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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ENVIRONMENTAL PROTECTION
INFORMATION CENTER,

Plaintiff,

v.

JACK BLACKWELL, *et al.*,

Defendants.

No. C-03-4396 EMC

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT;
GRANTING IN PART AND DENYING IN
PART DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT
(Docket Nos. 29, 30)**

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1 Plaintiff Environmental Protection Information Center (“EPIC”) has filed suit against the
2 United States Forest Service (“FS”) and various individuals in their official capacities, alleging that
3 the FS violated both the National Environmental Policy Act (“NEPA”) and the National Forest
4 Management Act (“NFMA”) by authorizing the Divide Auger (“DA”) Timber Sale in the Mendocino
5 National Forest (“MNF”). More specifically, EPIC asserts that the FS violated NEPA: (1) by failing
6 to take a hard look at the cumulative impacts on late-successional wildlife and wildlife habitat; (2) by
7 failing to provide a convincing statement of reasons for its finding of no significant impact
8 (“FONSI”); (3) by failing to consider a reasonable range of alternatives; and (4) by failing to
9 diligently involve the public. EPIC contends that the FS violated NFMA by failing to ensure species
10 diversity and viability with respect to the northern spotted owl, the northern goshawk, the Pacific
11 fisher, and the American pine marten.

12 The parties filed cross-motions for summary judgment on April 14, 2004. A hearing on the
13 motions was held on June 9, 2004. Supplemental briefing was provided by the parties in August and
14 September 2004. Having reviewed the parties’ briefs and accompanying submissions as well as the
15 administrative record, and having considered the oral argument of counsel, and good cause appearing
16 therefor, the Court hereby GRANTS in part and DENIES in part EPIC’s motion for summary
17 judgment and GRANTS in part and DENIES in part the FS’s motion for summary judgment.
18 Because EPIC’s motion for summary judgment is granted in part, the Court issues an injunction as
19 discussed in further detail below.

20 I. FACTUAL BACKGROUND

21 At issue in this case is the FS’s decision to authorize the DA Timber Sale, which will take
22 place in the MNF. The MNF is governed by the MNF Land and Resource Management Plan of 1995
23 (“MNF Plan”) as well as by the Northwest Forest Plan of 1994 (“NW Forest Plan”). *See* AR 2029
24 (MNF Plan; stating that the MNF Plan “fully incorporates all applicable land allocations and
25 standards and guidelines” of the NW Forest Plan).

26 The NW Forest Plan provides in part standards and guidelines for management of habitat for
27 late-successional and old-growth forest related species within the range of the northern spotted owl.
28 *See* AR 1604 *et seq.* (NW Forest Plan). “Late-successional forests are those forest seral stages that

1 include mature and old-growth age classes.” AR 1703 (NW Forest Plan). Species that depend on
2 old-growth forests include the northern spotted owl, goshawk, fisher, and marten. *See* AR 4451
3 (MIS Report). Indeed, each of these species is considered a management indicator species (“MIS”)
4 for old-growth forests. *See* AR 4451 (MIS Report). MIS

5 function as barometers for wildlife communities. These species were
6 selected because: 1) they are believed to represent the vegetation types,
7 successional stages, and special habitat elements necessary to provide
8 for viable populations of all species in the Forest; and 2) their
9 population changes are believed to indicate or represent the effects of
10 management activities on wildlife and fish.

11 AR 1982 (MNF Plan); *see also* AR 1984 (MNF Plan; listing MIS and ecological elements
12 represented in Table 3-9).

13 The NW Forest Plan allocates land into seven different categories. For purposes of this case,
14 the two categories that merit discussion are late-successional reserves (“LSRs”) and matrix lands.
15 LSRs are federal lands within the range of the northern spotted owl that “are designed to serve as
16 habitat for late-successional and old-growth related species including the northern spotted owl.” AR
17 1615 (NW Forest Plan). A fully functional LSR is not only one that “contain[s] well connected late
18 successional habitat” but also is “connected to other LSRs through dispersal habitat for both aerial
19 and ground traversing species.” AR 3360 (LSR Assessment).

20 Matrix lands are federal lands within the range of the northern spotted owl “in which most
21 timber harvest and other silvicultural activities will be conducted.”¹ AR 1616 (NW Forest Plan).
22 While most timber harvest will be conducted in matrix lands, matrix lands also “contain non-
23 forested areas as well as forested areas that may be technically unsuited for timber production.” AR
24 1616 (NW Forest Plan). In addition, when there is a northern spotted owl activity center on matrix
25 land – “[a]ctivity center’ is defined as an area of concentrated activity of either a pair of spotted
26 owls or a territorial single owl” – then “[o]ne hundred acres of the best northern spotted owl habitat
27 will be retained as close to the nest site or owl activity center as possible” and “[t]imber management
28 activities within the 100-acre area should comply with management guidelines for Late-Successional

¹ Silviculture is a branch of forestry dealing with the development and care of forests. *See* <http://www.m-w.com/home.htm> (Merriam-Webster online; last visited July 2, 2004).

1 Reserves.” AR 1746 (NW Forest Plan). This one hundred acre area is called a “100 acre LSR/core.”
2 AR 4421 (Wildlife BA; defining term as “an area of 100 acres of the most suitable habitat designed
3 for each [activity center] on Matrix land occurring outside of the LSR RC network”). The area of
4 habitat within a 1.3-mile radius from an owl activity center is called the home range. *See* AR 4421
5 (Wildlife BA); *see also* AR 4507 (MIS Report; stating that, “[b]ecause . . . the actual configuration
6 of the home range is rarely known, the estimated home range of an owl pair is represented by a circle
7 with an area of 3,340 acres, with a 1.3-mile radius centered upon the owl activity center”). The Fish
8 & Wildlife Service (“FWS”) recommends a minimum of 1,336 acres of nesting and foraging habitat
9 – *i.e.*, 40 percent of the acres in the home range – to support a pair of nesting spotted owls. *See* AR
10 4467 (FWS Biological Opinion).

11 The DA Timber Sale will take place on matrix lands in the MNF, more specifically on matrix
12 lands in the Thomes Creek Watershed. *See* Docket No. 40 (map).² The entire project area for the
13 DA Timber Sale encompasses 2,882 acres, *see* AR 4415 (Wildlife BA), and is divided into a
14 northern portion and a southern portion. *See* Docket No. 40 (map); *see also* AR 4583-84 (maps).
15 There is a total of twenty-one harvest units, thirteen in the north and eight in the south. *See* AR 4415
16 (Wildlife BA). The northern part of the project is located directly between the Yolla Bolly Middle
17 Eel Wilderness (“YBME Wilderness”) and the Buttermilk LSR (also known as RC 309) and
18 encompasses two northern spotted owl activity centers known as 1008 and 1052. *See* Docket No. 40
19 (map); AR 4583 (map). The southern part of the project is located close to a portion of the
20 Buttermilk LSR and encompasses owl activity center 1001. *See* Docket No. 40 (map); AR 4584
21 (map).

22 _____
23 ² At the request of the Court, the parties prepared a map showing on one piece of paper the
24 location of “key” sites such as the northern part of the project area, the southern part of the project area,
25 the harvest units, the Yolla Bolly Middle Eel Wilderness, the Buttermilk LSR, and certain owl activity
26 centers. Although the administrative record contains a number of maps, *see, e.g.*, AR 4583-84 (maps),
the Court was not able to find a map that compiled all of the relevant information in one place. The map
prepared by the parties is appended to this opinion. *See* Appendix A.

27 At the hearing on the parties’ cross- motions for summary judgment, the Court asked the parties
28 if they objected to including this map as part of the trial court record. The FS had no objection. EPIC
also had no objection though it noted that the map was not part of the administrative record. The Court
recognizes such and limits its reliance on the map to providing information about general geographic
location.

1 In February 2002, the FS issued for public comment its first Environmental Assessment
2 (“EA”) for the DA Timber Sale. *See* AR 4588 (Decision Notice and FONSI). “As a result of public
3 comments, the . . . proposed action was dropped and a new proposed action developed.” AR 4588-
4 89 (Decision Notice and FONSI). In October 2002, a new EA was issued for public comment, and a
5 legal notice regarding the sale was posted in November 2002. *See* AR 4589 (Decision Notice and
6 FONSI). This EA put forth three alternatives with respect to the DA Timber Sale: (1) no action
7 (Alternative A), (2) logging in the southern harvest units only (Alternative B), or (3) logging in both
8 the northern and southern harvest units (Alternative C, the proposed action). *See* AR 4600-06 (EA).

9 Based on the EA, the FS issued its Decision Notice and FONSI on June 6, 2003. *See* AR
10 4592 (Decision Notice and FONSI). The FS selected Alternative C as the preferred alternative. *See*
11 AR 4591 (Decision Notice and FONSI). Under Alternative C, the proposed action, 4.5 million board
12 feet (“MMBF”) of timber from 264 net acres of forest land will be harvested, for a net value of
13 approximately \$665,542. *See* AR 4588 (Decision Notice and FONSI). “Based on silvicultural
14 review, approximately 123 acres are proposed for green tree retention, 101 acres would have the over
15 story trees removed and 40 acres of the oldest, best condition trees would be retained to provide
16 habitat for old growth wildlife and vegetation.”³ AR 4593 (EA). The forty acres were retained

18 ³ According to the EA,

19
20 Green Tree Retention is a timber management prescription used to
21 regenerate stands by retaining a number of overstory trees per acre or a
22 percentage of the area associated with each harvest unit. The primary
23 basis for retaining these green trees is to provide for dispersal of
24 numerous organisms such as plants, animals, fungi, mollusks, bryophytes,
25 etc. Other purposes include maintaining visual quality, provide future
26 opportunities for recruitment of snags and downed logs, increasing
27 vertical diversity within stands, and to retain native genetic diversity.

28 . . . Overstory removal is used to regenerate stands which have relatively
light stocking in their overstories and substantial numbers of small
conifers (seedlings, saplings, and poles) in their under stories. Under this
method, the protection/seed source from the overstory trees is no[] longer
needed. These trees are competing with the newly established udnerstory
for light and nutrients. The overstory trees are typically removed[;]
however, some may be retained where isolated patches of trees are
needed for wildlife and/or other resource needs.

AR 4611 (EA).

1 pursuant to the MNF Plan, which provides as a forest-wide standard and guideline, “[m]aintain at
 2 least 15% of federal forest lands within fifth field watersheds (20-200 square miles) in late-
 3 successional forest.” AR 2020 (MNF Plan).

4 “Approximately five acres of nesting habitat [for the northern spotted owl] and 154 acres of
 5 foraging habitat [will] be removed” under Alternative C, the proposed action. AR 4470 (MIS
 6 Report); *see also* AR 4468 (MIS Report; noting that, in the project area, there are approximately 768
 7 acres of nesting habitat and 399 acres of foraging habitat and that, in the Thomes Creek Watershed,
 8 there are approximately 16,036 acres of nesting habitat and 16,424 acres of foraging habitat). The
 9 five acres of nesting habitat will be from the southern units as will approximately 54 of the 154 acres
 10 of foraging habitat.⁴ *See* AR 4424 (Wildlife BA); AR 4469-70 (MIS Report).

11 According to the EA for the DA Timber Sale, the sale will serve the following purposes and
 12 needs:

- 13 (1) “[T]o achieve a desired condition of an even-age, fire resilient forest while providing
 14 an adequate timber supply that contributes to economic stability of rural communities
 15 by generating economic activity, income and employment.”⁵

17 ⁴ At the hearing on the parties’ cross-motions for summary judgment, the FS proffered for the
 18 first time a declaration from Jesse Rosenquist, a silviculturalist for the FS, which noted that the DA
 19 Timber Sale as “originally planned” included the “harvest of five acres of nesting habitat for the
 20 Northern Spotted Owl . . . in the southern portion of the Divide Auger project area” but, as “currently
 21 planned,” the harvest no longer includes the harvest of these five acres “or any other nesting habitat for
 the Northern Spotted Owl.” Rosenquist Decl. ¶¶ 2-3. The FS stated that, so far as it knew, this meant
 that there would be a net reduction in the number of acres to be harvested (*i.e.*, the five acres would not
 be “made up” elsewhere in the project area).

22 After having a chance to review the declaration, EPIC stated that it did not object to admission
 23 of the declaration but felt the declaration was untimely. More specifically, EPIC noted that, according
 24 to the declaration, the FS became aware that the five acres would not be harvested in the summer of
 2003, which was about the time it issued the Decision Notice and FONSI and which was well before
 resolution of the administrative appeal (in September 2003). However, the FS never brought this fact
 up until the hearing before this Court on the parties’ cross-motions for summary judgment.

25 That the DA Timber Sale – as of date – will not involve harvesting on the five acres of nesting
 26 habitat is of no consequence, at least for purposes of this opinion. The Court’s analysis below does not
 depend on the issue of whether or not there will be harvesting on these acres.

27 ⁵ “The Divide Auger Sale has been proposed to meet a portion of the 4,481 acres of the ‘timber
 28 modified’ emphasis requirements agreed to within Management Area # 35 of the [MNF Plan].” AR
 4594 (EA); *see also* AR 2079 (MNF Plan). The MNF Plan describes the management prescription of
 “timber modified” as “provid[ing] emphasis on timber production while providing for other resource

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- (2) “[To] minimiz[e] the spread of . . . pathogens [such as insects and diseases] to prevent . . . [l]oss of timber volume[;] [r]eduction in visual quality . . . caused by the long-term loss of trees due to insect and disease manifestations[;] [i]ncreased fuels near the wilderness boundary from dead and dying trees[;] [s]pread of insects and disease within riparian reserves, late successional reserves, and the wilderness that would result in the loss of dispersal habitat for wildlife species.” The disease *H. annosum* is a special concern for the northern units. While this disease is a “normal part of western forest ecosystems and contributes to structural and compositional diversity,” it “has increased in recent decades.”
- (3) “[T]o increase the presence of mixed conifers, decrease the presence of red and white fir, and to protect and encourage the growth of oak.”
- (4) “[T]o reduce natural fuels to levels that can be managed with hand crews”

AR 4594-95 (EA).

II. LEGAL STANDARD

A. Judicial Review of Agency Action

Both parties agree, as does the Court, that judicial review of the FS’s Decision Notice and FONSI is governed by the Administrative Procedure Act (“APA”). *See* 5 U.S.C. § 706; *see also Earth Island Inst. v. United States Forest Serv.*, 351 F.3d 1291, 1300 (9th Cir. 2003) (stating that judicial review of agency decisions under both NEPA and NFMA is governed by APA). Under Section 706(2), a reviewing court shall “hold unlawful and set aside agency action, findings and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” or “without observance of procedure required by law.” *Id.* § 706(2)(A), (D).

The Supreme Court has stated that, as a general rule under the APA,

[t]he scope of review under the “arbitrary and capricious” standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a “rational connection between the facts found and the choice made.” In

objectives, including visual quality, watershed, rare and endemic species, and wildlife.” AR 2054 (MNF Plan).

1 reviewing that explanation, we must “consider whether the decision
2 was based on a consideration of the relevant factors and whether there
3 has been a clear error of judgment.” Normally, an agency rule would
4 be arbitrary and capricious if the agency has relied on factors which
5 Congress has not intended it to consider, entirely failed to consider an
6 important aspect of the problem, offered an explanation for its decision
7 that runs counter to the evidence before the agency, or is so
8 implausible that it could not be ascribed to a difference in view or the
9 product of agency expertise. The reviewing court should not attempt
10 itself to make up for such deficiencies; we may not supply a reasoned
11 basis for the agency's action that the agency itself has not given. We
12 will, however, “uphold a decision of less than ideal clarity if the
13 agency’s path may reasonably be discerned.”

14 *Motor Vehicle Manufacturers Ass’n of United States v. State Farm Mut. Automobile Ins. Co.*, 463
15 U.S. 29, 43 (1983); *see also Westlands Water Dist. v. United States Department of Interior*, 376 F.3d
16 853, 865 (9th Cir. 2004) (“[A] reviewing court ‘must consider whether the decision was based on a
17 consideration of the relevant factors and whether there has been a clear error of judgment. This
18 inquiry must be searching and careful, but the ultimate standard of review is a narrow one.’”).

19 B. Injunctive Relief

20 The Supreme Court has also stated that, unless a statute restricts a court’s jurisdiction in
21 equity, the full scope of that jurisdiction is to be recognized. *See Amoco Prod. Co. v. Village of*
22 *Gambell*, 480 U.S. 531, 542 (1987). The authority to order injunctive relief obtains under NEPA and
23 NFMA. The Ninth Circuit has specifically noted that “[t]here is nothing in NEPA to indicate that
24 Congress intended to limit [a] court’s equitable jurisdiction.” *Save the Yaak Committee v. Block*,
25 840 F.2d 714, 722 (9th Cir. 1988). Although the Ninth Circuit does not appear to have addressed
26 this issue squarely with respect to NFMA, it has proceeded under the assumption that claims under
27 the statute encompass injunctive relief. *See, e.g., Forest Conservation Council v. United States*
28 *Forest Serv.*, 66 F.3d 1489, 1496 (9th Cir. 1995) (discussing whether injunction should issue if
district court found violation of either NEPA or NFMA).

There are well-established principles governing awards of injunctive relief. *See Save the*
Yaak, 840 F.2d at 722. Generally, the basis for such relief is irreparable injury and inadequacy of
legal remedies. “In each case, a court must balance the competing claims of injury and must
consider the effect on each party of granting or withholding of the requested relief.” *Id.* In the
context of environmental claims, the Ninth Circuit has indicated that, absent “unusual

1 circumstances,” injunctive relief is the appropriate remedy for a violation of either NEPA or NFMA.
2 *See Forest Conservation*, 66 F.3d at 1496 (noting that, if court determines there is violation of either
3 statute, injunction “will not automatically issue” and that defendant “should be allowed to present
4 evidence to the court that ‘unusual circumstances’ weigh against the injunction sought, and to
5 present evidence to assist the court in fashioning the appropriate scope of whatever injunctive relief
6 is granted”). Absent documentation of such “unusual circumstances,” injunctive relief typically
7 follows from a finding of a violation of NEPA or NFMA in a case such as this. The Court therefore
8 first focuses on the substantive claims.

9 III. DISCUSSION

10 A. NEPA

11 1. Cumulative Effects

12 EPIC’s first argument is that the FS violated NEPA because it failed to take a hard look at the
13 cumulative effects of the DA Timber Sale and other sales on late-successional wildlife and wildlife
14 habitat.

15 NEPA is “‘our basic national charter for protection of the environment.’” *Center for*
16 *Biological Diversity v. United States Forest Serv.*, 349 F.3d 1157 1166 (9th Cir. 2003); *see also* 40
17 C.F.R. § 1500.1 (same). There are two goals underlying the statute: “(1) to ensure that the agency
18 will have detailed information on significant environmental impacts when it makes decisions; and
19 (2) to guarantee that this information will be available to a larger audience.” *Neighbors of Cuddy Mt.*
20 *v. Alexander*, 303 F.3d 1059, 1063 (9th Cir. 2002) [hereinafter *Alexander*]; *see also Earth Island*,
21 351 F.3d at 1300 (“NEPA requires that a federal agency ‘consider every significant aspect of the
22 environmental impact of a proposed action . . . [and] inform the public that it has indeed considered
23 environmental concerns in its decision-making process.’”).

24 “NEPA does not contain substantive environmental standards and guidelines, nor does the
25 Act mandate ‘that agencies achieve particular substantive environmental results.’” *Center for*
26 *Biological Diversity*, 349 F.3d at 1166. Rather, “NEPA imposes procedural requirements designed
27 to force agencies to take a ‘hard look’ at [the] environmental consequences” of their actions. *Earth*
28 *Island*, 351 F.3d at 1300. “This includes considering all foreseeable direct and indirect impacts.

1 Further, NEPA requires that an environmental analysis for a single project consider the *cumulative*
2 *impacts* of that project together with all past, present and reasonably foreseeable future actions.”
3 *Idaho Sporting Cong. v. Rittenhouse*, 305 F.3d 957, 973 (9th Cir. 2002) [hereinafter *Rittenhouse*]
4 (emphasis added); *see also* 40 C.F.R. § 1508.7 (defining cumulative impact as “the impact on the
5 environment which results from the incremental impact of the [proposed agency] action when added
6 to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal
7 or non-Federal) or person undertakes such other actions”). The regulations implementing NEPA⁶
8 note that “[c]umulative impacts can result from individually minor but collectively significant
9 actions taking place over a period of time.” *Id.*

10 Notably, an agency must take a hard look at cumulative impacts whether an EIS or EA is
11 involved. *See Churchill County*, 276 F.3d at 1081 (interpreting the regulations implementing NEPA
12 as requiring that an EIS consider the cumulative impacts of the proposed agency action); *Kern v.*
13 *United States Bureau of Land Mgmt.*, 284 F.3d 1062, 1076 (9th Cir. 2002) (stating that an EA “may
14 be deficient if it fails to include a cumulative impact analysis”). In fact, even though an EA is
15 supposed to be a “concise public document,” 40 C.F.R. § 1508.9, the Ninth Circuit has underscored
16 the importance of a cumulative impacts analysis in an EA:

17 The importance of analyzing cumulative impacts in EAs is apparent
18 when we consider the number of EAs that are prepared. The Council
19 on Environmental Quality noted in a recent report that “in a typical
20 year, 45,000 EAs are prepared compared to 450 EISs. . . . Given that so
many more EAs are prepared than EISs, adequate consideration of
cumulative effects requires that EAs address them fully.”

21 *Kern*, 284 F.3d at 1076 (quoting CEQ, *Considering Cumulative Effects Under the National*
22 *Environmental Policy Act* 4 (Jan. 1997), also available at
23 <http://ceq.eh.doe.gov/nepa/ccenepa/ccenepa.htm> (last visited October 13, 2004)). Because
24 cumulative impacts analysis is important to both an EIS as well as an EA, the Court concludes that it

25 _____
26 ⁶ “The Council of Environmental Quality (CEQ), established by NEPA with authority to issue
27 regulations interpreting it, has promulgated regulations to guide federal agencies in determining what
28 actions are subject to that statutory requirement.” *Department of Transp. v. Public Citizen*, 124 S. Ct.
2204, 2209 (2004). The CEQ regulations are entitled to “substantial deference.” *Robertson v. Methow*
Valley Citizens Council, 490 U.S. 332, 355 (1989); *see also Churchill County v. Norton*, 276 F.3d 1060,
1072 n.7 (9th Cir. 2001) (noting same).

1 is appropriate to look to case law on cumulative impacts analyses in EISs for guidance even though
 2 this case involves an EA rather than an EIS.

3 As noted above, EPIC argues that the FS violated NEPA by failing to take a hard look at the
 4 cumulative impacts of the DA Timber Sale and other sales on late-successional wildlife and wildlife
 5 habitat. More specifically, EPIC contends that the FS failed to take a hard look at the cumulative
 6 impacts because (1) the FS made conclusions about cumulative impacts even though it did not have
 7 adequate information about past timber sales or reasonably foreseeable future timber sales; (2) the
 8 FS’s determinations about cumulative impacts were conclusory, “providing only generalized
 9 statements of impacts,” Pl.’s Mot. at 11; and (3) the FS did not consider as part of its cumulative
 10 impacts analysis the effects that roads would have. Each argument is addressed below.

11 However, before addressing each argument, the Court notes briefly that, in making the above
 12 arguments, EPIC criticizes the cumulative impacts analysis provided in not only the EA but also the
 13 wildlife specialists’ reports underlying the EA. There are three specialists’ reports that are relevant:

NAME	CITATION TO AR	PURPOSE OF REPORT
Biological Assessment, Divide Auger Timber Sale, Grindstone Ranger District, Mendocino National Forest (a.k.a. Wildlife BA)	AR 4411-46	“[T]o analyze the proposed activities associated with the Divide Auger Timber Sale to determine the effects upon federally Threatened and Endangered species [including the northern spotted owl], and to determine whether formal consultation or conferencing with the US Fish and Wildlife Service (FWS) is required.” AR 4412 (Wildlife BA).
Divide Auger T.S. Effects of Alternatives, Wildlife Specialist’s Report (a.k.a. MIS Report)	AR 4447-84	To examine the effects of the DA Timber Sale (all three alternatives) on MIS, including the northern spotted owl, goshawk, fisher, and marten. See AR 4451 (MIS Report).

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Biological Evaluation, Divide Auger Timber Sale, Grindstone RD, Mendocino NF (a.k.a. Wildlife BE)	AR 4530-82	“[T]o analyze the proposed activities associated with the Divide Auger Timber Sale to determine the effects upon Forest Service Sensitive species [including the goshawk, marten, and fisher], and to determine whether proposed activities would result in a trend toward Forest Service Sensitive species becoming federally listed.” AR 4531 (Wildlife BE).
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To the extent the environmental analysis in the EA incorporates and depends upon the analyses in these specialists’ reports, the adequacy of the analyses in the specialists’ reports must be scrutinized.

a. Information About Past and Reasonably Foreseeable Future Timber Sales

As stated above, EPIC asserts that, because the FS did not have sufficient information about past timber sales or reasonably foreseeable future timber sales, it failed to take a hard look at cumulative effects.

Regarding *past* timber sales, EPIC does not dispute that the FS properly identified such sales. *See* AR 4434 (Wildlife BA; listing past sales that occurred within and 1.3 miles from the proposed DA project); AR 4478 (MIS Report; same); AR 4570 (Wildlife BE; same); *cf. Muckleshoot Indian Tribe v. United States Forest Serv.*, 177 F.3d 800, 809-10 (9th Cir. 1999) (stating that an EIS “must ‘catalogue adequately the relevant past projects in the area’”); *Lands Council v. Vaught*, 198 F. Supp. 2d 1211, 1246 (E.D. Wash. 2002) (“[T]he failure to identify [past] projects prevents the decisionmaker from knowing what projects have been included and therefore from making an informed decision.”). Rather, EPIC contends that, even though the FS knew what past sales took place, the agency did not know what the effects of those past sales were. In support, EPIC points to the wildlife specialists’ reports, which state that “[i]t is unknown what silvicultural prescriptions were utilized to harvest these [past timber] sales.” AR 4434 (Wildlife BA); AR 4478 (MIS Report); AR 4570 (Wildlife BE).

In response, the FS argues that it does not matter what silvicultural prescriptions were actually used to harvest the past timber sales so long as the agency knew what the results of those

1 silvicultural prescriptions were – *i.e.*, how much late-successional forest remained after the sales.
2 *See* 40 C.F.R. § 1508.7 (stating that “[c]umulative impact” is “the impact on the environment which
3 *results* from the incremental impact of the action when added to other past, present, and reasonably
4 foreseeable future actions”) (emphasis added). The FS asserts that it knew what the results of the
5 past silvicultural prescriptions were based on a table in the MIS Report and a table in the EA. *See*
6 AR 4448-49 (MIS Report; detailing, *inter alia*, the current number of acres for each timber strata in
7 the harvest units for the DA Timber Sale); *see also* AR 4609-10 (EA; same).

8 The problem for the FS is that, even if these tables reflect how much late-successional forest
9 remained after the sales, they do not provide any “discussion of how [past] projects (and differences
10 between the projects) have harmed the environment.” *Lands Council v. Powell*, 379 F.3d 738, 744
11 (9th Cir. 2004). Furthermore, these tables only provide information about late-successional forest
12 for the harvest units of the DA Timber Sale; they say nothing about the results of the past
13 silvicultural prescriptions for land *within* the project/analysis area but *outside* of the harvest units.
14 The project area is the acreage within the project area boundary, not just the harvested units. The
15 analysis area is the acreage within the project area plus a 1.3-mile radius surrounding the project
16 boundary. *See* AR 4450 (MIS Report; noting that analysis area “acreage is used for those species
17 that are wide ranging”). The entirety of the project/analysis area, not just the harvest units
18 themselves, is relevant to assessment of the impact on late-successional wildlife and wildlife habitat.

19 At the hearing on the parties’ motions for summary judgment, the Court expressly asked the
20 FS for record evidence demonstrating that it considered the effects of the past timber sales for land
21 within the project/analysis area but outside of the harvest units. The FS failed to do so. While the
22 agency claimed that the wildlife specialists made field visits to the project/analysis area, the reports
23 suggest that the specialists looked only at the harvest units themselves, not land outside of the
24 harvest units. *See, e.g.*, AR 4413-14 (Wildlife BA; listing field visits made “to review units and
25 prescriptions”). Similarly, while the reports indicate that the specialists did consider, *inter alia*,
26 aerial photographs and maps of the project/analysis area, again the focus of the specialists was on the
27 harvest units; nothing was said in the reports about the status of late-successional forest in the land
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1 outside of the harvest units. *See, e.g.*, AR 4415 (Wildlife BA; discussing timber strata in certain
2 harvest units).

3 Thus, although there is a record of prior harvested areas within the project/analysis area for
4 the DA Timber Sale, the FS failed to conduct the necessary cumulative effects analysis for two
5 reasons. First, the tables reflect only limited information about the areas to be harvested for the DA
6 Timber Sale. *See Lands Council*, 379 F.3d at 745 (“[I]n assessing cumulative effects, the
7 Environmental Impact Statement must give a sufficiently detailed catalogue of past, present, and
8 future projects, *and* provide adequate analysis about how these projects, and differences between the
9 projects, are thought to have impacted the environment.”) (emphasis added). Second, the tables do
10 not in any way provide information about the areas within the DA project/analysis area outside of but
11 proximate to the harvested areas. Because the FS did not have information about the effects of past
12 timber sales on all of the land within the project/analysis area (only the effects within the harvest
13 units for the DA Timber Sale), the Court cannot say that the FS satisfied its duty to take a hard look
14 at the cumulative impacts of the DA Timber Sale along with, *inter alia*, the past timber sales.

15 Furthermore, the Court concludes that the FS failed to take a hard look at the cumulative
16 effects of the DA Timber Sale and reasonably foreseeable *future* timber sales. As a preliminary
17 matter, the Court acknowledges that, of the four future sales discussed in the wildlife specialists’
18 reports – *i.e.*, Croney Basin, Black Bear, Ball Mountain, and Foreman/Fish – only one appears to
19 qualify as “reasonably foreseeable” because it is a proposed action – *i.e.*, Black Bear. *See Lands*
20 *Council*, 379 F.3d at 746 (“Our precedent defines ‘reasonably foreseeable’ in this context to include
21 only ‘proposed actions.’”). The Court notes that evidence establishing the status of these sales was
22 only recently provided by the FS and does not appear to have been part of the administrative record.
23 *See* Def.’s Supp. Br. at 5 & Ex. A. However, the Court shall consider the evidence since there has
24 been no objection by EPIC.⁷

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26 ⁷ The Ninth Circuit has said that

27 district courts are permitted to admit extra-record evidence: (1) if
28 admission is necessary to determine “whether the agency has
considered all relevant factors and has explained its decision,” (2) if
“the agency has relied on documents not in the record,” (3) “when

1 According to EPIC, the FS failed to take a hard look under NEPA because, even though the
2 agency did identify the Black Bear and other future sales, it did not know the number of acres to be
3 harvested for each sale and it did not know what silvicultural prescriptions were to be used for each sale.
4 *See* AR 4478 (MIS Report; stating that, for future sales, “[a]cres of harvest and silvicultural
5 treatments have not yet been determined for these projects”).

6 The Court does not accept EPIC’s position. The FS cannot be blamed simply because the
7 number of acres to be harvested and the silvicultural prescriptions to be used had not been
8 determined yet for the future sales. Notably, one of the regulations implementing NEPA recognizes
9 that there are circumstances in which information is not complete or is not available to an agency. In
10 such circumstances, the regulation directs that the agency “make clear that such information is
11 lacking.” 40 C.F.R. § 1502.22. While this regulation on its face applies to EISs and not EAs, it still
12 provides some guidance to the Court as to whether an agency can be charged with having failed to
13 take a hard look simply because information is incomplete or unavailable.⁸

14 Although the Court does not accept EPIC’s broader argument, it concludes that the FS did
15 not consider all of the information it had about the one reasonably foreseeable future sale at issue
16 (*i.e.*, Black Bear). Ironically, this became clear when the FS submitted the declaration of Jesse
17 Rosenquist for the Court’s consideration at the summary judgment hearing. Based on the wildlife

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19 supplementing the record is necessary to explain technical terms or
20 complex subject matter,” or (4) “when plaintiffs make a showing of
agency bad faith.”

21 *Lands Council*, 379 F.3d at 747.

22 ⁸ This is not to say that § 1502.22 should apply with full force to both EISs and EAs. Section
23 1502.22 provides that, if the incomplete or unavailable information “is essential to a reasoned choice
24 among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the
25 information in the environmental impact statement.” 40 C.F.R. § 1502.22(a). If the information “cannot
26 be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not
known,” then the agency must include in the EIS, *inter alia*, a statement that the information is
incomplete or unavailable, a statement of the relevance of the information, and a summary of existing
credible scientific evidence relevant to evaluating the reasonably foreseeable significant adverse impacts
on the human environment. *Id.* § 1502.22(b).

27 This level of detail is unlikely to be required of EAs as opposed to EISs. *See* 51 Fed. Reg.
28 15,625 (1986) (“It is only appropriate to require this level of analysis when an agency is preparing an
EIS. The type of analysis called for in § 1502.22 is clearly more sophisticated and detailed than the
scope of an environmental assessment.”). However, the basic principle should still apply.

1 specialists' reports, it seemed that the only information the FS had about the future sale was
2 information about its general location. *See* AR 4478 (MIS Report; noting that Black Bear sale was
3 "located over 10 miles southeast" of DA).

4 The Rosenquist declaration, however, demonstrates that the FS knew more about the future
5 sale than just its general location – in fact, that the agency had information about the tentative project
6 boundary for Black Bear. *See* Rosenquist Decl., Ex. 3 (map). But nothing in the EA or wildlife
7 specialists' reports shows that the FS considered the project boundary (and hence size) of the future
8 sale in analyzing cumulative impacts. Nor was the boundary identified in any of the public
9 documents attendant to the EA. This is especially problematic since, if the project boundary for the
10 Black Bear sale was known – even if just tentatively – some assessment about the effect of the future
11 sale could have been made based on, *e.g.*, the amount of acreage affected, the stand conditions or
12 riparian reserves within the project boundary, and the proximity to habitat of protected or sensitive
13 species.⁹

14 Thus, because the FS lacked information about the past timber sales and did not consider all
15 of the information it had about the reasonably foreseeable future Black Bear sale, the Court holds
16 that the agency failed to take a hard look at the cumulative impacts of the DA Timber Sale in
17 conjunction with other sales.

18 As a final point, the Court notes that it is troubled by the cumulative impacts analysis of the
19 FS because it is not clear that the agency necessarily looked at the "incremental impact of the action
20 when *added* to other past, present, and reasonably foreseeable future actions" as required by the
21 regulations implementing NEPA. 40 C.F.R. § 1508.7 (emphasis added). While the wildlife
22 specialists' reports do discuss past, future, and proposed/existing timber sales, the reports discuss the
23 categories of sales separately; that is, the reports do not clearly aggregate the various sales to
24 determine their cumulative impacts. *See, e.g.*, AR 4434-35 (Wildlife BA; addressing consecutively
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27 ⁹ At the summary judgment hearing, the FS pointed out that the Rosenquist declaration and the
28 attached map defining the project boundaries for the future sales was prepared only some forty-eight
hours before the hearing. However, the FS did not dispute that it *could* have prepared the map during
the NEPA process for the DA Timber Sale. The FS has not demonstrated that the map reflected new
information.

1 past sales, future sales, and then existing and proposed timber sales). Thus, there is an additional
2 reason why NEPA was violated with respect to cumulative impacts.

3 b. Conclusory Cumulative Impacts Analysis

4 EPIC argues next that the FS failed to take a hard look at cumulative impacts because the
5 cumulative impacts analysis that it did was overly conclusory. The Ninth Circuit has emphasized
6 that a cumulative impacts analysis cannot be conclusory:

7 Consideration of cumulative impacts requires “some quantified
8 or detailed information; . . . general statements about ‘possible’ effects
9 and ‘some risk’ do not constitute a ‘hard look’ absent a justification
10 regarding why more definitive information could not be provided.”
The cumulative impact analysis must be more than perfunctory; it must
provide a “*useful* analysis of the cumulative impacts of past, present,
and future projects.”

11 *Kern*, 284 F.3d at 1075 (emphasis added). Usefulness is the key. *See Muckleshoot*, 177 F.3d at 810
12 (stating that an environmental analysis “must analyze the combined effects of the actions in
13 sufficient detail to be ‘useful to the decisionmaker in deciding whether, or how, to alter the program
14 to lessen cumulative impacts.’”); *Natural Res. Defense Council v. Hodel*, 865 F.2d 288, 298 (D.C.
15 Cir. 1988) (“Conclusory remarks [on cumulative impacts] . . . do not equip a decisionmaker to make
16 an informed decision about alternative courses of action or a court to review the Secretary’s
17 reasoning.”).

18 In the instant case, the Court concludes that the cumulative impacts analysis of the FS was
19 conclusory. More specifically, the FS failed to provide a useful cumulative impacts analysis
20 because, even though the agency repeatedly recognized that the DA Timber Sale and/or the other
21 timber sales would fragment habitat for late-successional wildlife (in particular, the northern spotted
22 owl), the agency summarily concluded, without any real explanation why, that the fragmentation was
23 not a problem and that there would still be sufficient dispersal habitat after the sales. *See Friends of
24 the Earth, Inc. v. United States Army Corps of Eng’rs*, 109 F. Supp. 2d 30, 42 (D.D.C. 2000) (noting
25 that the Corps “dedicated nine or ten pages of each EA to cumulative impacts” but that “[t]here is no
26 actual analysis” as the EAs “merely recite the history of development along the Mississippi coast and
27 then conclude that the cumulative direct impacts ‘have been minimal’”); *see also Yolano-Donnelly
28 Tenant Ass’n v. Cisneros*, No. S-86-846 MLS PAN, 1996 U.S. Dist. LEXIS 22778, at *42-43 (E.D.

1 Cal. Mar. 8, 1996) (criticizing EA because it was “full of conclusory language and provides virtually
2 no factual support for its analyses and conclusions”; adding that “conclusory statements of reasons
3 supporting HUD’s finding is clearly at odds with NEPA’s mandate”); *cf. National Wildlife Fed’n v.*
4 *National Marine Fisheries Serv.*, 235 F. Supp. 2d 1143, 1159-60 (W.D. Wash. 2002) (in Endangered
5 Species Act case, stating that, “[d]ue to [the agency’s] failure to explain [in its biological opinion]
6 how dredging in the Snake River Fall Chinook’s critical habitat will not adversely modify that
7 habitat, its action appears to be arbitrary and capricious”).

8 For example, in the EA, the FS admits that the DA Timber Sale and other sales will fragment
9 habitat for mid- and late-successional wildlife by reducing suitable nesting, denning, and dispersal
10 habitat for such wildlife; the agency also emphasizes that dispersal habitat between large LSRs and
11 the 100 acre LSRs is “important to maintain.” AR 4646 (EA). However, the FS then goes on to
12 conclude – without any explanation why – that the DA Timber Sale and other sales would “still
13 allow protected movement.” AR 4646 (EA).

14 There are similar conclusory statements in the wildlife specialists’ reports underlying the EA.
15 In the Wildlife BA, for instance, the specialist acknowledges that the DA Timber Sale, by removing
16 five acres of suitable nesting/roosting habitat and 154 acres of suitable foraging/dispersal habitat for
17 the northern spotted owl, “could limit the availability of nesting sites, cause further fragmentation
18 within the analysis area, and reduce the availability of dispersal habitat for juvenile young owls.
19 Fragmentation would increase the probabilities of predation on spotted owls [as] [s]potted owl young
20 and adults may come into contact with predators (great horned owls, goshawks, etc.) more often in
21 fragmented environments.” AR 4425 (Wildlife BA); *see also* AR 4428 (Wildlife BA; same). The
22 specialist later states that the cumulative harvesting of existing and proposed timber sales will cause
23 fragmentation of habitat for the northern spotted owl; that most matrix land will continue to be
24 harvested such that it will not reach suitability as nesting habitat; and that, even though the
25 Buttermilk LSR was considered fully functional in the most recent LSR Assessment, dispersal
26 habitat between 100 acre LSRs and large LSRs is important to maintain and critical areas to maintain
27 adequate dispersal habitat into the future will be between the Buttermilk LSR and YBME
28 Wilderness. *See, e.g.*, AR 4435 (Wildlife BA). After stating all of this, the specialist then concludes

1 – without any explanation or analysis – that “[t]his area [between the LSR and Wilderness] would
2 continue to provide dispersal habitat after implementation of this project.” AR 4435 (Wildlife BA).

3 As another example, in the Wildlife BA, the specialist recognizes that the DA Timber Sale
4 will impact at least some of the owl activity centers in the project area, for example, activity center
5 1008, which is located between the YBME Wilderness and Buttermilk LSR. Dispersal from this
6 activity center takes place north to the Wilderness and south to the LSR. *See* AR 4426 (Wildlife
7 BA). The home range for 1008 consists of only 835 acres, far less than the minimum 1,336 acres
8 recommended by the FWS to support a pair of nesting owls. With the DA Timber Sale, 100 more
9 acres of foraging/dispersal habitat would be removed from the home range. *See* AR 4424, 4426
10 (Wildlife BA). Given these circumstances, the specialist concedes that “harvesting would fragment
11 habitat” but then concludes – without any explanation – that “suitable dispersal would still exist to
12 allow protected movement.” AR 4426 (Wildlife BA).

13 For further examples of conclusory statements in the wildlife specialists’ reports, see AR
14 4434 (Wildlife BA; noting that future Cronney Basin sale “could potentially affect” owl activity center
15 1052, also located directly between the YBME Wilderness and Buttermilk LSR, “if suitable habitat
16 is removed” but then concluding – without providing any reasoning – that “[t]he addition of this sale
17 should not effect dispersal between [the Buttermilk LSR] and Yolla Bolly Wilderness”); AR 4466
18 (MIS Report; noting that southern part of the project area has “small, isolated patches of suitable
19 habitat” and that harvesting in one southern harvest unit will “remove foraging habitat within the
20 largest contiguous block” but then concluding – without explanation – that “dispersal would not be
21 inhibited”); AR 4467 (MIS Report; taking note that the DA Timber Sale will fragment
22 foraging/dispersal habitat, including that between the Wilderness and LSR, but concluding – without
23 explaining why – that “suitable habitat would still exist to allow protected movement” and that,
24 “[a]lthough reduced, dispersal habitat would still exist”).

25 At the hearing on the motions for summary judgment, the Court pressed the FS to explain the
26 basis of its conclusion that fragmentation would not be a problem given the findings of risk
27 identified in the EA and wildlife specialists’ reports. Notably, the FS responded first by admitting
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1 that the analysis in the EA and reports “sounds conclusory” before arguing that its conclusion was
2 based on field visits made by the specialists as well as quantitative data.

3 The FS’s argument is not persuasive. Even though the specialists appeared to have made
4 field visits to the project area, that does nothing to explain the substantive basis of their conclusion,
5 *e.g.*, that sufficient dispersal habitat would remain even after the DA Timber Sale and other sales.
6 As for quantitative data, the MIS Report does reflect the size of the habitats for the northern spotted
7 owl, goshawk, marten, and fisher in the project/analysis area. *See* AR 4466-67 (stating that, for
8 southern part of project, “[s]potted owl and goshawk habitat is mostly divided into one large patch,
9 approximately 280 acres in size, and two smaller patches approximately 135 acres each” and
10 “[m]arten and fisher habitat is divided into one large patch of 250 acres in size, and two smaller
11 patches approximately 70 and 140 acres, as well as smaller isolated patches”; for northern part,
12 “[a]lthough convoluted, the mid to late successional habitat is spread throughout the project area and
13 is fairly contiguous”). But the size of the habitats does little to explain again *how* sufficient dispersal
14 habitat would remain after the DA Timber Sale, let alone the DA Timber Sale when taken in
15 conjunction with other sales. For example, how did the FS or the specialists determine that removal
16 of 59 and 100 acres respectively from the southern and northern portions of the project area was a
17 negligible amount for purposes of dispersal? *Cf. Marble Mountain Audubon Society v. Rice*, 914
18 F.2d 179, 182 (9th Cir. 1990) (holding that FS failed to take a hard look at impact of timber sale on
19 biological corridor; stating that “the FEIS concludes, without any apparent study or supporting
20 documentation, that the preservation of a 1/2-mile wide strip bisecting the drainage will be sufficient
21 to maintain the corridor”). The Court therefore finds the FS’s cumulative impacts analysis was too
22 conclusory. The conclusory analysis in the EA and wildlife specialists’ reports fail to establish the
23 hard look required of the agency in assessing cumulative impacts.

24 c. Effects of Roads

25 EPIC argues that the FS also failed to take a hard look at the cumulative impacts on late-
26 successional wildlife and wildlife habitat because the EA and wildlife specialists’ reports did not
27 address the effects of roads as part of the cumulative impacts analysis. EPIC asserts that “road
28 densities are of documented importance to the viability of late-successional wildlife,” Pl.’s Opp’n at

1 4, and notes that, according to the Wildlife BE, current road densities are approximately five miles
2 per square mile, which falls under low quality habitat for both the marten and fisher. *See* AR 4547,
3 4550 (Wildlife BE).

4 EPIC is correct that road densities are important to the viability of late-successional wildlife.
5 The LSR Assessment, for example, notes that “[r]oad densities can affect habitat quality for many
6 species, including marten, fisher, nesting owls, goshawks, and other species. Roads affect the quality
7 of late successional habitat by increasing erosion, exposing animals to predation, and increasing
8 noise disturbance.” AR 3376 (LSR Assessment).

9 While the FS does not really dispute the significance of road densities, it still argues that it
10 did not have to discuss the influence of roads as part of the cumulative impacts analysis because the
11 DA Timber Sale will not involve any road construction, only road maintenance. *See* AR 4593 (EA);
12 AR 4415 (Wildlife BA). Under the FS Handbook, road maintenance may be categorically excluded
13 from documentation in an EA. *See* Forest Service Handbook 1909.15, at §§ 30.3(1), 31.1b (stating
14 that “[r]epair and maintenance of roads, trails, and landline boundaries” may be categorically
15 excluded); *see also* SAR 2 (road repair and maintenance proposal, dated 11-08-98; stating that
16 project falls within category of actions for which no formal documentation required). “‘Categorical
17 exclusion’ means a category of actions which do not individually *or* cumulatively have a significant
18 effect on the human environment and which have been found to have no such effect in procedures
19 adopted by a Federal agency in implementation of these regulations (§ 1507.3)” 40 C.F.R. §
20 1508.4 (emphasis added).

21 The problem with this argument is that the FS Handbook states that there may be a
22 categorical exclusion only when there are no extraordinary circumstances related to the proposed
23 action. “Extraordinary circumstances include, but are not limited to, the presence of . . . threatened
24 and endangered species or their critical habitat.” Forest Service Handbook 1909.15, at § 30.3(2)(b).
25 In the instant case, the goshawk, marten, and fisher are only sensitive species, *see* AR 4531 (Wildlife
26 BE), but the northern spotted owl is a threatened/endangered species. *See* AR 4412 (Wildlife BA).
27 Thus, it would appear that the categorical exclusion would not apply to the assessment of impacts on
28 the northern spotted owl.

1 Even if the categorical exclusion did not apply, the Court finds that the FS’s analysis was not
2 deficient. To be sure, the FS’s cumulative impacts analysis did, in a formal sense, omit
3 consideration of roads. In the various sections titled “cumulative effects” (whether in the EA or the
4 wildlife specialists’ reports), the FS and/or specialists do not engage in any discussion of roads.
5 However, the FS and/or specialists cannot be said to have ignored the effects of roads because those
6 effects are discussed in other sections. *Cf. City of Carmel-by-the-Sea v. United States Dep’t of*
7 *Transp.*, 123 F.3d 1142, 1160 (9th Cir. 1997) (noting that EIS considered impacts on certain
8 resources in “individual sections dealing with each resource, and collectively in a section entitled
9 ‘Environmental Consequences: Cumulative Impacts’” but that these analyses “taken either separately
10 *or together . . . fail to provide sufficient information to satisfy*” NEPA) (emphasis added). For
11 example, the Wildlife BA discusses as part of its direct effects analysis whether road maintenance
12 and other road activity will have a significant effect on northern spotted owls in terms of noise
13 disturbance. *See* AR 4427 (Wildlife BA).

14 While the EA and wildlife specialists’ reports do not discuss roads in terms of potential
15 habitat fragmentation, the DA Timber Sale will not involve any new road construction. Rather, the
16 sale will involve the maintenance of eighteen miles of existing roads, grading of two additional
17 miles, and construction of 0.25 miles of temporary spur roads which will be closed immediately after
18 harvest. *See* AR 4593 (EA); AR 4415 (Wildlife BA). “All of these roads . . . [will] not require
19 removal of additional timber.” AR 4415 (Wildlife BA). Because there will be no new road
20 construction with the DA Timber Sale and the road activity under the sale will not require the
21 removal of additional timber, there will be no increase in road densities and thus EPIC has not
22 demonstrated that there is a substantial risk of habitat fragmentation to the northern spotted owl. *Cf.*
23 40 C.F.R. § 1502.2 (“Impacts shall be discussed in proportion to their significance. There shall be
24 only brief discussion of other than significant issues. As in a finding of no significant impact, there
25 should be only enough discussion to show why more study is not warranted.”).

26 For the foregoing reasons, the Court holds that the FS did not improperly omit discussion of
27 the effects of roads as part of its analysis of impacts and thus did not violate NEPA in this regard.
28

1 2. Convincing Statement of Reasons for FONSI

2 NEPA requires that an EIS be prepared for all “major Federal actions significantly affecting
3 the . . . environment.” 42 U.S.C. § 4332(2)(C). However, in certain circumstances, *see, e.g.*, 40
4 C.F.R. § 1501.4 (if an agency’s regulations do not categorically require the preparation of an EIS),
5 agencies may first prepare an EA to make a preliminary determination whether the proposed action
6 will have a significant environmental effect. *See National Parks & Conservation Ass’n v. Babbitt*,
7 241 F.3d 722, 730 (9th Cir. 2001). “If the EA establishes that the agency’s action *may* have a
8 significant effect upon the . . . environment, an EIS must be prepared.” *Id.* (emphasis in original;
9 internal quotation marks omitted). More specifically,

10 an EIS *must* be prepared if substantial questions are raised as to
11 whether a project . . . *may* cause significant degradation to some
12 human environmental factor. To trigger this requirement, a plaintiff
13 need not show that significant effects *will in fact occur*[:] raising
14 substantially questions whether a project may have a significant effect
15 is sufficient.

14 *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149-50 (9th Cir. 1998) [hereinafter *Thomas*]
15 (emphasis in original; internal quotation marks omitted). If the EA does not establish that the action
16 may have a significant effect, then the agency must issue a FONSI, “accompanied by a convincing
17 statement of reasons to explain why a project’s impacts are insignificant.” *National Parks*, 241 F.3d
18 at 730 (internal quotation marks omitted). “The statement of reasons is crucial to determining
19 whether the agency took a hard look at the potential environmental impact of a project.” *Save the*
20 *Yaak*, 840 F.2d at 717 (internal quotation marks omitted). Thus, a court should defer to an agency’s
21 decision only when it is “fully informed and well-considered.” *Id.*

22 According to the CEQ regulations, “[s]ignificantly’ as used in NEPA requires considerations
23 of both context and intensity.” 40 C.F.R. § 1508.27. Context “means that the significance of an
24 action must be analyzed in several contexts such as society as a whole (human, national), the affected
25 region, the affected interests, and the locality.” *Id.* § 1508.27(a). Intensity “refers to the severity of
26 an impact.” *Id.* § 1508.27(b). Factors that should be considered in evaluating intensity include:

- 27 (3) Unique characteristics of the geographic area such as proximity
28 to historic or cultural resources, park lands, prime farmlands,
 wetlands, wild and scenic rivers, or ecologically critical areas.

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- (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
-
- (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

Id. § 1508.27(b)(3), (7) (10).

EPIC argues that the FS’s assessment of significance was flawed in three ways: (1) because the FS did not take a hard look at the cumulative impacts on late-successional wildlife and wildlife habitat, *see id.* § 1508.27(b)(7); (2) because the FS did not adequately take into account the ecologically critical area between the YBME Wilderness and Buttermilk LSR, where the project area is located, *see id.* § 1508.27(b)(3); and (3) because the DA Timber Sale threatens a violation of federal law, namely, NFMA which imposes a duty on the FS to ensure the diversity and viability of species. *See id.* § 1508.27(b)(10). EPIC’s first argument has already been addressed above. *See* Part III.A, *supra*. EPIC’s remaining arguments are addressed below.

a. Area Between YBME Wilderness and Buttermilk LSR

As noted above, the regulations implementing NEPA provide that one of the factors for an agency to consider in assessing significance is the “[u]nique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.” 40 C.F.R. § 1508.27(3). According to EPIC, the project area for the DA Timber Sale is an ecologically critical area – in particular, the northern part which is located directly between the YBME Wilderness and Buttermilk LSR. EPIC asserts that this area provides “key ecological and biological connectivity between the Wilderness and the LSR.” Pl.’s Mot. at 21.

In response, the FS argues that the project area is not critical for connectivity. Relying on the most recent LSR Assessment, the FS contends that the key areas for connectivity are the riparian

1 reserves to the west of the project area (along the Middle Ford Eel River) and certain northern
2 spotted owl activity centers, none of which are implicated in the DA Timber Sale. *See* AR 3411,
3 3452-54 (LSR Assessment). In addition, the FS relies on the Wildlife BA, which states that “Critical
4 Habitat does not exist within the project boundary, [although] it does exist immediately adjacent
5 along the southern boundary of the north portion ([Buttermilk LSR]).” AR 4423 (Wildlife BA).

6 The FS’s argument is not persuasive. First, as one appellate court has recognized, simply
7 because an area is not designated as critical habitat does not mean that its potential destruction
8 should not be considered significant for purposes of NEPA. *See Greater Yellowstone Coalition v.*
9 *Flowers*, 359 F.3d 1257, 1275 (10th Cir. 2004) (noting that “the record clearly establishes that this
10 stretch of the Snake River has long been an important and productive bald eagle nesting territory”).

11 Second, the LSR Assessment defines a fully functional LSR as not only one that “contain[s]
12 well connected late successional habitat” but also one that is “*connected* to other LSRs through
13 dispersal habitat for both aerial and ground traversing species.” AR 3360 (LSR Assessment;
14 emphasis added). Based on this definition, the project area would appear to be important to
15 connectivity since activity centers 1008 and 1052 (as well as 1001) are located in close proximity to
16 the Buttermilk LSR. *See* Docket No. 40 (map); AR 4583 (map).

17 Third, while the LSR Assessment does acknowledge that the riparian reserves to the west
18 “will be important for connectivity between [the Buttermilk] LSR and the [YBME] wilderness,” it
19 does not state that the other areas (such as the project area) are meaningless or do not provide
20 important connectivity. AR 3411 (LSR Assessment).

21 Finally, while the owl activity centers encompassed in the project area (*e.g.*, 1008 and 1052)
22 are not identified in the LSR Assessment as providing “critical connectivity,” AR 3452-54 (LSR
23 Assessment), the wildlife specialists’ reports suggest that the area is important to connectivity. For
24 example, in the section on cumulative effects, the Wildlife BA states: “[R]emoval of key dispersal
25 habitat between the 100 acre LSR’s and the large LSR’s would adversely affect the ability of young
26 owls to safely leave their natal areas. Critical areas to maintain adequate dispersal habitat into the
27 future would be between [the Buttermilk LSR] and the Yolla Bolly Wilderness. This area would
28 continue to provide dispersal habitat after implementation of this project [*i.e.*, the DA Timber Sale].”

1 AR 4435 (Wildlife BA); *see also* AR 4479 (MIS Report; same); AR 4571 (Wildlife BE; same). The
2 Wildlife BA also states: “[The Buttermilk LSR] and the Yolla Bolly Wilderness are separated by .75
3 mile[s] of Matrix land. Activity center 1052 is located directly between the Yolla Bolly Wilderness
4 boundary and is .5 mile[s] from [the Buttermilk LSR]. Removal of 67 acres of foraging and
5 dispersal habitat from [Harvest] Units 19, 20, 21, and 22 [within the home range of 1052] could
6 effect direct dispersal between these areas.” AR 4427 (Wildlife BA).

7 Consequently, the record in the instant case suggests that the project area for the DA Timber
8 Sale may play an important role to connectivity. Furthermore, the record indicates that, at the very
9 least, the FS *did* consider the project area important to connectivity – the agency simply determined
10 in the end that there would be no significant effects. *See, e.g., Indiana Forest Alliance, Inc. v.*
11 *United States Forest Serv.*, No. NA 99-214-C H/G, 2001 U.S. Dist. LEXIS 11996, at *44 (S.D. Ind.
12 July 5, 2001) (stating that, although plaintiff identified certain unique characteristics of the property
13 such as its karst features, plaintiffs did not show FS “unreasonably concluded that the forest
14 openings maintenance project will not significantly affect any of them”; “mere presence of unique
15 features does not require . . . preparation of an EIS”), *aff’d*, 325 F.3d 851 (7th Cir. 2003); *cf. Presidio*
16 *Golf Club v. National Park Serv.*, 155 F.3d 1153, 1162 (9th Cir. 1998) (holding that Park Service did
17 take into account proximity to historical resources and that EA was replete with considerations of
18 unique characteristics of Presidio and its ecological resources). Thus, to the extent EPIC argues that
19 the FS did not even recognize that the DA Timber Sale affected an important ecological area, EPIC
20 is wrong. However, EPIC additionally argues that the FS improperly concluded that there would be
21 no significant effects to this important ecological area. It is in this regard that the FS’s EA is
22 problematic.

23 As discussed in Part III.A.2, *supra*, the FS’s explanation as to why there would be no
24 significant effects was conclusory. The FS did not explain, *e.g.*, why there would still be sufficient
25 dispersal habitat after the DA Timber Sale and/or other sales, thus failing to provide a convincing
26 statement of reasons to support the FONSI. *Cf. Blue Mts. Biodiversity Project v. Blackwood*, 161
27 F.3d 1208, 1213-14 (9th Cir. 1998) (“The EA’s cursory and inconsistent treatment of sedimentation
28

1 issues, alone, raises substantial questions about the project’s effects on the environment and the
2 unknown risks to the area’s renowned fish populations.”).

3 While the FS contends that the riparian reserves to the west of the DA Timber Sale provide
4 connectivity between the Buttermilk LSR and YBME Wilderness, there is little analysis of the
5 relative importance as between those reserves and the project area to overall connectivity. As noted
6 above, the geographic proximity of the project area and the wildlife specialists’ reports strongly
7 suggest that the project area plays an important role in habitat connectivity. The EA contains no
8 comparative analysis of the importance of the project area relative to the riparian reserves and risk of
9 overall impact to connectivity resulting from the sale. There is no detailed showing that the effect of
10 the DA Timber Sale on connectivity overall will be insignificant.

11 The FS largely defends its position by arguing that, while there might be some adverse effects
12 as a result of the sale, “EPIC ignores scientific evidence that failing to harvest timber in the northern
13 Divide Auger units will fragment habitat even further.” D’s Opp’n at 9; *see also Wetlands Action*
14 *Network v. United States Army Corps of Eng’rs*, 222 F.3d 1105, 1120-21 (9th Cir. 2000) (stating
15 that, “when the record reveals that an agency based a finding of no significant impact upon relevant
16 and substantial data, the fact that the record also contains evidence supporting a different scientific
17 opinion does not render the agency’s decision arbitrary and capricious”). More specifically, the FS
18 points out that the northern part of the project area is plagued by the *H. annosum* fungus and that, if
19 these harvest units are not treated, they, “as well as the other northern units, would become
20 unsuitable as foraging and dispersal habitat in the immediate future and the disease may spread
21 outside the harvested boundaries.” AR 4427-28 (Wildlife BA). This argument is, in essence, that
22 the benefits of the DA Timber Sale will outweigh any adverse effects.

23 The problem with this argument is that, “[a] significant effect may exist even if the Federal
24 agency believes that on balance the effect will be beneficial.” 40 C.F.R. § 1508.27(b)(1). In *Friends*
25 *of Fiery Gizzard v. Farmers Home Admin.*, 61 F.3d 501 (6th Cir. 1995), the Sixth Circuit noted that,
26 “[w]here [significant] adverse effects can be predicted, and the agency is in the position of having to
27 balance the adverse effects against the projected benefits, *the matter must, under NEPA, be decided*
28 *in light of an environmental impact statement.*” *Id.* at 505 (emphasis added); *see also Border Power*

1 *Plant Working Group v. Department of Energy*, 260 F. Supp. 2d 997, 1023 n.22 (S.D. Cal. 2003)
2 (“Although it appears that the treatment of water to be used in the plants will remove contaminants
3 in the water and improve the biological and chemical quality of the New River, these welcome
4 benefits do not in some way negate the agencies’ duty to separately analyze the negative impacts on
5 water flow and salinity.”).

6 The Court therefore concludes that the FS violated NEPA because, even though it did
7 recognize that the project area was important to connectivity, its determination that there would be
8 no significant effect to the area was conclusory, thus providing no convincing statement of reasons in
9 support of the FONSI.

10 b. Threatened Violation of NFMA

11 EPIC also argues that the FS’s assessment of significance was flawed because the DA Timber
12 Sale threatens a violation of NFMA which imposes a duty on the FS to ensure the diversity and
13 viability of species. Whether or not there was actually a violation of NFMA is discussed in Part
14 III.E, *infra*. The question here, of course, is somewhat different as NFMA involves the FS’s
15 substantive duties and NEPA its procedural duties.

16 NEPA requires that, in assessing whether proposed action would have a significant impact,
17 the agency must consider the threat that substantive environmental laws will be violated. *See* 40
18 C.F.R. § 1508.27(b)(10). *See Sierra Club v. United States Forest Serv.*, 843 F.2d 1190, 1195 (9th
19 Cir. 1988)(noting that 40 C.F.R. § 1508.27(b)(10) requires the FS “to consider state requirements
20 imposed for environmental protection to determine whether the action will have a significant impact
21 on the human environment” but “[n]owhere do the EAs mention the impact of logging upon
22 California’s water quality standards”). However, contrary to what EPIC suggests, this is not a
23 situation in which the agency was unaware of its duty to comply with federal law, *i.e.*, NFMA. The
24 MIS Report alone demonstrates that the FS was cognizant of its obligation to ensure diversity and
25 viability of species in the MNF. *See* AR 4447 *et seq.* (MIS Report); *see also* AR 4664 (EA; noting
26 that diversity and viability are addressed in various wildlife specialists’ reports). Further, the EA
27 reflects the FS’s understanding of its need to abide by the MNF Plan and NW Forest Plan. *See* AR
28 4594 (EA; discussing forest plans); 16 U.S.C. § 1604(i) (“Resource plans and permits, contracts, and

1 other instruments for the use and occupancy of National Forest System lands shall be consistent with
2 the land management plans.”).

3 EPIC contends still that, even if the FS was aware of its duty to comply with the NFMA, the
4 agency confused this *substantive* duty with its *procedural* duty to comply with NEPA. According to
5 EPIC, “[e]ven if the agency has fully complied with its substantive duties, . . . this does not render
6 environmental impacts – in particular[,] cumulative impacts – ‘insignificant’ and does not absolve
7 the agency from its NEPA duties.” Pl.’s Mot. at 19. EPIC continues: “This is particularly so in this
8 case because the substantive thresholds established by NFMA and the Forest Plan are much *higher*
9 than the ‘may have a significant effect’ standard established for NEPA’s significance threshold.”
10 Pl.’s Mot. at 19.

11 The Court does not dispute that the FS’s duties with respect to NFMA and NEPA are
12 different; however, there is little support for EPIC’s argument. The FS did not conclude that,
13 because it had complied with NFMA and the MNF Plan, there would be no significant effects to late-
14 successional wildlife and wildlife habitat. Rather, its conclusion was based on the (albeit flawed)
15 cumulative effects analyses in the EA and wildlife specialists’ reports. *See* AR 4646 (EA).

16 The fact that, in the EA, the FS used the word “viability” in its discussion of cumulative
17 impacts does not necessarily imply that the agency confused its substantive duties under NFMA with
18 its procedural duties under NEPA – *i.e.*, requiring a threat to the viability of the species before it
19 could find a likely significant effect warranting an EIS. *See* AR 4646 (EA; noting that EIS for the
20 NW Forest Plan “determined that[,] when the LSR’s were fully functional, matrix acres were not
21 required to support the LSR’s and would not affect the viability of these species across their range”).
22 The FS’s reference to viability was entirely sensible when, *e.g.*, addressing the degree to which its
23 action might adversely effect endangered or threatened species under the Endangered Species Act, a
24 consideration required under 40 C.F.R. § 1508.27(9). *See* AR 4647-48 (EA; discussing viability of,
25 *e.g.*, northern spotted owl, bald eagle, and red-legged frog). In any event, when reviewing the entire
26 EA in its context, the Court concludes that the FS did not confuse its substantive duties under NFMA
27 with its procedural duties under NEPA.

28

1 3. Reasonable Range of Alternatives

2 EPIC’s third argument is that the FS violated NEPA because it did not consider a reasonable
3 range of alternatives in the EA. As discussed above, the FS discussed three alternatives in the EA:
4 (1) Alternative A, which was the “no action” alternative; (2) Alternative B, which involved logging
5 in the southern units only; and (3) Alternative C (the proposed action), which involved logging in
6 both the northern and southern units. According to EPIC, this was not a reasonable range of
7 alternatives because it did not include an alternative in which there was no commercial logging and
8 which was restoration based (thus distinguishing it from the “no action” alternative).

9 NEPA requires federal agencies to “study, develop, and describe appropriate alternatives to
10 recommended courses of action in any proposal which involves unresolved conflicts concerning
11 alternative uses of available resources.” 42 U.S.C. § 4332(2)(E). The regulations implementing
12 NEPA make clear that an agency must consider alternatives in an EIS. *See* 40 C.F.R. § 1502.14
13 (stating that section on alternatives is the “heart” of an EIS). The same is true with respect to an EA.
14 *See id.* § 1508.9(b) (stating that an EA “[s]hall include brief discussions of the need for the proposal,
15 of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action
16 and alternatives, and a listing of agencies and persons consulted”); *see also Bob Marshall Alliance v.*
17 *Hodel*, 852 F.2d 1223, 1228-29 (9th Cir. 1988) (stating that consideration of alternatives is critical to
18 goals of NEPA even where proposed action does not trigger EIS process); *Akiak Native Community*
19 *v. United States Postal Serv.*, 213 F.3d 1140, 1148 (9th Cir. 2000) (noting that an EA must consider
20 a reasonable range of alternatives). Because alternatives are an important consideration in an EA as
21 well as an EIS, the Court takes guidance from case law discussing alternatives with respect to an
22 EIS, not just an EA.¹⁰

23 _____ In *Westlands*, the Ninth Circuit established the legal framework for analyzing whether an
24 agency has considered a reasonable range of alternatives as part of its environmental analysis.

25
26 _____
27 ¹⁰ The discussion of alternatives in an EIS, however, may be more rigorous than that in an EA.
28 *Compare* 40 C.F.R. § 1502.14 (stating that an EIS must “[r]igorously explore and objectively evaluate
all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly
discuss the reasons for their having been eliminated”), *with id.* § 1508.9(b) (stating that an EA “[s]hall
include brief discussions . . . of alternatives”).

1 Because the stated goal of a project dictates the range of reasonable alternatives, a court must first
2 determine whether the purpose and need statement for the agency action was reasonable. *See*
3 *Westlands*, 376 F.3d at 865. A purpose and need statement will be considered unreasonable if the
4 agency defined its objectives in unreasonably narrow terms. *See id.* As noted by the D.C. Circuit,
5 “an agency may not define the objectives of its action in terms so unreasonably narrow that only one
6 alternative . . . would accomplish the goals of the agency’s actions, and the EIS [or EA] would
7 become a foredoomed formality.” *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C.
8 Cir. 1991).

9 If the purpose and need statement was reasonable, the court must then determine whether the
10 range of alternatives in the environmental analysis was reasonable. The “rule of reason” is used to
11 make this determination. Under the rule of reason, an agency need not consider a minimum number
12 of alternatives, *see Laguna Greenbelt, Inc. v. United States Dep’t of Transp.*, 42 F.3d 517, 524 (9th
13 Cir. 1994), nor must it consider an “infinite range of alternatives.” *Westlands*, 376 F.3d at 868.
14 Rather, an agency must only take into account feasible alternatives. *See id.*; *see also Vermont*
15 *Yankee Nuclear Power Corp. v. Natural Res. Defense Council, Inc.*, 435 U.S. 519, 551 (1978)
16 (noting that the concept of alternatives under NEPA is “bounded by some notion of feasibility”).
17 Because alternatives must be feasible, an agency does not have to include, *e.g.*, alternatives that are
18 remote or speculative or whose effects cannot be readily ascertained. *See Westlands*, 376 F.3d at
19 868; *Laguna Greenbelt*, 42 F.3d at 525. In contrast, “[a] viable but unexamined alternative renders
20 [an environmental analysis] inadequate.” *Muckleshoot*, 177 F.3d at 813 (internal quotation marks
21 omitted). However, even though alternatives must be feasible, the agency need not consider every
22 feasible alternative; for instance, an agency is not “required to undertake a ‘separate analysis of
23 alternatives which are not significantly distinguishable from alternatives actually considered, or
24 which have substantially similar consequences.’” *Westlands*, 376 F.3d at 868.

25 Ultimately, the rule-of-reason standard “requires an agency to set forth only those alternatives
26 necessary to permit a reasoned choice.” *Tillamook County v. United States Army Corps of Eng’rs*,
27 288 F.3d 1140, 1144 (9th Cir. 2002). “The touchstone . . . is whether [the] selection and discussion
28 of alternatives fosters informed decision-making and informed public participation.” *Westlands*,

1 376 F.3d at 868; *see also* 40 C.F.R. § 1502.14 (stating that alternatives “sharply defin[e] the issues
2 and provid[e] a clear basis for choice among options by the decisionmaker and the public”).

3 a. Purpose and Need Statement

4 As noted above, *see* pages 6-7, *supra*, the EA for the DA Timber Sale articulated four
5 different purposes and needs, including a logging purpose. *See* AR 4594-95 (EA). At the hearing on
6 the motions for summary judgment, EPIC did not really challenge these purposes and needs as
7 unreasonable, not even the logging purpose.¹¹ In fact, EPIC stated at the hearing that, if the only
8 purpose for the DA Timber Sale was a logging purpose, then the range of alternatives in the EA
9 would be proper; but, because the FS identified other purposes in addition to a logging purpose, it
10 should have considered a noncommercial logging, restoration-based alternative. The Court therefore
11 turns its attention to the second stage of the analysis required by *Westlands*.

12 b. Range of Alternatives

13 First, EPIC suggests that the EA was inadequate because a noncommercial, restoration-based
14 alternative was not considered even though it was viable. The FS, however, did give consideration
15 to this alternative because the alternative was raised in a public comment. *See* AR 4654 (EA; public
16 comment claiming that “[t]he EA fails to provide an alternative that does not involve logging old-
17 growth forest to meet the stated purpose and need for action[;] [u]nderstory thinning of small
18 diameter trees could address all of the identified needs without causing significant impact”). The FS
19 simply rejected it after a brief explanation, which, under the regulations, it was entitled to do. *See* 40

21
22 ¹¹ This is only sensible since the MNF Plan contemplates logging in the management area where
23 the DA Timber Sale is to take place. *See* AR 2079 (MNF Plan; designating more than 4,000 acres in
24 Management Area #35 “timber modified”); AR 4594 (EA; noting “timber modified” requirement for
25 Management Area #35 in statement of purpose and need). Notably, in *Muckleshoot*, the Ninth Circuit
26 concluded that an EIS’s stated purpose (to “consolidate ownership and enhance future resource
27 conservation and management by exchanging parcels of National Forest System and Weyerhaeuser [a
28 private company] land”) was not overly narrow because it incorporated the forest plan’s stated purpose
29 (“creating consolidated land ownership patterns where consistent management mandates, policies and
30 objectives apply across large blocks of land”). *Muckleshoot*, 177 F.3d at 813. Given the nature of the
31 statement held reasonable in *Muckleshoot*, the district court in *Kettle Range Conservation Group v.*
32 *United States Forest Serv.*, 148 F. Supp. 2d 1107 (E.D. Wash. 2001), concluded that the inclusion of a
33 timber purpose was not overly narrow: “[T]he statement of purpose in this case, while it presupposes
34 an element of logging, does not restrict the Project to logging at a minimum number of board feet or
35 engaging in a particular transaction. Rather, the statement of purpose leaves considerable room for the
36 development of alternatives with varying degrees of timber harvest.” *Id.* at 1118.

1 C.F.R. § 1502.14(a) (stating that, “for alternatives which were eliminated from detailed study, briefly
2 discuss the reasons for their having been eliminated”). Courts have held that an agency may address
3 an alternative in a public comment. *See Natural Res. Defense Council v. Hodel*, 865 F.2d 288, 296
4 (D.C. Cir. 1988) (indicating that discussion of alternatives may be adequate because of inclusion of
5 interested parties’ comments and government’s responses); *see also Westlands*, 376 F.3d at 870
6 (noting that “[t]he record shows that the EIS team considered and directly responded to suggestions”
7 made by commentators regarding alternatives).

8 However, even if addressing an alternative in a public comment were not sufficient, the FS
9 was not required to consider the noncommercial, restoration-based alternative supported by EPIC
10 because the range of alternatives in the EA was sufficient to permit the FS to make a reasoned
11 choice. *See id.* at 868 (emphasizing that the “touchstone” is whether the selection and discussion of
12 alternatives fosters informed decision-making and informed public participation). Alternative B in
13 the EA, while it did permit logging in the southern units, took a noncommercial, restoration-based
14 approach for the northern units, just as advocated by EPIC. *Cf. id.* at 870 (rejecting plaintiffs’
15 argument that alternatives were inadequate because they failed to consider flow options along with
16 other non-flow measures; record demonstrated that non-flow measures were part of each alternative
17 considered). The FS provided specific reasons as to why Alternative B was not workable. Its
18 analysis would logically carry over and lead to the same conclusion for an alternative that was
19 completely noncommercial and restoration based (*i.e.*, no logging in either the northern or southern
20 units). *See id.* at 868 (stating that an agency is not “required to undertake a ‘separate analysis of
21 alternatives which are not significantly distinguishable from alternatives actually considered, or
22 which have substantially similar consequences’”); *Idaho Conservation League v. Mumma*, 956 F.2d
23 1508, 1520 (9th Cir. 1992) (noting that “[t]he inclusion of alternatives similar to the one put forward
24 by plaintiffs was held sufficient by the [Ninth Circuit]”); *Northern Plains Resource Council v. Lujan*,
25 874 F.2d 661, 666 (9th Cir. 1989) (“NEPA does not require a separate analysis of alternatives with
26 consequences indistinguishable from the action proposed . . .”).

27 Furthermore, the noncommercial, restoration-based alternative proposed by EPIC was not
28 consistent with two of the purposes for the proposed action. As discussed above, there were four

1 purposes and needs for the DA Timber Sale: (1) to provide an adequate timber supply that
2 contributes to economic stability of rural communities; (2) to minimize the spread of insects and
3 disease; (3) to increase the presence of mixed conifers and encourage the growth of oak; and (4) to
4 reduce natural fuels (*i.e.*, intensity of future wildfires). The noncommercial, restoration-based
5 alternative clearly was not consistent with the first purpose. It was also inconsistent with the second
6 purpose. EPIC wanted “a noncommercial, restoration based alternative that relied on understory
7 thinning of small diameter trees to respond to insect and disease concerns and high fuel loads and
8 fire risk.” P’s Mot. at 25. However, as explained in the EA,

9 [p]re-commercial thinning to reduce the spread of *H. annosum* has not
10 been successful in reducing the spread of the disease. Research has
11 shown that simply thinning the understory in a two-story stand does
12 little to slow the spread of the disease. The spread of *H. annosum*
13 from root to root contact may be possibly avoided by maintaining an
14 even-aged stand where trees are spaced greater than 6m (approximately
20 feet) away from other trees. However, in the northern portion of the
15 sale, pre-commercial thinning the understory trees will not result in 20
16 foot spacing between overstory trees. Minimizing root-to-root spread
17 of the disease could only be accomplished by commercial thinning
18 overstory trees and the removal of most second story trees.

19 AR 4615 (EA).

20 At the summary judgment hearing, EPIC contested the accuracy of this scientific analysis.
21 However, the Court cannot conclude that the FS acted arbitrarily or capriciously simply because the
22 agency and EPIC have a disagreement about the science involved. *See Westlands*, 376 F.3d at 871
23 (taking note of agency’s technical expertise and experience with respect to questions involving
24 scientific matters); *see also Wetlands Action Network*, 222 F.3d at 1120-21 (stating that, “when the
25 record reveals that an agency based a finding of no significant impact upon relevant and substantial
26 data, the fact that the record also contains evidence supporting a different scientific opinion does not
27 render the agency’s decision arbitrary and capricious”).

28 EPIC protests, however, that the FS could not decline the noncommercial, restoration-based
approach “simply on the grounds that it is not a ‘complete solution’ to the agency’s goals,” P’s Mot.
at 27 (quoting *Natural Res. Defense Council v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972)), and the
alternatives in the EA were skewed in favor of logging. Again, these arguments are not convincing.
First, the D.C. Circuit limited the reach of *Morton* in a subsequent case, *City of Alexandria v. Slater*,

1 198 F.3d 862 (D.C. Cir. 1999). In *City of Alexandria*, the court stated that *Morton* simply stood for
2 the proposition that a reasonable alternative is defined by reference to a project’s objectives and that
3 a broad articulation of reasonable alternatives was compelled in *Morton* because of the national
4 scope of the problem to be addressed. *See id.* at 868-69. Notably, other courts have held that an
5 alternative may be rejected because it does not meet the stated purposes and needs for the proposed
6 action. *See, e.g., Hells Canyon Alliance v. United States Forest Serv.*, 227 F.3d 1170, 1181 (9th Cir.
7 2000) (stating that alternative proposed by plaintiff would not have met goal of striking balance
8 between recreational and ecological values); *Seattle Audubon Soc’y v. Moseley*, 80 F.3d 1401, 1404
9 (9th Cir. 1996) (noting that no harvest alternative was part of the preliminary discussion but
10 abandoned because it was inconsistent with the purpose/need to find a balance between competing
11 uses); *Utah Env’tl. Cong. v. Bosworth*, 285 F. Supp. 2d 1257, 1274 (D. Utah 2003) (noting that
12 project had two purposes, *i.e.*, to reduce spread of insects and provide timber; “an alternative
13 proposing ‘no timber harvest’ would not meet the primary or secondary purpose of the project”). In
14 this case, the alternative advanced by EPIC would not meet two of the four purposes of the DA
15 Timber Sale.¹²

16 Second, this case is not comparable to those in which courts have found the alternatives
17 skewed in favor of a certain result. *See, e.g., Muckleshoot*, 177 F.3d at 813 (in which two action
18 alternatives were virtually identical); *California v. Bergland*, 483 F. Supp. 465, 489 (E.D. Cal.
19 1980), *aff’d in part and rev’d in part*, 690 F.2d 753 (9th Cir. 1982) (noting that FS offered no
20 alternative that allocated between 34 and 100% of areas to wilderness). The two action alternatives,
21 Alternatives B and C, for example, are not identical, and Alternative B does not favor logging over
22 restoration; rather, it is a combination of both, allowing logging in the south but not the north.

23
24
25 ¹² Regarding the fire risk purpose for the DA Timber Sale, EPIC argues that the agency’s
26 decision to approve the sale was arbitrary and capricious because the FS’s own National Fire Plan
27 indicates that logging should not be relied on to reduce fire risks. *See* AR 4669 (EA; public comment).
28 The FS, however, reasonably responded to this argument in the public comment section of the EA. *See*
AR 4669 (EA; noting that the National Fire Plan “was developed to address fuel reduction as the primary
purpose” so that the plan “does not specifically apply to projects like the Divide Auger timber sale with
‘modified timber’ as its primary emphasis; adding that timber harvest will increase fuels but that MNF
Plan provides standards and guidelines to address such).

1 The Court therefore concludes that the FS considered a reasonable range of alternatives in the
2 EA.

3 4. Public Participation

4 In its briefing, EPIC initially argued that the FS violated NEPA because the specialists'
5 reports on wildlife and wildlife habitat, fuels and fire risk, and roads were not subjected to adequate
6 public review. The FS's main argument in response was that the reports were subject to sufficient
7 public review because they were incorporated by reference in the EA. At the summary judgment
8 hearing, EPIC focused solely on the reports on wildlife and wildlife habitat and conceded that an
9 agency may incorporate by reference in an EA.¹³ EPIC also clarified that it was not asserting that the
10 wildlife specialists' reports which were discussed in the EA were insufficiently incorporated by
11 reference. Rather, EPIC's argument was that the FS should have identified effects on late-
12 successional wildlife and wildlife habitat as one of the "primary" issues in the EA – thereby
13 warranting "full" discussion in the body of the EA – and that, by failing to do so, the agency failed to
14 adequately involve the public. *See* Pl.'s Reply at 12 (asserting that the FS's incorporation by
15 reference "is not a substitute for analysis within the body of the NEPA document itself"); *see also*
16 AR 4596-97 (EA; listing only three main issues to address in the EA, *i.e.*, insects and disease, use of
17 borax, and visuals). In support of this argument, EPIC cites the regulations implementing NEPA that
18 discuss in broad terms the need for public participation. *See, e.g.*, 40 C.F.R. § 1501.4(b) (providing
19 that "[t]he agency shall involve environmental agencies, applicants, and the public, to the extent
20 practicable, in preparing [environmental] assessments"); *id.* § 1506.6(a) (providing in part that
21 agencies shall "[m]ake diligent efforts to involve the public in preparing and implementing their
22 NEPA procedures"); *see also* Pl.'s Reply at 12 (also citing 40 C.F.R. §§ 1500.2(d), 1503.1(a)(4),
23 1506.6(e)).

24 While the Court agrees that these regulations underscore the importance of public
25 participation, *see Citizens for Better Forestry v. USDA*, 341 F.3d 961, 970 (9th Cir. 2003)

27 ¹³ The incorporation-by-reference regulation on its face applies only to EISs, *see* 40 C.F.R. §
28 1502.21 (discussing incorporation by reference in an EIS); however, given that an EA is supposed to be
a "concise public document," *id.* § 1508.9, it is reasonable to conclude that the regulation applies, at least
in principle, to EAs as well.

1 (“Although we have not established a *minimum* level of public comment and participation required
2 by the regulations governing the EA and FONSI process, we clearly have held that the regulations at
3 issue [*i.e.*, 40 C.F.R. § 1501.4(b) and § 1506.6] must mean something.”), it also finds that the FS
4 complied with these regulations. By covering the issue of impacts on late-successional wildlife and
5 wildlife habitat in the EA, with a fuller discussion of the issue being provided in the wildlife
6 specialists’ reports that were incorporated by reference into the EA, the FS made reasonably diligent
7 efforts to involve the public during the NEPA process, especially since an EA is designed to be a
8 “concise public document.”¹⁴ 40 C.F.R. § 1508.9.

9 Furthermore, EPIC has not demonstrated any real likelihood of prejudice flowing from the
10 alleged omission of a “full” discussion of the issue of impacts on late-successional wildlife and
11 wildlife habitat in the EA. The wildlife specialists’ reports, which were all incorporated by reference
12 into the EA, were all available to the public as demonstrated by EPIC’s ability to obtain the
13 documents through FOIA requests. *See* Pl.’s Mot. at 30 (identifying three FOIA requests); 40 C.F.R.
14 § 1506.6(f) (providing that an agency shall “[m]ake environmental impact statements, the comments
15 received, and any underlying documents available to the public pursuant to the provisions of the
16 Freedom of Information Act”). While a final version of the Wildlife BE was not completed until
17 June 6, 2003, the day that the FS’s Decision Notice and FONSI for the DA Timber Sale was issued, a
18 draft version was available prior thereto, *see* AR 4035 (letter of 6/7/02 from MNF to EPIC;
19 providing draft wildlife specialists’ reports); AR 4390 (letter of 12/5/02 from EPIC to MNF; noting
20 that previously draft wildlife specialists’ reports were available and requesting final versions), and
21 there is no evidence that there were any material differences between the draft and final versions.

22 That being said, public participation during the NEPA process was inadequate in one respect
23 which became evident at the hearing on the summary judgment motions. At the hearing, the FS
24 stated that, in considering the effects of the DA Timber Sale, it considered and relied on not only the
25

26 ¹⁴ For the same reasons, the Court holds that there was sufficient public participation with respect
27 to the reports on fuels and fire risk. Moreover, the Court notes that, in its briefing, EPIC did not point
28 to any harm resulting from the alleged lack of public review with respect to the reports on fuels and fire
risk. In contrast, EPIC did argue harm from the alleged lack of public review with respect to wildlife
and wildlife habitat – *i.e.*, a lack of public review regarding the cumulative effects on late-successional
wildlife and wildlife habitat (including the effects on roads).

1 wildlife specialists' reports but also the FWS Biological Opinion.¹⁵ *See* AR 4489 *et seq.* (FWS
2 Biological Opinion). However, the agency failed to point to any place in the EA where it
3 incorporated the FWS Biological Opinion by reference, thus failing to provide the public with notice
4 of its reliance on the document and depriving the public of the opportunity to review the document.
5 *See Citizens for Better Forestry*, 341 F.3d at 970 (stating that regulations governing public
6 participation must be given some effect). Moreover, the FWS Biological Opinion was not even
7 provided to the FS itself until June 4, 2003, *see* AR 4489 (FWS Biological Opinion), well after the
8 EA was posted in November 2002 and only two days before the FS's Decision Notice and FONSI for
9 the DA Timber Sale was issued on June 6, 2003. Given this timeframe, the possibility for public
10 review of a document on which the FS stated that it relied as part of its decision regarding the sale
11 was virtually nonexistent. *Cf. Cold Mountain v. Garber*, 375 F.3d 884, 893 (9th Cir. 2004) (holding
12 that FS did not violate NEPA, in part because it solicited public comments and made available all
13 relevant documents).

14 Accordingly, the Court finds that there was a NEPA violation inasmuch as there was no
15 adequate opportunity for public review of the FWS Biological Opinion on which the FS relied.

16 B. NFMA

17 EPIC asserts that the FS violated NFMA by failing to ensure species diversity and viability,
18 in particular, with respect to the northern spotted owl, goshawk, marten, and fisher, all of which are
19 wildlife dependent on late-successional forest.

20 NFMA governs the management of our national forests. It
21 provides a two-step process for forest planning. First, the Forest
22 Service must develop a Land Resources Management Plan (also
23 known as a forest plan) for all national forest lands.^[16]
24 Implementation of the forest plan then occurs at the site specific level.
25 Activities in the forest, including timber sales, must be determined to
26 be consistent with the governing forest plan.

26 ¹⁵ Notably, the FS has also relied on the FWS Biological Opinion in its briefing. *See, e.g.,* Def.'s
27 Opp'n at 16; Def.'s Mot. at 6-7.

28 ¹⁶ In the instant case, there is the MNF Plan, which as noted above incorporates the NW Forest
Plan. *See* AR 2029 (MNF Plan; stating that the MNF Plan "fully incorporates all applicable land
allocations and standards and guidelines" of the NW Forest Plan).

1 *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 897 (9th Cir. 2002); *see also Rittenhouse*,
 2 305 F.3d at 962 (“[A]ll management activities undertaken by the Forest Service must comply with
 3 the forest plan, which in turn must comply with the Forest Act . . . ”); 16 U.S.C. § 1604(a) (“[T]he
 4 Secretary of Agriculture shall develop, maintain, and, as appropriate, revise land and resource
 5 management plans for units of the National Forest System”); *id.* § 1604(i) (“Resource plans and
 6 permits, contracts, and other instruments for the use and occupancy of National Forest System lands
 7 shall be consistent with the land management plans.”).

8 The Ninth Circuit has emphasized that “NFMA imposes substantive duties on the Forest
 9 Service, one of which is the duty to ‘provide for diversity of plant and animal communities.’” *Inland*
 10 *Empire*, 88 F.3d at 759 (quoting 16 U.S.C. § 1604(g)(3)(B)). The Ninth Circuit has also highlighted
 11 that, pursuant to NFMA regulations, the FS has a “duty to ensure viable, or self-sustaining,
 12 populations,” a duty that “applies with special force to ‘sensitive’ species” such as the goshawk,
 13 marten, and fisher and therefore presumably applies with equal force to endangered and threatened
 14 species such as the northern spotted owl. *Id.* This duty regarding species viability arises from
 15 former 36 C.F.R. § 219.19, in effect at the time the MNF Plan was issued.¹⁷ The regulation provides
 16 that

[f]ish and wildlife habitat shall be managed to maintain viable
 populations of existing native and desired non-native vertebrate
 species in the planning area. For planning purposes, a viable
 population shall be regarded as one which has the estimated numbers
 and distribution of reproductive individuals to insure its continued
 existence is well distributed in the planning area. In order to insure
 that viable populations will be maintained, habitat must be provided to
 support, at least, a minimum number of reproductive individuals and
 that habitat must be well distributed so that those individuals can
 interact with others in the planning area.

25 ¹⁷ This regulation was not in effect at the time of the approval of the DA Timber Sale. However,
 26 both parties cite this regulation, and it was controlling at the time that the MNF Plan was issued in
 27 February 1995. The regulations in effect at the time of the DA Timber Sale’s approval are structured
 28 somewhat differently from the 1995 regulations but basically they still provide for diversity, viability,
 etc. In any event, EPIC’s NFMA arguments are largely dependent on violations of the MNF Plan, and
 the MNF Plan against which the action herein was challenged may fairly be interpreted consistent with
 the regulations applicable when the plan was issued. Accordingly, given the implicit assumption of the
 parties, the Court bases its analysis in the case at bar on those regulations.

1 36 C.F.R. § 219.19.¹⁸

2 Under § 219.19, not only does the FS have a duty to insure species viability but it must also
 3 estimate and monitor the effect of forest management on populations of certain species in a forest,
 4 more specifically, MIS. See 36 C.F.R. § 219.19(a)(1)-(7). The regulation notes, *inter alia*:

5 (1) In order to estimate the effects of each [forest planning]
 6 alternative on fish and wildlife populations, certain vertebrate
 7 and/or invertebrate species present in the area shall be
 8 identified and selected as management indicator species

9 (2) Planning alternatives shall be stated and evaluated in terms of
 10 both amount and quality of habitat and of animal population
 11 trends of the management indicator species.

12

13 (6) Population trends of the management indicator species will be
 14 monitored and relationships to habitat changes determined.
 15 This monitoring will be done in cooperation with State fish and
 16 wildlife agencies, to the extent practicable.

17 *Id.* § 219.19(a)(2), (6).

18 Related to § 219.19, which requires monitoring of MIS, are 36 C.F.R. § 219.11 and § 219.12,
 19 which address respectively forest plan content and the forest planning process. Former § 219.11(d)
 20 provides that a forest plan has to contain “[m]onitoring and evaluation requirements that will provide
 21 a basis for periodic determination and evaluation of the effects of management practices.” *Id.* §
 22 219.11(d). Former § 219(k), titled “monitoring and evaluation,” provides:

23 At intervals established in the plan, implementation shall be evaluated
 24 on a sample basis to determine how well objectives have been met and
 25 how closely management standards and guidelines have been applied.
 26 Based upon this evaluation, the interdisciplinary team shall
 27 recommend to the Forest Supervisor such changes in management
 28 direction, revisions, or amendments to the forest plan as are deemed
 necessary.

Id. § 219.12(k).

¹⁸ The Ninth Circuit has stated that § 219.19 applies not only to forest plan-level management actions but also project-level management actions. See *Inland Empire*, 88 F.3d at 760 n.6 (concluding that § 219.19 applies to specific projects, not just forest plans in general); *Utah Environmental Congress v. Bosworth*, 372 F.3d 1219, 1225 (10th Cir. 2004) (“[R]ead as a whole, the regulations anticipate application of § 219.19 to project level as well as plan level management actions.”).

1 According to EPIC, the FS violated NFMA because (1) the FS did not comply with its
2 monitoring obligations under the MNF Plan; (2) it failed to ensure species diversity and viability by
3 following a “proxy-on-proxy” approach with respect to monitoring (*i.e.*, monitoring habitat for each
4 MIS rather than monitoring each MIS directly); even if it could use habitat as a proxy, (3) it did not
5 have sufficient information about habitat for the northern spotted owl, goshawk, marten, and fisher
6 and (4) based on the record, there was not sufficient habitat for species dependent on late-
7 successional forest; and (5) it did not properly inventory the goshawk as required by the MNF Plan.
8 Each argument is addressed below. Before addressing these issues on the merits, however, the Court
9 must first address the FS’s argument that the Court does not have subject matter jurisdiction under
10 the APA over EPIC’s NFMA claim. This argument applies largely to issue (1) above but also has
11 some relevance for issues (2) through (4) since all concern monitoring obligations on the part of the
12 FS.

13 1. Subject Matter Jurisdiction Under APA

14 The FS’s argument regarding lack of subject matter jurisdiction is based on the Ninth Circuit
15 opinion *Ecology Center, Inc. v. United States Forest Serv.*, 192 F.3d 922 (9th Cir. 1999). In *Ecology*
16 *Center*, the plaintiff claimed that the FS failed to comply with monitoring duties imposed by NFMA
17 and its implementing regulations with respect to the Kootenai National Forest (“KNF”). *See id.* at
18 923. Under the KNF Plan, the FS was “required to produce annual, biannual, and five-year reports
19 containing monitoring data helpful for the Forest Service to make ‘periodic determinations and
20 evaluations of the effects of management practice.’” *Id.* at 924. The FS admitted that it failed to
21 publish annual reports in 1988 and 1993; it also admitted that “the reports it published presented
22 inadequate results with regard to some of the monitoring items.” *Id.* However, the FS argued that
23 the court did not have subject matter jurisdiction over the plaintiff’s claim under the APA because
24 the agency’s inadequate monitoring efforts did not constitute final administrative agency action
25 subject to judicial review. *See id.*

26 The Ninth Circuit began its opinion by noting that, for an agency action to be considered final
27 under the APA, “(1) the action should mark the consummation of the agency’s decision making
28 process; and (2) the action should be one by which rights or obligations have been determined or

1 from which legal consequences flow.” *Id.* at 925. With respect to the first factor, the court held that
2 the plaintiff failed to show that monitoring under the KNF Plan was “an action that marks the
3 culmination of a decision making process”; rather, “monitoring and reporting are only steps leading
4 to an agency decision.” *Id.* As for the second factor, the court stated that the FS’s monitoring duty
5 was mandatory under the KNF Plan, but “legal consequences do not necessarily flow from that duty,
6 nor do rights or obligations arise from it.” *Id.* The plaintiff failed to identify any concrete agency
7 action that directly caused it harm. *See id.*

8 Contrary to what the FS argues, *Ecology Center* does not dispose of the NFMA claim.
9 *Ecology Center* simply establishes that inadequate monitoring by itself does not constitute final
10 agency action. “However, the courts clearly permit a plaintiff to raise claims *pertaining to*
11 inadequate monitoring by bringing an APA challenge to a *final* decision.” *Id.* at 926 n.6 (emphasis
12 added). In support of this statement, the Ninth Circuit cited *Thomas*, a case in which the plaintiff
13 challenged the decision of the FS to allow a specific timber sale on the grounds that the agency had
14 allegedly failed, in contravention of the forest plan, to monitor trout populations in streams affected
15 by the sale. *See Thomas*, 137 F.3d at 1153.

16 In *Alexander*, the Ninth Circuit reiterated this point. The plaintiffs in *Alexander* claimed that
17 the FS violated NFMA by, *inter alia*, failing to monitor population trends to ensure species viability
18 and that this failure tainted the FS’s approval of a specific timber sale called the Grade/Dukes sale.
19 *See Alexander*, 303 F.3d at 1066. Relying in part on *Ecology Center*, the defendants argued that a
20 court does not have the power to remedy defects in forest-wide monitoring. *See id.* at 1067. The
21 Ninth Circuit agreed that forest-wide monitoring, even when required by a forest plan, is not final
22 agency action under the APA. However, it then went on to hold that forest-wide management
23 practices can be reviewed if a plaintiff challenges a specific, final agency action – such as a specific
24 timber sale – “the lawfulness of which hinges on these practices.” *Id.* In short,

25 monitoring and management practices are reviewable when, and to the
26 extent that, they affect the lawfulness of a particular final agency
27 action. Where the Forest Service generally fails to comply with
28 NFMA and the governing Forest Plan, and where that failure renders
an approval of a timber sale unlawful, [a] court has power, under the
APA to review the sale and to conclude that its approval was unlawful

1 AR 2098 (MNF Plan). Habitat capability models “were developed for use in Land Management and
2 project level planning to describe habitat conditions needed to sustain Management Indicator Species
3 (MIS) at different wildlife population levels.” AR 2111 (MNF Plan). The models can be found in
4 the administrative record at AR 2111 *et seq.* (MNF Plan).

5 Because the administrative record does not appear to contain clear documentation on the
6 extent of monitoring by the FS, the Court issued an order asking the parties to file supplemental
7 briefs addressing, *inter alia*, this issue as well as the issue of whether, if the Court were to find the
8 record evidence incomplete, remand would be appropriate. *See* Docket No. 46 (order of 8/18/04).

9 In its supplemental brief, EPIC argues first that there is “absolutely no evidence in the record
10 indicating that the agency has actually complied with these monitoring duties.” Pl.’s Supp. Br. at 1.
11 EPIC then contends that there should not be a remand because the burden is on the FS to prepare the
12 administrative record, *see Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) (“The
13 task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the
14 agency decision based on the record the agency presents to the reviewing court.”), and, if the agency
15 did not prepare a complete record, it should bear the consequences of its failure to do so.

16 In its supplemental brief, the FS claims that the administrative record does show compliance
17 with at least part of its monitoring duties; that is, under the first monitoring objective, the agency first
18 monitors how each FS project affects habitat for each MIS and then prepares an annual summary of
19 all project MIS monitoring. The MIS Report satisfies the first part of the first monitoring objective.
20 *See* Defs.’ Supp. Br. at 2. However, the FS concedes that “[t]he administrative record does not
21 contain annual summaries as described in the second part of the first monitoring objective, or
22 evaluations of MIS habitat capability models as described in the second monitoring objective.”
23 Defs.’ Supp. Br. at 2. Although the administrative record does not demonstrate that the latter types
24 of monitoring were conducted, the FS argues that there still should not be a remand because its
25 “compliance with forest-wide monitoring objectives . . . is not actionable under the APA, and EPIC
26 has failed to meet its burden of proving that the Forest Service’s habitat capability models are
27 deficient or that they prevent the Forest Service from meeting its NFMA obligations.” Def.’s Supp.
28 Br. at 1.

1 As suggested above, both parties vigorously oppose remand. Although the Court has the
2 discretion to remand under certain circumstances, *see Florida Power & Light*, 470 U.S. at 744 (“If
3 the record before the agency does not support the agency action, if the agency has not considered all
4 relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the
5 basis of the record before it, the proper course, except in rare circumstances, is to remand to the
6 agency for additional investigation or explanation.”), it will not here. Not only is remand opposed by
7 both parties, but also, even if a remand were ordered, it is unlikely that the FS would supplement the
8 administrative record with evidence showing that the monitoring at issue did take place. Nowhere in
9 its briefing has the FS even suggested that the monitoring did occur (with the exception of the MIS
10 Report) and, even though the agency has not been shy about providing extra-record evidence for
11 other issues, it has made no effort to do so on this particular issue. The Court therefore shall address
12 the merits of the monitoring issue based on the present record.

13 As a preliminary matter, it is important to note that, although the Court has subject matter
14 jurisdiction over this claim because EPIC’s challenge to the FS’s alleged failure to monitor is tied to
15 a final agency action (*i.e.*, the DA Timber Sale), “not all forest-wide practices [such as monitoring]
16 may be challenged on the coattails of a site specific action [such as a timber sale]; there must be a
17 relationship between the lawfulness of the site-specific action and the practice challenged.”
18 *Alexander*, 303 F.3d at 1067. In *Alexander*, the Ninth Circuit held that, although the structure of the
19 plaintiffs’ complaint left “much to be desired,” the plaintiffs had alleged a sufficient connection
20 between the forest-wide NFMA claims and their challenge to the Grade/Dukes timber sale. *Id.*
21 More specifically, the complaint contained allegations that the FS’s “forest-wide failures to protect
22 old growth habitat and species in accordance with NFMA and the Forest Plan render the approval of
23 a specific mature growth timber sale, Grade/Dukes, unlawful.” *Id.* at 1068.

24 In this regard, EPIC contends that, based on the record, either the FS did not prepare the
25 annual monitoring summaries or it failed to integrate them into the DA Timber Sale, *see* Pl.’s Mot. at
26 34, and argues that this was problematic because the summaries were how the agency ensured that its
27 habitat capability models were still valid; the failure to prepare the summaries thus tainted the DA
28 Timber Sale. While EPIC thus asserts some relationship between the FS’s alleged failure to meet its

1 monitoring obligations and the DA Timber Sale, EPIC establishes a causal connection only with
2 respect to the *second* monitoring objective (*i.e.*, failure to evaluate inventory data and compare with
3 habitat capability models) and not the *first* (*i.e.*, failure to prepare an annual summary of all project
4 MIS monitoring).

5 As noted above, the first monitoring objective has two parts: The FS must (1) monitor how
6 each FS project affects habitat for each MIS and then (2) prepare an annual summary of all project
7 MIS monitoring. There is no dispute that the MIS Report satisfies the first part. It is only the annual
8 summary that is at issue. EPIC has not demonstrated how there is a causal connection between the
9 alleged failure to prepare the annual summary and the allegedly unlawful approval of the DA Timber
10 Sale.

11 It is difficult to discern how the failure to compile an annual summary of all project MIS
12 monitoring will have any material effect in a case such as this where a NEPA violation is asserted
13 based in part on the cumulative impacts analysis. The MNF Plan adds little to the analysis required
14 under NEPA. As noted above, the FS must, in preparing the EA for the DA Timber Sale, consider
15 the cumulative effects of all past, current, and reasonably foreseeable future projects that could
16 impact MIS. This assessment must be undertaken regardless of whether a separate document in the
17 form of an annual summary of projects is prepared. To the extent such a summary includes projects
18 outside the subject sale which do not contribute to a cumulative impact, they are irrelevant to the
19 subject sale. If after an adequate EA (including cumulative impact analysis) is completed, a valid
20 FONSI is rendered, then it would follow *a fortiori* that the MIS diversity or viability is not
21 threatened by the DA Timber Sale. Accordingly, under these circumstances where NEPA requires
22 an EA and examination of cumulative effects in assessing potential impacts upon MIS, the Court
23 discerns no causal connection between the MNF Plan annual summary and the lawfulness of the
24 proposed timber sale at issue as required under *Alexander*. No claim is stated as to this alleged
25 violation.

26 The Court thus turns to the second monitoring objective, which requires the FS to
27 “[e]valuat[e] the most recent inventory data and compar[e] to Habitat Capability Models” in order
28 “[t]o assess whether MIS populations are being affected; to determine that selected MIS are

1 appropriate; and to determine whether standards and guidelines are effective.” AR 2098 (MNF
2 Plan). Here, there is a sufficient causal connection between the alleged failure to monitor and the
3 allegedly unlawful DA Timber Sale. The DA Timber Sale will involve the harvesting of late
4 successional forest, and the northern spotted owl, goshawk, marten, and fisher are all wildlife
5 dependent on late successional habitat. According to EPIC, the assessment of habitat for these
6 species in the EA and the wildlife specialists’ reports was based on the habitat capability models of
7 the MNF Plan. Therefore, if the FS failed to monitor to ensure that the models are accurate, this
8 could undermine the reliability of those models and thus subject these species to endangerment in the
9 DA area. The important role of periodic monitoring and assessment of models provided for in the
10 MNF Plan is reinforced by the monitoring regulations cited above. *See* 36 C.F.R. §§ 219.19(a)(6),
11 219.11(d), 219.12(k). The MNF Plan’s monitoring obligations function to implement these
12 regulations. Accordingly, there is a sufficient causal claim to proceed under *Alexander*. As in
13 *Alexander*, “forest-wide failures to protect old growth habitat and species in accordance with NFMA
14 and the Forest Plan render the approval of a specific mature growth timber sale, [the DA Timber
15 Sale], unlawful.” *Alexander*, 303 F.3d at 1068.

16 The FS contends, however, that the Supreme Court’s recent decision in *Norton v. Southern*
17 *Utah Wilderness Alliance*, 124 S. Ct. 2373 (2004), bars EPIC’s claim as the Supreme Court held that
18 an agency’s monitoring objectives cannot establish legally binding commitments that are enforceable
19 under the APA. In *Norton*, the plaintiff sought declaratory and injunctive relief for the failure of the
20 Bureau of Land Management (“BLM”) to act to protect public lands in Utah from damage caused by
21 off-road vehicle use. *See id.* at 2377-78. One of the claims asserted by the plaintiff was that the
22 BLM failed to comply with certain provisions in its land use plan – more specifically, (1) the plan’s
23 statement that a certain area known as the Factory Butte area ““will be monitored and closed if
24 warranted”” and (2) the plan’s general discussion of “use supervision and monitoring” in designated
25 areas. *Id.* at 2382. The Supreme Court rejected the plaintiff’s claim and held that “a statement in a
26 plan that BLM ‘will’ take this, that, or the other action” is not a binding commitment that can be
27 compelled, “at least absent clear indication of binding commitment in the terms of the plan.” *Id.*
28

1 “[A] land use plan is generally a statement of priorities; it guides and constrains actions, but does not
2 (at least in the usual case) prescribe them.” *Id.* at 2383.

3 While *Norton* and the instant case are similar as both involve monitoring obligations on the
4 part of an agency under a land use or forest plan, there is an important difference between the two.
5 *Norton* dealt with a claim under 5 U.S.C. § 706(1), which provides a court with the authority to
6 “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1). In
7 contrast, the instant case is a challenge under § 706(2). *See id.* § 706(2) (providing that a court shall
8 “hold unlawful and set aside agency action, findings, and conclusions found to be . . . (A) arbitrary,
9 capricious, an abuse of discretion, or otherwise not in accordance with law; . . . (D) without
10 observance of procedure required by law”). The instant case entails not a *failure* to act as in *Norton*;
11 rather, this involves a challenge to an affirmative final agency *action*. Therefore, *Norton* is not
12 controlling here. *See Oregon Natural Desert Ass’n v. United States Forest Serv.*, No. 03-381-HA,
13 2004 U.S. Dist. LEXIS 13695, at *26-27 (D. Ore. July 15, 2004) (rejecting defendants’ attempt to
14 portray plaintiffs’ claims as “‘failure to act’ allegations similar to those rejected in *Norton*,” in part
15 because plaintiffs were challenging final agency actions pursuant to § 706(2), including decisions to
16 authorize grazing allegedly inconsistent with the forest plan).

17 The Court thus addresses the merits of the alleged failure to monitor with respect to the
18 second monitoring objective. Here, the alleged failure to monitor is the failure to “[e]valuat[e] the
19 most recent inventory data and compar[e] [it] to Habitat Capability Models.” AR 2098 (MNF Plan).
20 It is not entirely clear what is meant in the MNF Plan by “the most recent inventory data.” Neither
21 the MNF Plan nor the NFMA regulations indicate how “recent” inventory data must be. Presumably,
22 the FS cannot rely on inventory data from, *e.g.*, decades ago, but that does not necessarily mean that,
23 under this monitoring obligation, the agency has to conduct new inventories every time it has a new
24 project or even that it cannot rely on inventory data from a few years past. *Cf. Lands Council*, 379
25 F.3d at 748-49 (noting that reliance on fish count surveys of at least six years old “is suspect”;
26 adding that data about habitat of certain fish species “was too outdated to carry the weight assigned
27 to it”). The administrative record indicates that there was some inventorying of the relevant species
28 here within the past several years, although the inventorying may not have been complete (*e.g.*,

1 northern spotted owl), *see* AR 4469 (stating that southern units of DA Timber Sale have current
2 surveys but that northern units are “not considered to be currently surveyed”), or precisely targeted
3 (*e.g.*, marten and fisher).²⁰ *See* AR 4476 (MIS Report; referring to “[g]eneral furbearer track plate
4 surveys . . . conducted in portions of the Forest in 1993 and 2000,” although also noting that there
5 have been no sightings in the project/analysis area and limited sightings elsewhere).

6 This issue of the adequacy of inventory data, however, need not be resolved here because,
7 even if the inventory data were adequate – *i.e.*, the monitoring obligation to evaluate “the most recent
8 inventory data” were satisfied – there is no evidence in the administrative record that the agency then
9 *compared* that information to the habitat capability models to ensure that the models are still valid, a
10 requirement explicitly set forth in the MNF Plan and which implements the applicable regulations
11 including 36 C.F.R. §§ 219(a)(6), 219.11(d), and 219.12(k)..

12 In response, the FS relies on *Gifford Pinchot Task Force v. United States Fish & Wildlife*
13 *Serv.*, No. 03-35279, 2004 U.S. App. LEXIS 16215 (9th Cir. Aug. 6, 2004), contending that EPIC
14 has failed to show “affirmative evidence” that the habitat capability models are in fact flawed. *Id.* at
15 *18. However, no such showing need to made in this context. Based on the record before the Court,
16 there is no evidence that the FS conducted the kind of periodic monitoring and evaluation of the
17 habitat capability models required by the MNF Plan. Violation of this element of the MNF Plan is a
18 violation of NFMA. *See Alexander*, 303 F.3d at 1061-62 (stating that, pursuant to 16 U.S.C. §
19 1604(i), “[s]pecific projects, such as [a] timber sale, must be analyzed by the Forest Service and the
20 analysis must show that each project is *consistent* with the [forest] plan”) (emphasis added); 16
21 U.S.C. § 1604(i) (“Resource plans and permits, contracts, and other instruments for the use and
22 occupancy of National Forest System lands shall be consistent with the land management plans.”).

23
24
25 ²⁰ In its briefing, the FS suggests that inventorying of the northern spotted owl, goshawk, marten,
26 and fisher may not be possible because they are reclusive species. *See* Def.’s Reply at 12 n.2. If, in fact,
27 a species is reclusive, it may be difficult for the FS to inventory that species. It would seem to the Court
28 that, so long as the FS has made a reasonable effort to inventory the species, then the agency cannot be
said to have acted arbitrarily or capriciously if inventory data is limited or not obtainable. *Cf. Inland*
Empire, 88 F.3d at 762 (“The [Forest] Service did not engage in a more extended analysis of the owl’s
nesting and feeding habitat requirements because such data were unavailable. We believe that an
analysis that uses all the scientific data currently available is a sound one.”).

1 Even if the mere fact of failure to conduct the monitoring required by the MNF Plan did not
2 constitute a per se violation of NFMA, a closer analysis demonstrates that the failure is material to
3 NFMA’s objective of protecting species diversity and viability and violates 36 C.F.R. § 219.19,
4 which requires management steps to safeguard species diversity and viability. *Gifford Pinchot Task*
5 *Force* is, in fact, instructive in this regard.

6 In *Gifford Pinchot Task Force*, the FWS relied on the habitat allocation of the forest plan
7 (especially LSRs) to support its finding that the proposed timber projects would not jeopardize the
8 northern spotted owl under the Endangered Species Act. See *Gifford Pinchot Task Force*, 2004 U.S.
9 App. LEXIS 16215, at *15-16. The plaintiffs argued that the FWS improperly relied on compliance
10 with the forest plan to make the no jeopardy finding because the forest plan did not have
11 “effectiveness monitoring results” to ensure that management practices in the forest were meeting
12 the standards and guidelines of the forest plan. See, e.g., AR 2083 (MNF Plan; describing
13 effectiveness monitoring). The Ninth Circuit ultimately ruled against the plaintiffs, finding that there
14 was sufficient evidence of monitoring to support reliance on the forest plan’s predictions. However,
15 importantly, the court stated that, “[i]f such effectiveness monitoring were not taking place, or if the
16 on-going monitoring reveals that the [forest plan] is not meeting expectations, we would not allow
17 the FWS to rely simply upon the NFP’s predictions. Without such affirmative evidence, however,
18 we refrain from punishing the FWS for relying on the [forest plan].” *Gifford Pinchot Task Force*,
19 2004 U.S. App. LEXIS 16215, at *18.

20 Although the statute allegedly violated in *Gifford Pinchot Task Force* was the Endangered
21 Species Act and not NFMA, this difference is not material. Cf. *id.* at *11 n.4 (applying analysis of
22 proxy-on-proxy approach discussed in NFMA cases to this case involving the Endangered Species
23 Act). The reasoning of the court in *Gifford Pinchot Task Force* parallels the issues here. The
24 question is whether the FS can reasonably rely on certain predictions contained in, e.g., a forest plan
25 (*Gifford Pinchot Task Force*) or a habitat capability model (the case at bar). As in *Gifford Pinchot*
26 *Task Force*, the reliability of the habitat capability models may be jeopardized in either of two ways:
27 If either “monitoring were not taking place, or if the on-going monitoring reveals that the [habitat
28

1 capability model] is not meeting expectations,” then the FS cannot rely on the surrogate methodology
2 of the model. *Id.* (emphasis added).

3 While the FS is correct in pointing out that EPIC has not affirmatively demonstrated the
4 invalidity of the habitat capability models, EPIC has provided affirmative evidence that there has
5 been a failure to monitor (*i.e.*, to compare inventory data with the habitat capability models) in a
6 manner that raises serious questions about the reliability of the models. In *Gifford Pinchot Task*
7 *Force*, the Ninth Circuit allowed the FWS to rely on the projections and assumptions of the forest
8 plan in its jeopardy analysis precisely because “such monitoring *is* currently being conducted with a
9 report due in 2004.” *Id.* at *18 (emphasis added); *see also id.* at *13 (noting that “the FWS has a
10 program of demographic studies that supplements and *verifies* the habitat results”) (emphasis added).
11 No such showing was made in the case at bar. Thus, the failure to perform the kind of verification
12 called for by the MNF Plan undermines the FS’s reliance upon the habitat capability models. This in
13 turn affects the lawfulness of the DA Timber Sale under NFMA; given the potential invalidity of the
14 FS’s methodology, there is no sufficient assurance that species diversity and viability – in particular,
15 that of late successional wildlife such as the goshawk, marten, and fisher (all sensitive species) as
16 well as the northern spotted owl (an endangered/threatened species) – will be adequately protected in
17 a sale that involves the harvesting of late successional forest.²¹

18 In sum, contrary to what the FS argues, the fact that EPIC has not demonstrated that the
19 habitat capability models are actually invalid does not negate its NFMA claim. The FS’s failure to
20 compare inventory data with the habitat models violates the MNF Plan, NFMA regulations, and
21 NFMA because it renders the models sufficiently questionable that they cannot be relied upon by the
22 FS.²²

24 ²¹ This underscores the causal connection between the lawfulness of the proposed sale and the
25 alleged violation of NFMA required by *Alexander* in order to state a claim for relief under NFMA.

26 ²² In its supplemental brief, the FS suggests that the habitat capability models are in fact accurate,
27 stating that the agency “reviews and updates its MIS habitat capability models, and that the models are
28 based on field research.” Def.’s Supp. Br. at 2 (citing AR 2111 (MNF Plan)). AR 2111, however, does
not reflect any reviewing and certainly not any updating of the models by the FS. Rather, it simply says
that certain information was used in compiling the models, including two publications over twenty years
old (dated 1982 and 1981 respectively) and “pertinent research and literature, published and
unpublished, which is not referenced in the two publications above.” AR 2111 (MNF Plan).

1 3. Proxy-on-Proxy Approach

2 EPIC contends next that the FS measured species viability improperly by using the proxy-on-
3 proxy approach – *i.e.*, by monitoring *habitat* for MIS rather than MIS directly. EPIC suggests that
4 the FS used the proxy-on-proxy approach at least in part because it did not have complete population
5 data on all of the MIS. *See* P’s Mot. at 33 (pointing to limited information for northern spotted owl,
6 goshawk, marten, and fisher). For example, for the northern spotted owl, the MIS Report states that
7 the southern part of the project has current surveys but the northern part is not considered to be
8 currently surveyed. *See* AR 4669 (MIS Report).

9 In *Inland Empire*, the Ninth Circuit first addressed the validity of the proxy-on-proxy
10 approach. The plaintiffs in *Inland Empire* argued that, under former 36 C.F.R. § 219.19, which
11 imparted a duty to ensure viable populations of existing native and desired non-native vertebrate
12 species, the FS could not use the proxy-on-proxy approach – that is, that the FS could not rely on
13 *habitat* management analysis but rather had to examine each sensitive *species*’ population size,
14 population trends, and their ability to travel between different patches of forest. *See Inland Empire*,
15 88 F.3d at 760. The Ninth Circuit disagreed. “The Regulation specifically provides that the Forest
16 Service may discharge its duties through habitat management as long as ‘habitat [is] provided to
17 support, *at least*, a minimum number of reproductive individuals and that habitat [is] well distributed
18 so that those individuals can interact with others in the planning area.’” *Id.* at 761 (quoting former 36
19 C.F.R. § 219.19; emphasis in original). Regarding four of the species, the court said that the FS’s

20 _____
21 Indeed, it appears to the Court that the whole point of the second monitoring objective is to
22 reasonably ensure that the habitat capability models are up to date and correct, and the FS has provided
23 no proof that it has other competent means of ensuring validity of the models or that the models are in
24 fact valid (although, admittedly, the burden of showing invalidity of the models is on EPIC as the
25 plaintiff as indicated by *Gifford Pinchot Task Force*). *Cf. Lands Council*, 379 F.3d at 752 (“We are
asked to trust the Forest Service’s internal conclusions of the reliability of the spreadsheet model when
the Forest Service did not *verify* the predictions of the spreadsheet model. Under the circumstances of
this case, the Forest Service’s basic scientific methodology, to be reliable, required that the hypothesis
and prediction of the model be verified with observation.”) (emphasis added).

26 To be sure, if the FS demonstrates that, even with the most recent inventory data acquired after
27 reasonable efforts, the comparison is of limited utility because of the limited inventory data reasonably
28 available, that would not preclude the FS from satisfying the MNF Plan and NFMA. But here there is
nothing in the record demonstrating that the FS used all reasonable efforts to obtain reasonably current
inventory data; nor is there anything in the record showing any attempt by the FS to compare that data
with the habitat capability models to test their validity.

1 habitat management analysis was not conducted in any way plainly erroneous or inconsistent with
2 this regulatory duty. “Regulation 219.19 ultimately requires the Forest Service to maintain viable
3 populations. In this case, the Service’s methodology reasonably ensures such populations by
4 requiring that the decision area contain enough of the types of habitat essential for survival.” *Id.*

5 The Ninth Circuit then went on to say that the FS had complied with 36 C.F.R. §
6 219.19(a)(2) – which provided that “[p]lanning alternatives shall be stated and evaluated in terms of
7 both amount and quality of habitat and of animal population trends of the management indicator
8 species” – by looking at habitat and basing conclusions on animal population trends on habitat
9 analysis. *See id.* at 762-63. For the same reasons, the court concluded that the FS had satisfied its
10 obligation under § 219.19(a)(6) to monitor population trends of MIS and determine relationships to
11 habitat. *See id.* at 763 n.12; 36 C.F.R. § 219.19(a)(6) (stating that “[p]opulation trends of the
12 management indicator species will be monitored and relationships to habitat determined”). The
13 Ninth Circuit then noted:

14 The Service specifically found that for the smaller, more reclusive
15 species, such as the pileated woodpecker, there is no technically
16 reliable and cost-effective method of counting individual members of
17 the species. In light of the Service’s alternative method of population
18 trend analysis [*i.e.*, monitoring habitat for the species rather than
19 monitoring the species directly], its failure to monitor the actual
20 population of the pileated woodpecker is not dispositive or
21 unreasonable.

19 *Inland Empire*, 88 F.3d at 763 n.12.

20 In *Rittenhouse*, the Ninth Circuit confirmed its holding in *Inland Empire* that the proxy-on-
21 proxy approach was permissible, at least in certain circumstances, *see Rittenhouse*, 305 F.3d at 972,
22 and, just recently, the Ninth Circuit again confirmed the use of the proxy-on-proxy approach in
23 *Gifford Pinchot Task Force and Lands Council*. *See Gifford Pinchot Task Force*, 2004 U.S. App.
24 LEXIS 16215, at *11-12 (discussing proxy-on-proxy approach and recognizing its acceptance in
25 *Inland Empire*); *Lands Council*, 379 F.3d at 754 (“We have, in appropriate cases, allowed the Forest
26 Service to avoid studying the population trends of the Indicator Species by using Indicator Species
27 habitat as a proxy for Indicator Species population trends in a so-called ‘proxy on proxy’
28 approach.”).

1 EPIC maintains that, under *Inland Empire* and *Rittenhouse*, the proxy-on-proxy approach can
2 be valid but only if the FS has a sufficient justification for not actually collecting and utilizing data
3 on MIS – e.g., if there is no technically reliable and cost-effective method of counting individual
4 members of the species. See Pl.’s Mot. at 36. Although, in *Inland Empire*, the Ninth Circuit did take
5 note of the FS’s finding that, “for the smaller, more reclusive species, such as the pileated
6 woodpecker, there is no technically reliable and cost-effective method of counting individual
7 members of the species,” the court did not limit the proxy-on-proxy approach to such circumstances.
8 See *Inland Empire*, 88 F.3d at 763 n.12. Nor is there anything in the court’s reasoning that would
9 suggest such a limit. Similarly, in neither *Rittenhouse* nor *Gifford Pinchot Task Force* nor *Lands*
10 *Council*, did the Ninth Circuit say anything about limiting *Inland Empire* in the way suggested by
11 EPIC.²³ Significantly, the current version of Part 219 of the NFMA regulations suggests that the
12 proxy-on-proxy approach is permissible and makes no mention of any limitation such as that
13 suggested by EPIC. See 36 C.F.R. § 219.11(a)(1)(ii)(B) (stating that, “[i]n addition to monitoring of
14 ecological conditions, the plan monitoring strategy may require population monitoring for some focal
15 species and some species-at-risk” and that “[t]his monitoring may be accomplished by a variety of
16 methods including population occurrence and presence/absence data, sampling population
17 characteristics, using population indices to track relative population trends, or inferring population
18 status from ecological conditions”).²⁴

19 Of course, even though the Ninth Circuit has held that the proxy-on-proxy approach may be
20 used, it has upheld its use only when the methodology for monitoring habitat was sound. See also
21 *Lands Council*, 379 F.3d at 754 (acknowledging that proxy-on-proxy approach has been upheld but

23 ²³ The FS argues that, in any event, the northern spotted owl, goshawk, marten, and fisher are
24 reclusive species. See Def.’s Reply at 12 n.2.

25 ²⁴ The Court acknowledges that “[s]everal courts have held that [former] § 219.19 does not allow
26 use of habitat as a proxy for hard population data,” *Indiana Forest Alliance, Inc. v. United States Forest*
27 *Serv.*, 325 F.3d 851, 864 & n.15 (7th Cir. 2003) (citing *Sierra Club v. Martin*, 168 F.3d 1 (11th Cir.
28 1999); *Utah Environmental Congress v. Zieroth*, 190 F. Supp. 2d 1265, 1271-72 (D. Utah 2002); *Forest*
Guardians v. U.S. Forest Service, 180 F. Supp. 2d 1273, 1279 (D.N.M. 2001)), but those cases are
largely distinguishable. For instance, the Eleventh Circuit and District of New Mexico cases are
different because there the *forest plan* specifically called for population data. See *Indiana Forest*, 325
F.3d at 864 & n.15. In any event, to the extent there is some divergence among the circuits on this
question, this Court is bound to follow the Ninth Circuit’s rulings on this issue.

1 emphasizing that “[c]rucial to this approach . . . is that the methodology for identifying the habitat
2 proxy be sound”). In *Inland Empire*, the court found the agency’s methodology was reliable but did
3 not find so in *Rittenhouse*. As one example, the *Rittenhouse* court pointed out that

4 the Monitoring Report shows that the Forest Service’s methodology
5 does not reasonably ensure viable populations of the species at issue.
6 In addition to the conclusions of the Monitoring Report, the record
7 demonstrates that the Forest Service’s methodology for dedicating old
8 growth is so inaccurate that it turns out there is no old growth at all in
9 management area 35, where the Forest Service has purported to
10 dedicate 1280 acres of old growth.

11 *Rittenhouse*, 305 F.3d at 972; see also *Indiana Forest Alliance, Inc. v. United States Forest Serv.*,
12 325 F.3d 851, 863 n.14 (7th Cir. 2003) (“In *Rittenhouse*, the court held that while the use of habitat
13 availability could be used as a proxy for population data, it was inappropriate when the Forest
14 Service’s own scientific evidence invalidated that approach.”). Drawing on the language in
15 *Rittenhouse*, the Ninth Circuit in *Gifford Pinchot Task Force* stated that “[t]he test for whether the
16 habitat proxy is permissible . . . is whether it ‘reasonably ensures’ that the proxy results mirror
17 reality.” *Gifford Pinchot Task Force*, 2004 U.S. App. LEXIS 16215, at *11.

18 In the instant case, the FS’s proxy-on-proxy approach is based upon the habitat capability
19 models. See AR 2111 (MNF Plan). The problem here, as described above, is that those models have
20 not been proven sufficiently reliable because of the failure of the agency to compare the most recent
21 inventory data with the models. The Court therefore cannot say that the habitat capability models are
22 “sound,” *Lands Council*, 379 F.3d at 754, or that they “‘reasonably ensure[]’ that the proxy results
23 mirror reality.” *Gifford Pinchot Task Force*, 2004 U.S. App. LEXIS 16215, at *11.

24 4. Sufficient Information About Habitat

25 EPIC contends that, even if the FS could use the proxy-on-proxy approach (*i.e.*, even if the
26 FS could rely on habitat analysis to determine population trends for MIS), the agency did not have
27 sufficient information about habitat for the northern spotted owl, goshawk, marten, and fisher. EPIC
28 points to the Thomes Creek Watershed Analysis, which states that “knowledge of habitat
characteristics selected for by [sic] northern spotted owls in this watershed is limited.” AR 2685
(Thomes Creek Watershed Analysis). EPIC also points to another section of the Thomes Creek
Watershed Analysis, which lists a number of species that can be found in the watershed (including

1 but not limited to the northern spotted owl, goshawk, marten, and fisher) and then states that, “[f]or
2 many of these species, there are not sufficient data available to determine either population counts
3 within the watershed, or total amounts of potential habitat.” AR 2652 (Thomes Creek Watershed
4 Analysis). The problem with this citation is that it does not make clear for *which* of the many
5 different species there is insufficient data about habitat. The Court thus considers this argument by
6 EPIC in the context of the northern spotted owl only.

7 EPIC’s main point seems to be that “concrete data” on habitat is necessary in order to utilize
8 the proxy-on-proxy approach. Pl.’s Mot. at 37. Here, knowledge about habitat for the northern
9 spotted owl is “limited.” AR 2685 (Thomes Creek Watershed Analysis). While there must be some
10 data on habitat in order to use the proxy-on-proxy approach, EPIC has overstated its case. The FS
11 points to the fact that the agency did have some knowledge about the habitats for the MIS at issue
12 here, including the northern spotted owl. *See* AR 4466-69, 4473-74, 4475-76 (MIS Report). The
13 fact that habitat data is limited does not necessarily render the FS’s action unlawful. In *Inland*
14 *Empire*, the Ninth Circuit noted that the FS “did not engage in a more extended analysis of the owl’s
15 nesting and feeding habitat requirements because such data were unavailable.” *Inland Empire*, 88
16 F.3d at 762. Even so, it “believe[d] that an analysis that uses *all the scientific data currently*
17 *available* is a sound one.” *Id.* (emphasis added). The fact that habitat data is limited does not
18 necessarily mean that it is insufficient. EPIC has failed to demonstrate that the habitat data relied
19 upon by the FS was so insufficient as to prevent utilization of the proxy-on-proxy approach. Nor, in
20 contrast to the record evidence regarding the FS’s failure to comply with its monitoring obligation,
21 has EPIC demonstrated a clear violation of any explicit provision of the MNF Plan in this regard.
22 Thus, the Court does not find a NFMA violation in this instance.

23 5. Sufficiency of Habitat

24 EPIC argues that, even if the FS could rely on the proxy-on-proxy approach, there is evidence
25 in the record that there is not adequate habitat to support late-successional wildlife in several of the
26 harvest units. Although the Court finds that, under the current record evidence, the FS may not rely
27 on the proxy-on-proxy approach, it addresses the merits to EPIC’s argument to guide future
28 proceedings.

1 According to EPIC, the FS claims that it is protecting late-successional habitat by “retaining
 2 15% of the overstory trees within all timber harvest units,” AR 4648 (EA), as required by the MNF
 3 Plan. *See* AR 2020 (MNF Plan; providing as a forest-wide standard and guideline “[m]aintain at
 4 least 15% of federal forest lands within fifth field watersheds (20-200 square miles) in late-
 5 successional forest”). However, in the Wildlife BA, the specialist states that, for four harvest units
 6 (Units T2, S15, T20, and T21), the retention standards technically are not met.

7 Unit T2 shows a mixture of M4G and M4P retained for the 15%
 8 wildlife habitat.^[25] Although this does not appear to meet the
 9 retention standards stated in the [MNF Plan], due to stand conditions,
 10 this mixture meets the intent of the plan. This Unit is made up of
 11 smaller even diameter trees with scattered larger trees. In order to
 12 retain the larger tree component, as well as maintain clumping and
 13 scattered distribution, some of the M4P stands were designated for
 14 retention. The large diameter trees within the M4P are equivalent to
 15 those in the M4G in terms of quality. The only difference between the
 16 M4P stands and the M4G stands are the density, rather than the size, of
 17 the trees. This also applies to Units S15, T20, and T21 with similar
 18 stand characteristics.

14 AR 4415 (Wildlife BA).

15 EPIC disputes the conclusion that the large diameter trees within the M4P are equivalent to
 16 those in the M4G in terms of quality. For the northern spotted owl, M4G but not M4P stands are
 17 suitable for nesting and roosting. *See* AR 4423 (Wildlife BA). While M4P stands can be suitable for
 18 northern spotted owl foraging, this is true only when there is “a minimum of 40% canopy closure.”
 19 AR 4423 (Wildlife BA). M4P stands, however, only have crown closure of only 20 to 39%. *See* AR
 20 4442 (Wildlife BA). Similarly, for the marten and fisher, M4G stands can provide suitable habitat
 21 (nothing is said about M4P stands), and there must be “canopy closure [of] not less than 40%.” AR
 22 4475 (MIS Report). Notably, the Thomes Creek Watershed Analysis pointed out that the M4P
 23 “timber strata included in this late-successional forest definition may not provide habitat for low
 24 mobility species (survey and manage species) or other late-successional associated species that were

25
 26 ²⁵ Appendix A of the Wildlife BA explains the timber strata codes used to describe trees. *See*
 27 AR 4442 (Wildlife BA). M4P and M4G are similar in their “M” and “4” components: M = mixed
 28 conifer/pine/Douglas-fir; 4 = crowns of 25-40 feet in diameter. *See* AR 4442. “P” and “G” are used
 to describe crown closure (which is defined as “the ratio of tree species crown area to the total area within
 the polygon perimeter”). AR 4442-43. P = 20 to 39% crown closure; G = 40% and above crown
 closure. *See* AR 4442.

1 intended to be assured habitat under the 15 percent late-successional standard.” AR 2686 (Thomes
2 Creek Watershed Analysis).

3 Nonetheless, the alleged deficiency does not constitute a violation of NFMA. EPIC’s
4 challenge must be kept in perspective. It has pointed to a potential problem with only four of the
5 twenty-one harvest units and, within these four units, it challenges not the quantity but rather the
6 relative composition of the M4 stands. While the difference between M4G and M4P stands is not
7 insignificant, the magnitude of the alleged deficiency is not one that EPIC has demonstrated is
8 material enough to violate the MNF Plan. This is underscored by the fact that M4P stands are old
9 growth trees, *see* AR 2686 (Thomes Creek Watershed Analysis), and it does not appear that the 15
10 percent retention standard established in the MNF Plan differentiates between M4G and M4P stands.
11 Furthermore, since the M4G and M4P trees differ only in canopy closure, it was reasonable for the
12 Wildlife BA to conclude that the grouping of the trees described therein “preserved the quality of
13 old-growth habitat that the Mendocino Forest Plan intended.” Def.’s Opp’n at 25. As the FS
14 contends, “EPIC’s attempt to inflate the significance of this inclusion of M4P trees with M4G trees
15 to preserve clumps of habitat in 4 of 21 timber units is just the type of ‘fly-specking’ that the Ninth
16 Circuit disapproved of in *Adler v. Lewis*, 675 F.2d 1085, 1099 (9th Cir. 1982)” Def.’s Opp’n at
17 25.

18 6. Inventory of Goshawk

19 Finally, EPIC argues that the FS violated NFMA because it did not comply with the MNF
20 Plan, which required the following for the goshawk: “Within LSRs and other reserved lands,
21 complete an inventory of the identified nest sites to determine occupancy and nesting status.
22 Inventory of other areas will be completed as part of project planning.” AR 2028 (MNF Plan).
23 According to EPIC, this statement meant that the FS was obligated to do an inventory of the
24 goshawk as part of the project planning for the DA Timber Sale; however, the only inventory of the
25 goshawk that the FS did as part of the sale was a single survey for a single logging unit (21) in 2002.
26 *See* AR 4474 (MIS Report; stating that, “[i]n 2001, one incidental sighting was recorded within Unit
27 21” and that “[o]ne survey was conducted for goshawks in 2002 within Unit 21”; adding that there
28 were sightings outside of but within miles of the project boundary in the 1980s and in 1990).

1 In response to this argument, the FS notes that the MNF Plan requires only an inventory of
2 nest sites, not, *e.g.*, monitoring of actual goshawk populations, and, as stated in the Wildlife BE,
3 “[t]here are no known nest sites located within the project area.” AR 4543 (Wildlife BE).

4 The Court concludes that EPIC has failed to meet its burden of proving a NFMA violation.
5 As the FS points out, the MNF Plan requires only an inventory of nest sites, not actual goshawks.
6 Moreover, the express language of the Plan requires only an inventory of *identified* nest sites, not
7 necessarily an inventory to determine whether there are *new* nest sites as part of project planning.
8 Because “[t]here are no known nest sites located within the project area,” AR 4543 (Wildlife BE), it
9 is not clear that the FS violated the MNF Plan. Furthermore, although EPIC contends that the FS’s
10 determination that there are “no known nest sites” was based inadequately on the single survey in the
11 single logging unit, that fact is not clear from the Wildlife BE. The report states: “There are no
12 known nest sites located within the project area. If nesting goshawks are located within the project
13 area, a Limited Operating Period would be required surrounding the nest site. The area surrounding
14 Unit T21 was surveyed in 2002[;] however, goshawks were not located.” AR 4543 (Wildlife BE).
15 This statement is ambiguous, suggesting even that more than the single unit was surveyed.

16 For these reasons, the Court concludes that EPIC has not met its burden of proving a NFMA
17 violation. *See Sierra Club v. Marita*, 46 F.3d 606, 619 (7th Cir. 1995) (in NEPA and NFMA case,
18 stating that “[t]he party challenging the agency action also bears the burden of proof in these cases”);
19 *Southern Utah Wilderness Alliance v. United States Forest Serv.*, No. 94-C-917G, 1995 U.S. Dist.
20 LEXIS 13776, at *10 (D. Utah July 28, 1995) (stating that plaintiffs failed to sustain burden of
21 proving NFMA violation).

22 C. FS’s Motion to Strike

23 In the above paragraphs, the Court has addressed the merits of the arguments made by EPIC
24 and the FS. However, remaining still is the FS’s motion to strike two declarations submitted by
25 EPIC in support of its motion for summary judgment, one from Cynthia Elkins, EPIC’s Program
26 Director, and another from Christine Ambrose, a member of EPIC. The FS has moved to strike the
27 declarations in their entirety. First, the FS argues that any allegations of standing in the declarations
28 are irrelevant because the FS did not claim lack of standing as an affirmative defense or anywhere

1 else in its papers. Second, the FS asserts that, although the declarations “purport to address EPIC’s
2 standing to file this lawsuit[,] [b]oth declarations also include opinion testimony about alleged
3 harmful effects of the Divide Auger timber sale.” D’s Mot. at 1.

4 In response, EPIC contends that the declarations were filed “*solely* to prove that it has
5 standing in this case,” Opp’n at 1 (emphasis in original), and Ninth Circuit case law indicates that a
6 plaintiff may submit a declaration on standing without it being considered improper extra-record
7 evidence. See Opp’n at 1 (citing *Northwest Environmental Defense Ctr. v. Bonneville Power*
8 *Admin.*, 117 F.3d 1520, 1527-28 (9th Cir. 1997)). EPIC also argues that the Elkins and Ambrose
9 Declarations “are not provided as expert testimony that might implicate any prohibition on extra
10 record evidence.” Opp’n at 2. EPIC notes that it did not cite to the declarations to support any of its
11 arguments on the merits.

12 The Court rejects the FS’s argument. The fact that the FS did not raise lack of standing as an
13 affirmative defense does not make the issue irrelevant since a court may always raise the issue sua
14 sponte. See *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 868 (9th Cir. 2002) (“Federal courts
15 are required sua sponte to examine jurisdictional issues such as standing.”). Standing presents a
16 material question. EPIC may introduce evidence regarding standing. In *Northwest Environmental*,
17 the Ninth Circuit distinguished between affidavits filed for purposes of standing and extra-record
18 evidence permitting the former. See *Northwest Environmental*, 117 F.3d at 1528 (“We therefore
19 consider the affidavits not in order to supplement the administrative record on the merits, but rather
20 to determine whether petitioners can satisfy a prerequisite to this court’s jurisdiction.”).

21 As for the FS’s argument regarding extra-record opinion evidence, this argument is more
22 persuasive. Regarding the Elkins declaration, the FS seems to have a problem with only a limited
23 portion of the document, which states: “I believe the Forest Service’s failure to comply with its legal
24 duties in authorizing the Divide Auger Timber Sale will contribute to imminent adverse impacts to
25 the Thomes Creek watershed and the Yolla Bolly-Middle Eel Wilderness.” Elkins Decl. ¶ 10. As
26 for the Ambrose declaration, the FS’s concern is greater. See, e.g., Ambrose Decl. ¶ 3 (claiming that
27 her “work experience has allowed [her] to identify many of the environmental issues raised by the
28

1 Forest Service’s approach to logging on the Mendocino National Forest” and then stating in
2 subsequent paragraphs her opinions about the environmental status of the forest).

3 While EPIC is correct that it did not rely on either declaration to support its arguments on the
4 merits, those parts of the declarations that contain opinion testimony border on impermissible extra-
5 record evidence. The Ambrose declaration in particular contains testimony that is “expert-like.”
6 Under these circumstances, the Court expressly disavows reliance on the declarations except as they
7 are relevant to standing. The Court notes that its merits-based analysis above did not rely on either
8 the Elkins or Ambrose declaration. With this clarification, the FS’s motion to strike is therefore
9 denied.

10 D. Injunctive Relief

11 Because the FS has granted in part EPIC’s motion for summary judgment, the Court must
12 consider whether the injunctive relief sought by EPIC is an appropriate remedy. As discussed in Part
13 II.B, *supra*, in considering a request for injunctive relief, a court must consider the inadequacy of
14 legal remedies and whether there will be irreparable injury absent an injunction. The Ninth Circuit
15 has indicated that, absent “unusual circumstances,” injunctive relief is the appropriate remedy for a
16 violation of either NEPA or NFMA. *Forest Conservation*, 66 F.3d at 1496.

17 In the instant case, it is clear that legal remedies will not be adequate. EPIC does not seek
18 money damages, for example, and, even if EPIC did, it would be virtually impossible to value the
19 harm resulting from the violations found herein. See *Amoco Prod. Co. v. Village of Gambell*, 480
20 U.S. 531, 545 (1987) (“Environmental injury, by its nature, can seldom be adequately remedied by
21 money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is
22 sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to
23 protect the environment.”); *High Sierra Hikers Ass’n v. Blackwell*, Nos. 02-15504, 02-15505,
24 02-15574, 2004 U.S. App. LEXIS 18019, at *20-21 (9th Cir. Aug. 25, 2004) (noting same).

25 As for injury, if the DA Timber Sale were allowed to go forward, then old growth trees
26 would be harvested and there would be no means to replace such trees in any meaningful fashion
27 since it takes years for such trees to mature. Furthermore, the northern spotted owl is a
28 threatened/endangered species that depends on old growth trees (not to mention sensitive species the

1 goshawk, marten, and fisher). For the same reasons, the public interest weighs in favor of an
2 injunction. *Cf. High Sierra*, 2004 U.S. App. LEXIS 18019, at *24 (noting that “there is a strong
3 public interest in maintaining pristine wild areas unimpaired by man for future use and enjoyment”).
4 In addition, the public policy underlying NEPA is to ensure that the agency action which potentially
5 affects the environment is taken only after thorough consideration of the relevant factors in which
6 meaningful public participation has been allowed.

7 In contrast, if the DA Timber Sale were enjoined, then the FS would not get the value of the
8 timber that would be harvested (*i.e.*, \$665,542) and the surrounding communities would not get the
9 benefit of the economic activity that the logging would likely generate. In addition, there is the
10 possibility of heightened risk of disease and fire as described by the FS in the EA. While the latter
11 raises serious and substantial concerns, the FS has not made any real effort to argue that this
12 possibility constitutes such “unusual circumstances” so as to warrant the denial of an injunction that
13 would otherwise lie. Moreover, the Court notes that its ruling on the motions for summary judgment
14 does not preclude the FS from ultimately proceeding with a lawful timber sale in the DA area
15 provided that the agency meets its statutory obligations. In the final analysis, it could well be that,
16 after full compliance with NEPA and NFMA, the FS might properly conclude that the DA Timber
17 Sale is appropriate; in that event, the harm resulting from an injunction would be that which flows
18 from delay, not complete denial of the sale.

19 Given the above, the Court grants EPIC’s request for injunctive relief and hereby enjoins the
20 FS from proceeding with the DA Timber Sale until it satisfies its statutory obligations under NEPA
21 and NFMA. *See Muckleshoot*, 177 F.3d at 815 (enjoining activities on land until FS satisfied its
22 NEPA and NHPA obligations).

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IV. CONCLUSION

For the reasons state above, the Court hereby GRANTS in part and DENIES in part EPIC’s motion for summary judgment and GRANTS in part and DENIES in part the FS’s motion for summary judgment. More specifically:

1. The Court grants EPIC’s motion, and denies the FS’s, in that the FS violated NEPA by failing to take a hard look at cumulative impacts, by failing to provide a convincing statement of reasons for the FONSI, and by failing to provide for sufficient public review.

2. The Court grants FS’s motion, and denies EPIC’s, in that the FS did not violate NEPA in considering a reasonable range of alternatives.

3. With respect to the alleged violations of NFMA, the Court grants the FS’s motion, and denies EPIC’s, for all claims except that related to the second monitoring obligation and its reliance on the proxy-on-proxy approach based on the record before the Court.

4. Finally, for the NFMA claim related to the second monitoring obligation (regarding habitat capability models) and the FS’s reliance on the proxy-on-proxy approach based on the record herein, the Court grants EPIC’s motion and denies the FS’s.

Accordingly, the FS is hereby permanently enjoined from proceeding with the DA Timber Sale. Should the FS at some point in the future comply with NEPA and NFMA consistent with this order, it may move to dissolve this injunction. *See id.* (“enjoin[ing] any further activities on the land such as would be undertaken pursuant to the Huckleberry Mountain Exchange Agreement . . . until such time as the Forest Service satisfies its NHPA and NEPA obligations”).

This order disposes of Dockets Nos. 29 and 30. The Clerk of the Court is directed to enter final judgment in this case and close the file in this case.

IT IS SO ORDERED.

Dated: October 13, 2004

/s/
EDWARD M. CHEN
United States Magistrate Judge