

Rachel M. Fazio (CA Bar # 187580)  
P.O. Box 697  
Cedar Ridge, CA 95924  
Tel: (530) 273-9290  
Fax: (530) 273-9260  
rfazio@nccn.net

Honorable John A. Mendez

René P. Voss (CA Bar # 255758)  
1006 Bienville Street  
Davis, CA 95616  
Tel: (530) 792-1270  
Fax: (832) 747-3513  
renepvoss@gmail.com

Attorneys for Plaintiff  
Earth Island Institute

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

EARTH ISLAND INSTITUTE, a non-profit )  
organization, )

Plaintiffs, )

vs. )

KATHLEEN MORSE, in her official capacity )  
as Forest Supervisor for Lassen National )  
Forest, RANDY MOORE, in his official )  
capacity as Regional Forester for Region 5 of )  
the United States Forest Service, , and the )  
UNITED STATES FOREST SERVICE, )

Defendants. )

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

**MEMORANDUM IN SUPPORT OF  
PLAINTIFF’S MOTION FOR  
SUMMARY JUDGMENT AND  
INJUNCTIVE RELIEF**

Hearing: April 8, 2009 at 9:00 a.m.  
Courtroom: 6

**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

TABLE OF AUTHORITIES ..... ii

SUMMARY OF ARGUMENT ..... 1

STATEMENT OF FACTS ..... 1

STANDARD OF REVIEW ..... 1

ARGUMENT ..... 2

I. FAILURE TO ENSURE SCIENTIFIC ACCURACY AND INTEGRITY ..... 2

    A. Use of an Erroneous Maximum Stand Density Index (“SDI-Max”) Value..... 3

    B. Inaccurate Comparisons between Current and Historic Stand Densities and Failure to Divulge Methodology Used for Comparison ..... 7

II. FAILURE TO DISCLOSE AND ANALYZE THE EFFECTS OF ITS CONIFER DENSITY STANDARD..... 9

    A. The Conifer Density Standard is Major Federal Action, which Required the Forest Service to First Prepare an EA or EIS and Involve the Public ..... 9

    B. The Conifer Density Standard is a Mandatory Directive that Agency Managers Must Follow ..... 13

III. FAILURE TO CONSIDER A REASONABLE RANGE OF ALTERNATIVES ..... 14

    A. The Forest Service’s Reliance on its Conifer Density Standard Unreasonably Narrowed the Project’s Purpose and Need ..... 15

    B. Reasonable Alternatives Not Fully Considered..... 17

IV. FAILURE TO TAKE A HARD LOOK AT IMPACTS..... 18

V. INJUNCTIVE RELIEF IS APPROPRIATE ..... 20

    A. Plaintiff Will Suffer Irreparable Harm Absent an Injunction, and Monetary Damages are Inadequate ..... 21

    B. The Balance of Hardships Tips Decidedly in Plaintiffs’ Favor..... 24

    C. The Public Interest Favors the Issuance of an Injunction in this Case. .... 25

CONCLUSION..... 25

**TABLE OF AUTHORITIES**

**Federal Cases**

Amoco Production Co., v. Village of Gambell, 480 U.S. 531, 545 (1987)..... 21

Blue Mts. Biodiversity Project v. Blackwood, 161 F.3d 1208, 1211 (9th Cir. 1998) ..... 1, 12

Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1229 (9th Cir. 1988) ..... 14

California v. Block, 690 F.2d 753, 767 (9th Cir. 1982)..... 15

City of Carmel-By-The-Sea v. U.S. Dept. of Transp., 123 F.3d 1142, 1155 (9th Cir. 1997)..... 14

Doran v. Salem Inn, Inc., 422 U.S. 922, 932 (1975) ..... 21

Earth Island Institute v. U.S. Forest Service, 351 F.3d 1291, 1299 (9th Cir. 2003)..... 23, 24

Earth Island Institute v. U.S. Forest Service, 442 F.3d 1147, 1166-1167 (9th Cir. 2006) ... passim

Environmental Protection Information Center v. Blackwell, 389 F. Supp. 2d 1174, 1221 (N.D. Cal. 2004)..... 24

Forest Conservation Council v. U. S. Forest Service, 66 F.3d 1489, 1496 (9th Cir. 1995) .. 21, 24

Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 986 (9th Cir.1985)..... 3

Geertson Seed Farms v. Johanns, 541 F.3d 938, 943 (9th Cir. 2008) ..... 20, 21

Hells Canyon Alliance v. U. S. Forest Service, 227 F.3d 1170, 1177 (9th Cir. 2000)..... 2

Idaho Conservation League v. Mumma, 956 F.2d 1508, 1519 (9th Cir. 1992)..... 14

Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1150-1151 (9th Cir. 1988) ..... 3

Klamath-Siskiyou Wildlands Center v. Bureau of Land Management, 387 F.3d 989, 993 (9th Cir. 2004)..... 18

Klamath-Siskiyou Wildlands Center v. U.S. Forest Service, 373 F. Supp. 2d 1069, 1078 (E.D. Cal. 2004) ..... 2

Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1120 (9th Cir. 2002) ..... 14, 25

Lands Council v. Martin, 479 F.3d 636, 643 (9th Cir. 2007) ..... 24

League of Wilderness Defenders-Blue Mts. Biodiversity Project v. U.S. Forest Service, 549 F.3d 1211, 1219 (9th Cir. 2008)..... 16, 17

Metcalf v. Daley, 214 F.3d 1135, 1142 (9th Cir. 2000) ..... 18

Midwater Trawlers Co-op v. Dep't of Commerce, 282 F.3d 710, 716 (9th Cir. 2002) ..... 2

Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43 (1983) ..... 2

Native Ecosystems Council v. U.S. Forest Service, 418 F.3d 953, 964-65 (9th Cir. 2005).... 7, 18

Native Ecosystems Council v. U.S. Forest Service, 428 F.3d 1233, 1245 (9th Cir. 2005) ..... 14

Nat'l Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 737 n.18 (9th Cir. 2001) ..... 21, 24

*Earth Island Institute v. Morse*, 08-1897

1	Natural Resources Defense Council v. U.S. Forest Service, 421 F.3d 797, 813 (9th Cir. 2005).....	14
2	Neighbors of Cuddy Mountain v. U. S. Forest Service, 137 F.3d 1372, 1382 (9th Cir. 1998).....	23, 25
3		
4	Northcoast Environmental Ctr. v. Glickman, 136 F.3d 660, 667 (9th Cir.1998) .....	9
5	Northern Cheyenne Tribe v. Norton, 503 F.3d 836, 843 (9th Cir. 2007) .....	21
6	Ocean Advocates v. U.S. Corps of Engineers, 402 F.3d 846, 859 (9th Cir. 2005) .....	2
7	Oregon Nat. Resources Council Action v. U.S. Forest Service, 293 F. Supp. 2d 1200, 1209 (D. Or. 2003) .....	15
8	Oregon Natural Resources Council v. Forsgren, 252 F. Supp. 2d 1088 (D. Or. 2003) .....	12, 13
9	Pacific Coast Fed. of Fishermen's Ass'n, Inc. v. Nat'l Marine Fisheries Serv., 265 F.3d 1028, 1034 (9th Cir. 2001) .....	2
10	People of California v. U.S. Forest Service, 2005 WL 1630020, *6-9 (N.D. Cal. July 11, 2005).....	13
11		
12	Save the Yaak Committee v. Block, 840 F.2d 714, 717 (9th Cir.1988).....	9
13	Seattle Audubon Society v. Moseley, 798 F. Supp. 1473, 1482 (W.D. Wash. 1992), aff'd, Seattle Audubon Soc. v. Espy, 998 F.2d 699 (9th Cir. 1993) .....	3
14	Sierra Club v. Bosworth, 510 F.3d 1016, 1034 (9th Cir. 2007).....	20, 21, 24
15	Sierra Club v. Eubanks, 335 F. Supp. 2d 1070, 1077-79 (E.D. Cal. 2004) .....	6, 23
16	Sierra Nevada Forest Protection Campaign v. Tippin, 2006 WL 2583036, *5-9 (E.D. Cal. Sept. 6, 2006) .....	18
17	Simmons v. U.S. Army Corps of Engineers, 120 F.3d 664, 666 (7th Cir. 1997) .....	14
18	Thomas v Peterson, 753 F.2d 754, 764 (9th Cir. 1985).....	21
19	Trout Unlimited v. Morton, 509 F.2d 1276, 1286 (9th Cir. 1974) .....	14
20	Westlands Water Dist. v. U.S. Dept. of Interior, 376 F.3d 853, 865 (9th Cir. 2004) .....	15
21	<b>Federal Statutes</b>	
22	42 U.S.C. § 4332(2)(C).....	9
23	42 U.S.C. § 4332(2)(E) .....	14
24	42 U.S.C. § 4332(C)(iii) .....	14
25	5 U.S.C. § 706(2) .....	1
26	<b>Federal Rules</b>	
27	Fed. R. Civ. P. 56(c) .....	2
28	<b>Federal Regulations</b>	
	40 C.F.R. § 1502.2 .....	16

1	40 C.F.R. § 1508.18(b) .....	10, 13
2	40 C.F.R. § 1508.2 .....	16
3	40 C.F.R. §§ 1501(4)(a) .....	9
4	40 C.F.R. §1502.2 .....	2, 3, 7
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1 **SUMMARY OF ARGUMENT**

2 In order to justify logging in the Champs Project, the Forest Service has overstated forest  
3 stand density, erroneously relied upon an unanalyzed Regional Directive, and has selectively  
4 interpreted and incorporated data, creating a fictitious need for logging medium and large trees to  
5 reduce stand densities, and thus prevent trees from dying, when in fact, the areas to be logged are  
6 not overly dense and are already deficient in large dead trees (snags) which are necessary for the  
7 survival of numerous imperiled wildlife species. The Forest Service failed to utilize the correct  
8 value in discerning stand densities, failed to disclose the methodologies it utilized to assess  
9 current basal area densities, made an inaccurate comparison between current and historic basal  
10 area densities, rejected reasonable alternatives from detailed study, and failed to assess the  
11 impacts of the project on imperiled wildlife species that depend upon large snags (dead trees  
12 over 15 inches in diameter at breast height) for their survival. These actions violate the National  
13 Environmental Policy Act (“NEPA”), the Administrative Procedure Act (“APA”), and ensure  
14 that the true environmental consequences of this project remain unknown.

15 **STATEMENT OF FACTS**

16 Pursuant to Local Rule 56-260(a) Plaintiff has provided all relevant material facts in its  
17 Statement of Undisputed Facts. Plaintiff has restated all relevant material facts in the Argument  
18 section below with citations to the Administrative Record (“AR”) and its Declarations.

19 **STANDARD OF REVIEW**

20 Violations of NEPA, are subject to judicial review under the APA. *Blue Mts.*  
21 *Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998).<sup>1</sup> The APA provides  
22 that the court “shall . . . set aside” agency action that is “arbitrary, capricious, an abuse of  
23 discretion, or otherwise not in accordance with law,” or found to be “without observance of  
24 procedure required by law.” 5 U.S.C. § 706(2).

25 The Court is charged with conducting a “searching and careful,” review of a challenged  
26 agency decision, to ensure that a rational connection between the facts found and the decision  
27

28 <sup>1</sup> Plaintiff has standing to bring these claims. *See* Declaration of Dr. Chad Hanson filed herewith.

1 made has been articulated. *Ocean Advocates v. U.S. Corps of Engineers*, 402 F.3d 846, 859 (9th  
2 Cir. 2005) (internal quotations omitted); *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State*  
3 *Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983); *Midwater Trawlers Co-op v. Dep't of*  
4 *Commerce*, 282 F.3d 710, 716 (9th Cir. 2002). Thus, the reviewing court must determine  
5 whether the decision was based on a consideration of the relevant factors and whether the  
6 decision was a clear error of judgment. *Hells Canyon Alliance v. U. S. Forest Service*, 227 F.3d  
7 1170, 1177 (9th Cir. 2000). A reviewing court may reverse an agency decision if the agency  
8 failed to consider an important aspect of the issue, offered an explanation for its decision in  
9 contradiction of the evidence before the agency, or made a determination so implausible that it  
10 could not be ascribed to a mere difference of opinion or the product of the agency's expertise.  
11 *Pacific Coast Fed. of Fishermen's Ass'n, Inc. v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028,  
12 1034 (9th Cir. 2001).

13 Summary judgment is appropriate when the pleadings, the record, and any affidavits  
14 show that there is no genuine issue as to any material fact and that the movant is entitled to  
15 judgment as a matter of law. Fed. R. Civ. P. 56(c). Summary judgment is generally appropriate  
16 in cases such as this involving judicial review of administrative action where review is based  
17 upon an administrative record. *Klamath-Siskiyou Wildlands Center v. U.S. Forest Service*, 373  
18 F. Supp. 2d 1069, 1078 (E.D. Cal. 2004).

## 19 ARGUMENT

### 20 I. FAILURE TO ENSURE SCIENTIFIC ACCURACY AND INTEGRITY

21 The Forest Service failed to ensure the scientific accuracy and integrity of its analysis in  
22 the Champs EA when it (a) used an erroneous maximum stand density index (“SDI-Max”) value  
23 in order to support the intensity of tree removal it proposed, (b) made uneven and therefore  
24 inaccurate comparisons between current and historic stand densities, and (c) failed to clearly  
25 divulge its methodologies.

26 NEPA requires that “[a]gencies **shall** insure the professional integrity, including  
27 scientific integrity, of the discussions and analyses in environmental impact statements.” 40  
28 C.F.R. §1502.24 (“Methodology and scientific accuracy”) (emphasis added). Agencies “shall

1 identify any methodologies used and shall make explicit reference by footnote to the scientific  
 2 and other sources relied upon for conclusions in the [impact] statement.” *Id.* The Ninth Circuit  
 3 applies this standard to EAs as well as EIS’s. *Idaho Sporting Congress v. Thomas*, 137 F.3d  
 4 1146, 1150-1151 (9th Cir. 1988). NEPA also requires agencies to disclose the underlying hard  
 5 data from which the agency derived its opinion. *Id.* at 1150. If the Forest Service presents  
 6 highly misleading scientific data, it abuses its discretion and violates NEPA by failing to take the  
 7 requisite “hard look” at the data underlying its environmental analysis and decision. If the Forest  
 8 Service, in its environmental analysis, provides inaccurate or highly misleading scientific data,  
 9 this is a violation of NEPA. *Earth Island Institute v. U.S. Forest Service*, 442 F.3d 1147, 1166-  
 10 1167 (9th Cir. 2006) (“*Earth Island II*”).

11 NEPA does not permit an agency to rely on its expert’s conclusions and opinions without  
 12 providing both supporting analysis and data to the public. *See Idaho Sporting Cong.*, 137 F.3d at  
 13 1150. A reviewing court must “ensure that the procedure followed by the Service resulted in a  
 14 reasoned analysis of the evidence before it, and that the Service made the evidence available to  
 15 all concerned.” *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 986 (9th  
 16 Cir.1985); *see Seattle Audubon Society v. Moseley*, 798 F. Supp. 1473, 1482 (W.D. Wash. 1992),  
 17 *aff’d*, *Seattle Audubon Soc. v. Espy*, 998 F.2d 699 (9th Cir. 1993) (the agency may not “rely on  
 18 conclusory statements unsupported by data, authorities, or explanatory information.”).

19 **A. Use of an Erroneous Maximum Stand Density Index (“SDI-Max”) Value**

20 Stand density index, or SDI, converts a stand’s current density into a density at a constant  
 21 reference tree size of 10 inches in diameter to allow comparisons between stands with different  
 22 sizes and numbers of trees. AR 1994. Maximum Stand Density Index, or SDI-Max, is the  
 23 maximum number of such trees that can possibly occupy a given acre of forest for a given forest  
 24 type, according to Oliver (1995). AR 1994, 5437; *see also* AR2531; Declaration of Dr. Guy  
 25 Pinjuv (“Pinjuv Dec.”) ¶¶1-8; Defendant’s Answer to Amended Complaint (“D’s Answer”) ¶33.  
 26 SDI-Max is an intrinsic biological maximum, and it is not possible for a forest stand’s current  
 27 condition to exceed this value. AR5437, Pinjuv Dec. ¶¶8. The central use of SDI-Max is to  
 28 determine when a forest stand is beginning to approach its capacity, and thus when some trees

1 might begin to die due to competition. Pinjuv Dec. ¶¶11. SDI-Max is important to this case  
2 because the Forest Service utilized this concept to eliminate from full review reasonable  
3 alternatives, and to ultimately justify the extensive logging authorized by the Champs project  
4 decision. Pursuant to a Directive from the Regional Forester, embodied in a 2004 letter, forest  
5 managers were instructed to ensure that all thinning projects they proposed would reduce stand  
6 densities so they would not exceed 60% of “**maximum stand density index**” until twenty years  
7 after the logging was completed. AR1454 (emphasis added). The Forest Service determined  
8 that altering the forest stands in the project area to ensure that they would have a post-thinning  
9 SDI value between 35-50% of SDI-Max would meet the mandate of the 2004 directive.  
10 AR1994. In preparing their analysis, however, the Forest Service capriciously lowered SDI-Max  
11 values to assess the density of the forest stands in the Champs project area. This resulted in a  
12 gross and scientifically inaccurate overstatement of the current density of the forest, which  
13 artificially created a “need” to intensively log medium and large trees from the project area in  
14 order to meet the 2004 Directive. Pinjuv Dec. ¶¶8-16.

15 Timber sale units in the Champs project area are made up mostly of eastside pine forest,  
16 AR2693, which is dominated by ponderosa pine. AR 5436-37. But a significant portion of the  
17 project area is eastside mixed conifer (“EMC”), AR2693, which consists mostly of white fir,  
18 with some ponderosa pine mixed in. AR2972-3089. The most recent scientific literature has  
19 identified the value of 571 as the SDI-Max value for ponderosa pine in California, and 800 as the  
20 SDI-Max value for white fir. Pinjuv Dec. ¶¶9-14; AR2972-73 (“pp” is ponderosa pine). The  
21 literature also instructs that the only accurate way to assess SDI-Max for mixed species stands is  
22 to calculate an SDI-Max, using the set SDI-Max for each species, based upon the proportions of  
23 each species in the stand. Pinjuv Dec., ¶¶12, 14.

24 In order to assess stand densities in the Champs project area, the Forest Service gathered  
25 field data, also known as stand exam data, from plots within the project area. AR1638-1799.  
26 The data gathered included the number of live trees per acre, species and size of trees, as well as  
27 number of dead trees (“snags”) per acre. *Id.* The Forest Service then input this information into  
28 a computer program known as the Forest Vegetation Simulator (“FVS”). AR2073. The FVS

1 then uses this information to generate data, including a given stand's density index (SDI) and  
2 basal area (BA). *See e.g.*, AR2977 (FVS outputs for existing condition—see “Start of  
3 Simulation Period”). The Forest Service can also input their proposed logging prescription  
4 (number of trees proposed to be removed in each size class) and the FVS program will then  
5 generate data describing not only the existing condition of the stand (i.e., its density and basal  
6 area numbers) but also the expected post-logging (“After Treatment”) SDI and basal area. *See*  
7 *e.g.*, AR3583 (FVS output for a forest stand using a 30 inch diameter limit).

8 In its analysis of the existing condition of the forest stands in the Champs project area,  
9 prepared in November 2, 2006, the Forest Service correctly identified 571 as the SDI-Max value  
10 for ponderosa pine. AR2973 (PP). The resulting data from this run of the FVS program clearly  
11 indicated that most existing stands, whether eastside pine, or eastside mixed conifer, currently  
12 met, or only slightly exceeded, the 2004 Regional Directive because their SDI values were  
13 already within or close to the EA's target range of 35-50% of SDI-Max (571) for ponderosa pine.  
14 AR 2977, 2984, 2994, 3004, 3011, 3020, 3029, 3038, 3046, 3054, 3063, 3071, 3078-79, 3088,  
15 3096 (percentages obtained by dividing 2006 SDI values by SDI-Max (571)). Given these  
16 outcomes, compliance with the 2004 Directive would not entail much, if any, logging and  
17 certainly not the intensive logging recommended by the Champs project.

18 But when the Forest Service subsequently ran its thinning scenarios through the FVS, it  
19 lowered the SDI-Max value for ponderosa pine from 571 to 365. AR 3252, 3254, 3413, 3415,  
20 3577, 3579. Contrary to their first FVS run, when the current stand density (SDI) is compared to  
21 the erroneous SDI-Max of 365, all stands now exceeded the EA targets (of 35-50% of SDI-  
22 Max),<sup>2</sup> and some stands even exceeded 100% of SDI-Max, AR 2552, 2984, 2994, which is a  
23 scientific impossibility. Pinjuv Dec. ¶¶8, 10-11, 13. To justify this change the Forest Service  
24 cited to Oliver (1995) and erroneously asserted that “Pines have a suggested maximum SDI of  
25 365”. AR 1994, 2531. The Oliver (1995) study, however, explains that the value of 365 “is  
26

---

27  
28 <sup>2</sup> AR 2977, 2984, 2994, 3004, 3011, 3020, 3029, 3038, 3046, 3054, 3063, 3071, 3078-79, 3088, 3096  
(percentages obtained by dividing 2006 SDI values by 365).

1 considerably below the maximum SDI of 500 [for ponderosa pine] used in Region 5 . . . .<sup>3</sup> AR  
 2 5437 (emphasis added); *see also* Pinjuv Dec. ¶¶9-11. Oliver (1995) clearly states that an SDI of  
 3 365 represents the “limiting” SDI, not the SDI-Max for ponderosa pine. *Id.* The limiting SDI is  
 4 the SDI level at which significant mortality of the weaker, less fit, trees starts to occur due to  
 5 competition and bark beetles. Pinjuv Dec. ¶11. This mortality occurs while the stand increases  
 6 in density toward the SDI-Max but does not represent the ultimate number of pines which can  
 7 exist on a given acre, nor does it represent the “maximum stand density index” referenced in the  
 8 2004 Directive. AR5437, Pinjuv Dec. ¶¶10-11.

9 The Forest Service’s misinterpretation of Oliver (1995) and erroneous use of an identified  
 10 “limiting” SDI of 365 as the SDI-Max value for ponderosa pine is scientifically inaccurate and  
 11 compromised the entire analysis of the Champs project by overstating current stand density.  
 12 Pinjuv Dec. ¶¶8-16; *see Sierra Club v. Eubanks*, 335 F. Supp. 2d 1070, 1077-79 (E.D. Cal. 2004)  
 13 (the Forest Service violated NEPA when it misrepresented scientific studies to justify more  
 14 intensive logging). This overstatement of current stand density was further compounded by the  
 15 Forest Service when they, without scientific support, applied their erroneous SDI-Max not only  
 16 to ponderosa pines, but to all species in the project area. AR 1994.<sup>4</sup> The end results of this were  
 17 the elimination of reasonable alternatives from detailed study that met the requirements of the  
 18 2004 Directive and a failure to adequately assess the impacts of the approved project.<sup>5</sup>

19 The erroneous use of 365 as SDI-Max in the analysis is further borne out by on-the-  
 20 ground conditions within the Champs project area. If the value of SDI-Max were 365, and

---

21 <sup>3</sup> Note that in 1995 when the Oliver study was published, the then current scientific knowledge was  
 22 that SDI-max for ponderosa pine was 500, whereas subsequent studies have established SDI-max at 571.  
 23 AR 2973; Pinjuv Dec. ¶9. But contrary to the Forest Service’s assertions in the EA, and as the original  
 24 FVS datasheets show, the Forest Service was aware at the time it prepared this project that SDI-Max for  
 ponderosa pine was 571. AR 2973.

25 <sup>4</sup> The scientifically accurate way to assess SDI-Max when more than one species of tree is present in  
 a stand is to utilize the separate SDI-Max values to calculate an SDI-Max which is based upon the  
 proportion of each species in a given stand. Pinjuv Dec. ¶¶12. For example if a stand is 70% ponderosa  
 pine and 30% white fir, then you calculate SDI-Max as:  $(0.70 \times 571) + (0.30 \times 800) = \text{SDI-Max of } 640$ .

26 <sup>5</sup> In fact, a 12-inch diameter limit would achieve the EA’s SDI targets even in the stands whose SDI  
 27 values currently exceed 50% of 571 (the SDI-Max value for ponderosa pine). AR3268, 3278, 3299,  
 3309, 3319, 3329, 3389, 3399 (percentages obtained by dividing “After Treatment” SDI values by 571);  
 28 *see also* Pinjuv Dec., ¶¶15.

1 current stands conditions are at, near, or impossibly beyond this SDI-Max value (as the Forest  
2 Service claims), then the referenced scientific literature suggests that substantial tree mortality  
3 should exist in these stands. AR 2531. However, this is not the case. Currently there is an  
4 alarming deficit of dead trees (snags) in the project area, and existing tree mortality, as  
5 determined by snag density per acre, is far below the minimum levels needed to provide  
6 adequate nesting and foraging habitat for native wildlife, as specified in the forest plan.  
7 Declaration of Dr. Chad Hanson (Hanson Dec.) ¶¶14-16; AR2693, 9409 (forest plan pp. 51-52).  
8 The chosen project alternative for the Champs project would virtually eliminate, from over 7,000  
9 acres of forest, the potential for snag recruitment for decades. Hanson. Dec. ¶¶ 14-16.

10 The Forest Service's choice of an incorrect value for SDI-Max for the Champs project  
11 has infected the entirety of the Champs analysis and has corrupted the scientific accuracy and  
12 integrity of their NEPA documents. 40 C.F.R. §1502.24. Agencies simply do not have the  
13 discretion to arbitrarily and capriciously alter a scientifically set value or deviate from a forest  
14 planning directive and still comply with NEPA. *Native Ecosystems Council v. U.S. Forest*  
15 *Service*, 418 F.3d 953, 964-65 (9th Cir. 2005) (the Forest Service's failure to use the correct  
16 calculation when determining the habitat necessary to protect elk in the project area violated  
17 NEPA's requirement that they ensure the scientific accuracy and integrity of the project and take  
18 a "hard look" at its impacts); *Earth Island II*, 442 F.3d at 1160-67 (whether the error was  
19 intentional or unintentional, the Forest Service violated NEPA by misrepresenting a scientific  
20 study to justify logging more larger trees).

21 **B. Inaccurate Comparisons between Current and Historic Stand Densities and**  
22 **Failure to Divulge Methodology Used for Comparison**

23 Similarly, the Forest Service violated NEPA by failing to ensure the scientific accuracy  
24 of the Champs EA when it erroneously determined that current basal area densities exceed  
25 historic densities, and failed to divulge the methodology it used—a combination of errors which  
26 led the agency to incorrectly report that current stands are far too dense, and that intensive  
27  
28

1 logging must occur in order to restore proper basal area densities. AR1993-94; 1996.<sup>6</sup>

2 The EA stated that current basal area is 140-220 sq. ft. per acre, AR 1994, and the  
3 Champs Eastside Historical Assessment reported, based upon a 1946 survey, that historic basal  
4 area was 39 to 180 sq. ft. per acre, with an average of about 79. AR1392 (Table 5). Thus the EA  
5 concluded that current basal area densities were much higher than normal and aggressive logging  
6 was necessary to restore historic conditions. AR1993-94; 1996. Over the course of two years,  
7 plaintiff communicated with the Forest Service 17 times in an effort to obtain the methodology  
8 utilized by the agency to calculate current basal area densities, expressing the view that the EA  
9 appeared to overstate existing basal area compared to a review of the stand exam data gathered  
10 for the project. AR0281, 1599-1600, 1607-08, 1637, 1800, 1804-06, 1809, 1814, 1826-28, 9205,  
11 9253, 9258, 9265, 9276, 9285-86. Although the Forest Service corresponded, AR1638, 1801,  
12 1808, 9254, 9261, 9270, it was not until litigation was imminent that the agency divulged the fact  
13 that they had dropped all plots with basal area less than 60 sq. ft. per acre from their calculation  
14 of existing basal area density, D's Answer ¶ 67, which resulted in an overstatement of the  
15 existing basal area density in the project area.<sup>7</sup> Hanson Dec. ¶¶ 11-13.

16 Conversely, the historical data analyzed in the Champs Eastside Historical Assessment  
17 included plots with less than 60 sq. ft. per acre in its calculation, AR1392 (Table 5), however  
18 trees less than 12 inches in diameter were excluded (because no data was gathered on these trees  
19 in 1946). *Id.* As previously stated, in the Forest Service's assessment of existing conditions,  
20 plots with less than 60 sq. ft. per acre were excluded from their calculation, however, trees under  
21 12 inches in diameter were included—the exact opposite of the historic data, and yet the Forest  
22 Service compared them as if they were the same. D's Answer ¶67; AR2972-3740; Hanson Dec.  
23 ¶¶11-13. Based upon this erroneous comparison, the Forest Service not only overstated the  
24 existing basal area density, leading to its conclusion that drastic basal area reductions was  
25 necessary to restore historic conditions, AR1993-94, 1996, but it also overstated the basal area

---

26 <sup>6</sup> Basal area (expressed in square feet per acre) refers to the total horizontal surface area, at breast  
27 height, comprised by the trunks of all trees in a given plot or stand. D's Answer, ¶ 65.

28 <sup>7</sup> This also led to an overstatement of existing SDI, which exacerbated the Forest Service's errors  
described in Section I.A.

1 density that would exist after the logging was completed (which effectively hid the true intensity  
 2 and impact of this project on wildlife). But if an even “apples to apples” comparison is made,  
 3 where both data sets exclude plots with less than 60 sq. ft. per acre and exclude basal area in  
 4 trees less than 12 inches in diameter, there is no difference between current and historic basal  
 5 area density in the project area, even when analyzed statistically.<sup>8</sup> Hanson Dec. ¶¶12-13.

6 In attempting to correlate current and historic basal area densities the Forest Service  
 7 violated NEPA by making a plainly erroneous comparison and by failing to disclose to the public  
 8 the methodology used in calculating the existing basal area density for the project. The scientific  
 9 integrity of the Champs analysis was compromised and a clear understanding of the impacts of  
 10 this project remains unknown.

## 11 **II. FAILURE TO DISCLOSE AND ANALYZE THE EFFECTS OF ITS CONIFER** 12 **DENSITY STANDARD**

13 The Regional Forester’s letter directing Forest Supervisors and Directors to ensure that  
 14 thinning projects meet specific stand densities for 20 years after logging is a major federal action,  
 15 and the Forest Service was required to prepare an EA or EIS assessing the impacts of the  
 16 directive prior to its application in the Region and to the Champs Project.

### 17 **A. The Conifer Density Standard is Major Federal Action, which Required the** 18 **Forest Service to First Prepare an EA or EIS and Involve the Public**

19 The Forest Service admits that it has not prepared an EA or EIS before issuing its Conifer  
 20 Density Standard. D’s Answer ¶38. NEPA, however, requires federal agencies to prepare an  
 21 EIS before taking “major Federal actions significantly affecting the quality of the environment.”  
 22 42 U.S.C. § 4332(2)(C).<sup>9</sup> A decision not to prepare an EIS is reviewed for “reasonableness,”  
 23 which is a “less deferential standard than arbitrary and capricious review.” *Northcoast*  
 24 *Environmental Ctr. v. Glickman*, 136 F.3d 660, 667 (9th Cir.1998); *see Save the Yaak Committee*  
 25 *v. Block*, 840 F.2d 714, 717 (9th Cir.1988) (court’s inquiry determines whether the agency has

26 <sup>8</sup> At best, given the Forest Service’s estimation about historic basal area density in trees 12 inches in  
 27 diameter or under, AR1392, current conditions in the project area may be denser in small trees, a  
 28 circumstance which could easily be remedied by implementing a project with a 12 inch diameter limit, a  
 reasonable alternative which the Forest Service arbitrarily excluded from detailed study. *See* Section  
 IV.B. *infra*.

<sup>9</sup> *See also*, 40 C.F.R. §§ 1501(4)(a); 1501.4(b); and 1508.4.

1 “reasonably concluded that the project will have no significant adverse environmental  
2 consequences.”) Moreover, NEPA defines a major federal action to include “formal documents  
3 establishing an agency’s policies which will result in or substantially alter agency programs” and  
4 the “[a]doption of formal plans, such as official documents prepared or approved by federal  
5 agencies *which guide or prescribe alternative uses of federal resources, upon which future*  
6 *agency actions will be based.*” 40 C.F.R. § 1508.18(b) (emphasis added).

7 Here, the Conifer Density Standard violates these NEPA regulations because it  
8 establishes agency policy that alters a Forest Service program and its application may have a  
9 significant effect on wildlife populations throughout the state. The program, which the Conifer  
10 Density Standard alters, was established in the 2004 Sierra Nevada Forest Plan Amendment  
11 (“2004 Framework”), which governs all Sierra Nevada national forests in Forest Service Region  
12 5, and requires protections for wildlife habitat in those forests by maintaining minimum snag  
13 densities (dead trees per acre) upon which certain native species depend. AR9409 (2004  
14 Framework Record of Decision pp. 15 and 51-52). The Framework requires that projects retain  
15 and sustain a minimum of 4 large (over 15 inches in diameter) snags per acre in westside mixed  
16 conifer forests, 6 large snags per acre in red fir forests, and 3 large snags per acre in eastside  
17 forests (such as the Champs project area) to provide habitat for the numerous native wildlife  
18 species that depend upon large snags for nesting/denning and foraging. *Id.*, pp. 51-52 (“Design  
19 projects to implement and sustain a generally continuous supply of snags and live decadent trees  
20 suitable for cavity nesting wildlife across a landscape.”). Thus, under the Framework standards,  
21 Forest Service managers have the flexibility to allow stands to reach density levels at which  
22 recruitment of large snags is likely to meet the minimum requirements for wildlife benefits.  
23 Rather than preserve this flexibility and these minimum snag density requirements, the Conifer  
24 Density Standard would effectively override this program by requiring reductions in stand  
25 density across the landscape such that tree mortality, especially in large trees, would virtually be  
26 eliminated for decades. Hanson Dec. ¶16.

27 Specifically, the Conifer Density Standard letter directs forest managers in Region 5 that  
28 “when designing thinning ensure that density does not exceed an *upper* limit (for example: 90%

1 of normal basal area, or 60% of maximum stand density index) . . . to avoid the health risks  
 2 associated with density. Design thinnings to ensure that this level will not be reached again for  
 3 at least 20 years after thinning.” AR1454 (emphasis in original). The stated purpose of this  
 4 Conifer Density Standard is to reduce conifer mortality—i.e., prevent future recruitment of  
 5 snags. AR1454, 1994. The Champs EA touts achievement of this goal as implementation of the  
 6 project in accordance with the Conifer Density Standard; however, implementation will result in  
 7 a reduction of future large snag densities across more than 7,000 acres by reducing tree mortality  
 8 due to competition. AR2147.

9 As discussed above, the Conifer Density Standard prescribes national forest resource uses  
 10 in Region 5 that differ from those previously prescribed in the 2004 Framework. The practical  
 11 effects on wildlife from implementing this program across the Sierra Nevada forests would be  
 12 nothing short of catastrophic. Hanson Dec. ¶19. Currently, there is a pervasive deficiency of  
 13 large snags in California’s forests, with less than 2 large snags per acre presently existing in  
 14 every region, including the Sierra Nevada. Hanson Dec. ¶15. In ponderosa pine forests in  
 15 California, such as those that dominate the Champs project area, AR2693, the large snag deficit  
 16 is currently even greater, with only 0.6 snags per acre statewide. Hanson Dec. ¶15. According  
 17 to the Forest Service’s own stand examination data gathered for the Champs project, there is on  
 18 average less than one large snag per acre in the Champs project area. AR1638-1799; 9301-02,  
 19 9313 (Table); 9313; Hanson Dec. ¶16 and Ex. B (FOIA response letter and Table).<sup>10</sup> Application  
 20 of the Conifer Density Standard, with its goal of avoiding “health risks” by reducing tree  
 21 mortality from competition and native bark beetles, will do nothing to reverse this trend and will  
 22 not create conditions necessary to sustain a continuous supply of large snags across the  
 23 landscape. Hanson Dec. ¶19; AR1454, 1994.

24 In the Sierra Nevada mature dense forests, numerous species depend upon an abundant  
 25

---

26 <sup>10</sup> More specifically in the Champs project area, within the eastside pine forest type, which comprises  
 27 just under 70% of the area proposed for logging, AR2693, current density of large snags averages about  
 28 one per 5-10 acres (less than 0.20 per acre). AR9313. This means that current large snag densities on  
 over 2/3rds of the project area are about *one-fifteenth* of the minimum levels needed for wildlife. Hanson  
 Dec. ¶16.

1 supply of large snags for their survival. Species such as the California Spotted Owl, Hairy  
2 Woodpecker, and Pileated Woodpecker, need large snags for their nests, which are either created  
3 for them (by branches or the top breaking off a dead tree) in the case of the spotted owl, or  
4 through their own industry, as in the case of woodpeckers. Hanson Dec. ¶14 Dead trees offer  
5 softer bark and wood, which allows woodpeckers to establish nest cavities and also enables food  
6 sources, such as bark beetles, to take up residence. Hanson Dec. ¶14. Naturally occurring  
7 cavities are also inhabited by small mammals (preyed upon by spotted owls), such as the flying  
8 squirrel, and cavities initially created by woodpeckers change hands several times over the life of  
9 a snag providing shelter for species such as the mountain blue-bird and red-breasted nuthatch.  
10 *Id.*, See also AR 5742 (Ch. 4, p. 72) (Verner et al. 1992) (Voss Dec., Ex. C). Many of these snag  
11 dependent species are either sensitive species or species at risk, meaning that there is a concern  
12 about the viability of their populations, and/or their populations are in decline. *Id.* Without an  
13 adequate number and distribution of snags, these species, as well as dozens of other species with  
14 similar habitat requirements will not be able to survive and would be at serious risk of extirpation  
15 or extinction in the national forests of Region 5 if the Conifer Density Standard is fully  
16 implemented. Hanson Dec. ¶¶14, 15, 19. Pursuant to NEPA, the significant harm to snag  
17 dependent wildlife species that may flow from implementation of the Conifer Density Standard  
18 must be analyzed in an EA or EIS. See *Blue Mtn. Biodiversity Project*, 161 F.3d at 1212 (to  
19 prevail on a claim that the Forest Service violated its duty to prepare an EIS, plaintiff need not  
20 show that significant effects will in fact occur; it is enough for plaintiff to raise substantial  
21 questions as to whether there will be significant environmental effects).

22 The present case is similar to Plaintiffs' challenge of the Forest Service's "new mapping  
23 directive" in the Wallowa-Whitman National Forest in Oregon. In that case, the court held that  
24 the Forest Service's directive had environmental effects on Canada lynx habitat and required  
25 analysis in an EA or EIS. See *Oregon Natural Resources Council v. Forsgren*, 252 F. Supp. 2d  
26 1088 (D. Or. 2003) ("ONRC"). Explaining that "major federal actions include new or revised  
27 agency policies such as those that guide or prescribe alternative uses of Federal resources, upon  
28 which future actions will be based," the court concluded that the Forest Service's new mapping

1 direction had substantial effects by significantly changing the nature and the extent of lynx  
2 habitat. *Id.* at 1104-05. It held that, because the directive allowed the elimination of thousands  
3 of acres of lynx habitat in future projects, the Forest Service was required under NEPA to  
4 prepare an EA with public involvement to determine whether its new mapping direction might  
5 significantly affect the lynx in the forest and whether it should prepare an EIS. *Id.*

6 Similarly, because the Conifer Density Standard results in the elimination of wildlife  
7 habitat by preventing future snag recruitment, and agency managers must base their future  
8 project decision upon this standard, it is a major federal action that requires NEPA analysis. *See*  
9 40 C.F.R. § 1508.18(b). In order to assess the impacts of this program on the wildlife species it  
10 would affect, the Forest Service should have prepared an EA or an EIS before applying the  
11 Conifer Density Standard to projects such as Champs.

12 **B. The Conifer Density Standard is a Mandatory Directive that Agency  
13 Managers Must Follow**

14 The Forest Service asserts that its conifer density management directive is not a standard.  
15 D's Answer ¶38. According to the letter, however, discretionary application of this directive  
16 cannot be considered an option. Because the letter directs that managers, when thinning, must  
17 "ensure" that density does not exceed 60% of SDI-Max and must "ensure" that this level will not  
18 be reached again for at least 20 years after thinning, AR1454, this directive takes the form of a  
19 mandatory standard. Moreover, the Champs Project applies the directive like a standard in its  
20 Purpose and Need Statement, by eliminating from detailed study any action alternatives that did  
21 not meet its requirements. AR2034, 2037-38. Thus, as evidenced by their own actions, agency  
22 managers have interpreted the Conifer Density Standard as a standard which must be followed.

23 A recent court opinion concisely sums up why a Court should look to the challenged  
24 policy or program rather than rely on post hoc statements such as the assertion made here, during  
25 litigation (D's Answer ¶38), that the Conifer Density letter is not a standard: "It is the content of  
26 the [document]—not a statement of the document's intended function—that is the basis for the  
27 determination of whether it is a decisional document." *People of California v. U.S. Forest*  
28 *Service*, 2005 WL 1630020, \*6-9 (N.D. Cal. July 11, 2005) (*see* Voss Declaration, Exhibit A).

1 **III. FAILURE TO CONSIDER A REASONABLE RANGE OF ALTERNATIVES**

2 NEPA requires the Forest Service to include in its EIS a “detailed statement . . . on . . .  
3 alternatives to the proposed action.” 42 U.S.C. § 4332(C)(iii). “NEPA regulations describe this  
4 alternatives requirement as the ‘heart’ of the EIS and require the agency to produce an EIS that  
5 ‘[r]igorously explore[s] and objectively evaluate[s] all reasonable alternatives’ so that the agency  
6 can ‘sharply defin[e] the issues and provid[e] a clear basis for choice among options by the  
7 decisionmaker and the public.’” *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1120 (9th  
8 Cir. 2002) (quoting 40 C.F.R. § 1502.14(a)). “The existence of a viable but unexamined  
9 alternative renders an [EIS] inadequate.” *Natural Resources Defense Council v. U.S. Forest*  
10 *Service*, 421 F.3d 797, 813 (9th Cir. 2005) (quoting *Citizens for a Better Henderson v. Hodel*,  
11 768 F.2d 1051, 1057 (9th Cir. 1985)). The “alternatives provision” of 42 U.S.C. § 4332(2)(E)  
12 applies whether an agency is preparing an EIS or an EA and requires the agency to give full and  
13 meaningful consideration to all reasonable alternatives. *Native Ecosystems Council v. U.S.*  
14 *Forest Service*, 428 F.3d 1233, 1245 (9th Cir. 2005); see *Bob Marshall Alliance v. Hodel*, 852  
15 F.2d 1223, 1229 (9th Cir. 1988) (The alternatives requirement is triggered where unresolved  
16 conflicts as to the proper use of resources exist, whether or not an EIS is required).

17 Reasonable alternatives are those that are viable, feasible, meet the stated goals of the  
18 project, or are reasonably related to the purposes of the project. *Idaho Conservation League v.*  
19 *Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992); *City of Carmel-By-The-Sea v. U.S. Dept. of*  
20 *Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997); *Trout Unlimited v. Morton*, 509 F.2d 1276, 1286  
21 (9th Cir. 1974). An agency must look at every reasonable alternative, with the range dictated by  
22 the nature and scope of the proposed action, sufficient to permit a reasoned choice. *Idaho*  
23 *Conservation League*, 956 F.2d at 1520. But the agency cannot contrive the project’s purpose so  
24 narrowly that competing reasonable alternatives cannot be fully considered. *City of Carmel*, 123  
25 F.3d at 1155. The “rule of reason” guides the choice of alternatives, the extent to which the  
26 agency must discuss each alternative, and whether the agency defined the project’s purposes too  
27 narrowly to allow consideration of alternatives. *Id.*; see *Simmons v. U.S. Army Corps of*  
28 *Engineers*, 120 F.3d 664, 666 (7th Cir. 1997) (noting that “[o]ne obvious way for an agency to

1 slip past the strictures of NEPA is to contrive a purpose and need so slender as to define  
2 competing reasonable alternatives out of consideration (and even out of existence).”).

3 “Thus, a court begins by determining whether or not the Purpose and Need Statement  
4 was reasonable.” *Westlands Water Dist. v. U.S. Dept. of Interior*, 376 F.3d 853, 865 (9th Cir.  
5 2004). The “touchstone” for the Court’s inquiry is whether the “selection and discussion of  
6 alternatives fosters informed decision-making and informed public participation.” *California v.*  
7 *Block*, 690 F.2d 753, 767 (9th Cir. 1982).

8 **A. The Forest Service’s Reliance on its Conifer Density Standard Unreasonably**  
9 **Narrowed the Project’s Purpose and Need**

10 Agencies cannot rely on an illegal action to eliminate full consideration of alternatives.  
11 *Cf. Oregon Nat. Resources Council Action v. U.S. Forest Service*, 293 F. Supp. 2d 1200, 1209  
12 (D. Or. 2003) (the underlying EAs for the timber sales at issue did not properly frame the Forest  
13 Service’s survey and manage duties and did not analyze a range of alternatives based upon these  
14 duties). Here, the Forest Service’s reliance on an illegal directive (the Conifer Density Standard)  
15 to narrow the Champs Purpose and Need Statement and reject detailed analysis of proffered  
16 alternatives was unreasonable. Moreover, the Conifer Density Standard unreasonably narrowed  
17 the Purpose and Need Statement because its application inherently conflicts with the Forest Plan  
18 standard to sustain a continuous supply of large snags across the landscape.

19 In Section II above, Plaintiff presents its claim that the Forest Service’s failure to analyze  
20 its Conifer Density Standard in an EA or EIS was unreasonable. If the Court agrees, we request  
21 that the Court find that the Forest Service’s reliance on this Standard, which narrowed the  
22 Purpose and Need Statement to reject full analysis of alternatives, was also unreasonable.

23 The Champs EA states that the Purpose and Need for the Champs Project is to reduce the  
24 risk of severe fire, improve “forest health” by complying with the Conifer Density Standard, and  
25 implement the Quincy Library Group Plan Record of Decision (QLG ROD) by conducting  
26 thinning and group selection logging. AR1991-98. Plaintiff asserted that the Forest Service  
27 could meet these project objectives with less intensive logging alternatives (12”, 16”, and 20”  
28 diameter limit alternatives, specifically) rather than logging medium and large trees 12-20” and

1 20-30” in diameter, and urged full consideration of these alternatives. AR1592-1608, 9285-  
 2 9319. The Champs EA concluded that 12 and 20 inch diameter limits would effectively achieve  
 3 the goal of fire risk reduction, but the Forest Service claimed that they would not comply with  
 4 the Conifer Density Standard or meet the QLG ROD’s goal of economic viability and rejected  
 5 full analysis of these alternatives.<sup>11</sup> AR2033-35, 2037-38. The Forest Service, however, has  
 6 implemented numerous projects under the QLG ROD with 12 to 20 inch diameter limits, and has  
 7 found that such projects satisfy the goals of the QLG ROD. Hanson Dec. ¶ 20. The main crux  
 8 of the Forest Service’s rejection of full analysis of Plaintiff’s proffered alternatives, however, lies  
 9 with the unreasonable application of the Conifer Density Standard to this project. The EA states  
 10 that the Forest Service did not study the 12 and 20 inch diameter limit alternatives (Alt. 6 & 8) in  
 11 detail because they did not meet the purpose and need for maintaining SDI at or below 60% of  
 12 SDI-Max for 20 years, referring to the Conifer Density Standard. AR2034; 2037-38.

13 The Forest Service’s reliance on the Conifer Density Standard to curtail rigorous  
 14 exploration of reasonable alternatives and thus avoid a hard look at the impacts of the project , is  
 15 similar to circumstances where a project EA or EIS relies on or “tiers”<sup>12</sup> to another document  
 16 that has not been subjected to a NEPA analysis to avoid analysis of impacts. The Ninth Circuit  
 17 recently reaffirmed that such reliance, on a non-NEPA document, is not allowed. *League of*  
 18 *Wilderness Defenders-Blue Mts. Biodiversity Project v. U.S. Forest Service*, 549 F.3d 1211,  
 19 1219 (9th Cir. 2008) (citations omitted).

20 Furthermore, as discussed in Section II above, the Conifer Density Standard is inherently  
 21 inconsistent with the 2004 Framework because the framework contains minimum large snag  
 22 targets for wildlife (3 large snags per acre in eastside forests), which must be sustained across the  
 23 landscape overtime, AR9409 (SNFPA 2004 ROD, pp. 51-52), while the Conifer Density  
 24

---

25 <sup>11</sup> Although Plaintiff suggested a 16” diameter limit as well, the Forest Service does not discuss this  
 26 as an alternative, but rather focused only on dismissing the 12” and 20” alternatives from consideration.  
 It stands to reason that if neither 12” nor 20” was acceptable a 16” diameter limit would also be rejected.

27 <sup>12</sup> “Tiering” refers to the coverage of general matters in broader environmental impact statements  
 28 (such as a program or policy statements) with subsequent narrower statements or environmental analyses  
 (such as site-specific statements) incorporating by reference the general discussions and concentrating  
 solely on the project-specific issues. 40 C.F.R. § 1508.28; *see also* 40 C.F.R. § 1502.20.

1 Standard would virtually prevent the future recruitment of large snags in the project area.  
2 Hanson Dec. ¶¶16, 17, 19. Because there is a pervasive deficiency of large snags across the  
3 Sierra Nevada landscape and the Champs Project area, Hanson Dec. ¶¶15-17, 19, and because the  
4 Conifer Density Standard would reduce future snag recruitment, *id.*, application of this directive  
5 will result in a violation of current Forest Plan standards.<sup>13</sup> Therefore, it would be unreasonable  
6 for the agency to use this Standard to limit alternatives.

7 Because the Conifer Density Standard has not been subjected to NEPA analysis and is  
8 contrary to existing Forest Plan standards, the Forest Service reliance on it to narrow the purpose  
9 and need of the Champs Project such that the 12, (16) and 20-inch diameter limit alternatives  
10 were dismissed from full consideration was arbitrary and capricious and in violation of NEPA.

11 **B. Reasonable Alternatives Not Fully Considered**

12 Even if this Court were to find that the Forest Service could rely on the Conifer Density  
13 Standard, both the use of an erroneous SDI-Max value and the erroneous and uneven comparison  
14 of current and historic basal area densities resulted in the Forest Service illegally eliminating  
15 from detailed study lower diameter limit alternatives which were viable, feasible and met the  
16 stated goals of the project.

17 As referenced in Section I.A. above, had the Forest Service utilized the correct maximum  
18 stand density index value (SDI-Max) of 571 for ponderosa pine, limiting thinning to the removal  
19 of trees up to 12 inches in diameter, it would result in stands being well within or below the  
20 Champs EA's stated target of 35-50% of SDI-Max. Pinjuv Dec. ¶15; AR3252-3412. Likewise,  
21 thinning trees up to 20 inches in diameter would also result in all stands being less than 35-50%  
22 of SDI-Max. *Id.* ¶14.

23 Moreover, had the Forest Service used the same methodology to compare current and  
24 historic basal area densities, as discussed in Section I.B, it would have been apparent that  
25 existing conditions are no different from historic conditions in terms of basal area in trees over  
26 12 inches in diameter. Hanson Dec. ¶¶11-13. Thus, the thinning of trees over 12 inches in  
27

28 <sup>13</sup> 16 U.S.C. § 1604(i) requires that all projects be consistent with the applicable forest plan.

1 diameter to restore historic conditions would not be necessary and rejection of a 12 inch  
2 alternative from consideration was not reasonable.

3           Regardless of the legality of the Conifer Density Standard, because the Forest Service  
4 could have met stand density targets by using correct SDI-Max values or by using consistent  
5 methodologies to match current to historic basal area densities, thinning prescriptions that  
6 impose diameter limits of 12 to 20 inches were reasonable, and the Forest Service violated  
7 NEPA when they dismissed full consideration of these alternatives. *Cf. Sierra Nevada Forest*  
8 *Protection Campaign v. Tippin*, 2006 WL 2583036, \*5-9 (E.D. Cal. Sept. 6, 2006) (finding that  
9 the Lassen NF unreasonably eliminated from consideration 12 and 20 inch diameter limit  
10 alternatives, similar to Alts. 6 & 8 in the Champs Project) (Voss Dec., Ex. B).

#### 11 **IV. FAILURE TO TAKE A HARD LOOK AT IMPACTS**

12           NEPA establishes procedural requirements to ensure that agencies take a hard look at the  
13 environmental impacts of their actions, including the consideration of all foreseeable direct and  
14 indirect impacts and a candid discussion of adverse impacts—one that does not improperly  
15 minimize negative side effects. *Earth Island II*, 442 F.3d at 1154, 1159 (citing *Kern*, 284 F.3d at  
16 1066; *Idaho Sporting Cong. v. Rittenhouse*, 305 F.3d 957, 973 (9th Cir. 2002); and *Native*  
17 *Ecosystems Council*, 428 F.3d at 1241). The Forest Service, therefore, must “undertake a  
18 thorough environmental analysis before concluding that no significant environmental impact  
19 exists.” *Earth Island II*, 442 F.3d at 1159 (citing *Native Ecosystems Council*, 428 F.3d at 1239).  
20 In reviewing the adequacy of an EIS, the Ninth Circuit applies the “rule of reason” standard,  
21 “which requires ‘a pragmatic judgment whether the EIS’s form, content and preparation foster  
22 both informed decision-making and informed public participation.’ ” *Native Ecosystems*, 418  
23 F.3d at 960 (9th Cir. 2005) (quoting *California v. Block*, 690 F.2d 753, 761 (9th Cir.1982)). The  
24 “hard look” requirement applies equally to EAs. *See e.g. Klamath-Siskiyou Wildlands Center v.*  
25 *Bureau of Land Management*, 387 F.3d 989, 993 (9th Cir. 2004); *Metcalf v. Daley*, 214 F.3d  
26 1135, 1142 (9th Cir. 2000).

27           The Champs Project was designed to drastically reduce current forest stand density across  
28

1 7,000 acres<sup>14</sup> in order to reduce competition between trees and thus greatly curtail future tree  
2 mortality. AR1994, AR2147. The Champs Decision Notice found that this drastic stand  
3 reduction and accompanying elimination of many of the snags that would otherwise occur in  
4 denser forests over time “will not have a significant effect” on the environment. AR 1974. The  
5 EA claimed the Champs Project is being proposed to promote “forest health,” AR1994, even  
6 though there currently is a severe shortage of large snags throughout forests in California, and in  
7 the Champs project area in particular (in majority of project area <0.20 snags per acre), and even  
8 though large snags are an essential forest ecosystem component necessary for the survival of  
9 numerous wildlife species including woodpeckers, flying squirrels etc. (Hanson Dec. ¶14-19; AR  
10 5742 (Ch. 4, p. 72 attached to Voss Dec., Ex. C)), and despite the requirement to sustain  
11 minimum numbers (at least 3 large snags per acre) by the Forest Plan (*see* discussion *supra*,  
12 section IV.A). AR9409 (2004 SNFPA, p. 51). Neither the EA nor the wildlife Biological  
13 Evaluation (BE) explain how severely reducing the number of future large snags for at least the  
14 next three decades: (a) would promote the “health” of snag dependent wildlife species living in  
15 the forest; and/or (b) would not have a significant effect on these species. AR 1985-2262, 2675-  
16 2786, Hanson Dec. ¶16.

17 One of the species in the Champs project area that needs abundant large snags in order to  
18 survive is the California spotted owl, a Region 5 sensitive species, which is currently in decline.  
19 Hanson Dec. ¶14. The EA readily admits that “increased tree mortality and high levels of future  
20 snag . . . recruitment . . . could benefit some aspects of habitat for spotted owls and their prey.”  
21 AR2059 (EA, p. 75). Yet, nowhere in the EA or BE does the Forest Service provide any analysis  
22 about the adverse environmental effects to the California spotted owl, of inhibiting large snag  
23 recruitment through the implementation of the Champs project. AR 2041-71, 2693-94, and  
24 2796-2732. Reductions in stand density also result in reductions in basal area. AR1994.  
25 California spotted owls depend upon dense, mature forest with at least 180 square feet of basal  
26

---

27 <sup>14</sup> Given the use of an erroneous value for SDI-Max, the actual reduction in forest stands in the  
28 Champs project area will actually be much more severe than articulated in the EA, and will thus likely  
prevent the recruitment of large snags for longer than 30 years. Hanson Dec., ¶ 16.

1 area per acre. Hanson Dec. ¶14. The Champs project intends to reduce basal area to 80-140 sq.  
 2 ft. per acre in most of the project area (DFPZs) and 60-80 sq. ft. per acre in individual tree  
 3 selection areas. AR1994-96. Again, the Forest Service did not analyze the resulting impact of  
 4 this reduction in basal area to levels that make spotted owl habitat unsuitable. AR2041-71, 2693-  
 5 94, and 2796-2732.

6 The need for an analysis of the adverse impacts to wildlife from the long-term reduction  
 7 of future large snags, which will result from the proposed logging, is even more crucial because  
 8 most of the proposed logging is concentrated in the dense, mature forest types (CWHR 4M and  
 9 4D)<sup>15</sup> which are most likely to produce additional large snags in the future due to competition.  
 10 AR 2693. These forest types are rare, have declined overall, and are depended upon by  
 11 imperiled species such as the Pileated woodpecker and the California spotted owl. AR1404  
 12 (Table 8); Hanson Dec. ¶¶14, 18. Once these stands structures are reduced through logging, they  
 13 will not only be less suitable for wildlife species, they will also be less able or likely to produce  
 14 future snags, and thus there will be even less forest in the project area that would maintain this  
 15 capability. Hanson Dec. ¶16, 18, 19. The Forest Service's failure to disclose the adverse effects  
 16 to wildlife from reducing future snag densities means that the agency has violated NEPA by  
 17 failing to take a "hard look" at the adverse environmental impacts of the Champs Project.

## 18 **V. INJUNCTIVE RELIEF IS APPROPRIATE**

19 To obtain permanent injunctive relief, a plaintiff must show: (1) irreparable injury; (2)  
 20 inadequacy of legal remedies, such as monetary damages; (3) that an equitable remedy is  
 21 warranted, considering the balance of hardships between the plaintiff and defendant; and (4) that  
 22 a permanent injunction would not disserve the public interest. *Geertson Seed Farms v. Johanns*,  
 23 541 F.3d 938, 943 (9th Cir. 2008). "In the NEPA context, irreparable injury flows from the  
 24 failure to evaluate the environmental impact of a major federal action." *Sierra Club v. Bosworth*,  
 25 510 F.3d 1016, 1034 (9th Cir. 2007) (internal quotations omitted).

---

27 <sup>15</sup> California Wildlife Habitat Relationship (CWHR) categories 4M and 4D are defined as having an  
 28 average tree size between 11 and 24 inches in diameter with canopy cover between 40-60% (M) or 60-  
 100% (D). AR 2690.

1 When determining whether injunctive relief is appropriate, the “traditional balancing of  
 2 harms applies in the environmental context.” *Geertson Seed Farms*, 541 F.3d at 943. Injunctive  
 3 relief, however, is typically appropriate in environmental cases because “ ‘[e]nvironmental  
 4 injury, by its nature, can seldom be adequately remedied by money damages and is often  
 5 permanent or at least of long duration, *i.e.*, irreparable.’ ” *Northern Cheyenne Tribe v. Norton*,  
 6 503 F.3d 836, 843 (9th Cir. 2007) (quoting *Amoco Prod. Co. v. Village of Gambell*, 480 U.S.  
 7 531, 545 (1987)). Moreover, it is well settled that “the presence of strong NEPA claims gives  
 8 rise to more liberal standards for granting an injunction.” *Sierra Club v. Bosworth*, 510 F.3d at  
 9 1033. The Ninth Circuit has made clear that, “absent unusual circumstances, an injunction is the  
 10 appropriate remedy for a violation of NEPA’s procedural requirements.” *Thomas v Peterson*,  
 11 753 F.2d 754, 764 (9th Cir. 1985); *see Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d  
 12 722, 737 n.18 (9th Cir. 2001) (NEPA violation justified injunctive relief). In the NEPA context,  
 13 those opposing an injunction must “present evidence to the court that ‘unusual circumstances’  
 14 weigh against the injunction sought.” *Forest Conservation Council v. U. S. Forest Service*, 66  
 15 F.3d 1489, 1496 (9th Cir. 1995).

16 **A. Plaintiff Will Suffer Irreparable Harm Absent an Injunction, and Monetary**  
 17 **Damages are Inadequate**

18 An injury is “irreparable” where it cannot be adequately remedied by money damages or  
 19 other legal remedies, where such injury is “permanent or at least of long duration,” *Amoco*  
 20 *Production Co., v. Village of Gambell*, 480 U.S. 531, 545 (1987), and where failure to enter the  
 21 injunction would essentially render final judgment useless. *Doran v. Salem Inn, Inc.*, 422 U.S.  
 22 922, 932 (1975).

23 Most of the 7,000 acres of planned logging in the Champs project area would occur in  
 24 mature, closed-canopy forest stands, which are defined as California Wildlife Habitat  
 25 Relationships (“CWHR”) 4M and 4D (forest stands comprised of trees 11-24 inches in diameter  
 26 and canopy cover of 40-60% (4M) or over 60% (4D)). AR2066, 2690. Specifically over half of  
 27 the group selection logging, 148 acres, and 5,016 acres of mechanical thinning would occur in  
 28 these mature forest stands. AR2693 (Table 11). CWHR 4M stands are in decline in the eastside

1 forests of the Eagle Lake Ranger District, where the Champs project is planned and, along with  
2 CWHR 4D stands, are one of the rarest and most limited forest structural in this District.  
3 AR1404 (Table 8). In fact, the QLG Final EIS found that, in eastside forests of the QLG project  
4 area<sup>16</sup> due to past logging, H-3B/C stands (equivalent to CWHR 4M/4D), AR 9291-92, have  
5 decreased since historic times, and that group selection logging in such stands would further  
6 decrease and “adversely impact[]” these rare habitat structures, creating a “further imbalance” in  
7 the habitat structure of the eastside forests. AR9385 (QLG FEIS, pp. 3-58). In addition, on  
8 1,210 acres, many occurring within CWHR 4M/4D, trees between 20-30 inches in diameter  
9 would be removed, AR1967, primarily ponderosa pine. Large ponderosa pines in and around the  
10 Champs project area extremely old trees. AR0284-85. Ponderosa pines 20-24.9 inches in  
11 diameter are on average 203.5 years old and ponderosa pines 25-29.9 inches in diameter are on  
12 average 275.3 years old. *Id.* Thus, once these trees are removed from the landscape it will take  
13 three to four human lifetimes for them to regrow.<sup>17</sup>

14 The removal of trees in mature dense forest proposed by this logging project would  
15 degrade current forest stands to below suitability for the California spotted owls, in an area  
16 which was designated in 1992 by the California Spotted Owl Technical Assessment (Verner et  
17 al. 1992) as a California Spotted Owl Area of Concern (AOC). AR2727-29. These Areas of  
18 Concern were designated to alert managers to the fact that any adverse impacts to spotted owl  
19 habitat in these areas are disproportionately large and the risks to spotted owls posed by habitat  
20 degradation are exceptionally severe. AR 5742 (Ch. 1, p. 6; Ch. 3, p. 45) (Voss Dec., Ex. C).  
21 The Forest Service’s Verner et al. (1992) study defined suitable spotted owl foraging habitat as  
22 having at least 180-220 square feet per acre of basal area in live trees. AR294-296; AR5742  
23 (Ch. 1, p. 24 , Table 1-H) (Voss Dec., Ex. C). The Champs Project would render approximately  
24 731 acres of California spotted owl habitat unsuitable by intensively logging trees up to 20 in  
25 diameter and reducing basal area 80-140 square feet per acre, creating forest stand conditions

---

26 <sup>16</sup> The Champs Project is in the QLG project area, which includes Lassen National Forest. AR9402.

27 <sup>17</sup> Across the rest of the logging project thousands of trees just under 20 inches in diameter would be  
28 logged, AR 1967, and even these trees will not be replaced on the landscape in our lifetime. AR 0283  
(ponderosa pines 15-19.9 inches in diameter are on average 153.5 years old).

1 which would inhibit the creation of large snags into the future. AR1969, 1994; Hanson Dec.  
2 ¶¶16-17. These changes in habitat conditions could result in the extirpation of spotted owls from  
3 this area.<sup>18</sup> Hanson Dec. ¶¶16-17.

4 In addition to causing irreparable harm to wildlife from the removal of medium and large  
5 trees from dense mature forest, the Champs logging project would cause irreparable injury to  
6 snag dependent species, such as woodpeckers, bats and cavity nesting mammals, by insuring that  
7 these currently snag-deficient forests would not reach the density necessary to naturally create  
8 large snags needed by wildlife, creating an even more extreme deficit of large snags for the next  
9 thirty years. Hanson Dec. ¶¶14-17; AR 3413-3740. The virtual elimination of these forests  
10 stands' ability to create a continuous supply of large snags overtime could result in the  
11 extirpation or extinction of snag dependent wildlife species in this project area, and throughout  
12 the Sierra Nevada if the Conifer Density Standard is allowed to be implemented without  
13 environmental review. Section, II.A. *supra*; *see also* Hanson Dec. ¶¶14-19.

14 All of the harms outlined above would occur as soon as the trees are felled, and their  
15 effects would be widespread (affecting dozens of wildlife species) and of long duration. No  
16 amount of money damages could replace what the logging would take away and without an  
17 injunction, final judgment in favor of plaintiffs would be meaningless. Consistent with the case  
18 law in the Ninth Circuit, this is exactly the type of irreparable harm which would support the  
19 issuance of an injunction. *See e.g., Earth Island Institute v. U.S. Forest Service*, 351 F.3d 1291,  
20 1299 (9th Cir. 2003) (Ninth Circuit has often held that a Forest Service logging project can  
21 fulfill the irreparable injury criterion for granting of an injunction due to its long term  
22 environmental consequences.); *Neighbors of Cuddy Mountain v. U. S. Forest Service*, 137 F.3d  
23 1372, 1382 (9th Cir. 1998) (injunction issued because the forests “would, if cut, take hundreds of  
24 years to reproduce”); *Sierra Club v. Eubanks*, 335 F. Supp.2d at 1082-84 (logging was enough to  
25 issue an injunction because once the trees are removed from the landscape they cannot be  
26 replaced); *Earth Island II*, 442 F.3d at 1169-73, *cert. denied*, 127 S. Ct. 1829 (2007) (logging of

---

27  
28 <sup>18</sup> As discussed previously in Section III above, the Forest Service utterly failed to assess the harm to  
owls from the reduction in basal area and snag densities which would result from the Champs project.

1 several thousand acres of California spotted owl habitat constitutes irreparable harm);  
 2 *Environmental Protection Information Center v. Blackwell*, 389 F. Supp. 2d 1174, 1221 (N.D.  
 3 Cal. 2004) (injunction necessary because there is no “. . . means to replace such trees in any  
 4 meaningful fashion since it takes years for such trees to mature.”); and *Lands Council v. Martin*,  
 5 479 F.3d 636, 643 (9th Cir. 2007) (logging constitutes “a permanent environmental injury”).

6 In addition to the irreparable harm to rare mature forest and wildlife habitat from the  
 7 proposed logging, “[i]n the NEPA context, irreparable injury flows from the failure to evaluate  
 8 the environmental impact of a major federal action.” *Sierra Club*, 510 F.3d at 1033 (quoting  
 9 *High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d 630, 642 (9th Cir. 2004)); *see also National*  
 10 *Parks & Conservation Ass’n*, 241 F.3d at 737 n.18 (“[B]ecause NEPA is a purely procedural  
 11 statute, the requisite harm is the failure to follow the appropriate procedures.”).

12 **B. The Balance of Hardships Tips Decidedly in Plaintiffs’ Favor.**

13 “[I]f environmental injury is sufficiently likely, the balance of harms will usually favor  
 14 the issuance of an injunction to protect the environment.” *Sierra Club*, 510 F.3d at 1033  
 15 (quoting *Amoco Prod. Co.*, 480 U.S. at 545); *Idaho Sporting Congress, Inc. v. Alexander*, 222  
 16 F.3d at 569; *see also Earth Island Institute*, 351 F.3d at 1299. Where a party demonstrates  
 17 irreparable harm to the environment and requests an injunction to prevent such harm, an  
 18 opposing party must show that “unusual circumstances” exist that weigh against the request. *See*  
 19 *Forest Conservation Council*, 66 F.3d at 1496; *EPIC*, 389 F. Supp. 2d 1174, 1184 (“Absent  
 20 documentation of such ‘unusual circumstances,’ injunctive relief typically follows from a finding  
 21 of a violation of NEPA . . .”).

22 There are no unusual circumstances here that would counsel against issuing an  
 23 injunction. The injunction sought by Plaintiff would allow the Forest Service to proceed with  
 24 limited thinning to address fire risks<sup>19</sup> (see Plaintiff’s “Requested Relief”), while the agency  
 25 adequately analyzes the Conifer Density Standard and the Champs Project under NEPA. In  
 26 addition, no contract has been advertised or awarded, nor will it be prior to a hearing on this

27 \_\_\_\_\_  
 28 <sup>19</sup> The Champs EA clearly states that the Forest Service’s fire risk reduction goals could be met  
 utilizing an 8 or 12 inch diameter limit. AR 2034.

1 matter, thus no financial loss can be asserted. *See* Joint Status Report, p.4 (Doc. # 14); *see also*  
2 *Earth Island II*, 442 F.3d at 1177. As discussed above, Plaintiff will suffer irreparable injury if  
3 logging is allowed to proceed absent compliance with NEPA. The Forest Service, however, has  
4 no valid interest in violating the law and will not suffer any harm if the Court enjoins  
5 implementation of the Champs Project until it has complied with the law. *See Neighbors of*  
6 *Cuddy Mountain*, 137 F.3d at 1382 (because the Forest Service should have done the analysis in  
7 the first instance, it is difficult to ascertain how it can suffer prejudice by having to do so now).

8 **C. The Public Interest Favors the Issuance of an Injunction in this Case.**

9 In actions to protect the environment, “the public’s interest in preserving precious,  
10 unreplaceable resources must be taken into account in balancing the hardships.” *Kootenai*  
11 *Tribe*, 313 F.3d at 1125; *see also Neighbors of Cuddy Mountain*, 137 F.3d at 1382 (noting that  
12 the old forests plaintiffs seek to protect “will be enjoyed not principally by plaintiffs and their  
13 members but by many generations of the public”). Ultimately, this case is about compliance by  
14 the Forest Service with the law. As the court stated in *Seattle Audubon Soc’y v. Evans*, “[t]his  
15 invokes a public interest *of the highest order*: the interest in having government officials act in  
16 accordance with the law.” 771 F. Supp. at 1096 (emphasis added). Moreover, because Plaintiff  
17 requests a tailored injunction that allows limited fuel reduction treatments, there would be no fire  
18 risk associated with the injunction, nor would there be a risk of excessive mortality in the  
19 Champs project area because the stands are nowhere near as dense as Defendants claim.  
20 Therefore, the public interest would be served by issuance of an injunction.

21 **CONCLUSION**

22 For the foregoing reasons, this Court should grant Plaintiff’s motion for summary  
23 judgment and grant Plaintiff’s requested declaratory and injunctive relief.

24 Respectfully submitted this 30th day of January 2009,

25 /s/ René Voss  
RENÉ P. VOSS

26 /s/ Rachel M. Fazio (as approved 1/30/2009)  
27 RACHEL M. FAZIO

28 Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2009, I served a true and correct copy of this Memorandum in Support of Plaintiff's Motion for Summary Judgment and Injunctive Relief with the Clerk of the Court using the CM/ECF system, thus effecting service on upon all the parties and the following attorneys of record:

Jared S. Pettinato  
[Jared.Pettinato@usdoj.gov](mailto:Jared.Pettinato@usdoj.gov)

/s/ René Voss  
RENÉ P. VOSS