

1
2
3
4
5
6
7
8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
10

11 EARTH ISLAND INSTITUTE, a non-
12 profit organization,

13 Plaintiff,

14 v.

15 KATHLEEN MORSE, in her official
16 capacity as Forest Supervisor
17 for Lassen National Forest,
18 RANDY MOORE, in his official
19 capacity as Regional Forester
20 for Region 5 of the United
21 States Forest Service, and the
22 UNITED STATES FOREST SERVICE,

23 Defendants.
24 _____/

Case No. 2:08-cv-01897-JAM-JFM

ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT AND
DENYING DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT; ORDER
GRANTING PLAINTIFF'S REQUEST
FOR INJUNCTIVE RELIEF

25 This matter comes before the Court on Plaintiff Earth
26 Island Institute's ("Plaintiff") and Defendants Kathleen Morse,
27 Randy Moore, and the United States Forest Service's
28 (collectively "Defendants") cross motions for summary judgment
pursuant to Rule 56 of the Federal Rules of Civil Procedure.

1 Having considered the parties' submissions and arguments, and
2 for the reasons set forth below, Defendants' motion is DENIED
3 and Plaintiff's motion is GRANTED in part and DENIED in part.
4

5 I. FACTUAL AND PROCEDURAL BACKGROUND

6 Plaintiff Earth Island Institute ("Plaintiff") alleges
7 Defendants Kathleen Morse, in her official capacity as Forest
8 Supervisor for Lassen National Forest, Randy Moore, in his
9 official capacity as Regional Forester for Region 5 of the
10 United States Forest Service, and the United States Forest
11 Service (collectively "Defendants") violated the National
12 Environmental Policy Act ("NEPA") by making numerous errors in
13 preparing the Champs Environmental Assessment ("Champs EA").
14

15 The errors in the Champs EA that Plaintiff alleges include
16 failing to adequately divulge the methodology used to assess
17 stand density and failing to ensure the scientific accuracy and
18 integrity of the Champs EA. Plaintiff also alleges Defendants
19 violated the Sierra Nevada Forest Plan Amendment and the
20 National Forest Management Act ("NFMA") by failing to monitor
21 and to protect Management Indicator Species ("MIS"). Finally,
22 Plaintiff also alleges Defendants violated the Administrative
23 Procedure Act ("APA") by making decisions that were arbitrary,
24 capricious, an abuse of discretion and not in accordance with
25 the law. Defendants deny the allegations in the Complaint and
26
27
28

1 aver that the project record complies fully with the APA, NEPA,
2 and NFMA.

3 The instant motions before the Court are Plaintiff and
4 Defendants' cross-motions for summary judgment. (Doc. # 28, 33,
5 36, 41). This matter is subject to record review under the APA,
6 thus the matter will be resolved based on these motions. Oral
7 argument was heard on the cross-motions for summary judgment on
8 July 1, 2009.
9

10 II. ANALYSIS

11 A. Legal Standard

12 Summary judgment is proper "if the pleadings, depositions,
13 answers to interrogatories, and admissions on file, together
14 with affidavits, if any, show that there is no genuine issue of
15 material fact and that the moving party is entitled to judgment
16 as a matter of law." Fed. R. Civ. P. 56(c). The purpose of
17 summary judgment "is to isolate and dispose of factually
18 unsupported claims and defenses." Cleotex v. Catrett, 477 U.S.
19 317, 323-324 (1986).
20

21 The moving party bears the initial burden of demonstrating
22 the absence of a genuine issue of material fact for trial.
23

24 Anderson v. Liberty Lobby, Inc., 447 U.S. 242, 248-49 (1986).
25

26 If the moving party meets its burden, the burden of production
27 then shifts so that "the non-moving party must set forth, by
28 affidavit or as otherwise provided in Rule 56, 'specific facts

1 showing that there is a genuine issue for trial.'" T.W. Elec.
2 Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626,
3 630 (9th Cir. 1987) (quoting Fed. R. Civ. P. 56(e) and citing
4 Celotex, 477 U.S. at 323). The Court must view the facts and
5 draw inferences in the manner most favorable to the non-moving
6 party. United States v. Diebold, Inc., 369 U.S. 654, 655
7 (1962).
8

9 The mere existence of a scintilla of evidence in support of
10 the non-moving party's position is insufficient: "There must be
11 evidence on which the jury could reasonably find for [the non-
12 moving party]." Anderson, 477 U.S. at 252. This Court thus
13 applies to either a defendant's or plaintiff's motion for
14 summary judgment the same standard as for a motion for directed
15 verdict, which is "whether the evidence presents a sufficient
16 disagreement to require submission to a jury or whether it is so
17 one-sided that one party must prevail as a matter of law." Id.
18

19 B. Standard of Review

20 The Administrative Procedure Act ("APA") provides the
21 authority for the Court's review of decisions under NEPA and
22 NFMA. Lands Council v. McNair, 537 F.3d 981, 987 (9th Cir.
23 2008). Under the APA, an agency decision will be set aside only
24 if it is "arbitrary, capricious, an abuse of discretion, or
25 otherwise not in accordance with law." 5 U.S.C. § 706(s)(A);
26 see Ecology Ctr., Inc. v. Austin, 430 F.3d 1057, 1062 (9th Cir.
27
28

2005). "Review under the arbitrary and capricious standard is narrow, and the reviewing court may not substitute its judgment for that of the agency." Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1156 (9th Cir. 2006). Rather, the Court "will reverse a decision as arbitrary and capricious only if the agency relied on factors Congress did not intend it to consider, has entirely failed to consider an important aspect of the problem, or offered an explanation 'that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" Id.

C. Governing Provisions

The National Forest Management Act (NFMA), 16 U.S.C. §§ 1600 *et seq.*, provides both procedural and substantive requirements. Procedurally, it requires the Forest Service to develop and maintain forest resource management plans. Id. § 1604(a). After a forest plan is developed, all subsequent agency action, including site-specific plans, like the Champs Project challenged here, must comply with NFMA and the governing forest plan. Id. § 1604(i); see Lands Council II, 537 F.3d at 989.

The National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, contains additional procedural requirements. Its purposes are to ensure the decision-maker will have detailed

1 information on environmental impacts and to provide that
2 information to the public. Inland Empire Pub. Lands Council v.
3 U.S. Forest Serv., 88 F.3d 754, 758 (9th Cir. 1996). The Forest
4 Service must prepare an EIS, which identifies environmental
5 effects and alternative courses of action, when undertaking any
6 management project. Id.; 42 U.S.C. § 4332(2)(C). "In contrast
7 to NFMA, NEPA exists to ensure a process, not to mandate
8 particular results." Neighbors of Cuddy Mountain v. Alexander,
9 303 F.3d 1059, 1063 (9th Cir. 2002). The agency must only take
10 a "hard look" at its proposed action. Id. at 1070.

13 D. Standing

14 In their motion for summary judgment, Defendants argue that
15 Earth Island lacks standing to challenge the Champs Project
16 because Earth Island "has not shown how the Champs Project will
17 injure any member." Defs' Motion for Summary Judgment, Docket #
18 33, 4:14-15. In response, Earth Island asserts its standing and
19 provides a supplemental declaration for additional support.

20 Pl's Response to Defs' Motion for Summary Judgment, Docket # 36,
21 Attch. 2. Defendants do not raise the standing issue in their
22 reply to Earth Island's response. See Defs' Reply to Pls'
23 Response, Docket # 41.

24 Organizations such as Earth Island may assert the standing
25 of their members by showing that a particular member "is under
26 threat of suffering 'injury in fact' that is concrete and
27
28

1 particularized." Summers v. Earth Island Institute, 129 S.Ct.
2 1142, 1149 (Mar. 3, 2009) (quoting Friends of Earth, Inc. v.
3 Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 180-81
4 (2000)). In addition, the threat of injury must be "actual and
5 imminent" and "traceable to the challenged action," and it must
6 be "likely that a favorable judicial decision will prevent or
7 redress the injury." Id. An injury that "affects the
8 recreational or even the mere esthetic interests of the
9 plaintiff" will suffice to establish standing. Id. See also
10 Lujan v. Defenders of Wildlife, 504 U.S. 555, 563-63 (1992);
11 Sierra Club v. Morton, 405 U.S. 727, 734-36 (1972).

14 In Summers, the plaintiff sufficiently established standing
15 in the district court by alleging in affidavits that a member of
16 the plaintiff's organization had visited the area of concern,
17 had imminent plans to return, and that the member's interests in
18 viewing flora and fauna in the area would be harmed by the
19 proposed project if the project went forward as planned.

21 Summers, 129 S.Ct. at 1149. Here, Earth Island asserts standing
22 by alleging that member Dr. Chad Hanson visited the Champs
23 Project area in 2008 and on June 29, 2009 and that his esthetic
24 interests in the area, including viewing native woodpecker
25 species and the occasional Pronghorn Antelope, would be harmed
26 if the current Champs Project proposal is implemented. Decl. of
27 Dr. Chad Hanson, Docket # 31, ¶¶ 7-8, 10; Supp. Decl. of Dr.

1 Chad Hanson, Docket # 36, Attch. 2, ¶¶ 3-5; Decl. of Dr. Chad
2 Hanson in Support of [Proposed] Order for Permanent Injunction,
3 Docket #52. These assertions are sufficient to demonstrate the
4 threat of imminent "injury in fact," resulting from the current
5 Champs Project proposal, which could potentially be remedied by
6 a favorable judicial decision.
7

8 Accordingly, Defendants' motion for summary judgment with
9 respect to the issue of standing is DENIED.
10

11 E. Waiver

12 Defendants allege that Earth Island has waived any legal
13 claims based upon the maximum stand density index ("SDI-Max")
14 issue because Earth Island did not raise this issue during the
15 administrative comment period. Defs' Motion for Summary
16 Judgment, Docket # 33, 5:10-6:4. Defendants rely on Dept. of
17 Transp. v. Public Citizen, 541 U.S. 752 (2004) to assert that
18 unless an intervenor participating in the NEPA administrative
19 process "alerts the agency" of all of its concerns and
20 objections during the administrative comment period, those
21 concerns and objections are waived as legal claims. See id. at
22 764 ("Persons challenging an agency's compliance with NEPA must
23 'structure their participation so that it . . . alerts the
24 agency to the [parties'] position and contentions,' in order to
25 allow the agency to give the issue meaningful consideration."
26
27
28

(quoting Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 553 (1978))).

As Earth Island notes, the cases cited by Defendant to support their waiver claim, including Public Citizen, apply to the narrow context of "a failure by plaintiffs to provide the agency with timely notice that it should have considered another NEPA alternative." Pls' Reply to Cross Motion for Summary Judgment, Docket # 36, 1 n.3. In Public Citizen, the Supreme Court held that an intervenor's failure to identify alternatives during the administrative comments period forfeited any objection concerning the agency's failure to discuss potential alternatives. 541 U.S. at 764-65. See also North Idaho Community Action Network v. U.S. Dept. of Transp., 545 F.3d 1147, 1156 n.2 (9th Cir. 2008) (holding that any objection to consider the alternative in question has been waived because the alternative in question was not raised until after the comment period had closed); 'Ilio'ulaokalani Coalition v. Rumsfeld, 464 F.3d 1083, 1092 (9th Cir. 2006) ("This court has declined to adopt 'a broad rule which would require participation in agency proceedings as a condition precedent to seeking judicial review of an agency decision.'" (quoting Kunaknana v. Clark, 742 F.2d 1145, 1148 (9th Cir. 1984))). Likewise, in Vermont Yankee, the case which originated the "alerts the agency" language in Public Citizen, the Court rejected a NEPA claim based upon the agency's

1 alleged failure to consider an energy conservation alternative
2 because the alternative was not raised until over a year after
3 the final project environmental statement had been completed.
4 435 U.S. at 550-53. Here, Defendants do not allege that Earth
5 Island failed to propose meaningful alternatives. In fact, the
6 Forest Service maintains that it considered and subsequently
7 rejected two proposed alternatives by Earth Island which are in
8 harmony with the SDI-Max claim. See Defs' Motion for Summary
9 Judgment, Docket # 33, 20:1-5; Pl's Motion for Summary Judgment,
10 Docket # 28, 17:17-22.

13 Moreover, Earth Island sufficiently notified the Forest
14 Service of the relevant positions and claims during the comment
15 period. The Supreme Court has made clear that the primary
16 responsibility for NEPA compliance is with the government
17 agency. Dept. of Transp. v. Public Citizen, 541 U.S. 752, 765
18 (2004) ("[T]he agency bears the primary responsibility to ensure
19 that it complies with NEPA"). The responsibility of a
20 intervenor is to "participate[] in a sufficiently meaningful
21 way" so as to "alert[] the agency to its position and claims."
22 City of Sausalito v. O'Neill, 386 F.3d 1186, 1208 (9th Cir.
23 2004). There is no requirement that an intervenor must make
24 every specific legal claim in the comment period or forfeit the
25 right to bring a case in federal court. Rather, a party need
26
27
28

1 only alert the agency to its contentions so that the agency may
2 fully consider those contentions during the commenting period.

3 The Forest Service was put on notice of Earth Island's
4 questions regarding the methodology and the figures used to
5 determine stand density as well as Earth Island's accusations of
6 over-thinning. Earth Island made repeated inquiries to the
7 Forest Service regarding stand density figures in the Champs
8 area. AR459, AR534, AR1607-08, AR9285-87. Earth Island
9 repeatedly accused the Forest Service of proposing more thinning
10 in proportion to the given SDI-Max than necessary. AR459,
11 AR534, AR1607-08, AR 9297. Additionally, Earth Island noted
12 that the Forest Service calculated current SDI in one instance
13 as well above 100% of SDI-Max. AR9286. Based on these
14 inquiries, the Forest Service should have been sufficiently
15 aware of potential stand density and SDI-Max issues so as to be
16 fully able to consider these issues during the commenting
17 period. Accordingly, Defendants' waiver argument fails as a
18 matter of law and summary judgment in Defendants favor on this
19 issue is DENIED.

20
21
22
23
24 F. Exhaustion of Administrative Remedies

25 Defendants allege that because Earth Island did not
26 directly question the accuracy of SDI-Max used for ponderosa
27 pine in the Champs project, it has failed to exhaust its
28 administrative remedies pursuant to 7 U.S.C. § 6912(e) and 36

1 C.F.R. § 215.21. Defs' Motion for Summary Judgment, Docket #
2 33, 6:5-7:4. This Court disagrees.

3 "The Administrative Procedure Act requires that plaintiffs
4 must exhaust available administrative remedies before bringing
5 their grievances to federal court." Idaho Sporting Congress v.
6 Rittenhouse, 305 F.3d 957, 965 (9th Cir. 2002); 5 U.S.C. § 704.
7
8 7 U.S.C. § 6912(e), which pertains to the Department of
9 Agriculture and consequently the Forest Service, states that "a
10 person shall exhaust all administrative appeal procedures
11 established by the Secretary or required by law before the
12 person may bring an action in a court of competent jurisdiction
13" Id. See also 36 C.F.R. § 215.21 ("It is the position
14 of the Department of Agriculture that any filing for Federal
15 judicial review of a decision subject to appeal is premature and
16 inappropriate unless the plaintiff has first sought to invoke
17 and exhaust the appeal procedures in [7 U.S.C. § 6912(e)].")
18
19 "[P]laintiffs have exhausted their administrative appeals if the
20 appeal, taken as a whole, provided sufficient notice to the
21 Forest Service to afford it the opportunity to rectify the
22 violations that the plaintiffs alleged." Native Ecosystems
23 Council v. Dombeck, 304 F.3d 886, 899 (9th Cir. 2002). In order
24 to provide sufficient notice, a claimant need only alert the
25 agency in "general terms, rather than [with] precise legal
26
27
28

1 formulations." Rittenhouse, 305 F.3d at 965 (citing Dombeck,
2 304 F.3d at 900).

3 As previously stated, Earth Island's concerns of
4 miscalculated stand densities and over-thinning alerted the
5 Forest Service of Earth Island's allegations. While Earth
6 Island did not specifically question the Forest Service's use of
7 365 as the SDI-Max for ponderosa pine, such a precise accusation
8 is not required by 5 U.S.C. § 704 or 7 U.S.C. § 6912(e). See
9 Rittenhouse, 305 F.3d at 965. Earth Island's general
10 accusations of over-thinning, in the context of concerns over
11 the Forest Service's calculations of SDI in the Champs area and
12 use of an allegedly arbitrary percentile to determine the amount
13 of thinning to be done, are sufficient to meet the
14 aforementioned notice standard. Earth Island repeatedly accused
15 the Forest Service of proposing more thinning in proportion to
16 the given SDI-Max than necessary. AR459, AR534, AR1607-08, AR
17 9297. These accusations should have alerted the Forest Service
18 to the possibility that perhaps it was not the percentile used,
19 but the size of the SDI-Max figure itself that was causing Earth
20 Island to question the amount of thinning proposed. Upon review
21 of Earth Island's contentions, the Forest Service had the
22 opportunity to rectify or explain its use of SDI-Max in the
23 Champs project and thus Earth Island has exhausted its
24
25
26
27
28

1 administrative remedies. Accordingly, Defendants Motion for
2 Summary Judgment on this issue is DENIED.

3 G. Maximum Stand Density Index (NEPA)
4

5 Stand density index or SDI, converts a stand's current
6 density into a density at a constant reference tree size of 10
7 inches in diameter to allow comparisons between stands with
8 different sizes and numbers of trees. AR1994. Maximum Stand
9 Density Index, or SDI-Max, is the maximum number of such trees
10 that can possibly occupy a given acre of forest for a given
11 forest type. AR1994, AR5437. SDI-Max is an intrinsic
12 biological maximum, and it is not possible for a forest stand's
13 current condition to exceed this value. AR5437; Pinjuv Dec. ¶
14 8. The central use of SDI-Max is to determine when a forest
15 stand is beginning to approach its capacity, and thus when some
16 trees might begin to die due to competition. Pinjuv Dec. ¶ 11.
17 Limiting-SDI is an SDI value at which significant mortality from
18 competition and beetles can occur as stands ultimately grow
19 towards their maximum density (SDI-Max). AR5437, Pinjuv Dec.
20 ¶¶10-11. SDI-Max and limiting-SDI are not interchangeable,
21 rather they are distinct scientific concepts with fundamental
22 differences.
23
24
25

26 Plaintiff alleges the Forest Service ("FS") failed to
27 ensure the scientific accuracy and integrity of its analysis in
28 the Champs EA when it used an erroneous maximum stand density

1 index ("SDI-Max") value of 365 to support the intensity of tree
2 removal it proposed. Pl's Mot. for Summary Judgment, Doc. # 28,
3 2:20-25. Plaintiff argues the correct SDI-Max for ponderosa
4 pine is 571, not 365 as Defendants assert. According to
5 Plaintiff, the erroneous scientific data used by the FS resulted
6 in an overstatement of the current density of the forest which
7 artificially created a "need" to intensively log medium and
8 large trees from the project area. Id. at 4:10-14; Pinjuv Dec.
9 ¶¶ 8-16. Plaintiff argues this resulting scientific inaccuracy
10 was an arbitrary and capricious alteration of science. Pl's
11 Mot. for Summary Judgment, Doc. # 28, 3-7. Defendants, on the
12 other hand, contend the FS made technical conclusions based on
13 its expertise in determining 365 as the SDI-Max value for
14 ponderosa pine and that the scientific literature supports that
15 figure. Defs' Motion for Summary Judgment, Docket # 33, 7:6-22.

16
17
18
19 Under NEPA, "agencies shall insure the professional
20 integrity, including scientific integrity, of the discussions
21 and analyses in environmental impact statements. They shall
22 identify any methodologies used and shall make explicit
23 reference by footnote to the scientific and other sources relied
24 upon for conclusions in the statement." 40 C.F.R. § 1502.24.
25 The Ninth Circuit applies this standard to EAs as well as EIS's.
26 Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1152 (9th Cir.
27 1988). Agencies have wide discretion in assessing scientific
28

1 evidence, but they must "take a hard look at the issues and
2 respond[] to reasonable opposing viewpoints." Earth Island
3 Inst. v. United States Forest Serv., 351 F.3d 1291, 1301 (9th
4 Cir. 2003). "Because analysis of scientific data requires a
5 high level of technical expertise, courts must defer to the
6 informed discretion of the responsible federal agencies." Id.
7 "When specialists express conflicting views, an agency must have
8 discretion to rely on the reasonable opinions of its own
9 experts, even if a court may find contrary views more
10 persuasive. At the same time, courts must independently review
11 the record in order to satisfy themselves that the agency had
12 made a reasoned decision based on its evaluation of the
13 evidence." Id. (quoting Marsh v. Or. Natural Res. Council, 490
14 U.S. 360, 378 (1989)). If an agency has failed to make a
15 reasoned decision based on an evaluation of the evidence, the
16 Court may properly conclude that an agency had acted arbitrarily
17 and capriciously. Id. at 1301.

21 Here, as stated in the Champs EA, the FS intended to
22 utilize SDI-Max, not limiting-SDI, when designing its thinning
23 project. AR1994. Although the FS is free to design a project
24 using some percentage of limiting-SDI as their benchmark for
25 thinning, the FS chose not to do so in this case. Instead, the
26 FS informed the public they designed a project using SDI-Max.
27 AR1994. Specifically the Champs EA provides, "Thinning
28

1 treatments would attempt to ensure that stand densities do not
2 exceed an upper limit of 60 percent of maximum SDI in order to
3 reduce health risks associated with density." AR1994. The
4 Champs EA further states that ponderosa pines have a "suggested
5 maximum SDI of 365." AR1994 citing Oliver Report, AR5436-41.
6 As such, the FS was bound to insure "the professional integrity,
7 including scientific integrity" of their use of 365 as the SDI-
8 Max value. If the Forest Service in the Champs EA provided
9 inaccurate or highly misleading scientific data, then it
10 violated NEPA. Earth Island Institute v. U.S. Forest Service,
11 442 F.3d 1147, 1166-1167 (9th Cir. 2006) ("Earth Island II").

14 Here, to assess stand densities in the Champs Project area,
15 the FS gathered field data from plots within the project area.
16 AR1638-1799. The data gathered included the number of live
17 trees per acre, species and size of trees, as well as the number
18 of dead trees per acre. Id. The FS then input this information
19 into a computer program known as the Forest Vegetation Simulator
20 ("FVS"). AR2073. The FVS then used this information to
21 generate data, including the given stand's density index. See
22 e.g., AR2977. When the FS ran its thinning scenarios through
23 the FVS, it used an SDI-Max value for ponderosa pine of 365.
24 AR3252, AR3254, AR3413, AR3415, AR3577, AR3579.

27 To support the use of 365 as the SDI-Max value the FS in
28 the Champs EA cites to Oliver (1995) and erroneously asserts

1 that "Pines have a suggested maximum SDI of 365." AR1994. The
2 Oliver (1995) study, however, explains that the value of 365 "is
3 considerably below the maximum SDI of 500 [for ponderosa pine]
4 used in Region 5 . . ."¹ AR5437 (emphasis added). The Oliver
5 study did not identify two different SDI-Max values for
6 ponderosa pine but, rather explicitly identified 365 as the
7 limiting-SDI and identified a much higher value as SDI-Max.
8 AR5437. Moreover, figures 1A, 1B and 1C in the Oliver study
9 demonstrate that the line representing 365 is for limiting-SDI,
10 and shows numerous ponderosa stands far exceeding 365 trees per
11 acre 10 inches in diameter, and reaching about 570 (Fig. 1A),
12 550 (Fig. 1b), and 560 (Fig. 1C). AR5438. As such, Oliver
13 (1995) clearly states that an SDI of 365 represents the
14 "limiting-SDI", not the SDI-Max for ponderosa pine and thus, the
15 FS erred in using 365 as the SDI-Max value in its thinning
16 calculations.
17
18
19

20 In addition to the Oliver (1995) study, Defendants argue
21 two Forest Service expert papers justify their use of 365 as the
22 SDI-Max value. Defs' Reply, Doc. #41 at 3:15-21; AR5539;
23 AR5720. The two FS expert papers were not noted in the Champs
24 EA and therefore, Defendants made no explicit reference by
25
26

27 ¹ In 1995 when the Oliver study was published, the then
28 current scientific knowledge was that SDI-Max for ponderosa pine
was 500, whereas subsequent studies have established SDI-Max at
571. AR 2973; Pinjuv Dec. ¶ 9.

1 footnote to the scientific studies nor disclosed these FS expert
2 papers to the public during the comment period. Nevertheless,
3 Defendants now argue they are supportive scientific literature
4 for their decision to use 365 as the SDI-Max for ponderosa pine.
5 Id. As such, the Court will briefly address the FS expert
6 papers.
7

8 The first FS expert paper cited by Defendants concludes
9 "Bark beetles define ponderosa pine's maximum SDI at 365 . . ."
10 AR5539. However, the FS paper relies solely on the Oliver study
11 for its assertion. Therefore, the FS paper mischaracterizes the
12 Oliver study's findings because, as stated above, the Oliver
13 study clearly states 365 is the limiting-SDI value. The other
14 FS paper relied upon by Defendants contains a table ("table 1")
15 which states 365 is the SDI for ponderosa pine. AR5720.
16 However, nowhere in the FS paper does it state that table 1
17 demonstrates an SDI-Max value for ponderosa pine. To the
18 contrary, the paper explains "the values in table 1, . . ., come
19 from a least squares fit of equation (1) using data collected
20 from stands across a range of ages, sites, and tree sizes, that
21 appeared to be *normally stocked*." AR5720. Thus, it appears the
22 table lists values of SDI for "normal" stands, not a maximum
23 stand density. Accordingly, this Court finds that the two FS
24 expert papers do not support Defendants' use of 365 as the SDI-
25 Max value.
26
27
28

1 In sum, after independent review of the record the Court
2 finds that the FS has not made a reasoned decision based on an
3 evaluation of the evidence. Marsh v. Ore. Natural Res. Council,
4 490 U.S. 360, 378 (1989). Here, the Forest Service's
5 misinterpretation of Oliver (1995) and erroneous use of
6 limiting-SDI of 365 as the SDI-Max value for ponderosa pine
7 corrupted the scientific accuracy and integrity of its NEPA
8 analysis. 40 C.F.R. §1502.24. Agencies simply do not have the
9 discretion to arbitrarily and capriciously alter a
10 scientifically set value or deviate from a forest planning
11 directive and still comply with NEPA. Native Ecosystems Council
12 v. U.S. Forest Service, 418 F.3d 953, 964-65 (9th Cir. 2005);
13 Earth Island II, 442 F.3d at 1160-67 (whether the error was
14 intentional or unintentional, the Forest Service violated NEPA
15 by misrepresenting a scientific study to justify logging more
16 larger trees). The Forest Service has not provided a reasoned
17 explanation for its decision to use a limiting-SDI value when
18 its binding Champs EA provides it will use an SDI-Max value for
19 thinning. As such, this Court finds Defendants acted
20 arbitrarily and capriciously when they used 365 as the SDI-Max
21 value in calculating its forest thinning scenarios.

22 Accordingly, Plaintiff's motion for summary judgment on the
23 issue of whether Defendants violated NEPA by failing to ensure
24
25
26
27
28

1 the scientific accuracy and integrity of the Champs EA is
2 GRANTED.

3
4
5 H. Blackwell Memo

6 The Blackwell Memo ("Memo") is a letter directed to Region
7 5 forest supervisors and directors from Jack A. Blackwell,
8 Regional Forester, dated July 14, 2004. AR1454. The Memo
9 states that forest supervisors and directors should "ensure that
10 density does not exceed an upper limit (for example: 90% of
11 normal basal area, or 60% of maximum stand density index); this
12 is a prudent way to avoid the health risks associated with
13 density." Id. The Memo further advises that when designing
14 thinnings supervisors and directors should "ensure that this
15 level will not be reached again for at least 20 years after
16 thinning." Id. This specific language from the Memo is
17 incorporated into the Champs Project. AR1994.

18
19
20 Plaintiff argues the Memo is a reviewable final agency
21 action because its application in the Champs Project marks the
22 consummation of the FS's decision making process, "by which
23 rights or obligations have been determined or from which legal
24 obligations flow." Pl's Opp., Doc. # 36 at 10:3-7 citing
25 Bennett v. Spear, 520 U.S. 154, 177 (1970). Plaintiff asserts
26 obligations flow from the Memo because it mandates a departure
27 from forest plan snag recruitments for wildlife. Pl's Opp.,
28

1 Doc. # 36 at 10:7-8. Defendants, on the other hand, argue the
2 Memo is not a final agency action under the APA, 5 U.S.C. § 704.
3 Defs' Reply, Doc. # 41 at 6:5-28, 7:1-2.

4
5 This Court has no jurisdiction under the APA to review the
6 Memo if it is not a final agency action over which Congress has
7 waived sovereign immunity. Rattlesnake Coal. v. EPA, 509 F.3d
8 1095, 1104-05 (9th Cir. 2007) ("The APA applies to waive
9 sovereign immunity only after final agency action. 5 U.S.C. §
10 704. Before final agency action has occurred, an action . . .
11 is premature and a federal court lacks subject matter
12 jurisdiction to hear the claim."). "[T]wo conditions must be
13 satisfied for agency action to be final: First, the action must
14 mark the consummation of the agency's decision-making process -
15 it must not be of a merely tentative or interlocutory nature.
16 And second, the action must be one by which rights or
17 obligations have been determined, or from which legal
18 consequences will flow . . ." Bennett v. Spear, 520 U.S. 154,
19 177-178 (1997) (quotations and citations omitted); see also
20 Franklin v. Mass., 505 U.S. 788, 797 (1992).

21
22
23
24 Here, neither of the sentences Plaintiff cites nor any of
25 the remainder of the Memo "mark[s] the consummation of the
26 agency's decision-making process." Bennett, 520 U.S. at 178.
27 Rather, the Forest Service's Champs Decision Notice by choosing
28 Alternative 9 from the EA and selecting the upper limits is the

1 final agency action, not the Blackwell Memo. AR1966. The
2 Blackwell Memo provides, at most, a general statement of policy
3 and a general goal because it makes nothing certain until the
4 project level. Therefore, the Memo is not subject to challenge
5 because it does not mark the consummation of the agency's
6 decision-making process.
7

8 Plaintiff argues that the Memo requires the FS to "'ensure'
9 that density does not exceed 60% of SDI-Max and [to] 'ensure'
10 that this level will not be reached again for at least 20 years
11 after thinning." Pl.'s Opp., Doc. # 36 at 13:1-8. The first
12 sentence of the Memo, however, merely states that the forest
13 thinnings should adhere to "an upper limit." AR1454 (emphasis
14 added). This gives complete discretion to the project designers
15 to decide what upper limit to use to design thinnings. Nothing
16 in the Memo requires the designer to set an upper limit at 60 %
17 SDI-Max. The second sentence of the Memo merely cites that
18 level as an example and recommends that project managers ensure
19 that their chosen, discretionary, density-levels remain
20 effective for twenty years. AR1454.
21
22
23

24 By leaving project designers broad discretion to choose the
25 upper density limit, this guidance does not meaningfully
26 constrain any FS action. At most, it gives project designers
27 guidance on how long to make their thinnings effective.
28 Therefore, because it leaves so much discretion to the project

1 designer over the ultimate decision, the Memo does not mark the
2 consummation of the decision-making process. Sakar Int'l, Inc.
3 v. United States, 516 F.3d 1340, 1344 (Fed. Cir. 2008) ("the
4 letter did not actually represent the 'consummation of the
5 agency's decision-making process' because [the agency] retained
6 discretion over the ultimate decision"). Accordingly,
7 because the Blackwell Memo offers ample latitude to the FS
8 supervisors and directors to apply the recommendations, it does
9 not mark the consummation of the agency's decision-making
10 process.
11
12

13 Moreover, even if the Memo constituted the consummation of
14 the FS's decision-making process, it would not be a final agency
15 action because no legal consequences flow from it. Instead,
16 only further actions, like decisions on projects, ever determine
17 any rights or obligations. The Memo does not allow, prohibit,
18 or require, anyone to do anything. It does not have any "direct
19 and immediate effect on the day-to-day operations of the party
20 seeking review," and whether anyone "immediate[ly] compli[es]"
21 with the terms is irrelevant because it provides no standard by
22 which to determine compliance. See Pub. Util. Dist. No. 1 v.
23 Bonneville Power Admin., 506 F.3d 1145, 1152 (9th Cir. 2007)
24 (providing indicia of finality); Fairbanks N. Star Borough v.
25 U.S. Army Corps of Eng'rs, 543 F.3d 586, 594 (9th Cir. 2008).
26
27
28

"[T]he fact that a statement may be definitive on some issue is insufficient to create a final action subject to judicial review." Indus. Customers of Nw. Utils. v. Bonneville Power Admin., 408 F.3d 638, 646 (9th Cir. 2005) (Northwest Utilities). In Northwest Utilities, the court held that a final decision in one phase of a three-phase process creates no final agency action. Similarly, here, even if the Memo is one part of the process, like the first phase of development at issue in Northwest Utilities, no legal consequences flow from the Memo. It neither marks the consummation of the agency's decision-making process nor creates any legal rights or obligations. As such, this Court does not have jurisdiction under the APA to review the Memo.

Accordingly, Plaintiff's motion for summary judgment on the issue of whether the Blackwell Memo was a final agency action and thus subject to NEPA review is DENIED.

III. ORDER

For the reasons set forth above, Defendants' motion for summary judgment is DENIED and Plaintiff's motion for summary judgment is GRANTED in part and DENIED in part.

The Court, having granted summary judgment, in part, to Plaintiff, hereby ORDERS the following injunctive relief against Defendants:

1 The Champs Project and any contracts that implement the
2 Champs Project (except activities as described below) are hereby
3 permanently enjoined until the Forest Service conducts an
4 adequate and sufficient National Environmental Policy Act
5 ("NEPA") review as discussed above in this Court's Order. In the
6 interim, thinning of trees less than twelve inches in diameter
7 at breast height that have been identified for removal pursuant
8 to the Champs Project will be allowed, including by means of
9 service contract. In addition, the removal and cleanup of slash
10 debris generated from this allowable activity, as well as the
11 prescribed burning in units of the Champs Project as detailed in
12 the Champs EA, are also permitted.
13
14

15 IT IS SO ORDERED.
16

17
18 Dated: August 5, 2009



JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE