicly available, allowing the public to raise problems with the application of the Guidelines to the proposals in the notice and comment process. (AR 24 n.8, 346 n.8, 702 n.8.)

When incorporating materials by reference, however, the agency may not engage in "improper tiering" by failing to "provide any analysis" of their reasons for adopting the decisions or analyses in those materials. *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1120 (9th Cir. 2018). The agency must still "articulate, publicly and in detail, the reasons for and likely effects of those management decisions" that are incorporated by reference. *Id.* at 1119 (quoting *Kern*, 384 F.3d at 1073). Here, while the EAs do cite to the Guidelines, the Guidelines are not themselves management decisions or environmental analyses that are being imported wholesale without analysis into the EAs. The Guidelines do not dictate which trees will be

felled, but instead describe themselves as providing "a range of hazard tree mitigation options . . . for the line officer's decision." (AR 1688.) Among other things, the Guidelines describe what measuring devices to use, how to record the data, and a rating system for hazard potential, noting that "[b]ecause tree inspection and hazard rating involve combining science and experience, it is sometimes reasonable to adjust the final rating to reflect what the inspector's experience and sound judgment deems to be correct." (AR 1690–91.) *See Earth Island Inst. v. Carlton*, 626 F.3d 462, 474 (9th Cir. 2010) (finding an earlier version of the Hazard Tree Guidelines to be "not substantive, but provid[ing] only internal guidance and parameters for the abatement of danger from hazard trees"). The Hazard Tree Guidelines do not set forth a program or management plan, unlike in *Kern*, where the Bureau of Land Management's "guidelines" at issue in that case laid out comprehensive "strategies to minimize the spread of fungus." 284 F.3d at 1068.

Moreover, the EAs do contain an independent analysis of how the Forest Service plans to identify hazard trees. For example, the Forest Service explained that trees will be deemed hazardous "based on the height of the tree, lean, condition, distance, and slope from the area to be protected based on the guidelines" and that the 300-foot buffer on either side of the road is based on "the potential for a 'domino effect' with the possibility of a more distant tree knocking down others closer to the road as it falls." (AR 24, 346, 702.) The Forest Service continued, "We would only fell moderate to high hazard trees up to 1.5 times the tree height striking distance of the road." (AR 24, 346, 702.) Although succinct, this analysis presents the Forest Service's methodology for identifying a tree as hazardous as well as its reasons for establishing the 300-foot buffer zone. The EAs' reliance on the Hazard Tree Guideline thus does not constitute improper "tiering" as that term is understood in the NEPA context.

**B. Analysis of Environmental Impacts (Count One)**

The Forest Service adequately considered the Projects' environmental impacts. (Pl. MSJ at 22–31.) NEPA requires agencies to take "a 'hard look' at the likely effects of the proposed action," including all foreseeable direct, indirect, and cumulative impacts. *Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 916–17 (9th Cir. 2012). "To satisfy the 'hard look'

requirement, an agency must provide a reasonably thorough discussion of the significant aspects of the probable environmental consequences." *350 Montana v. Haaland*, 50 F.4th 1254, 1265 (9th Cir. 2022) (citation and quotation marks omitted). An agency "is only required to focus on the issues that are truly significant to the action in question. Also, impacts shall be discussed in proportion to their significance." *Hapner v. Tidwell*, 621 F.3d 1239, 1245 (9th Cir. 2010) (citation and quotation marks omitted). When reviewing an agency decision to determine whether the hard look standard is met, courts must "employ a 'rule of reason,'" rather than "fly-speck" the agency's analysis or "act[ ] as a type of omnipotent scientist." *Audubon Soc'y of Portland v. Haaland*, 40 F.4th 967, 984 (9th Cir. 2022) (cleaned up).

**1. Wild and Scenic Rivers**

The Forest Service, relying on a specialist report on special management areas, concluded in the EAs that the Projects would not affect Wild and Scenic River ("WSR") values. (AR 71, 395, 757, 4516–22.) Plaintiffs contend that the specialist report fails to support this conclusion because the report (1) contained no data or analysis regarding effects to WSR values and (2) failed to address eligible or suitable river segments. (Pl. MSJ 23–25.)

As a preliminary matter, Plaintiffs fault the Forest Service for failing to make public the data underlying its specialist's report regarding WSR impacts. (Dkt. No. 33 ("Pl. Opp.") at 16.) However, the authority Plaintiffs rely on, *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146 (9th Cir. 1998), cited a regulation that was no longer in effect when the Forest Service issued the EAs in this case. In *Idaho Sporting Cong.*, the Ninth Circuit stated that NEPA "requires that the public receive the underlying environmental data from which [an] . . . expert derived her opinion," and noted that 40 C.F.R. § 1502.24 at that time "required agencies to 'identify any methodologies used and [ ] make explicit reference by footnote to the scientific and other sources relied upon for conclusions' used in any EIS statement." *Id.* at 1150 (quotation marks omitted). As of September 14, 2020, 40 C.F.R. § 1502.24 no longer contains this language. The applicable implementing regulations in effect at the time the Forest Service issued the EAs require only that material incorporated by reference be made "reasonably available" to the public. 40 C.F.R.

§ 1501.12 (2020). Here, there is no evidence in the record that Plaintiffs requested the data underlying the specialist report from the Forest Service and were unable to obtain it. Thus, the Forest Service did not err in this regard.

As for substance, Plaintiffs dispute the Forest Service's conclusion that the Projects will not affect WSR values for designated rivers. (AR 71, 395, 757.) "[A]n agency is entitled to wide discretion in assessing the scientific evidence, . . . [and] courts must defer to the informed discretion of the responsible federal agencies[.]" *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1301 (9th Cir. 2003) (citation omitted). Plaintiffs have not demonstrated that the Forest Service's conclusion is unreasonable.

The Forest Service gathered information on location, river miles, status (designated or eligible), classification (wild, scenic, or recreational), and outstandingly remarkable values for designated and eligible segments within the Projects' areas for each of the three zones, in addition to information on the amount of treatment areas for designated segments. (AR 4441–47, 4458–77 .) This information was summarized and analyzed in a specialist's report on special management areas. (AR 4516–22.) According to the specialist's report, no Project activities would occur within any designated Wild and Scenic River segments in the Southern Zone. (AR 4517.) In the North and Central Zones, no Project activities would occur in designated segments classified as wild, which is the most sensitive designation, only in scenic and recreational segments. (AR 4516–17.) However, as the specialist report noted, "a range of vegetation management and timber harvest practices are allowed" in scenic and recreational segments. (AR 4516, 4517.) Furthermore, hazard tree removal would be "limited in scope, and only take place at a select few locations where high use roads and these rivers intersect." (AR 4516, 4517.) Accordingly, the Forest Service's conclusion of "no effect" to WSR values was supported by a reasoned analysis that considered both the magnitude of the hazard tree removal relative to the river segments at issue, as well as on the consistency of the hazard tree removal with existing vegetation and timber management practices along those river segments.

Plaintiffs also criticize the Forest Service's specialist report for not containing a

sufficiently detailed discussion of certain river segments that are "eligible" to be considered Wild and Scenic Rivers based on recommendations from the Secretaries of the Interior and Agriculture, but have not yet been so designated by Congress.[7] As noted above, under NEPA, an agency "is only required to focus on the issues that are truly significant to the action in question" and, in those cases, "impacts shall be discussed in proportion to their significance. *Hapner*, 621 F.3d at 1245 (cleaned up).

The Forest Service generated tables of the eligible Wild and Scenic Rivers and the affected river segments. (AR 4457–77.) Those tables show the limited scale of the affected portions and the even smaller proportion involving segments with the most sensitive designation ("wild," as opposed to "scenic" or "recreational"). The proposed action in the North Zone would affect two wild segments totaling 0.53 miles. (AR 4457.) The proposed action in the Central Zone would affect segments totaling 8.41 miles, the majority of which are recreational or scenic rather than wild. (AR 4464.) The proposed action in the Southern Zone would affect a 0.15-mile wild river segment and a 0.29-mile recreational river segment. (AR 4471.)

In view of that limited impact, the Forest Service's discussion of eligible segments was reasonably thorough. The Forest Service concluded in the EAs that "[t]he project will not affect [those] river segments" because "[t]he proposed action is limited in scope and is focused in high-use roads within the recreational and scenic sections of the eligible river segments." (AR 71, 395, 757.) As noted above, vegetation management and timber harvest practices are already permitted in scenic and recreational segments. In addition, although the Forest Service did not repeat its description of why the project was limited in scope and impact, the Forest Service had already explained two pages earlier why it believed that the overall project of removing dead and dying trees would have a limited effect on the scenic appearance of the landscape throughout the proposed treatment areas. "[V]isual signs of activity (such as cut stumps or track and tire marks)

[7] Congress authorized the Secretaries of the Interior and Agriculture to recommend river segments as eligible for inclusion in the Wild and Scenic Rivers System, but reserved to itself the ultimate decision to designate river segments as part of that system. 16 U.S.C. §§ 1274, 1275.

. . . would be anticipated to dissipate over time" and "would not be anticipated to be evident to the casual forest visitor." (AR 69, 393, 752.) In addition, "vegetation would regrow that provides a visually pleasing contrast," particularly in moderate- and high-severity burn areas that had already had their landscape altered. (AR 69, 393, 752.) Moreover, from a recreation perspective, the proposed action might "temporarily limit access" but would ultimately ensure more "trails and facilities would become available for public use" by removing safety hazards from dead and dying trees that would otherwise require closures. (AR 69, 393, 753.) The discussion was more than sufficient to satisfy NEPA, given the limited scope of the impact.

**2. Wildlife**

Plaintiffs argue that the Forest Service's analysis of Project impacts on terrestrial and aquatic wildlife was insufficiently "site-specific." (Pl. MSJ at 28; Pl. Opp. at 17–19.) In particular, Plaintiffs contend that the Forest Service failed to provide "maps or any other site-specific information providing geographical detail about the location of habitat areas that support critical life cycle functions." (Pl. Opp. at 17.) As examples, Plaintiffs point to the Forest Service's analyses of impacts on northern spotted owls ("NSO") in the North Zone and four amphibian species in the Central and South Zones. (Pl. MSJ at 26–28.) The EAs identified and analyzed effects on federally listed and sensitive species for the no action and proposed action alternatives and ultimately concluded that the Projects would not have any significant effects on wildlife. (*See, e.g.*, AR 36–39, 44–48, 358–61, 366–69, 715–19, 725–28.) These analyses, which were supported by biological assessments and evaluations for each Zone, were sufficiently site-specific and satisfied NEPA's hard look requirement.

For federally listed species, the EAs' analyses of impacts on wildlife incorporated by reference biological assessments ("BAs") for each of the three zones that the Forest Service completed pursuant to Section 7 of the Endangered Species Act ("ESA"). (AR 45, 367, 725, 3452–580, 3581–677, 3678–840.) The BAs identified the action areas, known species and critical habitat in Project areas, proposed actions, best management practices, project design features, and environmental baselines. (AR 3456–73, 3583–99, 3680–94.) The BAs also

analyzed the Projects' direct and indirect effects on listed species and their critical habitat within each project area, as well as the cumulative effects of the Projects in combination with activities from other projects like fire suppression, timber harvest, recreation, nonnative invasive plant management, road and facility maintenance, livestock grazing, and mining. (AR 3473–563, 3600–76, 3695–745.) Similarly, for sensitive species, the Forest Service analyzed the Projects' potential effects in Terrestrial Wildlife Biological Evaluations, which the EAs also incorporated by reference. (AR 38, 359, 717, 2598–675, 2676–765, 2766–847.)

With regard to the NSO, the BA for the North Zone discussed impacts on that species in detail. For example, the Forest Service quantified the total acreage of suitable nesting/roosting, foraging, and dispersal habitat after the 2021 fires on each of the four Northern forests and within the proposed treatment areas on each of the forests. (AR3514–15 (Tables 20-21).) The BA identified which critical habitat subunits would have treatments (AR 3515–16 (Table 22)), the acres of nesting/roosting, forage, and dispersal habitat in each of the subunits (AR 3516 (Table 23), and the percentage of acres in each subunit that would be affected by the proposed treatments (AR 3516–17 (Table 24)), in addition to the number of documented NSO territories within each fire perimeter on the four forests (AR 3520 (Table 27)). The Forest Service also examined the effects on NSO habitat in three different zones: the proposed 1.3-mile buffer area around the proposed treatment area, the proposed treatment area itself, and in the NSO's core area/home range. (AR 3525–28 (Tables 30–34).) Based on this information, the Forest Service concluded that there would be no significant Project impacts on the NSO, in part because only 0.06 percent of the nesting/roosting habitat would be removed, 1.0 percent of that nesting/roosting habitat would be downgraded to foraging habitat, and 7.6 percent would be downgraded to dispersal habitat. (AR 755.) The Forest Service consulted with the U.S. Fish and Wildlife Service ("FWS") as required by the ESA, and FWS concluded that the removal of trees that were already dead and dying through the Project would not jeopardize the continued existence of the NSO or result in the destruction or adverse modification of that species critical habitat. (AR 754, 11262, 11264.) *See W. Watersheds Proj. v. Perdue*, No. CV-21-00020, 2023

WL 6377287, at *6 & n.7 (D. Ariz. Sept. 29, 2023) (observing that agency may rely on information from FWS consultation as part of NEPA analysis).

The Central and South EAs, and referenced documentation therein, likewise contained ample discussion of the Projects' impacts on the four amphibian species on which Plaintiffs focus. (*See, e.g.*, AR 39, 107, 361, 436–37, 3629–60.) Location information for those species was also provided. For example, the BAs contained tables with information about detections in the Projects' areas. (*See* AR 3630–31, 3638–40, 3645–53, 3658 (Tables 10–14); 3698–708, 3724-31 (Tables 6a–6n and 8a–8q).) The Forest Service also disclosed the databases it had reviewed for known species locations, including the Forest Service's Natural Resource Information Service Aquatic Survey and the California Natural Diversity Database. (AR 3583, 3680.) FWS, as part of the consultation process, concluded that the Projects were "not likely to jeopardize the continued existence" of the four amphibian species. (AR 11420, 11473.)

Plaintiffs do not adequately explain why the specific maps and geographical information they request were needed for the Forest Service to adequately assess impacts on wildlife or for informed public participation. For example, as noted above, the North Zone EA states that "[t]he majority of the nesting/roosting habitat [for the northern spotted owl] will be avoided (approximately .06 percent of the nesting/roosting removed)." (AR 755.) Plaintiffs offer no compelling reason why knowing exactly where the owls' habitats are would change the Forest Service's analysis given the small fraction of habitat affected. Moreover, the record indicates that, at the request of Plaintiff Center for Biological Diversity, the Forest Service uploaded its Geographic Information System data to the public website where the supporting materials for the Projects were provided. (AR 10543–45; *see also* AR 4957, 5329, 5672, 10728–30.) Plaintiffs do not explain why that data was insufficient for the Center for Biological Diversity or the public to double-check the agency's calculations as to the percentage of affected habitat or to raise concerns about the agency's overall conclusion.

In sum, the record supports that the Forest Service reached its conclusion of no significant impacts on wildlife through a reasoned analysis. Further detail was not required to

comply with NEPA. *See, e.g.*, *Ctr. for Sierra Nevada Conservation v. U.S. Forest Serv.*, 832 F.Supp.2d 1138, 1160 (E.D. Cal. 2011) (lack of site-specific data regarding various specific road issues and impacts did not prevent the EIS from sufficiently "foster[ing] both informed decision-making and informed public participation.").

**3. Cumulative Impacts**

The Forest Service concluded that the Projects would not have any significant cumulative impacts. Cumulative impacts or effects are "effects on the environment that result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions." 40 C.F.R. § 1508.1 (2022). Plaintiffs contend the cumulative effects analysis was deficient for several reasons: the Forest Service (1) failed to provide any quantified or detailed information about cumulative effects; (2) provided an incomplete list of related projects; and (3) used too small of a scale to evaluate cumulative effects. (Pl. MSJ at 29–31.)

First, contrary to Plaintiffs' contention, the Forest Service did provide quantified and detailed information about cumulative effects. The Forest Service considered past actions in the aggregate, listed ongoing and reasonably foreseeable future actions, and provided a brief description of those actions in Appendix C to each EA. (AR 42–43, 104–05, 364, 433–34, 722–23, 795–98.) The EAs included discussions of cumulative effects on various issues, including, for example, wildlife and sediment and erosion. (*See, e.g.*, AR 47–48, 64, 368–69, 386, 727–28, 745–46.) The BAs and specialist report discussed above, and other additional documents, also contained an analysis of cumulative effects from fire suppression, post-fire repair and restoration, prescribed burns, timber harvest, range management, nonnative invasive plant management, road and facility maintenance, recreational activities, livestock grazing, and mining. (*See, e.g.*, AR 1753–56, 2661–64, 3553–63.) The agency also provided quantified data about significant federally authorized timber harvesting in the North Zone. (AR 3555–59.)

The amount of detail was appropriate, based on what the EAs described as the "relatively small, spatially intermittent treatments" that would remove dead or dying trees alongside roads that were already running through the habitats. (AR 48, 369, 732; *see also* AR 49, 370, 729

(describing "the limited, linear arrangement of the treatment areas along existing roads where habitat value may be lower due to fragmentation and disturbance"); AR 51, 372, 731 ("Only dead and dying trees that are identified as a hazard would be felled, leaving standing live trees available for long-term recruitment where available, such as from forested stands with low to moderate burn severity. Dead and dying trees are expected to fall on their own, likely within 20 years post-fire.").) Plaintiffs accurately observe that some areas in the Mendocino National Forest and the Sierra National Forest were crisscrossed with roads that needed to be treated, resulting in more concentrated removals of dead or dying trees in those areas. (Pl. MSJ at 32–33.) That fact, however, does not render arbitrary and capricious the Forest Service's reasonable conclusion that habitats along roadways are already subject to "fragmentation and disturbance" from the road itself, or that the treatments are "intermittent" in the sense that the removals would be limited to dead or dying trees along those roads.

Ultimately, the Forest Service reasonably concluded that the cumulative effects from the Projects were limited because of the intermittent nature of treatments removing dead or dying trees in areas already disrupted by roadways. Plaintiffs do not identify how additional quantification or detail concerning other activities had the potential to affect that reasoning. Therefore, the record does not demonstrate that the Forest Service failed to take a "hard look" at cumulative effects. *See, e.g.*, *Selkirk Conservation All. v. Forsgren*, 336 F.3d 944, 964 (9th Cir. 2003) (holding that FWS "may employ any method that adequately considers cumulative impacts" under the ESA and was not required to "list, detail, and discuss each and every forest practices application"); *Mont. Wilderness Ass'n v. Connell*, 725 F.3d 988, 1003 (9th Cir. 2013) (affirming an agency's resource management plan in relevant part "notwithstanding the absence of a cumulative impact section" where the issues pertinent to cumulative impact analysis were already analyzed elsewhere in an EIS).

The same logic applies to Plaintiffs' second contention that the Forest Service's lists of ongoing and reasonably foreseeable future actions in the EAs for the North and South Zones were incomplete. (*See* AR 5094–95, 5609.) Nothing required the Forest Service to list every

single future action in order to take an adequately hard look at cumulative effects. *See Selkirk*, 336 F.3d at 964 (rejecting challenge to agency's cumulative effects analysis based on the failure to list certain individual projects). Plaintiffs do not explain how consideration of these additional projects had the potential to affect the Forest Service's reasoning, which was that the cumulative effects were limited due to the intermittent nature of the project to remove dead or dying trees along roadways.

Third, as to the scale the Forest Service used for the cumulative effects analysis, "an agency has the discretion to determine the physical scope used for measuring environmental impacts," but "the choice of analysis scale must represent a reasoned decision and cannot be arbitrary." *Idaho Sporting Cong.*, 305 F.3d at 973 (citations omitted). Here, the EAs explained that that the spatial and temporal boundaries analyzed varied by resource. (AR 43, 364, 723). For example, the analysis of cumulative impacts on wildlife focused on a 600-foot-wide corridor (300-feet buffer zone on each side of the road) and a 0.25-mile buffer zone around that, whereas impacts on aquatics were analyzed on a subwatershed level. (AR 43, 364, 723, 1091, 2604, 2682, 2771–72.) Plaintiffs argue that the Forest Service should have considered more than just the 600-foot-wide corridor and 0.25 buffer zone for wildlife as this corridor "only captures the Project's direct effects." (Pl. Opp. at 21.) The EAs explained this spatial bounding was chosen because it would capture "the physical change to the habitat within the 300-feet buffer from implementation of the proposed actions, and the approximate area where noise or smoke from implementation may impact threatened, endangered, and sensitive species outside or within the treatment unit itself." (AR 47, 368, 727.) The inclusion of the 0.25-mile (1,320 feet) buffer zone for effects on wildlife, which is more than twice the size of the treatment area, is sufficient to distinguish the cumulative effects analysis from the direct effects analysis, especially given the spatially intermittent nature of the proposed treatments along roadways. (AR 48, 369, 728.) The Forest Service's decision regarding the scope of its cumulative effects analysis was thus not arbitrary.

**C. Decision Not to Prepare an EIS (Count Three)**

Plaintiffs challenge the Forest Service's decision not to prepare an EIS largely on two grounds: (1) the statement of reasons for not preparing EIS was arbitrary because the Forest Service did not acknowledge the scale of the Projects; and (2) substantial questions exist regarding whether significant impacts may exist in view of the Forest Service's reliance on design features. "An agency shall prepare a finding of no significant impact ["FONSI"] if the agency determines, based on the [EA], not to prepare an [EIS] because the proposed action will not have significant effects." 40 C.F.R. § 1501.6(a) (2020). "In considering whether the effects of the proposed action are significant, agencies shall analyze the potentially affected environment and degree of the effects of the action." *Id.* § 1501.3(b). An EIS is required if there are "substantial questions whether a project may have a significant effect on the environment." *Blue Mountains Biodiversity Proj. v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998) (cleaned up). "[T]he decision not to [prepare an EIS] may be overturned only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Anderson v. Evans*, 371 F.3d 475, 486 (9th Cir. 2004) (citation and quotation marks omitted). Plaintiffs failed to raise a substantial question as to significant impacts and to otherwise show that the Forest Service's decision not to prepare an EIS was arbitrary and capricious.

With regard to Plaintiffs' first point, the large size of the Projects, alone, does not necessarily raise a substantial question as to significant environmental impacts, so the Forest Service's alleged failure to address scale across all nine affected National Forests does not make the FONSIs arbitrary. *See W. Watersheds Proj. v. Perdue*, 2023 WL 6377287, at *12 ("While this is a large Project—spanning across two states and multiple national forests—Plaintiffs do not point to, and the Court is unaware of, any authority holding large projects necessarily have a significant environmental impact."). As described above, the Forest Service adequately took a hard look at the Projects' impacts. In the FONSIs, the Forest Service considered the relevant factors under the CEQ regulations and provided a convincing statement of reasons why the Projects' impacts were insignificant. (AR 74–76, 398–400, 761–62.)

As for Plaintiffs' second argument, the Forest Service's use of design features to minimize the Projects' potential negative effects during its implementation does not raise substantial questions of significant impacts. The Forest Service incorporated a series of design features, such as avoiding activity near known NSO nests during the spring or avoiding the use of tightly woven fiber netting near the habitats of certain frog species, to reduce the impact of the Projects. (AR 26, 85–103, 348, 412–32, 704, 774–95.) Plaintiffs suggest that, as a result, the agency was required to prepare a "mitigated FONSI" that conducts a separate detailed analysis of the effectiveness of the design features. However, such an analysis is only required where the agency has found the proposed action will have significant impacts and is relying on mitigation measures to offset those effects after the fact. As another court explained:

> An agency may make a finding of no significance if it proposes an action that would have significant impacts but also proposes mitigation to reduce or offset the effects of the action to below a significant level. In such circumstances, the agency must make a finding that the mitigation measures would render any environmental impact resulting from the action insignificant. BLM's NEPA Handbook refers to such a finding as a "mitigated FONSI."
>
> Alternatively, an agency may incorporate mitigation into the project design so that significant impacts are avoided, rather than mitigated after the project is developed. In such situations, the agency need not separately evaluate whether mitigation adopted after the fact would reduce impacts to a level of non-significance.

*W. Watersheds Proj. v. Lueders*, 122 F. Supp. 3d 1039, 1052 (D. Nev. 2015) (citations and quotation marks omitted), *aff'd sub nom. W. Watersheds Proj. v. Ruhs*, 701 F. App'x 651 (9th Cir. 2017); *see also Friends of Animals v. Haaland*, No. 3:22-CV-00365, 2024 WL 3599148, at *6 (D. Nev. July 30, 2024). The then-applicable regulation concerning mitigated FONSIs confirms this point by requiring that analysis only where no significant impact is found *based on* the mitigation. "If the agency finds no significant impacts based on mitigation, the mitigated finding of no significant impact shall state any enforceable mitigation requirements or commitments that will be undertaken to avoid significant impacts." 40 C.F.R. § 1501.6(c) (2020).

Here, the Forest Service was not required to prepare a mitigated FONSI because it has not found that the Projects had significant impacts that the mitigation measures were required to address after the fact. To the contrary, the FONSIs conclude, "The interdisciplinary team considered and evaluated both short- and long-term effects for their resources and identified no significant effects (see [hyperlinks to] 'Issues Analyzed in Detail,' 'Other Law, Regulation, and Policy Consistency,' and supporting analyses in the project record)." (AR 75, 399, 761.) Instead, the Forest Service's analysis falls in the second category, where various design features were incorporated into a project design that avoided any significant impact in the first place, rather than providing mitigation after the fact. The Forest Service incorporated design features "throughout the plan of action, so that [any adverse] effects are analyzed with those measures in place. Thus, it cannot be said that the EA[s] fail[ed] to analyze the effects of the mitigation measures; instead, the EA[s] analyze[d] the Project[s] under the enumerated constraints and conclude[d] that any environmental impacts [would] not be significant." *Env't Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1015 (9th Cir. 2006).

## III. CONCLUSION

Based on the foregoing, the Forest Service's motion for summary judgment is granted, and Plaintiffs' motion for summary judgment is denied. The Clerk of the Court shall enter judgment in favor of the United States Forest Service and close the case.

**IT IS SO ORDERED.**

Dated: August 23, 2024

RITA F. LIN
United States District Judge