IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

CASCADIA WILDLANDS and OREGON WILD,

Plaintiffs,

v.

ALICE CARLTON, in her official capacity as Umpqua National Forest Supervisor and UNITED STATES FOREST SERVICE, an administrative agency of the United States Department of Agriculture,

Defendants,

v.

AMERICAN FOREST RESOURCE COUNCIL, an Oregon nonprofit Corporation,

Defendant-intervenor.

Case No. 6:16-cv-01095-JR

FINDINGS AND RECOMMENDATION

RUSSO, Magistrate Judge:

Plaintiffs Cascadia Wildlands and Oregon Wild, two Oregon non-profit corporations, filed suit against defendants the United States Forest Service ("USFS") and Alice Carlton, in her official capacity as the Umpqua National Forest Supervisor, seeking to enjoin the Loafer timber sale ("Project"). American Forest Resource Council ("AFRC"), an Oregon non-profit

corporation, intervened on behalf of its members and USFS. The parties each move for summary judgment pursuant to Fed. R. Civ. P. 56.[1] Oral argument was held on March 3, 2017. For the reasons set forth below, the parties' motions should be granted in part and denied in part.

BACKGROUND

This case involves a challenge to the Project, which authorizes the commercial thinning of approximately 1,400 acres, as well as prescribed burning on the thinned stands and 821 additional acres. Administrative Record ("AR") 12246-47. The Project site encompasses 22,614 acres within the Diamond Lake District of the Umpqua National Forest, which is situated in Douglas County (approximately fifty miles east of Glide, Oregon) and covers 986,100 acres. AR 10002, 12243, 12245, 13211-13. Of those 986,100 acres, approximately half are designated in the underlying Umpqua Land and Resource Management Plan ("LRMP") as late-successional reserves ("LSRs"), Wilderness or Recreation lands, Wild and Scenic River corridor lands, or Inventoried Roadless Areas. AR 4780-84, 10002, 12243, 12245. The remaining acres are designated as Matrix lands, which are managed to emphasize "the economic and social benefit of timber harvest." AR 4784, 4824, 7122.

The Loafer timber sale is designed to take place primarily within Matrix lands, except that 40 acres fall within Riparian Reserves. AR 12243, 12246-47. The purpose of the Project is to:

> maintain and promote pine species in forested stands, restore the species and structural composition consistent with natural disturbance regimes, facilitate the development of large-diameter trees in early- to mid-seral forest stands, restore species composition and structural diversity needed to attain ACS Objectives within riparian reserves, promote priority wildlife habitats identified in the

[1] AFRC's arguments in favor of summary judgment are largely analogous to those asserted by USFS. Except where otherwise indicated, the Court will address AFRC's and USFS' motions together.

> [LRMP] and associated conservation strategies, and provide socioeconomic benefits of employment and wood products for the local community.

AR 12246.

To access the Project site, 5.6 miles of new temporary roads will be constructed. AR 12247, 12269, 13214. USFS will also reconstruct 3.0 miles of spur routes on the existing footprint of old tracks. AR 13214. While no action is planned within any Wilderness, Potential Wilderness, or Inventoried Roadless area, or within any Wild or Scenic River corridor, the Loafer timber sale does overlap with lands that are part of a current citizens' wilderness proposal known as the Crater Lake Wilderness Proposal.[2] AR 12406-11, 13224.

The Project site contains many recreation opportunities, such as the Umpqua Hot Springs[3] and the North Umpqua Trail. AR 12256-57, 12399-400. Beyond recreation, the Project site provides critical habitat to the Northern Spotted Owl ("NSO"), which was listed as "threatened" under the Environmental Species Act ("ESA") in 1990. AR 10364-69, 10655. As a result of that designation, the Fish and Wildlife Service ("FWS") was required to develop a recovery plan to improve NSO conservation and survival. 16 U.S.C. § 1533(f). The current recovery plan ("2011 Recovery Plan") identifies 33 specific Recovery Actions. Suppl. AR 67-343 (doc. 32); AR 10382.

In March 2012, USFS initiated planning for the Loafer timber sale. AR 9490-92. Plaintiffs provided comments to USFS' scoping notice later that month. AR 9637-42, 9647-68. In May 2012, Cascadia Wildlands joined USFS on an agency-sponsored public field tour of the Project area, after which additional comments were submitted. AR 9861-928.

---

[2] Congress identified the conservation of lands with statutorily-defined wilderness characteristics as a national priority in the Wilderness Act, 16 U.S.C. § 1131 et seq. Wilderness Soc'y v. U.S. Fish & Wildlife Serv., 353 F.3d 1051, 1055-56 (9th Cir. 2003) (en banc).

[3] Given environmental damage and excessive use of the Umpqua Hot Springs, USFS closed the area to public use. Suppl. AR 344-80 (doc. 32).

In July 2012, USFS furnished a Biological Assessment to FWS consistent with the ESA. AR 9985-10042. In August 2012, FWS issued a Biological Opinion determining that, although the Project was likely to adversely affect the NSO, it was not anticipated to jeopardize the species or its critical habitat.[4] AR 10356-426. Based on its findings, FWS issued an incidental take permit for one NSO pair and two juveniles during Project implementation. AR 10411.

In March 2013, USFS prepared a draft Environmental Assessment ("EA") in order to analyze the potential environmental impacts of the Project. AR 10814-15, 10823-1054. In April 2013, plaintiffs commented on the draft EA. AR 11067-222. In May 2013, USFS published a revised EA and corresponding Finding of No Significant Impact ("FONSI"). AR 11425-660, 11703-15.

In June 2013, Cascadia Wildlands administratively appealed the Loafer timber sale. AR 11772-802, 11991-2034. In April 2014, after Cascadia Wildlands initiated a federal lawsuit, USFS withdrew the 2013 EA and FONSI. AR 12087. The parties then filed a stipulated judgment, dismissing the federal action without prejudice. Cascadia Wildlands v. U.S. Forest Serv., Case No. 6:13-cv-02130-MC (D. Or. Apr. 22, 2014).

In May 2015, after completing additional surveys, USFS authored a new EA and FONSI. AR 12237-469, 12474-580, 12593-610. In July 2015, Cascadia Wildlands lodged objections to the Loafer timber sale with USFS. AR 12739-76. In August 2015, USFS met with Cascadia Wildlands in an unsuccessful attempt to craft a resolution. AR 12785-836. In October 2015, USFS formally responded to Cascadia Wildlands' objections. AR 12837-61. In February 2016,

[4] USFS updated its Biological Assessment with the new critical habitat designations in February 2013; FWS thereafter confirmed that the Biological Opinion's conclusions remained valid. AR 10694-751, 10795.

Ms. Carlton signed the EA Decision Notice and FONSI, thereby authorizing the Project. AR 13207, 13211-28.

In June 2016, plaintiffs commenced this lawsuit, asserting the Loafer timber sale violates the National Environmental Policy Act ("NEPA"). In October 2016, plaintiffs moved for summary judgment. In December 2016, defendants and AFRC filed cross-motions for summary judgment.

STANDARD

A federal agency's compliance with NEPA is reviewed under the Administrative Procedure Act. 5 U.S.C. § 706. In an Administrative Procedure Act case, summary judgment is awarded in favor of the plaintiff if, after reviewing the administrative record, the court determines that the agency's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Natural Res. Def. Council v. Nat'l Marine Fisheries Serv., 421 F.3d 872, 877 (9th Cir. 2005) (citation and internal quotations omitted). A decision is not arbitrary or capricious if the agency articulated a rational connection between the facts found and the choice made. Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs, 384 F.3d 1163, 1170 (9th Cir. 2004); see also Lands Council v. McNair, 537 F.3d 981, 987 (9th Cir. 2008) (en banc), overruled on other grounds by Am. Trucking Ass'ns Inc. v. City of L.A., 559 F.3d 1046 (9th Cir. 2009) (the court "will reverse a decision as arbitrary and capricious only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise").

Review under this standard is narrow and the court may not substitute its judgment for that of the agency. Lands Council, 537 F.3d at 987. Nevertheless, while this standard is deferential, the court must "engage in a substantial inquiry, . . . a thorough, probing, in-depth review." Native Ecosys. Council v. U.S. Forest Serv., 418 F.3d 953, 960 (9th Cir. 2005) (citation and internal quotations omitted).

DISCUSSION

This case hinges on whether defendants adequately complied with NEPA when designing the Project. NEPA is "a procedural statute that does not mandate particular results, but simply provides the necessary process to ensure that federal agencies take a hard look at the environmental consequences of their actions." Sierra Club v. Bosworth, 510 F.3d 1016, 1018 (9th Cir. 2007) (citation and internal quotations omitted); 40 C.F.R. §§ 1502.1, 1502.2; see also Barnes v. U.S. Dep't of Transp., 655 F.3d 1124, 1131 (9th Cir. 2011) (NEPA exists "to protect the environment by requiring that federal agencies carefully weigh environmental considerations and consider potential alternatives to the proposed action before the government launches any major federal action").

Plaintiffs contend that defendants violated NEPA in two respects. First, they assert USFS violated the "hard look" mandate by failing to: (1) "disclose and analyze relevant information regarding older forests within the Loafer Project area"; and (2) "consider the effects of road building and logging on the visual and recreation aspects of the North Umpqua Trail and Umpqua Hot Springs." Pls.' Mot. Summ. J. 18, 22 (doc. 26). Second, plaintiffs argue an Environmental Impact Statement ("EIS") was required in light of the Project's intensity, as evinced by the presence of several factors enumerated in 40 C.F.R. § 1508.27(b). Conversely, defendants assert that the Loafer timber sale – designed over a three-year period in consultation

with the public and its own experts, and resulting in a 200-plus page final EA and FONSI – satisfied NEPA's procedural requirements.

I. Failure to Take a Hard Look

In order to satisfy the "hard look" mandate, NEPA requires agencies to disclose and analyze the direct, indirect, and cumulative environmental impacts of any proposed action. 40 C.F.R. §§ 1502.16(a)-(b), 1508.7, 1508.8(a)-(b), 1508.25(c); see also Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1149 (9th Cir. 1998), overruled on other grounds by Lands Council, 537 F.3d 981 (agency must provide "a reasonably thorough discussion of the significant aspects of the probable environmental consequences").

A. Information Relating to Tree Stands

Plaintiffs object to the 2015 EA on the ground that it "does not include the ages of the units . . . nor an analysis as to why some stands were dropped during the planning process and others were not." Pls.' Mot. Summ. J. 18-20 (doc. 26). Specifically, plaintiffs argue USFS' decision was deficient because it does not disclose "the location, distribution, composition and quality of older forests within the project area." Id. at 20-21 (citing WildEarth Guardians v. Mont. Snowmobile Ass'n, 790 F.3d 920 (9th Cir. 2015)).

Initially, concerning stands that are not being proposed for thinning, plaintiffs did not raise this matter in either their complaint or during the administrative process.[5] AR 11067-81, 11226-367, 12739-76; Compl. ¶ 76A (doc. 1). Accordingly, plaintiffs failed to preserve this issue for judicial review. See Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1079-80 (9th Cir.

[5] Plaintiffs do not dispute that neither their complaint nor their comments to the 2013 draft EA addressed the stands being removed from treatment. See Pls.' Reply to Mot. Summ. J. 21 (doc. 36) (citing solely to their objection to the 2015 EA as the basis of issue preservation). As such, plaintiffs' request, via their reply brief, "to amend [the] complaint to rectify any deficiency" is procedurally improper. Id.; see also LR 7-1(b) ("[m]otions may not be combined with any response, reply, or other pleading").

2008), cert. denied, 556 U.S. 1281 (2009) ("[where] the complaint does not include the necessary factual allegations to state a claim, raising such claim in a summary judgment motion is insufficient to present the claim to the district court") (citations omitted); Lands Council v. McNair, 629 F.3d 1070, 1076 (9th Cir. 2010) ("[a] party forfeits arguments that are not raised during the administrative process") (citation omitted); see also Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 764 (2004) ("[p]ersons challenging an agency's compliance with NEPA must structure their participation so that it . . . alerts the agency to the parties' position and contentions, in order to allow the agency to give the issue meaningful consideration"). In any event, as addressed herein, USFS reasonably disclosed and analyzed forest conditions throughout the Project area. See, e.g., AR 12283-84, 12287-300, 12661.

Plaintiffs' remaining contention ignores the detailed information provided by USFS regarding existing forest conditions. Notably, the 2015 EA included color maps of past and present forest successional stages within the Project area, and explained how successional stages are linked to stand age and canopy cover. AR 12283-84. The 2015 EA also included a unit-by-unit table showing the average size of trees, the existing canopy cover, the dominant species, and other ecosystem data. AR 12288-89. In addition, a color map and table detail the location of each unit and applicable silvicultural prescription (by acre), as well as the volume of timber to be removed and which logging system would be used. AR 12254-57. The 2015 EA likewise examined existing stand conditions, desired stand conditions, and the effects of the Project alternatives.[6] AR 12283-303. As part of that discussion, USFS disclosed that the proposed

[6] Plaintiffs contend, for the first time in their reply brief, that the 2015 EA neglected to include "vitally important" data in determining whether a stand qualifies as Recovery Action 32 ("RA 32") habitat under the 2011 Recovery Plan. Pls.' Reply to Mot. Summ. J. 4-5 (doc. 36). Aside from the fact that courts need not consider arguments first raised in a reply brief, this new assertion directly contradicts plaintiffs' prior position. Lentini v. Cal. Ctr. for the Arts,

alternative would result in "a slight reduction in mature and late successional forest – i.e., "66 acres [representing] 0.29% . . . of the planning area landscape" – such that "the proportion of late-successional forest would remain within reference conditions and the cumulative trend would not show a drop below reference conditions." AR 12299.

Moreover, the 2015 EA expressly "incorporate[d] by reference the Project Record" – which encompassed, amongst other documents, numerous photos cataloguing stand structure and unit conditions, and the 2013 draft EA's unit-by-unit data on tree age – and emphasized that it was available for public review.[7] AR 9672-833, 9841-58, 10876-77, 12246 (citing 40 C.F.R. § 1502.21); see also Cascadia Wildlands v. U.S. Forest Serv., 937 F.Supp.2d 1271, 1277 (D. Or. 2013) ("[r]ather than keeping its analysis from the light of day, as plaintiffs suggest, the record shows the Forest Service's attempt to keep the EA concise"). Plaintiffs do not dispute that they received the draft 2013 EA pursuant to the NEPA process and, in fact, submitted comments in relation thereto; in so doing, plaintiffs did not identify any concerns or inaccuracies with the

---

Escondido, 370 F.3d 837, 843 n. 6 (9th Cir. 2004). In particular, plaintiffs recognized in their opening brief that USFS "include[d] information . . . on older forest structure in regard to . . . FWS' determination that there are no RA 32 stands in the project area," and argued that it was erroneous "[t]o address impacts only to older forests in the context of RA 32 and spotted owl habitat." Pls.' Mot. Summ. J. 20 (doc. 26) (citing AR 10339); see also Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC, 692 F.3d 983, 993 (9th Cir. 2012) (a party is judicially estopped "from gaining an advantage by taking inconsistent positions" due to "general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings, and to protect against a litigant playing fast and loose with the courts") (citations and internal quotations omitted). Regardless, plaintiffs do not substantively challenge the Biological Opinion upon which USFS' conclusion regarding RA 32 habitat was based.

[7] Plaintiffs make broad assertions regarding the content of the administrative record in their reply brief. See Pls.' Reply to Mot. Summ. J. 2-3 n. 1 (doc. 36) (implying in a footnote that the Project Record does not include the 2013 draft EA because defendants did not adequately incorporate it by reference); but see Morales v. Woodford, 388 F.3d 1159, 1168 n. 14 (9th Cir. 2004), cert. denied, 546 U.S. 935 (2005) (court need not consider substantive arguments raised only in a footnote). Plaintiffs nonetheless rely on many administrative documents, including their comments to the 2013 draft EA, in arguing that the 2015 EA is inadequate. See, e.g., Pls.' Mot. Summ. J. 19 (doc. 26).

stand age data. AR 11067-81, 11226-367. USFS also took interested members of the public, including plaintiffs, on field trips to the Project area. AR 9861-63, 13200-03. Given these circumstances, the precedent on which plaintiffs rely is inapposite. Compare WildEarth, 790 F.3d at 925-28 (failure to identify where the big game winter range was located precluded EIS from adequately analyzing the impact of snowmobiles on wildlife and habitat), with AR 12237-469 (2015 EA describing actual forest conditions with tables, maps, and narratives).

Therefore, USFS furnished a great deal of data and analysis concerning the units at issue, including information pertaining to stand age and conditions, such that the Court finds that USFS did not arbitrarily or capriciously shield essential Project information from the public. See League of Wilderness Defs.-Blue Mountains Biodiversity Project v. U.S. Forest Serv., 2004 WL 2642705, *9 (D. Or. Nov. 19, 2004) (upholding the agency's decision where the information sought by the plaintiff could be reasonably ascertained from the underlying environmental data); see also Native Ecosys. Council v. U.S. Forest Serv., 428 F.3d 1233, 1242 (9th Cir. 2005) (failure to specify percentages of the canopy closure resulting from the proposed action was not arbitrary or capricious where the agency reasonably assessed the impact of changes to the canopy). Indeed, plaintiffs have not cited to, and the Court is not aware of, any authority requiring agencies to disclose information in accordance with the challenging party's preferences. See Ecology Ctr. v. Castaneda, 574 F.3d 652, 667 (9th Cir. 2009) (courts must "defer to an agency's choice of format for scientific data"); see also League of Wilderness Defs.-Blue Mountains Biodiversity Project v. U.S. Forest Serv., 549 F.3d 1211, 1218 (9th Cir. 2008) ("[i]t is not for this court to tell the Forest Service what specific evidence to include, nor how specifically to present it") (emphasis removed). Defendants' and AFRC's motions should be granted, and plaintiffs' motion should be denied, as to this issue.

B. Information Relating to Recreation and Visuals

Plaintiffs next argue USFS "failed to actually analyze" recreational and visual values in units 302 and 303, which are "in the immediate vicinity" of popular recreation sites, and instead offered conclusions that are "unsupported by any modeling, photographs or reports, and explicitly contradict Cascadia's observations during site-visits." Pls.' Mot. Summ. J. 22-23 (doc. 26).

As a preliminary matter, the complaint only alleges a "hard look" violation in regard to unit 302 and effects on the North Umpqua Trail. Compl. ¶ 76B (doc. 1). In other words, plaintiffs neglected to assert any NEPA issues in association with unit 303 or the Umpqua Hot Springs, such that this aspect of their claim "is waived on appeal." Navajo Nation, 535 F.3d at 1080.

Regardless, the 2015 EA disclosed that the Umpqua Hot Springs and the North Umpqua Trail are popular recreation sites that will be impacted to a limited degree by the Loafer timber sale. AR 12399-401, 12413-15, 12676-79. As for recreation values, USFS noted that "[u]nits 302 and 303 are the closest units to the hot springs at a distance of 500 and 550 feet, respectively," and "[u]nits 302, 036, 037, and 039 are the closest to the North Umpqua Trail (#1414) at a distance of 70, 410, 600, and 550 feet, respectively." AR 12399-400. USFS deduced that the Project's effect on recreation values would be minimal because units adjacent to the North Umpqua Trail "are on higher ground from the trail" and "no activities are proposed in or immediately adjacent to the Umpqua Hot Springs." AR 12400-01. Outside of some "short-term" disturbances (namely, temporary traffic and access limitations, and noise and poor visibility associated with ground disturbing activities), the 2015 EA determined recreation values would not be impeded. Id.

Concerning visuals, the 2015 EA described the Project site and denoted that "[t]he Umpqua LRMP applies the Visual Management System Inventory as a minimum standard." AR 12413. Pursuant to this standard, units 302 and 303 were designated with the visual quality objective ("VQO") of "partial retention (moderate scenic integrity)," meaning that "management activities are to remain visually subordinate to the characteristic landscape." Id. USFS went on to explain that the proposed Project would adopt the C4-III prescription in order to satisfy the VQO in units 302 and 303:

> The C4-III prescription specified in the LRMP addendum would re-introduce and expand naturally occurring patterns historically found in the area, which includes open large meadows with canopy cover below 30%. Because C4-III would borrow form, line, color and texture common in the historical characteristic of the landscape, it meets Partial Retention VQOs.
>
> Additionally, the C4-III prescription meets the Forest Plan Standards and Guidelines for created openings within C4-III areas. The suggested range of opening size (acres) defined in the LRMP for background, Partial Retention, is defined as 'to be specified under site-specific analysis'. The Forest Plan Prescription C4-III Programmatic Amendment specified a prescription where 30% canopy retention or below may be used.
>
> While silvicultural prescription for all units in proximity to the North Umpqua Trail and the Umpqua Hot Springs would ensure the Partial Retention VQO is met, retained tree canopy and canyon topography between the units and these sites would add an additional layer of screening, ensuring the VQO for sensitivity level 2 viewsheds would be met or exceeded.

AR 12414; see also AR 12255, 13239, 13249 (site-specific analysis identifying the opening size for partial retention units based on the applicable silvicultural prescription). The 2015 EA resolved that direct and cumulative visual effects "would be short term," with "no known adverse indirect effects." AR 12414-15.

The Court finds the foregoing discussion sufficient to satisfy NEPA's "hard look" mandate. USFS concluded that tree canopy and canyon topography would minimize visual and recreational impacts from thinning in units 302 and 303, a determination that was based on maps,

aerial photos, and other site-specific knowledge. See Hells Canyon All. v. U.S. Forest Serv., 227 F.3d 1170, 1184 (9th Cir. 2000) ("[t]he agency is entitled to rely on its own expertise"). While plaintiffs disagree and characterize USFS' analysis as an inappropriate "values based judgment," they cite to nothing in the record undermining USFS's conclusion or otherwise demonstrating that it fails the "rule of reason."[8] Pls.' Reply to Mot. Summ. J. 9 (doc. 36); see also Sierra Club v. U.S. Dep't of Transp., 310 F.Supp.2d 1168, 1186 (D. Nev. 2004) ("[m]ere disagreement with the [agency's] substantive conclusions regarding the proposed project's impacts . . . is not a basis for overturning an agency decision under NEPA"). Because management activities are designed to return the area to its documented characteristic landscape – indeed, the Project's very purpose is to restore historical conditions – they are reasonably consistent with the VQO in units 302 and 303.[9] AR 12246, 12255, 12290; Suppl. AR 21-62 (doc. 32); see also Defs.' Reply to Cross-Mot. Summ. J. 14 (doc. 38) (USFS "is not judging that any historic landscape is somehow 'better' than the status quo, but instead making a rational finding that the Loafer prescription will produce consonance within the historic landscape, based on the methodology of the meadow-geared prescription itself").

To the extent plaintiffs point to the lack of stump restrictions along the North Umpqua Trail, which were included for the Dread and Terror Ridge Trail, their argument is misplaced. Three different units directly overlap with the Dread and Terror Ridge Trail, such that stump

[8] The only data plaintiffs allege is "incorrect" relates to defendants' contention regarding the existence of a "'considerable vegetative buffer' between the hot springs and unit 302." Pls.' Reply to Mot. Summ. J. 9 (doc. 36). Plaintiffs' assertion, however, is belied by the administrative record. See AR 10436 (color map showing a riparian buffer adjacent to unit 302 and the river), 12256-57 (color maps in the 2015 EA showing unit 302 and a riparian buffer), 12290 (aerial photo in the 2015 EA showing dense vegetation along the river).

[9] As AFRC denotes, "plaintiffs do not assert that the project violates the [VQOs] contained in the [LRMP because to] do so they would have to bring a claim under 16 U.S.C. § 1604(i) . . . rather than NEPA." AFRC's Cross-Mot. Summ. J. 16 (doc. 33).

restrictions were proposed to reduce the visible effects of commercial thinning to hikers on that trail. AR 12413. Conversely, the North Umpqua Trail neither goes through any units nor is topographically equivalent to unit 302, such that any visual impacts will not be at or below eye level. AR 12274, 12413, 12678; see also AR 12758 (plaintiffs characterizing the North Umpqua Trail as "directly beneath and behind Unit 302"). Defendants' and AFRC's motions should be granted, and plaintiffs' motion should be denied, as to plaintiffs' first NEPA claim.

II. Failure to Prepare an EIS

NEPA specifies that an EIS be prepared for any "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Importantly, an agency's duty to prepare an EIS is triggered if a substantial question is raised "whether a project may have a significant effect on the environment." Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998). In other words, certainty related to a potentially significant environmental impact is not required in order to trigger the agency's duty to prepare an EIS. Id. If an agency moves forward without issuing an EIS, it must provide a "convincing statement of reasons" to support why the proposed project is not significant. Id.

In determining whether a project "significantly" impacts the environment, NEPA counsels the agency to consider context and intensity. 40 C.F.R. § 1508.27. Context refers to the area of "the affected region, the affected interests and the locality." 40 C.F.R. § 1508.27(a). Intensity "refers to the severity of the impact" and is evaluated based on ten "significance" factors. 40 C.F.R. § 1508.27(b). The presence of "one of these factors may be sufficient to require preparation of an EIS in appropriate circumstances." Ocean Advocates v. U.S. Army Corps of Eng'rs, 402 F.3d 846, 865 (9th Cir. 2004).

A. Impact to NSOs and Critical Habitat

Plaintiffs first assert that USFS neglected to adequately consider the Project's "significant adverse effects on the northern spotted owl and its critical habitat." Pls.' Mot. Summ J. 28 (doc. 26) (citing 40 C.F.R. § 1508.27(b)(9)). According to plaintiffs, USFS "erroneously conflate[d] NEPA's requirement to assess impacts to spotted owls on the individual level with the ESA's requirement that a project not jeopardize the existence of a species as a whole." Id. at 27.

Contrary to plaintiffs' assertion, NEPA does not require an EIS every time a proposed action discloses a negative individual impact. See Envtl. Prot. Info. Ctr. v. U.S. Forest Serv. ("EPIC"), 451 F.3d 1005, 1010-11 (9th Cir. 2006) (NEPA regulations only "direct the agency to consider the degree of adverse effect on a species, not the impact on individuals of that species") (citation omitted). Plaintiffs are nonetheless correct that "a project need not jeopardize the continued existence of a threatened or endangered species to have a 'significant' effect on the environment." Cascadia Wildlands, 937 F.Supp.2d at 1282 (citation and internal quotations omitted).

Thus, the dispositive inquiry is whether the Project impacts the NSO and its habitat to a degree that would merit further NEPA analysis. Although the Loafer timber sale may not drive the NSO to the precipice of extinction, both USFS and FWS determined that it would have an adverse effect on that species and its habitat. In its Biological Assessment, USFS acknowledged the Project would remove or downgrade approximately 1,400 acres of forest, all of which is designated NSO critical habitat (908 acres are identified as NSO nesting, roosting, and foraging ("NRF") habitat, largely of low or lower quality, and 522 acres are identified as dispersal

habitat).[10] AR 10713, 10719-20. USFS also located "eight potential NSO home ranges within the analysis area" using a computer modeling method, as "[t]here are no current surveys for owls within the action area." AR 10713, 10717. Of these eight potential home ranges, one site included suitable NFR habitat that would be eliminated so that the area could be converted into meadow. AR 10718, 10724-25.

In addition, USFS found the Project would reduce the number of northern flying squirrels, the primary NSO prey species, over the next 11 to 60 years. AR 10725, 10727. USFS noted that NSO "also prey upon a variety of other small mammals, particularly woodrat species"; however, the incidence of woodrats in the Project area was "unknown" and the proposed "[u]nderburning may adversely affect woodrat nests," although such burning may have a "beneficial impact on deer mice populations which are an NSO prey item." AR 10725.

Further, the Biological Assessment described the "reasonable uncertainty" surrounding the use and removal of anchor/hazard trees, due, in large part, to the lack of NSO surveys within the planning site. See AR 10727 ("without surveys, we are unable to determine with certainty where any spotted owls using the stand might be nesting," resulting in the potential removal of nest sites which, in turn, correlates to a reduction in "the flying squirrel carrying capacity at the stand scale" and "spotted owl reproductive success").

USFS ultimately determined the Loafer timber sale "may affect and is likely to adversely affect" the NSO through the reduction in designated critical NSO habitat and "habitat removal impacting NSO prey species and foraging behavior." AR 10084. Nevertheless, USFS resolved that the Project's "objectives of improving habitat for pine species, restoring historic disturbance

[10] The Project was initially designed to treat 1,430 acres within the Umpqua National Forest. See, e.g., AR 10720. Thinning sites were eliminated during the planning process, such that the acreage articulated in the Biological Assessment and Biological Opinion does not precisely correspond to the final Project treatment area.

regimes, and promoting historic meadow distributions are consistent with . . . critical habitat restoration principles," which encourage "hands-on ecosystem management [of the] landscape that should include a mix of active and passive actions to meet a variety of conservation goals that support long-term spotted owl conservation." AR 10730, 10735.

In its Biological Opinion, FWS resolved that implementation of the Project was "not likely to jeopardize the continued existence of the spotted owl [or] to destroy or adversely modify . . . critical habitat." AR 10356. FWS explained that "the loss of canopy cover and other essential features [within the eight potential home ranges] is likely to adversely affect spotted owls [and their] critical habitat" – i.e., NSOs and their primary prey species will "be displaced and/or avoid . . . areas where NRF and/or dispersal habitat is removed/downgraded." AR 10400, 10402-04, 10409. Regardless, for seven of the eight potential home ranges, FWS did not anticipate the "outright removal of 908 acres of NRF and 522 acres of dispersal-only habitat along with the likely reduction of primary prey species" to cause "measurable reductions in spotted owl habitat-fitness" because a large amount of quality habitat would remain within the 20,000-acre-plus Project site. AR 10400-02, 10408-09. To address the one potential home range where a measureable reduction in suitable NSO habitat was foreseeable, FWS authorized the incidental take of one pair and two juvenile NSOs. AR 10411-12.

In sum, FWS concluded that, while the Loafer timber sale was "likely to adversely affect" NSO critical habitat, it would not negatively impact the species. In reaching this conclusion, FWS emphasized that, pursuant to the Northwest Forest Plan, Matrix lands, despite including "some proportion [of NSOs] nesting and rearing young," are not crucial to NSO survival; they are essentially conduits to allow for "dispersal between habitat blocks to be

provided by the LSRs." AR 10399-402, 10408-11; see also AR 12301-03, 12455-59 (2015 EA expressly relying on the Biological Opinion).

The Court finds the degree of NSO impact contemplated in the Biological Assessment sufficient to require additional study. See Or. Wild v. Bureau of Land Mgmt., 2015 WL 1190131, *9-10 (D. Or. Mar. 14, 2015) (proposed action removing less than 190 acres of critical NSO habitat (including 153 acres of NRF habitat) within three overlapping spotted owl home ranges, even with "no nests or projected taking of spotted owls," was significant under 40 C.F.R. § 1508.27(b)(9) and supported the need for an EIS); Cascadia Wildlands, 937 F.Supp.2d at 1282-83 (proposed action downgrading 406 acres and removing 82 acres of "suitable" NSO habitat, which "would cause the 'incidental take of two northern spotted owl nest pairs and one resident owl,'" was significant under 40 C.F.R. § 1508.27(b)(9) and supported the need for an EIS); see also Klamath–Siskiyou Wildlands Ctr. v. U.S. Forest Serv., 373 F.Supp.2d 1069, 1080-81 (E.D. Cal. 2004) (FWS' "likely to adversely affect" finding "is an important factor supporting the need for an EIS").[11]

[11] Defendants' attempt to meaningfully distinguish these cases is unpersuasive. At oral argument, defendants asserted that Or. Wild and Cascadia involved different factual scenarios and, as such, were not comparable. Hearing (Mar. 3, 2017). Similarly, defendants intimate in their reply brief that Klamath-Siskiyou is no longer good law because EPIC "later recognized that the issuance of a Biological Opinion does not equate to a 'significance' finding under NEPA." Defs.' Reply to Cross-Mot. Summ. J. 21 (doc. 38). In Or. Wild and Cascadia, the court's significance findings were based on the degree of impact to NSOs and their habitat. Or. Wild, 2015 WL 1190131 at *9-10; Cascadia Wildlands, 937 F.Supp.2d at 1282-83. In other words, while defendants are correct that the purpose, location, and scale of the proposed actions in Or. Wild and Cascadia were distinct, those differences were not material to the court's analysis pursuant to 40 C.F.R. § 1508.27(b)(9). Further, aside from the fact that Klamath-Siskiyou has not been overturned, the proposed action in EPIC involved a much smaller environmental effect – i.e., a 578-acre timber harvest that encompassed 125 acres of critical NSO habitat, only 14 acres of which qualified as NFR habitat. EPIC, 451 F.3d at 1010. Despite USFS' assertion to the contrary, EPIC merely reiterated that an agency's "'no jeopardy' conclusion" is one factor that must be considered in light of "the analysis contained in the BiOp, as well as numerous other sources of information." Id. at 1212.

Although, as USFS emphasizes, there is no high quality NSO habitat sufficient to qualify under RA 32, the fact remains that a considerable portion of designated critical habitat will be removed or downgraded, causing quantifiable short- and long-term impacts to the NSO. See AR 10409 ("[FWS] believe[s] the loss of 906 acres of NRF and 511 acres of dispersal habitat within [designated] spotted owl critical habitat will have a measurable reduction in spotted owl life history functions [for] the anticipated 10-50 year temporal period of loss"); see also AR 10700-04 (USFS confirming that habitat loss and forest fragmentation pose a threat to the NSO's continued nesting success and abundance). Perhaps as a result, USFS has not cited to any precedent involving a comparable amount of critical habitat removal coinciding with a finding of non-significance.[12] Moreover, USFS' reliance on LSRs is unavailing. See Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d 1059, 1075-76 (9th Cir. 2004) (as amended) (LSRs cannot be treated as a substitute for critical NSO habitat); see also Klamath–Siskiyou, 373 F.Supp.2d at 1083 (rejecting the agency's contention that "NSO critical habitat was unnecessary [in light of the Northwest Forest Plan's] reserve system"). Indeed, as plaintiffs noted at oral argument, habitat must be crucially important to a threatened or endangered species to earn the "critical" designation pursuant to the ESA. Hearing (Mar. 3, 2017). This factor indicates that an EIS is warranted.

B. Highly Controversial or Highly Uncertain Effects

Second, plaintiffs contend the Project's actions may produce "highly uncertain or highly controversial effects that involve unique or unknown risks." Pls.' Mot. Summ. J. 30 (doc. 26) (citing 40 C.F.R. §§ 1508.27(b)(4), (b)(5)). Namely, plaintiffs identify "logging in riparian

[12] AFRC points to Or. Wild v. United States ("Or. Wild II"), 107 F.Supp.3d 1102 (D. Or. 2015), to argue the Project's impacts to the NSO are insignificant. AFRC's Cross-Mot. Summ. J. 20 (doc. 33). Yet, in stark contrast to the case at bar, the proposed action at issue in Or. Wild II did "not include any removal of owl critical habitat." Or. Wild II, 107 F.Supp.3d at 1114.

reserves [and] mature – more than 80 year-old – forests," "the unique hydrology of the area," the failure of the 2015 EA to disclose "stand age and trees per acre," and the proposed use of "fire to restore human-created meadows" as the basis of its challenge.[13] Id.

The Court finds no substantial dispute relating to the Project's size, nature, or effect. See N.W. Envtl. Def. Ctr. v. Bonneville Power Admin., 117 F.3d 1520, 1536 (9th Cir. 1997) (defining the term "highly controversial"). Plaintiffs' reliance on the debate surrounding whether historic meadows were caused by human or natural fires is unfounded. As defendants observe, "disagreement about the cause of historic meadows does not establish highly controversial environmental effects from thinning areas formally managed as shrubland habitat and big game winter range." Defs.' Cross-Mot. Summ. J. 48 (doc. 35) (emphasis in original); see also AFRC's Cross-Mot. Summ. J. 22 (doc. 33) ("a debate of sorts as to whether anthropogenic fire is 'natural' . . . does not equate, as plaintiffs argue, to a substantial dispute about the size, nature or effect of the [Project]"). This is because "[i]t is impossible to distinguish with any degree of accuracy the impacts from natural vs man caused fires" but, "[r]egardless of the cause, . . . fire has played a key role in the flats of the planning area." AR 12367. Furthermore, the land use management techniques at issue are among the most commonly used. See AR 13225 (USFS previously "implement[ed] similar types of harvest, fuel treatments, road work and other connected actions" in the Umpqua National Forest).

As addressed in section I(A), the 2015 EA adequately disclosed and analyzed stand age and conditions, such that there is no uncertainty related to the Project's impact to older-growth

[13] For the first time in their reply brief, plaintiffs point to uncertainty concerning NSO habitat as the basis for their significance argument pursuant to 40 C.F.R. §§ 1508.27(b)(4) and (b)(5). Compare Pls.' Mot. Summ. J. 26-32 (doc. 26), with Pls.' Reply to Mot. Summ. J. 15-16 (doc. 36). As outlined in section II(A), FWS' misgivings regarding certain Project aspects, especially due to the lack of NSO surveying, supports the need for an EIS.

forests. The Northwest Forest Plan also does not prohibit treating stands over 80 years of age outside of LSRs. AR 12856.

Plaintiffs do not provide any further elaboration regarding the remaining allegedly highly uncertain or controversial effects and, in fact, abandon these arguments in their reply brief. See, e.g., Pls.' Mot. Summ. J. 31-32 (doc. 26); Pls.' Reply to Mot. Summ. J. 15-17 (doc. 36). In any event, the Project's activities in Riparian Reserves is not substantial – impacting 40 of approximately 3,800 acres of reserves in the planning area – and serves important ecological purposes. AR 12422-30, 12855-57. There will be no-cut buffers, the largest trees will be retained, and no thinning will occur along fish-bearing streams. AR 12856, 13213-14. As for plaintiffs' "unique hydrology of the area" argument, the administrative record demonstrates that there would be, at most, a minimal effect to this resource. AR 12715, 12851-52; see also N.W. Envtl. Def. Ctr., 117 F.3d at 1536 (mere public opposition to a proposal does not render it highly controversial). This factor does not evince significance.

C. Unique Characteristics of the Geographical Area

Third, plaintiffs point to the "unique characteristic" of the Project area and its proximity to "ecologically critical areas," including NSO critical habitat, undeveloped areas, and Riparian Reserves. Hearing (Mar. 3, 2017); Pls.' Mot. Summ. J. 32 (doc. 26) (citing 40 C.F.R. § 1508.27(b)(3)).

As denoted in section II(B), the Project's impact to Riparian Reserves is limited and intended to preserve important ecological qualities of those areas, as the Project will help meet management objectives under the Northwest Forest Plan's Aquatic Conservation Strategy. AR 12424, 12851, 12854-56. Accordingly, the presence of Riparian Reserves within the Project area does not lend support to plaintiffs' argument under 40 C.F.R. § 1508.27(b)(3).

Whether the presence of undeveloped areas within Project units is significant poses a closer question. Although the 2015 EA evaluated the Loafer timber sale's effects to Wilderness, Potential Wilderness, and other undeveloped areas, the Court nonetheless finds this discussion inadequate in relation to essential aspects of the Project. The 2015 EA acknowledged that all logging units, except for one, "are within or partially within undeveloped areas," which "may have unique characteristics because they have not been managed in the last 60 years and as such may exhibit a sense of naturalness that is not normally found in managed lands." AR 12411. If implemented, the Project would preclude 1,077 acres "from consideration for potential wilderness areas." Id. Beyond these disclosures, USFS did not meaningfully identify or analyze any characteristics of these undeveloped areas. See Lands Council v. Martin, 529 F.3d 1219, 1230 (9th Cir. 2008) ("logging in roadless areas is environmentally significant" due to "their potential for designation under the Wilderness Act" and the natural qualities of the areas themselves, including "wildlife habitat" and "recreation opportunities"); see also Or. Natural Desert Ass'n v. Bureau of Land Mgmt., 625 F.3d 1092, 1116-22 (9th Cir. 2010) (the extent to which "wilderness values" and/or "roadless character[istics]" are present in the planning area outside of pre-existing potential or proposed Wilderness must be evaluated under NEPA). This oversight is especially important because, as articulated in section II(A), the Project area includes critical NSO habitat.

Concerning potential Wilderness, USFS recognized that Thorn Prairie and the Dread and Terror Ridge – two areas included as part of the Crater Lake Wilderness Proposal — did not contain roads and would be reduced by 66 and 432 acres, respectively, via the Project. AR 12407, 12410-11. Nevertheless, USFS resolved that the Project's impacts to these areas was not

significant because Thorn Prairie and the Dread and Terror Ridge are each under 5,000 acres.[14] AR 12407-11. The Wilderness Act, however, "does not limit the potential for wilderness designation to roadless areas 5,000 acres or larger."[15] Martin, 529 F.3d at 1231; compare Or. Wild II, 107 F.Supp.3d as 1111-15 (agency sufficiently addressed unique characteristics where it included a thirty-three page appendix specifically analyzing ten distinct proposed Wilderness areas (totaling 2,693 acres) to conclude that the action was not likely to have "long term impacts on the landscape [or] to wilderness values"), with AR 12402-13 (2015 EA discussing undeveloped and potential Wilderness Areas (totaling 14,176 and 12,321 acres, respectively, within the Project area and encompassing critical NSO habitat), and acknowledging potential long-term impacts to wilderness values). The presence of undeveloped areas within the Project site, especially to the extent that these areas contain critical NSO habitat, supports the need for an EIS.

[14] USFS noted "a major power line corridor through the middle of Thorn Prairie and to the south of the Dread and Terror Ridge," and that other qualities within these areas "lend[ing] themselves to preservation" were lacking; however, the 2015 EA's discussion regarding these aspects of landscape are cursory such that it appears as though USFS' Potential Wilderness determination was based predominantly on the acreage of Thorn Prairie and the Dread and Terror Ridge. AR 12408, 12411.

[15] AFRC argues that, under Smith v. U.S. Forest Serv., 33 F.3d 1072 (9th Cir. 1994), this Court "lack[s] jurisdiction to consider plaintiff's challenge to the agency's failure to consider the wilderness option in its NEPA documents" pursuant to the Oregon Wilderness Act. AFRC's Cross-Mot. Summ. J. 27-29 (doc. 33) (citation and internal quotations omitted). AFRC is correct in that Smith held, pursuant to Washington's equivalent of the Oregon Wilderness Act, that "the agency is in far better position than we are to make these fact-specific determinations" of what constitutes a road. Smith, 33 F.3d at 1076-77. Yet that issue is not before this Court. Smith ultimately determined that the agency failed to adequately consider the "environmentally significant" effects of logging in a roadless area under NEPA. Id. at 1078-79. As a result, courts within this District have relied on Smith in resolving that an EIS was required based on the presence of proposed Wilderness within the project area. See, e.g., Cascadia Wildlands, 937 F.Supp.2d at 1281.

D. Cumulative Impacts

Plaintiffs' penultimate argument is asserted under 40 C.F.R. § 1508.27(b)(1), pursuant to which agencies must look at "[i]mpacts that may be both beneficial and adverse." Pls.' Mot. Summ. J. 33 (doc. 26). In their reply brief, however, plaintiffs clarify that their cumulative impacts argument relates to three District of Oregon cases, as opposed to 40 C.F.R. § 1508.27(b)(1). See Pls.' Reply to Mot. Summ. J. 13 (doc. 36) ("[t]his court has repeatedly held that consideration of the significance factors collectively can require that an EIS be prepared . . . [e]ven if no single factor justifies an EIS"). As defendants note, Ninth Circuit precedent is not wholly in accord with this line of cases, in part because "[n]othing in the NEPA regulations requires an agency to complete a separate cumulative-effects evaluation of bunched intensity factors after it finds that each factor individually causes no significant impacts." Defs.' Cross-Mot. Summ. J. 32 (doc. 35). The Court declines to resolve this issue as it is not dispositive.

E. Precedential Value

Finally, plaintiffs argue that "the degree to which the [Project] may establish a precedent for future actions with significant effects" counsels towards preparation of an EIS. Pls.' Mot. Summ. J. 33 (doc. 26) (quoting 40 C.F.R. § 1508.27(b)(6)).

There is no indication, either from plaintiffs' briefing or the administrative record, that the Project will bind future federal actions; any other project would still be subject to a NEPA analysis. In fact, plaintiffs concede that "EAs are usually highly specific to the project and the locale, thus creating no binding precedent." Id. (citation and internal quotations omitted); see also Anderson v. Evans, 371 F.3d 475, 493 (9th Cir. 2004) (precedential factor is generally "insufficient on its own to demonstrate a significant environmental impact"). Although plaintiffs

point to the fact that "the Ninth Circuit has held that some actions documented in an EA can have precedential effect," those circumstances are not present here. Pls.' Mot. Summ. J. 33 (doc. 26).

In sum, the Project is likely to adversely affect a threatened species, even though it is not likely to imperil the continued existence of that species. Likewise, there is uncertainty surrounding the Project's impacts to NSO critical habitat and prey. The Project also authorizes logging that would reduce the Crater Lake Wilderness Proposal by approximately 500 acres, which may significantly affect the unique attributes of that area. The Court is therefore compelled to find that a substantial question exists as to whether the Project may significantly affect the environment, such that an EIS was required.

RECOMMENDATION

Defendants' Cross-Motion for Summary Judgment (doc. 35) and AFRC's Cross-Motion for Summary Judgment (doc. 33) should be GRANTED as to plaintiffs' first NEPA claim that USFS failed to disclose and analyze essential information and DENIED in all other respects. Plaintiffs' Motion for Summary Judgement (doc. 26) should be GRANTED as to their second NEPA claim concerning the need for an EIS and DENIED in all other respects. Accordingly, USFS should be enjoined from going forward with the Loafer Project until an EIS has been prepared.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the court. Thereafter, the parties shall have fourteen (14) days within which to file a response to the objections. Failure to

timely file objections to any factual determination of the Magistrate Judge will be considered as a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to this recommendation.

DATED this 20th day of March 2017.

s/Jolie A. Russo
Jolie A. Russo
United States Magistrate Judge