

SAM HIRSCH
Acting Assistant Attorney General
Environment & Natural Resources Division
United States Department of Justice
DAVID B. GLAZER (D.C. 400966)
Natural Resources Section
301 Howard Street, Suite 1050
San Francisco, California 94105
Tel: (415) 744-6491
Fax: (415) 744-6476
E-mail: david.glazer@usdoj.gov
DEAN DUNSMORE
Natural Resources Section
c/o U.S. Attorney's Office
222 W 7th Avenue, Room 253 #9
Anchorage, Alaska 99513
Tel: (907) 271-4273
Fax: (907) 271-1505
E-mail: dean.dunsmore@usdoj.gov

Attorneys for Federal Defendant

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

CASCADIA WILDLANDS, *et al.*,

Plaintiffs,

v.

FORREST COLE, *et al.*,

Defendants.

No. 1:14-cv-00015-RRB

FEDERAL DEFENDANTS' BRIEF IN
OPPOSITION TO PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT

Hon. Ralph R. Beistline

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TABLE OF ACRONYMS

ADFG	Alaska Department of Fish and Game
ANILCA	Alaska National Interest Lands Conservation Act
APA	Administrative Procedure Act
AR	Administrative Record
DEIS	Draft Environmental Impact Statement
FEIS	Final Environmental Impact Statement
GMU	Game Management Unit
MMBF	Million board feet (a measure of timber volume)
MUSYA	Multiple-Use Sustained-Yield Act
NEPA	National Environmental Policy Act
NFMA	National Forest Management Act
OGR	Old Growth Reserve
POG	Productive Old Growth
ROD	Record of Decision
SEIS	Supplemental Environmental Impact Statement
SIR	Supplemental Information Report
TTRA	Tongass Timber Reform Act
USFWS	United States Fish and Wildlife Service
VCU	Value Comparison Unit
WAA	Wildlife Analysis Area

Federal Defendants Forrest Cole, Beth Pendleton, Thomas Tidwell, and U.S. Forest Service submit this brief in opposition to Plaintiffs’ motion for summary judgment, ECF No. 28 (“Pls.’ Br.”), and in support of their cross-motion for summary judgment under LR 16.3.

I. INTRODUCTION

Like the Plaintiffs in the companion case, *South East Alaska Conservation Council v. U.S. Forest Service* (“*SEACC I*”), No. 1:14cv00013-RRB, Plaintiffs here challenge the Big Thorne Project, repeating many of the arguments made by the *SEACC I* plaintiffs. Like the *SEACC I* Plaintiffs, the Plaintiffs here focus on narrow provisions of the Tongass Forest Plan and mistakenly argue that those provisions should have precluded the Forest Service from approving the Project. But viewed in context, those Forest Plan provisions and the Agency’s approval of the Big Thorne Project comply with both the National Environmental Policy Act (“NEPA”) and the National Forest Management Act (“NFMA”). The Court should therefore deny Plaintiffs’ motion for summary judgment and grant summary judgment to the Federal Defendants.

A. Factual and Procedural Overview

Plaintiffs’ extended factual and procedural overview, Pls.’ Br. at 2–15, largely repeats the discussion in *SEACC I*. Federal Defendants therefore refer the Court to the introductory discussion in their *SEACC I* opposition brief, ECF No. 58, at 1–21.

B. Statutory Background

Federal Defendants will not repeat their recitation of the statutory and case law governing resolution of this case and judicial review of the Big Thorne Project approval. *See* ECF No. 58, at 2–5. Federal Defendants reiterate only that the species diversity requirements of the 1982 forest planning regulations do not apply to this case. *See* Pls.’ Br. at 16. As explained in Federal Defendants’ *SEACC I* brief, ECF No. 58, at 4–5, the Management Indicator Species (“MIS”) analysis tool provided in the 1982 regulations has no continuing applicability, other than as it may be expressly incorporated in the governing forest plan. 36 C.F.R. § 219.17(c) (2014); *see Ecology Ctr. v. Castaneda*, 574 F.3d 652, 657 (9th Cir. 2009) (MIS approach no longer applies,

unless specifically incorporated in the governing forest plan).¹

II. ARGUMENT

A. The Big Thorne Project Complies with the Requirements of the Tongass Forest Plan

The NFMA requires that forest plans “provide for diversity of plant and animal communities based on the suitability and capability of the specific land area.” 16 U.S.C. § 1604(g)(3)(B). The forest planning regulations in force at the time the 1997 Forest Plan revision was issued called for forest plan provisions directing that “[f]ish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area.” 36 C.F.R. §§ 219.19; *id.* § 219.27(a)(6) (1983). A “viable” population is one that “has the estimated number and distribution of reproductive individuals to insure its continued existence is well distributed in the National Forest.” 2008 Forest Plan, AR 603_1593, at 7-47 (Glossary). The Final Environmental Impact Statement (“FEIS”) for the 1997 Tongass Forest Plan revision concluded that wolf populations would remain viable after 100 years of full implementation of the Forest Plan. 1997 Forest Plan FEIS, AR 10_006971, App. N at N-7 (Table 3). That conclusion was reaffirmed in the FEIS supporting the 2008 Tongass Forest Plan Amendment. 2008 Forest Plan FEIS, AR 603_1591, App. D at D-63 (“virtually no chance of extirpation of the wolf from the Tongass National Forest”); *see*

¹ Plaintiffs also suggest that the “no genuine dispute as to any material fact” standard governs the Court’s review. Pls.’ Br. at 18 (citing Fed. R. Civ. P. 56(c)). That statement goes too far. The Ninth Circuit has endorsed the use of Rule 56 motions in review of administrative agency decisions under the limitations of the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701–706. *See, e.g., Nw. Motorcycle Ass’n v. U.S. Dep’t of Agric.*, 18 F.3d 1468, 1471–72 (9th Cir. 1994) (discussing standards of review under the APA and Rule 56 and noting that review does not require “fact finding” by the court). Under the APA, the Court neither sits as an evidentiary fact-finder nor resolves allegedly disputed facts. Rather, the Court sits as an appellate tribunal and determines, as a matter of law, whether the facts found by the agency and the agency’s decision as a whole are supported by the administrative record. *See Occidental Eng’g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985) (in an APA action, “there are no disputed facts that the district court must resolve. That court is not required to resolve any facts in a review of an administrative proceeding. Certainly, there may be issues of fact before the administrative agency. However, the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.”).

also AR 736_0372, at 7 (“wolves are viable (i.e., not threatened with extinction) across their overall range in Southeast Alaska”).

As part of its wolf conservation strategy, the Forest Plan directs the Forest Service to provide

where possible, sufficient deer habitat capability to first maintain sustainable wolf populations, and then *to consider* meeting estimated human deer harvest demands. This is *generally* considered to equate to the habitat capability to support 18 deer per square mile (using habitat capability model outputs) in *biogeographic provinces* where deer are the primary prey of wolves. Use the most recent version of the interagency deer habitat capability model and field validation of local deer habitat conditions to assess deer habitat, unless alternate analysis tools are developed. Local knowledge of habitat conditions, spatial location of habitat, and other factors need to be considered by the biologist rather than solely relying upon model outputs.²

2008 Forest Plan, AR 603_1593, at 4-95 (Standard and Guideline WILD1.XIV.A.2) (emphasis added).³ That Standard and Guideline on its face provides for flexibility in its implementation.⁴

² The Forest Service has conducted field validation of black-tailed deer winter habitat, using the protocol described in Kirchholff and Hanley 1992, AR 736_0274, which assigns a score to each sample station according to biological characteristics (i.e., presence and quality of particular forage species) and physical characteristics (i.e., snow interception and melt, elevation, proximity to coast, and shading) associated with deer winter habitat. *See* AR 736_419, at 14. The results of those surveys are appear at AR 736_0375. The Forest Service further analyzed deer habitat for connectivity and fragmentation. AR 736_419, at 13. Finally, the Forest Service uses pellet surveys, performed with ADFG, to monitor deer population trends. *See* AR 736_0474.

³ Federal Defendants here use the same Administrative Record citation conventions as in their *SEACC I* brief. *See* ECF No. 58, at 5 n.3.

⁴ Plaintiffs insist that the Standard and Guideline sets a hard floor below which a project cannot go. Pls.’ Br. at 20–21 (citing Pls.’ Ex. 4, at 8–9 (AR 736_0367, at 8–9)). Plaintiffs rely on a letter to the Regional Forester taking issue with how the Forest Service has implemented findings of the Wolf Conservation Assessment (Person *et al.* (1996), AR 736_0302). That document does not determine the issue; instead, the Forest Service’s interpretation of its own forest plan is to be accorded substantial deference. *Siskiyou Reg’l Educ. Project v. U.S. Forest Serv.*, 565 F.3d 545, 555 (9th Cir. 2009) (Forest Service’s interpretation of forest plan guidance is entitled to deference); *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1099 (9th Cir. 2003) (same) (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)); *Hells Canyon Alliance v. U.S. Forest Serv.*, 227 F.3d 1170, 1180 (9th Cir. 2000) (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). Moreover, Person *et al.* (1996), AR 736_0302, at 8, does not contradict the Agency’s interpretation. Rather, it merely points out that, to result in a deer density of 13 deer/mi.², a habitat capability value of 18 deer/mi.² must be assumed. The Forest Service in fact changed the value provided in the Standard and Guideline from 13 to 18 deer/mi.². 2008 Forest Plan, AR 603_1593, at 4-95; 2008 Forest Plan FEIS, AR 603_1591, at 3-283. Finally, the authors of the (Footnote continued)

A failure to meet the modeled value of 18 deer/mi.² does not mean that wolf viability is imperiled. AR 736_4589, at 2. The deer habitat capability Standard and Guideline “was designed to maintain equilibrium populations of wolves and deer while also providing *for a sustainable harvest of deer by humans* (Person et al. 1996).” *Id.* (emphasis added). Human harvest of deer, and of wolves for that matter, remains a variable independent of wolf viability. *See* 1997 Forest Plan FEIS, AR 10_006971, at 3-405 (“Maintaining habitat to support current relatively high wolf populations and current human deer harvest is unlikely a viability issue for wolves.”). Deer densities below the value provided in the Standard and Guideline do not by themselves indicate that wolf populations are not viable. *Id.* App. N at N-31 (“Deer densities less than 13 deer/mile² but greater than 5 deer/mile² may indicate that wolves are viable but that human deer harvest could decline.”). Maintaining viability avoids the potential need to list a species under the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, *see* 2008 Tongass Forest Plan, AR 603_1593, at 2-1, while the Forest Plan sets a *further* goal of “[m]aintain[ing] habitat capability sufficient to produce wildlife populations that support the use of wildlife resources for sport, subsistence, and recreational activities,” *id.* at 2-9.

While there may be localized areas of population “vulnerabilities” in “select parts of [Game Management Unit] 2,” AR 736_0372, at 7 (citing Person *et al.* 1996, Person 2001, Person and Russell 2008, Person and Logan 2012), those localized concerns relate to *sustainability*, not viability, Big Thorne ROD, AR 736_2248, at 36. Where deer habitat capability is projected to be less than 18 deer/mi.², opportunities for sport hunting may be reduced followed, if necessary, by restrictions on subsistence harvest. *See* 2008 Forest Plan FEIS, AR 603_1591, at 3-428 (“Sport hunting restrictions would, however, occur first, followed by selective subsistence reductions, based on ANILCA Section 804.”); *see also* AR 736_0419, at 133, 183. The Forest Service works with other federal land managers, the Alaska Department of Fish and Game

letter Plaintiffs cite do not state that the Forest Service has no authority to apply the Standard and Guideline flexibly and, even if they did, that is the Agency’s determination to make. *Siskiyou Reg’l Educ. Project*, 565 F.3d at 555.

(“ADFG”), and the Alaska Board of Game to “provide mechanisms for modifying seasons, bag limits, and hunting/trapping methods and means for purposes of maintaining sustainable populations.” AR 736_0372, at 7. Hunting and subsistence restrictions, along with the development (if necessary) of a wolf habitat management plan, including road access management, Big Thorne ROD, AR 736_2248, at 36, “are intended to help ensure *sustainable* wolf populations and are an important part of the wolf standard and guideline.” AR 736_0419, at 48 (emphasis added). Therefore, a viable wolf population may exist even if other uses, such as sport and subsistence hunting, are reduced.

In keeping with the distinction between “viability” and “sustainability,” this Court has held that the 18 deer/mi.² value is not in fact a hard floor. In *Greenpeace v. Cole*, No. 3:08-cv-00162-RRB, 2014 U.S. Dist. LEXIS 136026, at *9 (D. Alaska Sept. 26, 2014), the Court observed that the 18 deer/mi.² value is to be applied “where possible.” Plaintiffs attempt to distinguish that holding—which directly undercuts their principal argument in this case—by claiming that the Agency did not assert “during the NEPA process” that the language (“where possible”) “alters its duty to provide for sustainable wolf population [sic].” Pls.’ Br. at 20 n.16. That is incorrect. The Forest Service pointed out in the Big Thorne FEIS and Record of Decision (“ROD”) that the Wildlife Analysis Areas (“WAAs”) affected by the Project were already below 18 deer/mi.² but that the Project should go forward, consistent with the 2008 Forest Plan and its flexible direction. *See* Big Thorne FEIS, AR 736_2244, at 251 (Table WLD-26), 252, 260; Big Thorne ROD, AR 736_2248, at 30–32, 33 (Table ROD-7).

Another Judge of this Court has also evaluated and rejected claims by some of the same Plaintiffs here that the Forest Service cannot approve a project that results in deer habitat capability values of less than 18 deer/mi.² In *Tongass Conservation Soc’y v. U.S. Forest Serv.*, No. 3:10-cv-00006 TMB, ECF No. 106, at 22 n.56 (D. Alaska Mar. 8, 2010),⁵ the Court found that

⁵ The district court opinion in *Tongass Conservation Society* was previously submitted to the Court with the Federal Defendants’ opposition to the Plaintiffs’ motion for summary judgment in (Footnote continued)

the EIS frankly discussed the possibility that the deer population might drop below 18.1 deer per square mile. It discussed how this would affect subsistence hunting, and took a “hard look” at these issues. However, the Forest Service is subject to competing demands, one of which is Congress’ mandate under the TTRA [Tongass Timber Reform Act] that it “seek to meet timber demand.” Since certain areas are more protected than others, the Forest Plan appears to recognize that some areas may need to drop below 18.1 deer per square mile to compensate.

The Ninth Circuit affirmed. *Tongass Conservation Soc’y v. U.S. Forest Serv.*, 385 F. App’x 708, 711 (9th Cir. 2010) (“[T]he Forest Service’s approval of a project that would result in less than eighteen deer per square mile was reasonable in light of the conflicting objectives of the Forest Plan” (citing *Native Ecosys. Council v. Dombeck*, 304 F.3d 886, 900 (9th Cir. 2002))). Here, the Forest Service made the same disclosures that the Court approved in *Tongass Conservation Society*: that the Project would have some incremental effect on WAAs that are already below the 18 deer/mi.² value.⁶

1. The Forest Service Explained How the Big Thorne Project is Consistent With the Forest Plan and NFMA

Plaintiffs complain that the Forest Service has failed to explain how it can authorize logging in areas where the deer habitat capability is less than 18 deer/mi.². Pls.’ Br. at 20–21. But as explained above, the deer habitat capability value is not a hard floor.⁷ Beyond that, the

SEACC I, ECF No. 58-1.

⁶ As explained in Federal Defendants’ *SEACC I* brief, ECF No. 58, at 14, and further below, the Deer Model includes a number of conservative assumptions and therefore is likely to *overstate* changes in deer habitat capability.

⁷ In arguing to the contrary, Plaintiffs quote the 2008 Forest Plan out of context, implying that because they represent “minimum achievement levels,” Standards and Guidelines must all be mandatory. Pls.’ Br. at 20 (quoting 2008 Forest Plan, AR 603_1593, at 1-2). But that is not what the Forest Plan says. While it remains true that a proposed action may provide more protection than afforded by a Standard and Guideline, 2008 Forest Plan, AR 603_1593, at 1-2, the Forest Plan does make a distinction between “Standard” and “Guideline”:

Standards, which can usually be identified by words such as “must” or “will,” are mandatory requirements or minimums that must be met. Project-level analysis may determine that additional requirements beyond these minimum are necessary. Guidelines, the majority of the [Forest Plan] direction, are not absolute requirements, but ways of achieving the standards or meeting other needs of the resource.

Id. at 1-3. The deer habitat capability Standard and Guideline includes the conditional language (Footnote continued)

Big Thorne Project is estimated to change deer habitat capability in the North Central Prince of Wales Biogeographic Province only slightly: from 17.95 to 17.23 deer/mi.² on National Forest lands and from 14.6 to 14.0 deer/mi.² considering all land ownerships. *See* Pls.’ Br. at 4 (Table). That amounts to only a 4 percent reduction from current conditions over that biogeographic province at the stem exclusion phase (25 years after Project completion).⁸ *Id.* Thus, at the relevant scale, the Project would not appreciably change the capability of lands surrounding the Project area to maintain a sustainable wolf population.⁹ Big Thorne FEIS, AR 736_2244, at 260. Those effects are within the range disclosed in the FEIS for the 2008 Amendment to the Tongass Forest Plan, to which the Big Thorne FEIS tiers.¹⁰ Big Thorne FEIS, AR 736_2244, at 260; *see also* Big Thorne Record of Decision (“ROD”), 736_2248, at 31–32, 33 (Table ROD-7).

Moreover, maintenance of deer habitat capability is only one component of the Tongass Old-Growth Conservation Strategy (“Conservation Strategy”). The Conservation Strategy establishes a system of Old Growth Reserves (“OGRs”) to provide areas of core habitat, 2008 Forest Plan FEIS, AR 603_1591, at 3-175, 3-253, particularly “to better maintain future old-growth forest in provinces where past harvest has been high.” 2008 Forest Plan FEIS, AR 603_1591, at 3-175; *see also* 1997 Forest Plan FEIS, AR 10_006971, App. N at N-30. The reserve system includes both the OGRs themselves and all other non-development Land Use Designations (“LUDs”): “Wilderness, National Monument, Legislated LUD II, Wild River,

“where possible,” which identifies that it is not a hard standard, as this Court has observed. *Greenpeace*, 2014 U.S. Dist. LEXIS 136026, at *9.

⁸ The Deer Model is also conservative in its treatment of non-Forest System lands, presuming in its cumulative impacts analysis that all such lands would likely be clear-cut. *See* AR 736_4587, at 2, 7.

⁹ The Deer Model projects theoretical carrying capacity, not actual population estimates. 1997 Forest Plan FEIS, AR 10_006971, App. N at N-31; AR 736_4587, at 6. Actual annual deer harvest in Game Management Unit (“GMU”) 2, in which the Big Thorne Project is located, has remained stable from 1996 to 2004. 2008 Forest Plan FEIS, AR 603_1591, at 3-252.

¹⁰ NEPA encourages agencies, where appropriate, to “tier” their environmental impact statements to eliminate repetitive discussion and to focus on the actual issues ripe for decision at each level of environmental review. 40 C.F.R. §§ 1502.20, 1508.28.

Remote and Semi-remote Recreation, Research Natural Area, Municipal Watershed, and all other LUDs that essentially maintain the integrity of the old-growth ecosystem.” 2008 Forest Plan FEIS, AR 603_1591, at 3-175. Along with establishing the reserve system, the Conservation Strategy provides a second layer of protection through Standards and Guidelines, including the deer habitat Standard and Guideline. *Id.* at 3-175, 3-254. Management of matrix lands through Standards and Guidelines benefits species, such as wolves, that require habitat larger than most OGRs.¹¹ *Id.* at 3-254.

Finally, to the system of reserves and deer habitat capability, the Conservation Strategy adds a third component: road management and hunting and trapping regulation. AR 736_0372, at 3; 2008 Forest Plan, AR 603_1593, at 4-95 (WILD1.XIV.A.1.c.). WILD1.XIV.A.1.c. provides that

[w]here road access and associated human-caused mortality has been determined, through an interagency analysis, to be a *significant contributing factor to locally unsustainable wolf mortality*, incorporate this information into Travel Management planning and hunting/trapping regulatory planning. The objective is to reduce mortality risk and a range of options to reduce this risk should be considered. . . . Total road densities of 0.7 to 1.0 mile per square mile or less may be necessary. Options shall likely include a combination of Travel Management regulations, establishing road closures, and promulgating hunting and trapping regulations to ensure locally viable wolf populations.

2008 Forest Plan, AR 603_1593, at 4-95 (emphasis added).¹² The Big Thorne FEIS discloses that the total road densities below 1,200 feet within all ownerships in the WAAs affected by the Big Thorne Project under Alternative 3¹³ exceed the Forest Plan recommendation of 0.7 to 1.0

¹¹ The mere fact that Standards and Guideline recommendations may not be attained “in areas within GMUs is not in and of itself a concern for wolves since wolves are managed on a larger, broader-scaled landscape such as islands or groups of islands (i.e., biogeographic provinces).” AR 736_0372, at 3.

¹² The 2008 Forest Plan establishes the road density figures as a discretionary guideline. 2008 Forest Plan, AR 603_1593, at 4-95; *see also* 1997 Forest Plan FEIS, AR 10_006971, at 3-402–3-403 (recommending against fixed road density number); *id.* App. N at N-35–N-37 (same).

¹³ The Big Thorne ROD selected a modified and somewhat scaled-back version of Alternative 3 analyzed in the FEIS. The Selected Alternative authorizes 934 acres less of old-growth harvest (6,186 versus 7,120 acres). Big Thorne ROD, AR 736_2248, at 11–14, 41 (Table ROD-9).

miles of roads per square mile, 2008 Forest Plan, AR 603_1593, at 4-95, while Alternative 3 would only increase those road densities in each WAA by approximately 0.1 mile/square mile. Big Thorne FEIS, AR 736_2244, at 253 (Table WLD-27). However, because total road densities are above 1.5 miles per square mile—the density beyond which roads are thought to have little additional effect on wolf harvest rates, Big Thorne FEIS, AR 736_2244, at 249; AR 736_0300 (Person and Russell 2008)—the authorization of higher road densities is not likely to substantially increase wolf harvest, Big Thorne FEIS, AR 736_2244, at 261. The FEIS therefore explained that the Big Thorne Project is consistent with the Forest Plan provision governing management of road densities for the benefit of wolves.

Finally, the Forest Service disclosed that it intends to pursue efforts to directly reduce human-caused wolf mortality through road closures to alleviate pressures from hunting and trapping. Big Thorne ROD, AR 736_2248, at 11–12, 15–17, 35–36. As discussed further in Section II.C.3 below, direct regulation of the greatest impact to wolves—hunting and trapping—is a reasonable, and likely the most certain, approach to balancing timber harvest with habitat requirements and provides further assurance that the Forest Plan’s provisions will be met.

In short, the Forest Service sufficiently explained that even though the Big Thorne Project results in a reduction (albeit a relatively small one) in modeled deer habitat capability, it is consistent with the Forest Plan’s Standards and Guidelines and with the Old Growth Conservation Strategy.

2. The Forest Service Did Not Fail to Consider an Alleged “Wolf Population Crash”

Plaintiffs claim that the Forest Service’s approval of the Big Thorne Project ignored evidence of a “wolf population crash,” relying heavily on the two “Statements” of Dr. David Person. Pls. Br. at 22–23; Pls.’ Ex. 30 (AR 736_4529); Pls.’ Ex. 37 (AR 736_4304). While it may be Dr. Person’s view that the wolf population on Prince of Wales Island is in danger of collapse, that opinion is not widely shared. The agency that formerly employed Dr. Person, the Alaska Department of Fish and Game (“ADFG”) is charged with game management in the State

of Alaska. ADFG is responsible for managing wolf populations and does so based on a combination of field work and evaluation of harvest records every year. *See, e.g.*, AR 736_0372, at 5; Person and Larson (2013), AR 736_2940; AR 736_2943. ADFG has not asserted that the wolf population on Prince of Wales Island or in GMU 2 is “crashing.”¹⁴

Finally, Plaintiffs recognize the significant contribution to wolf mortality from direct human causes.¹⁵ Pls.’ Br. at 22–23. As noted above, the Forest Service fully intends to pursue efforts to reduce that contributor to wolf mortality. Big Thorne ROD, AR 736_2248, at 11–12, 15–17, 35–36. Thus, the Forest Service did not ignore an alleged “population crash,” but instead intends to address the direct causes of wolf mortality.

¹⁴ The State has reiterated this point consistently. *See* State Scoping Comments, AR 736_0052, at 8 (“Our goal, through developing a wolf mortality risk analysis model, is to identify Wildlife Analysis Areas (WAAs) with potentially unsustainable levels of wolf mortality on Prince of Wales Island to better inform management decisions on the Thorne Bay and Craig Ranger Districts; however, individual timber sales in GMU2 should not be precluded. ADF&G will review the DEIS and offer comments on specific wolf concerns, if any, that may be triggered by the Big Thorne Project.”); State Draft EIS (“DEIS”) Comments, AR 736_3150, at 6 (“Though there is a paucity of quantitative data with which to assess actual population levels, the ADFG believes that, while there may be vulnerabilities for wolves in select parts of Game Management Unit (GMU) 2 (Person et al. 1996, Person 2001, Person and Russell 2008, Person and Logan 2012), wolves are viable (i.e., not threatened with extinction) across their overall range in Southeast Alaska. Regulatory processes used by state and federal agencies and their associated boards provide mechanisms for modifying seasons, bag limits, and hunting/trapping methods and means for purposes of maintaining sustainable populations. Also, the ADFG has initiated research on Prince of Wales Island and will work with the Board of Game, Southeast Alaska Regional Advisory Council, Federal Subsistence Board, and the USFS to address any identified conservation concerns.”) (footnote omitted); AR 736_2943, at 2 (same). In fact, the State has noted that “[a]s the princip[al] manager of deer and wolves in Alaska, [it] find[s] no evidence to support Mr. Person’s conclusion that ‘the Big Thorne timber sale, if implemented, represents the final straw that will break the back of a sustainable wolf-deer predator-prey ecological prey ecological community on Prince of Wales Island, and consequently, the viability of the wolf population on the island may be jeopardized’ [and] no evidence to support Mr. Person’s conclusion that ‘the Big Thorne project puts the viability of the wolf population on Prince of Wales and the surrounding islands (the Prince of Wales Archipelago) in doubt.’” State Comments on Wolf Task Force, AR 736_4280 (emphasis in original); *see also* AR 736_0372, at 6 (“Based on field observations and harvest data, wolf numbers are believed to be lower, but still viable, in GMU 2 than they were in the 1990s.”).

¹⁵ Wolves are at more risk from human-caused mortality (hunting and trapping) than from natural causes (starvation, disease, accidents, fights). AR 10_00096, at 9 (Person et al. 1996); *see also* AR 736_0300, at 1, 6 (Person and Russell 2008) (87% mortality due to human causes); AR 736_303, at 3 (Person 2001) (82% mortality caused by humans).

3. The Forest Service Did Not Ignore the Allegedly “Uncertain” Effects of Logging Areas With a Modeled Deer Habitat Capability Less Than 18 Deer/Mi.²

Plaintiffs insist that the Forest Service ignored the effects of logging in areas with a modeled deer habitat capability less than 18 deer/mi.², asserting that the Agency failed to consider the “non-linear” relationship of carrying capacity and the “predator-prey” relationship. Pls.’ Br. at 23–24.

Again, Plaintiffs rely principally on Dr. Person to argue that “uncertain” and “severe” effects may result from a drop in deer habitat capability below 18 deer/mi.². They also claim that “the science on this point is clear.” Pls.’ Br. at 24. In particular, Plaintiffs cite Person 2001, AR 736_3361, at 96–97, for the proposition that small changes in carrying capacity may result in large swings in population and that the Forest Service “ignored” that hypothesis. Pls.’ Br. at 24 & n.18. But the Forest Service has recognized the hypothesis that below a certain (as-yet-undefined) threshold, a loss of deer habitat capability may accelerate the rate of population decline. *See* 2008 Forest Plan FEIS, AR 603_1591, at 3-267–3-268 (citing Boutin 1992), 3-293 (citing Fahrig 1997, 1999, 2003; Flather *et al.* 2002; Andren 1994; Haufler 2006); *see also* Big Thorne Supplemental Information Report (“SIR”), AR 736_4559, at 16 (noting that FEIS considered potential non-linear dynamics of predator-prey-habitat interactions). While the FEIS did disclose that the Deer Model assumes a *linear* relationship between “habitat capability” and “habitat values,” *see* Pls.’ Br. at 25 (citing Big Thorne FEIS, AR 736_2244, at 181 (Pls.’ Ex. 25, at 155)), that is a different relationship than the potentially non-linear relationship (acknowledged in the FEIS) between habitat loss and population reduction. When the Deer Model assumes a linear relationship between “habitat capability” and “habitat value,” that simply means that, for a given amount of modeled change in habitat capability, there is a fixed amount of change in resultant theoretical deer density. *See* Suring (1992), AR 736_3356 (“The model provides an evaluation of habitat quality which is assumed to be related to long-term carrying capacity.”). In any event, the Agency’s candid acknowledgement of a model’s assumptions does not amount to a failure to consider “uncertain” effects. Rather, the Agency may rely on

methodologies that it deems reliable. *Lands Council v. McNair*, 537 F.3d 981, 991–94 (9th Cir. 2008) (en banc). Although the Deer Model did assume a linear relationship between deer habitat capability and habitat value, the Model nevertheless remains conservative for a variety of reasons.¹⁶ Plaintiffs thus fail to demonstrate that the Model on the whole significantly *under-*predicts habitat capability and that the Agency’s reliance on it was arbitrary and capricious.

4. The Forest Service Properly Considered Potential Source Populations of Wolves

Plaintiffs claim that the Forest Service failed to consider the habitat conditions in areas from which wolves might emigrate to WAAs within the Project area, which they believe casts doubt on the Forest Service’s conclusion that such areas could support potential source populations and that, therefore, the Agency has mistakenly relied on the habitat reserve component of the wolf conservation strategy to support areas where modeled deer habitat capability is estimated to be less than 18 deer/mi². Pls.’ Br. at 24–28. Once more, Plaintiffs rely principally on Dr. Person. Plaintiffs’ reliance is misplaced.

First, the fact that WAAs may generally be smaller than a typical wolf pack home range is not necessarily relevant in evaluating the value of a landscape for wolves.¹⁷ See Pls.’ Br. at

¹⁶ As explained in Federal Defendants’ response brief in *SEACC I*, ECF No. 58, at 14, the Model considers only the carrying capacity during the winter and does not consider spring fawn production, which would provide prey for wolves throughout the year. 1997 Forest Plan FEIS, AR 10_006971, at 3-405, N-33. Next, the Model does not consider the habitat value for deer and wolves provided by non-federal lands, which are extensive, as reflected in Table 3-112. *Id.* Third, the habitat capability value provides for both wolf viability and current levels of human deer harvest. Deer densities may have to be much lower to trigger a viability concern if human deer harvest rates decline. *Id.* App. N at N-33. Finally, the estimated deer densities generated by the Model are less than the actual densities reported in similar habitat, making it likely that the Model *underestimates* actual deer habitat capability. *Id.*

¹⁷ Plaintiffs also note that WAA 1332 has a modeled deer habitat capability of 12.44 and that, in Dr. Person’s view, WAAs 1323, 1526, and 1532 are also not good deer habitat. Pls.’ Br. at 25. But the deer habitat capability Standard and Guideline is relevant only *where deer are the primary prey of wolves*. 2008 Forest Plan, AR 603_1593, at 4-95. By its terms it is not relevant to wolf populations elsewhere, and wolves range widely, Person *et al.* 1996, AR 10_00096, at 4, and eat a variety of animals other than deer, 2008 Forest Plan FEIS, 603_1591, at 3-283; Person *et al.* 1996, AR 10_00096, at 8; AR 736_0334; Person 2001, AR 736_0303, at 32, 51, 55, 87, 92. Therefore, the mere fact that a WAA may have a deer habitat capability value of less than 18 (Footnote continued)

25–26, 27. WAAs are not separated by boundaries that wolves cannot pass through and, in fact, WAAs, designated wilderness areas, OGRs, and other non-development LUDs form a generally continuous landscape. *See* AR 603_0658 (WAA map); AR 603_1606 map (map of Land Use Designations). Because wolves range widely over a variety of habitats, Person *et al.* 1996, AR 10_00096, at 4, the Forest Service reasonably supposed that wolves could emigrate to Project area WAAs from a variety of other locations.¹⁸ The reliance on the habitat reserve component of the wolf conservation strategy was therefore reasonable.

Second, contrary to Plaintiffs’ assumption, Pls.’ Br. at 26–27, it was not inconsistent with the Forest Plan for the Forest Service to rely on the habitat reserve component of the wolf conservation strategy when approving the Big Thorne Project on matrix lands. As noted above, OGRs and other non-development areas are meant to work in tandem with management of matrix lands (lands where development may occur). 2008 Forest Plan FEIS, AR 603_1591, at 3-175, 3-253–3-254. Plaintiffs point to nothing in the Forest Plan¹⁹ that suggests, instead, that the Agency cannot rely on habitat in the reserve system—which was established for the very purpose of providing that core habitat, 2008 Forest Plan FEIS, AR 603_1591, at 3-175, 3-253—when considering a project in matrix lands. Plaintiffs’ reliance on *Idaho Sporting Cong. v. Rittenhouse*, 305 F.3d 957, 972 [sic, should be 971] (9th Cir. 2002), is similarly misplaced. In that case, the court was concerned that the Forest Service did not have an inventory of a new category of old growth that it was using as a substitute for the definition of “old growth” in the

deer/mi.² does not mean that it cannot serve as habitat for wolves.

¹⁸ Plaintiffs worry that future habitat capability may be affected by potential land transfers between the Forest Service and Sealaska Corporation, Pls.’ Br. at 25–26, but the FEIS did analyze the potential effects on wolves of that proposed transfer. Big Thorne FEIS, AR 736_2244, at 841. Further, inclusion of that scenario in the deer habitat capability model produced virtually no change to deer habitat capability in affected WAAs or in the North Central Prince of Wales Biogeographic Province and on the northern portion of Prince of Wales Island. AR 736_0419, at 137–38 (Table 31 & n.4).

¹⁹ Plaintiffs’ Exhibit 14, cited in Pls.’ Br. at 26 n.19, is merely a journal article and carries no regulatory weight. Rather, as noted above, the Forest Service’s interpretation of its own Forest Plan is entitled to deference. *See, e.g., Siskiyou Reg’l Educ. Project*, 565 F.3d at 555.

governing forest plan. The case does not support the proposition that the Forest Service cannot rely on habitat reserves that were specifically recommended (by Dr. Person, among others) to provide habitat for species.²⁰

Finally, Plaintiffs rely on comments from the U.S. Fish and Wildlife Service (“USFWS”) on the DEIS, suggesting that the Forest Service should not rely upon OGRs for the dispersal of wolves to the Project area WAAs. Pls.’ Br. at 27–28 (citing AR 736_3156, at 6 (Pls.’ Ex. 21, at 6)). But while the Forest Service considers the comments of sister agencies, it need not adopt their conclusions. *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1087 (9th Cir. 2013); *Akiak Native Cmty. v. U.S. Postal Serv.*, 213 F.3d 1140, 1146 (9th Cir. 2000); *see also San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 603–04 (9th Cir. 2014) (“When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts.” (citing *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 378 (1989))).

B. The Forest Service Adequately Disclosed the Potential Effects of the Big Thorne Project on Wolves

1. The Agency Considered “Opposing” Science

Plaintiffs offer the views of Dr. Person as “dissenting” scientific opinion and insist that the Forest Service improperly failed to consider them when it approved the Big Thorne Project. In claiming that the Forest Service simply ignored Dr. Person’s opinions, Plaintiffs conflate views expressed by Dr. Person while he was still employed by ADFG (and before the Big Thorne FEIS was issued) concerning wolves *within the Project area* and views developed after Dr. Person left ADFG (after the FEIS) concerning wolves *on the whole of Prince of Wales*

²⁰ As noted in Federal Defendants’ *SEACC I* brief, ECF No. 58, at 10, Person *et al.* 1996, AR 10_00096, recommended establishing one 50,000 acre unroaded and unfragmented reserve per 192,000 acres of landscape in areas where extensive timber harvest is planned. 1997 Forest Plan FEIS, AR 10_006971, at 3-403; *id.* App. N at N-34–N-35. Alternative 11, selected by the 1997 Forest Plan ROD, AR 10_009819, at 1, meets that criterion for Prince of Wales Island, 1997 Forest Plan FEIS, AR 10_006971, at 3-403 (Table 3-121), App. N at N-35 (Table 9). The Forest Service thus implemented the recommended habitat reserves.

Island. See Pls.’ Br. at 28–32. As explained below, the difference is significant, and the Forest Service considered both sets of opinions at the time each was presented to the Agency.

Plaintiffs first recite that Dr. Person raised concerns about the Big Thorne Project with his colleagues at ADFG, but allege that those opinions were not conveyed to the Forest Service.²¹ Pls.’ Br. at 12–13, 28–29. Plaintiffs then recount that they obtained e-mails between Dr. Person and others at ADFG and appended them to their own comments on the Big Thorne DEIS. *Id.* at 13, 29. But what Dr. Person expressed at the time were his concerns that the Big Thorne Project would adversely affect watersheds *within the Project area*. See Pls.’ Br. at 12 (citing Pls.’ Ex. 17, at 1 (AR 736_4310, at 1)); *see also* Person Statement, AR 736_4529 ¶ 32 (describing earlier concerns). Similarly, the information from Dr. Person that Plaintiffs included with their DEIS comments also concerned impacts to watersheds *within the Big Thorne Project area*. See Pls.’ Br. at 13, 29 (citing Pls.’ Ex. 20, at 60–71 (AR 736_3112, at 60–71)). Contrary to Plaintiffs’ assertions, the Forest Service did address those issues, and the Federal Defendants have not “admit[ted]” that they failed to do so. See Pls.’ Br. at 29. Federal Defendants’ answer to the complaint accurately pleads that “Federal Defendants admit that the FEIS did not respond directly to Dr. Person’s *recent conclusions* that the Big Thorne Project would threaten the viability of the Alexander Archipelago wolf population on Prince of Wales Island, *rather than within the Big Thorne Project area*, but aver that the FEIS did disclose, discuss, and incorporate other scientific work developed to date by Dr. Person.” ECF No. 25, ¶ 116 (emphasis added).²² In other words, the FEIS obviously did not address Dr. Person’s post-FEIS “Statement,” AR

²¹ Plaintiffs do acknowledge that Dr. Person met with the Forest Service and even with the Forest Supervisor and that he corresponded with Forest Service personnel. Pls.’ Br. at 29 n.21; *see* Person Statement, AR 736_4529 ¶¶ 9, 10 (describing those contacts).

²² Similarly, Federal Defendants’ answer pleads that they “admit that the DEIS did not disclose the specific comments made by Dr. Person in the e-mail referred to in Paragraph 106 [AR 736_4310], aver that the Forest Service was not in possession of the e-mail until after the DEIS was published, aver that the DEIS disclosed, considered, and incorporated much scientific work done by Dr. Person concerning wolves on Prince of Wales Island, and otherwise deny the allegations of this paragraph.” ECF No. 25 ¶ 108.

736_4529, which drew broad conclusions about wolf viability on Prince of Wales Island. But the FEIS did address concerns about the effect of the Big Thorne Project on WAAs within the Project footprint, which is what Dr. Person's earlier remarks (and Plaintiffs' DEIS comments) addressed. *See* Big Thorne FEIS, AR 736_2244, at 235, 236 (Table WLD-19), 242, 243, 246–49, 251–52, 255, 256, 260.

Dr. Person's later views, set forth in his August 2013 Statement, AR 736_4529, expanded his earlier concerns to include his fears that the wolf population on Prince of Wales Island might collapse. *Id.* ¶¶ 13, 31. Dr. Person's August 2013 Statement was submitted after the June 2013 FEIS was issued (and after Dr. Person left ADFG²³), AR 736_2244, so it could not have been addressed in the FEIS. Nevertheless, as directed by the Regional Forester, AR 736_4015, at 2, the Forest Supervisor convened the Interagency Wolf Task Force to review Dr. Person's post-FEIS Statement, AR 736_4529, and the Forest Supervisor further considered Dr. Person's June 2014 comments, AR 736_4304, on the draft SIR, AR 736_4243, prepared in response to the Wolf Task Force Report, AR 736_4244. *See* Final SIR, AR 736_4559, at 6–11.

Reviewing Dr. Person's August 2013 Statement, the Task Force concluded:

Our assessment of the four assumptions that are critical to the substantial conclusions reached in the [Person] Statement raises considerable doubt regarding the scenario leading to “the ecological collapse of the predator prey system” (Statement p7), the contention that “wolves are already facing the possibility of extinction on Prince of Wales Island” (Statement p15) or that “the Big Thorne timber sale, if implemented, represents the final straw that will break the back of a sustainable wolf-deer predator-prey ecological community on Prince of Wales Island” (Statement p5) presented in the Statement. We acknowledge that the Big Thorne Project increases the likelihood of low wolf populations occurring on Prince of Wales and associated islands. We concur that there are complex interactions among deer habitat, snow, roads, deer population abundance, wolves, and humans *which were evaluated in the USFS EIS and Record of Decision.*

AR 736_4244, at 14 (emphasis added). Three of the Wolf Task Force members stated that a need exists for information to assess the effectiveness of the Tongass Conservation Strategy and

²³ Dr. Person left ADFG in May 2013, prior to release of the Big Thorne FEIS in June 2013 and before he submitted his August 2013 “Statement,” AR 736_4529. *Id.* ¶ 3.

that, until such information is developed, the Agency should make efforts to reduce the level of risk by considering actions that might include “modification of wolf harvest regulations, increased enforcement effort, access management, and conservation of important winter habitat for deer.” *Id.* The other three found “that the evidence fails to suggest a substantial risk of island-wide predator/prey collapse or loss of sustainable populations of deer and wolves in the context of active regulation of deer and wolf harvest. . . . [and that t]he conservation fabric developed in the 1997 and 2008 Forest Plans is still intact and a sound regulatory framework is in place to modify harvest of deer and wolves.” *Id.* The Forest Supervisor concluded in the Final SIR that Dr. Person’s August 2013 Statement raised no significant new circumstances or information relative to environmental concerns that would warrant preparation of a supplemental EIS. Final SIR, AR 736_4559, at 6–11, 15–27. The Regional Forester concurred in the Forest Supervisor’s conclusion. AR 736_4573. Dr. Person obviously disagrees with the Forest Service’s rationale for approving the Big Thorne Project, but that disagreement does not invalidate the Forest Service’s decision or suggest the Agency simply ignored Dr. Person’s views, much less establish a NEPA violation. *See Native Ecosys. Council v. Weldon*, 697 F.3d 1043, 1051 (9th Cir. 2012) (agency has the discretion to rely on its own expertise); *McNair*, 537 F.3d at 1000 (same).²⁴

Finally, Dr. Person himself did not speak for ADFG as an agency, either while he was still employed there or, certainly, after he left. It is the opinion of the agency, not those of its subordinate employees, that is relevant under the Administrative Procedure Act (“APA”). *See Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658-59 (2007) (views of agency, not its employees); *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 718 (10th Cir. 2010) (same); *Nat’l Audubon Soc’y. v. Dep’t of the Navy*, 422 F.3d 174, 198-99 (4th

²⁴ Of course, Plaintiffs may be able to point to specific, detailed points that Dr. Person raised and that the Forest Service did not address in depth. But NEPA does not require “the Forest Service to affirmatively present every uncertainty in its EIS.” *McNair*, 537 F.3d at 1001.

Cir. 2005) (same); *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1321 (D.C. Cir. 1998) (same).

As noted above, ADFG did not share Dr. Person's views.²⁵

In short, the Forest Service took appropriate account of Dr. Person's "dissenting" scientific opinion and fully complied with its NEPA obligations.

2. The Forest Service Disclosed the Potential Effects of Logging in Areas With a Modeled Deer Habitat Capability Value of Less than 18 Deer/Mi.²

Plaintiffs claim that the Forest Service failed to disclose the impacts to wolves of logging areas with modeled deer habitat capability less than 18 deer/mi.² Pls.' Br. at 32–34. That is not true. Plaintiffs cite only to the August 2013 Person Statement, which obviously post-dated the June 2013 FEIS. *See* Pls.' Br. at 33–34 (citing Pls.' Ex. 30 ¶¶ 13.d, 23, 31 (AR 736_4529 ¶¶ 13.d, 23, 31)). As explained in the preceding Section, those opinions were thoroughly vetted by the Wolf Task Force and considered by the Forest Service in the SIR. And the Forest Service certainly considered and disclosed the *prior* science cited by Dr. Person, *id.* ¶ 23 (citing Person and Brinkman 2013, Person and Russell 2008, Person 2001, Person *et al.* 1996). *See* Big Thorne FEIS, AR 736_2244, at 656 (References).²⁶ And the FEIS did disclose the potentially non-linear predator-prey-population hypothesis that Plaintiffs are concerned about. *See* 2008 Forest Plan FEIS, AR 603_1591, at 3-267–3-268 (citing Boutin 1992), 3-293 (citing Fahrig 1997, 1999, 2003; Flather *et al.* 2002; Andren 1994; Haufler 2006). It is true, as Plaintiffs observe, Pls.' Br. at 33–34, that the Forest Service did not then seek to model those non-linear effects, but Plaintiffs have not suggested that such modeling is even possible. The Agency did disclose that the Big Thorne Project would reduce deer habitat capability in the North Central Prince of Wales

²⁵ Plaintiffs also assert that the Forest Service failed to respond to the views of the USFWS. Pls.' Br. at 29–30. But as explained above, the Forest Service considered those comments but did not—and need not—adopt them. *Alaska Survival*, 705 F.3d at 1087; *Akiak Native Cmty.*, 213 F.3d at 1146.

²⁶ Person and Brinkman 2013 was not considered in the FEIS because of the article's late publication date; however, it was considered in the Wolf Task Force Report. *See* AR 736_4244, at 16 (References).

Biogeographic Province slightly: from 17.95 to 17.23 deer/mi.² on National Forest lands and from 14.6 to 14.0 deer/mi.² considering all land ownerships. *See* Pls.’ Br. at 4 (Table). Given that there is no identified inflection point where the relationship between habitat capability and population decline is hypothesized to become non-linear, 2008 Forest Plan FEIS, AR 603_1591, at 3-267, it was not unreasonable for the Agency to conclude that the minor reduction in deer habitat capability associated with the Project would not trigger such non-linear responses. The Agency therefore was not required to conduct the modeling that Plaintiffs insist on. *See McNair*, 537 F.3d at 991–92 (agency not required to validate its hypotheses with on-the-ground analysis).

Plaintiffs further charge that, while acknowledging that road density is significantly contributing to wolf mortality, the FEIS fails to explain why increasing road densities above the range of 0.07 to 1.0 mi./mi.² would be consistent with the Forest Plan. Pls.’ Br. at 34 n.23. As noted earlier, the Big Thorne FEIS discloses that the Project would increase road densities in each WAA by 0.1 mi./mi.² or less. *Id.* at 253 (Table WLD-27). Big Thorne FEIS, AR 736_2244, at 253 (Table WLD-27).²⁷ The FEIS further observed that most wolf harvest is performed by people working from boats, Big Thorne FEIS, 736_2244, at 186; *see Person et al.* 1996, AR 736_0302, at 34; Person and Russell 2008, AR 736_0300, 5, 7; Person and Logan 2012, AR 736_0299, at 20, and that in any event, road densities above 1.5 mi./mi.² have little additive effect on wolf harvest rates, Big Thorne FEIS, AR 736_2244, at 249; *see Person and*

²⁷ As a substantive matter, road densities above the 0.07–1.0 mi./mi.² value are not necessarily inconsistent with the Forest Plan. The Forest Plan does not set a hard number on allowable road densities, but rather affords the Forest Service flexibility in managing road-related wolf mortality. *See* 2008 Forest Plan, AR 603_1593, at 4-95 (“Options shall likely include a combination of Travel Management regulations, establishing road closures, and promulgating hunting and trapping regulations to ensure locally viable wolf populations.”); *see also* 1997 Forest Plan FEIS, AR 10_006971, at 3-402–3-403 (recommending against a fixed road density number); *id.* App. N at N-35–N-37 (same). Unlike the NFMA, NEPA is a procedural statute that does not dictate substantive results; NEPA only requires an agency to disclose potential environmental impacts and explain the rationale behind its decision. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *see also Native Ecosys. Council*, 697 F.3d at 1051. NEPA does not require that the Forest Service comply with any particular road density standard; it only requires that the Agency explain how its approval of the Big Thorne Project is consistent with the applicable standard. The Forest Service did so here.

Russell 2008, AR 736_0300, at 9.²⁸ Thus, the FEIS sufficiently explained that the Project's authorization of road densities slightly higher than those that now exist would not be likely to substantially increase wolf harvest. *Id.* at 261.

In sum, the FEIS adequately disclosed the potential effects of logging in areas with modeled deer habitat capability less than 18 deer/mi.², and that disclosure satisfies NEPA.

C. The Forest Service Was Not Required to Prepare a Supplemental EIS

1. The Forest Service Appropriately Used the SIR

The Forest Supervisor convened the Interagency Wolf Task Force to review the August 2013 Statement of Dr. Person to determine whether it contained significant new information that would require preparation of a supplemental EIS for the Big Thorne Project. AR 736_4203; AR 736_4204; AR 736_4244. The task force consisted of two representatives each from ADFG, the Forest Service, and the USFWS. *See* AR 736_4244, at 1. After several meetings, the Wolf Task Force set forth its conclusions in a May 21, 2014 Report. AR 736_4244. The Forest Supervisor documented his own conclusions in the Final SIR, AR 736_4559, in which he concluded that there were no significant new circumstances or information relative to environmental concerns that would warrant preparation of a SEIS. AR 736_4559, at 27. The Regional Forester concurred in the Forest Supervisor's conclusion. AR 736_4573. Plaintiffs object to that procedure, arguing that a SIR cannot "correct deficiencies" in an FEIS and that the Forest Service's use of a SIR in this case was improper. Pls.' Br. at 34–36. While it is true that a SIR cannot substitute for a supplemental NEPA document, it can certainly be used where supplemental NEPA analysis is not required.

Here, Plaintiffs insist that a supplemental EIS was required, again conflating information that was provided to the Agency during the NEPA process with information that was developed

²⁸ Apart from allowing hunters and trappers easier access, roads themselves do not decrease wolf habitat capability. 2008 Forest Plan FEIS, AR 603_1591, App. D at D-26.

later. Pls.’ Br. at 35. As explained above in Section II.B.1, the Forest Service used the SIR to evaluate information provided to the Agency *after* the FEIS was issued. This Court approved that very procedure in *Greenpeace, Inc. v. Cole*, No. 3:08-cv-00162-RRB, where it held that “[t]he use of an SIR to evaluate an interdisciplinary review of new information is the appropriate course of action in evaluating new information in th[e] context [of applying the Deer Model] and the decision on how to proceed is at the discretion of the Forest Supervisor.” 2014 U.S. Dist. LEXIS 136026, at *27–28 (citing *N. Idaho Cmty. Action Network v. U.S. Dep’t of Transp.*, 545 F.3d 1147 (9th Cir. 2008)).

Plaintiffs rely on *Idaho Sporting Cong, Inc. v. Alexander*, 222 F.3d 562 (9th Cir. 2000), to support their claim that the Agency’s reliance on the SIR in this case violated NEPA. In *Idaho Sporting Congress*, the Ninth Circuit held that because the deficiencies in question were in the agency’s *original* NEPA documents, a SIR (rather than a supplemental NEPA document) could not be used to correct those deficiencies. *Id.* at 566–67. In this case, the FEIS addressed the relevant science and responded to comments submitted on the DEIS. The SIR was merely a tool to respond to a document that *Plaintiffs* provided *after* the FEIS was issued, which was an entirely appropriate procedure.

Plaintiffs also rely on two cases from the District of Montana, Pls.’ Br. at 35. In *Friends of the Clearwater v. McAllister*, 214 F. Supp. 2d 1083 (D. Mont. 2002), the Forest Service decided after it released its initial decision that it would increase the volume of the advertised timber project threefold and would also concentrate that increased harvest on less than one quarter of the original project footprint. The district court held that it was improper to use a SIR to support such a significant project modification, when the necessary analysis should have been performed during the original NEPA process, given that the information upon which the agency based its decision was not “new” and the failure to analyze it earlier deprived the plaintiffs of the opportunity to comment on the newly chosen action. *Id.* at 1089. At the same time, however, the court concluded that had the underlying information been truly new, the SIR would have been an appropriate means of determining whether tripling the volume of the project (an alterna-

tive that had been previously analyzed but not circulated for comment) would have been a significant change. *Id.* at 1089–90. Here, of course, there is no drastic increase in the size of the Big Thorne Project; in fact, following the SIR the Forest Service *reduced* the size of the Project. *See* Big Thorne ROD, AR 736_2248, at 11–14, 41 (Table ROD-9). Similarly inapposite is *Friends of the Wild Swan v. U.S. Forest Serv.*, No. 11-125-M, 2013 U.S. Dist. LEXIS 45488 (D. Mont. Mar. 27, 2013), where on remand the Forest Service failed to prepare a supplemental Environmental Assessment, as expressly directed by the court. *Id.* at *3–6.

Here, the Forest Service’s use of a SIR to address the Person Statement was appropriate under NEPA, and the Agency was not required to prepare a supplemental EIS.

2. The Forest Service Properly Determined that a Supplemental EIS Was Not Necessary

Plaintiffs contend that in determining that a supplemental EIS was not necessary, the Forest Service did not properly evaluate the “significance” factors set out in the NEPA regulations. Pls.’ Br. at 36–39. As explained below, the Agency did.

In order to trigger the duty to supplement the Big Thorne FEIS, Plaintiffs must show that “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action and its impacts.” 40 C.F.R. § 1502.9(c)(1)(ii). The new information must suggest “that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered.” *Marsh*, 490 U.S. at 374 (internal quotations and alterations omitted). Because Plaintiffs have failed to demonstrate a “seriously different picture of the likely environmental harms stemming from” the Person Statement’s hypotheses, supplementation is not required. *Tri-Valley CAREs v. U.S. Dep’t of Energy*, 671 F.3d 1113, 1130 (9th Cir. 2012). NEPA does not “task the agencies with a sisyphian feat of forever starting over in their environmental evaluations, regardless of the usefulness of such efforts.” *Price Road Neighborhood Ass’n v. U.S. Dep’t of Transp.*, 113 F.3d 1505, 1510 (9th Cir. 1997); *see also League of Wilderness Defenders v. Connaughton*, 752 F.3d 755, 760 (9th Cir. 2014) (NEPA’s general “rule of reason” governs an agency’s determination whether or not

to supplement an EIS) (citing *Marsh*, 490 U.S. at 373–74)). When the agency takes the requisite “hard look” and “determines that the new impacts will not be significant (or not significantly different from those already considered), then the agency is in full compliance with NEPA.” *N. Idaho Cmnty. Action Network*, 545 F.3d at 1154–55.

The NEPA regulations define what may be considered “significant” within the meaning of 40 C.F.R. § 1502.9(c)(1)(ii).²⁹ Plaintiffs, however, merely reiterate what are to them the

²⁹ “Significance” factors may include the following:

- (2) The degree to which the proposed action affects public health or safety.
- (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
- (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
- (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
- (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
- (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
- (8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.
- (9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
- (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

40 C.F.R. § 1508.27.

salient points of Dr. Person’s Statement, Pls.’ Br. at 37–39, insisting that they come under the “context,” “controversy,” and “uncertainty” factors. None of those points supports invocation of any of the NEPA “significance” factors.³⁰

First, the mere presence of a listed factor does not demonstrate “significance” under NEPA. In *Native Ecosystems Council v. U.S. Forest Service*, 428 F.3d 1233, 1240 (9th Cir. 2005), the court held that “[t]he presence of negative effects regarding the impact of the . . . Project . . . or even information favorable to [the Plaintiff’s] position” does not mean that the project may have a “significant” effect. The court went on to explain that

[u]nder [the Plaintiff’s] theory, any information included in an [Environmental Assessment] and its supporting NEPA documents that admits impacts on wildlife species and their habitat would trigger the preparation of an EIS. Not only would such a standard deter candid disclosure of negative information, it does not follow that the presence of some negative effects necessarily rises to the level of demonstrating a significant effect on the environment. [The court] decline[s] to interpret NEPA as requiring the preparation of an EIS any time that a federal agency discloses adverse impacts on wildlife species or their habitat or acknowledges information favorable to a party that would prefer a different outcome. NEPA permits a federal agency to disclose such impacts without automatically triggering the “substantial questions” threshold.

428 F.3d at 1240; *see also Env’tl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1012 (9th Cir. 2006) (the § 1508.27(b)(9) (endangered species) “‘intensity’ factor focuses on the ‘degree to which an action may adversely affect’ a threatened species or critical habitat”) (emphasis added)). As long as the Agency took a reasonable approach in addressing the relevant significance factors, its determination should be upheld. *Bering Strait Citizens for Resp. Dev. v. U.S. Army Corps of Eng’rs*, 524 F.3d 935, 956–57 (9th Cir. 2008).

Similarly, “controversy” does not arise merely because opinions about a project differ. The test is whether “[t]he degree to which the effects on the quality of the human environment

³⁰ Plaintiffs insist that their “new” information is significant because it suggests that the Project does not comply with the NFMA, which they assert is a violation of law. Pls.’ Br. at 39 (citing 40 C.F.R. § 1508.27(b)(10) (threatened violation of law). But if that is all it takes to invoke § 1508.27(b)(10), all new information would be significant in any case where an action is challenged on the basis of substantive law; in other words, § 1508.27(b)(10) would apply in every case one could imagine.

are likely to be *highly* controversial.” 40 C.F.R. § 1508.27(b)(4) (emphasis added); *see Native Ecosys. Council*, 428 F.3d at 1240 (“A project is highly controversial if there is a substantial dispute [about] the size, nature, or effect of the major Federal action rather than the existence of opposition to a use.”) (internal quotations marks and citations omitted); *Presidio Golf Club v. Nat’l Park Serv.*, 155 F.3d 1153, 1162 (9th Cir. 1998) (the existence of opposition does not automatically render a project controversial). Here, Plaintiffs rely on the Person Statement, which was vetted by the Wolf Task Force. After thoroughly reviewing the Person Statement, the Task Force members arrived at “views [that] var[ied] in degree and may be most clearly characterized as alternative perspectives of uncertainty and alternative assessments of the strength of evidence and evaluation of risk.” AR 736_4244, at 14. Such nuances of opinion do not make the Big Thorne Project’s potential effects “highly controversial.”

Finally, “uncertainty” (just as “controversy”) requires an evaluation of “[t]he degree to which the possible effects on the human environment are *highly* uncertain or involve unique or unknown risks.” 40 C.F.R. § 1508.27(b)(5); *see Env’tl. Prot. Info. Ctr.*, 451 F.3d at 1013 (the regulation does not anticipate the need for an EIS anytime there is *some* uncertainty, only if effects are “highly” uncertain); *Jones v. Nat’l Marine Fisheries Serv.*, 741 F.3d 989, 998 (9th Cir. 2013) (same); *Ctr. For Biological Diversity v. Kempthorne*, 588 F.3d 701, 712 (9th Cir. 2009) (same); *see also McNair*, 537 F.3d at 1001 (NEPA does not require “the Forest Service to affirmatively present every uncertainty in its EIS.”).

In the end, the Person Statement does not provide new information that suggests that the Big Thorne Project and its effects are either “highly uncertain” or “highly controversial.” Rather, it simply represents Dr. Person’s personal evaluation of information of a kind provided elsewhere in the record and in the FEIS. Plaintiffs’ concern about the unavailability of wolf population data,³¹ their fear of a “population crash,” and their criticisms of (slightly) increased

³¹ Plaintiffs imply that the Forest Service in fact believed that it was “critical” to acquire additional wolf population data. Pls.’ Br. at 37 (citing Final SIR, AR 736_4559, at 5). But that state- (Footnote continued)

road densities, Pls.’ Br. at 38, have all been addressed.³² See Sections II.A, B.2, D.2. Those repackaged concerns are insufficient to trigger the “significance” factors of the NEPA regulations and to require that the Agency redo its thorough analysis.³³

ment merely acknowledged that future work to track wolf population numbers was necessary for the development of a Wolf Habitat Management Plan, as provided for in the 2008 Forest Plan, AR 603_1593, at 4-95. The statement does not support the conclusion that the existing information did not sufficiently allow the Agency to reasonably choose from among the alternatives analyzed in the FEIS. As another judge in this district has concluded, nothing in NEPA, NFMA, or the Forest Plan requires that a Wolf Habitat Management Plan be developed prior to the approval of a site-specific project. *Tongass Conserv. Soc’y*, No. 3:10-cv-00006-TMB, ECF No. 106, slip op. at 19–20 (Tongass Forest Plan does not require preparation of a Wolf Habitat Management Plan prior to project approval).

³² Plaintiffs cite the Wolf Task Force Report, Appendix A, AR 736_4244, at 21, 23, to support their claim that the FEIS did not “directly” analyze Dr. Person’s “population sink” concerns. See Pls.’ Br. at 37. But those pages of Appendix A do state that wolf mortality issues were addressed, if perhaps not in the exact terms that Plaintiffs would have preferred. That, however is not a NEPA violation. *McNair*, 537 F.3d at 1001. Plaintiffs also ascribe to the Forest Service “admissions” based upon a misreading of Federal Defendants’ answer to the complaint. Pls.’ Br. at 38 (citing Answer, ECF No. 25, ¶¶ 76, 91). Those paragraphs of Federal Defendants’ answer do not contain admissions. Rather, Federal Defendants aver in response to one paragraph of Plaintiffs’ complaint that Plaintiffs merely paraphrase and partially quote a document, ECF No. 25 ¶ 76, and in response to another paragraph state that the Federal Defendant lack sufficient knowledge or information, *id.* ¶ 91. In neither case are those admissions. See *id.* General Denial (“Federal Defendants deny any allegations in the Complaint that are not expressly and unqualifiedly admitted.”); Fed. R. Civ. P. 8(b)(5) (pleading lack of knowledge or information has the effect of a denial).

³³ Plaintiffs cite 40 C.F.R. § 1508.27(b)(7) (“cumulative impacts”), but that adds nothing to Plaintiffs’ argument. See Pls.’ Br. at 38–39. Plaintiffs merely repeat their earlier assertions, breaking them into their component parts (“habitat,” “overharvest,” “connections between . . . deer population, roads, and wolf mortality,” and “reliance on game regulations”) so that the parts appear to be larger than their sum. But Plaintiffs are not really invoking NEPA’s “cumulative impacts” provision, which addresses the effects of a proposed action “when added to other past, present, and reasonably foreseeable future actions [undertaken by an agency or person].” 40 C.F.R. § 1508.7 (emphasis added). Instead, Plaintiffs merely identify “factors” raised by Dr. Person, Pls.’ Br. at 39, not other past, present, or reasonably foreseeable future agency actions.

3. The Forest Service Properly Relied Upon Regulation of Wolf Hunting and Trapping

Plaintiffs insist that the SIR improperly relied upon the regulation of wolf harvest to support approval of the Big Thorne Project. Pls.' Br. at 39–40. But harvest management (and its control through road access restrictions) has long been a key component of the Forest Plan's Old Growth Conservation Strategy supporting deer and wolves. AR 736_372, at 3; 2008 Forest Plan, AR 603_1593, at 4-95 (WILD1.XIV.A.1.c.). It is not a creation of the SIR.

As Plaintiffs seem to recognize, Pls.' Br. at 7–8, 40, the biggest cause of wolf mortality is not lack of food (deer and also other prey species³⁴), but hunting and trapping of wolves.³⁵ See Big Thorne ROD, AR 736_2248, at 11, 17, 36; see also Final SIR, AR 736_4559, at 7 (“All information and analysis indicates that human-caused mortality is the primary and most direct threat to wolves on [Prince of Wales Island.]”); *id.* at 7–9 (discussing need for road and wolf harvest management); Wolf Task Force Report, AR 736_4244, at 6 (“[E]xperience demonstrates that the characteristics of hunting/trapping are key in determining the short- and long-term status of wolves where human access is a factor. Empirical evidence supports the contention that wolf populations become locally extirpated from intentionally focused killing by humans and that hunting/trapping mortality, both legal and illegal, can lead to wolf extirpation in a wide range of situations.”). Therefore, it was not arbitrary and capricious for the Forest Service to have acknowledged in the SIR the role of regulatory enforcement to directly address the biggest threat

³⁴ See 2008 Forest Plan FEIS, 603_1591, at 3-283; AR 10_00096, at 8 (Person *et al.* 1996).

³⁵ As the 2008 Forest Plan FEIS observes:

roads themselves do not decrease habitat capability for wolves, but increased density of roads may lead to higher hunting and trapping mortality through improved human access. There are other methods available to address unsustainable hunting and trapping mortality including changes to both State and Federal hunting and trapping regulations and increased enforcement.

Id., AR 603_1591, App. D at D-26.

to the wolf population.³⁶

Plaintiffs further argue that it is irrational to rely on hunting and trapping regulation when exact wolf population numbers remain unknown. Pls.’ Br. at 40. But as explained above in Section II.A.2, ADFG, the agency charged by the State of Alaska with managing wolf and other game populations, is able to perform its function without exact population estimates by relying on a number of management tools. *See also* 2008 Forest Plan FEIS, AR 603_1591, App. D at D-49 (“In addition [to road closures and access management], seasons, harvest methods and bag limits need to be considered as population management tools by the ADF&G and Federal Subsistence Board as a cooperative approach to managing wolf mortality at a sustainable level.”).

Finally, Plaintiffs assert that illegal harvest has contributed to “unsustainable” levels of wolf harvest. Pls.’ Br. at 40–41. For that conclusion Plaintiffs’ cite the Wolf Task Force Report, AR 736_4244, at 12 (Pls.’ Ex. 39, at 12), which only reports mixed conclusions about the likelihood of future unsustainable wolf harvest. Plaintiffs also cite comments on the draft SIR submitted by the USFWS, AR 736_4299, at 3 (Pls.’ Ex. 36, at 3), which in turn cites Person and Larson 2013, AR 736_3718 (Pls.’ Ex. 29), drawing the conclusion that wolf mortality has been as high as 80 percent. But that mortality figure was derived from a sample within a study area much smaller than Prince of Wales Island, encompassing the central WAAs on the Island, *id.* at 1, where hunting and trapping mortality would be expected to exceed that in other areas of the Island because of the very same road access that facilitated the study itself, *see* Big Thorne FEIS, AR 736_2244, at 249 (Table WLD-25) (showing road densities); *id.* at 76 (Fig. 3-1) (map of WAAs). The 80 percent mortality figure therefore cannot be assumed to be representative of

³⁶ Plaintiffs imply that road management is a useless tool because of the large number of roads in the Project area. Pls.’ Br. at 5 (citing Pls.’ Ex. 26, at 36 (Big Thorne ROD, AR 736_2248, at 36)). But the ROD provides for key seasonal road closures into or adjacent to the Honker Divide OGR, which is expected to be the most immediate and locally beneficial measure and which was recommended by the group of interagency wildlife biologists with whom the Forest Service consulted. Big Thorne ROD, AR 736_2248, at 11, 36.

mortality island-wide.³⁷ Nor is it evidence of an imminent “population crash,” as Plaintiffs assert. Pls.’ Br. at 41.

In short, the Agency’s reliance on the expected benefits from road closures and hunting and trapping regulation to respond to direct threats to wolf populations was reasonable and appropriate under NEPA.

D. The 2008 Tongass Forest Plan Amendment Complies With the NFMA

Plaintiffs argue that the 2008 Forest Plan Amendment violates the NFMA because it fails to provide for viability of wolf populations. Pls. Br. at 43–48. They first claim that it is unclear whether Forest Service interprets the deer habitat capability value of 18 deer/mi.² set out in WILD1.XIV.A.2 as a “standard” or a “guideline”; if it is a “guideline,” Plaintiffs then insist that it is inadequate to support viability because Projects, such as Big Thorne, may reduce modeled deer habitat capability to less than 18 deer/mi.². Pls.’ Br. at 44–45. There should be no confusion on the first point: the Forest Service has most certainly applied WILD1.XIV.A.2 as a flexible guideline, and two judges of this district court and the Ninth Circuit have upheld that interpretation. *Greenpeace*, No. 3:08-cv-00162-RRB, 2014 U.S. Dist. LEXIS 136026, at *9; *Tongass Conservation Soc’y*, No. 3:10-cv-00006 TMB, ECF No. 106, at 22 n.56; *Tongass Conservation Soc’y v. U.S. Forest Serv.*, 385 F. App’x 708, 711 (9th Cir. 2010) (affirming *Tongass Conserv. Soc’y*, No. 3:10-cv-00006 TMB)).

On the second point, the deer habitat capability value in WILD1.XIV.A.2 does provide for viability. As explained at length in Section II.B of Federal Defendants’ response brief in *SEACC I*, as well as in Section II.A, above, the deer habitat capability value sufficient to support both wolves and human harvest of deer (now 18 deer/mi.²) is well above the value thought

³⁷ The USFWS comments on the draft SIR “recommend that additional road management be implemented and incorporated into Travel Management regulations, to reduce risks to wolves prior to implementation of the Big Thorne Project.” *Id.* at 3–4. That recommendation is not inconsistent with approval of the Big Thorne Project, which provides that 36 of the 46 miles of authorized new roads will be only temporary roads. Big Thorne ROD, AR 736_2248, at 7, 10.

necessary to support viable populations of wolves alone (5 deer/mi.²).³⁸ See 1997 Forest Plan FEIS, AR 10_006971, App. N at N-31; see also Kirchhoff (1993), AR 603_0008 at 161, 169. The mere fact that the deer habitat capability in a given area may fall below the value set out in WILD1.XIV.A.2 does not equate to a threat to wolf population viability. 1997 Forest Plan FEIS, AR 10_006971, App. N at N-33.

Finally, all three legs of the wolf conservation strategy—deer habitat capability, habitat reserves, and regulation of road access and hunting and trapping—contribute to continued viable wolf populations.³⁹ 1997 Forest Plan FEIS, AR 10_006971, App. N at N-37; 2008 Forest Plan FEIS, AR 603_1591, at 2-55; 2008 Forest Plan ROD, AR 603_1606, at 19–20. By focusing solely upon deer habitat capability, Plaintiffs put too much emphasis on that component of the conservation strategy.

Plaintiffs similarly argue that the road density provisions in WILD1.XIV.A.1.c fail to prevent unsustainable wolf mortality because those provisions allow too much flexibility in their implementation. Pls. Br. at 45–48. The Forest Service concluded, however, that “[e]stablishing a rigid road density level, and arbitrarily closing roads to meet this density, provides no management assurance that wolf conservation objectives would be achieved, and may unnecessarily limit overall public use of an established road system that may otherwise have no specific adverse impact on wolf mortality.” 1997 Forest Plan FEIS, AR 10_006971, App. N. at N-37.

³⁸ Plaintiffs claim that a carrying capacity of 18 deer/mi.² is necessary to support a deer density of value of 5 deer/mi.². Pls. Br. at 43 n.24 (citing Person *et al.* 1997, Pls. Ex. 4 (AR 736_367)). Person *et al.* 1997 in fact states that the deer habitat capability value of 18 deer/mi.² is what is needed to support a deer density of 13 deer/mi.², not 5 deer/mi.². AR 736_0367, at 8. Plaintiffs acknowledge the correct assumption later in their brief. *Id.* at 44 n.25. The Plaintiffs mistakenly quote Person *et al.* 1996 as referring to “[h]abitat to support a minimum density of 5 deer per square mile (13 deer/mi.²).” Pls. Br. at 43 (citing Person *et al.* 1996, Pls.’ Ex. 2, at 6 (AR 736_0302, at 6)). But the document cited actually speaks of “5 deer *per square kilometer* (13 deer/mi.²).” AR 736_0302, at 6 (emphasis added). The initial misquotation apparently carried through to Plaintiffs’ argument.

³⁹ The Forest Service further explained that the Deer Model produces conservative results that could overestimate changes in deer habitat capability. 1997 Forest Plan FEIS, AR 10_006971, at 3-404–3-405, App. N at N-33.

Instead, “recommendations for road and access management, if necessary, would result from the site-specific analysis discussed above that would identify a problem requiring a local and cooperative management resolution. Open road densities above or indeed below these referenced densities may be appropriate to effectively manage road-access related wolf mortality.” *Id.* Finally, the Agency noted that “roads themselves do not decrease habitat capability for wolves, but increased density of roads may lead to higher hunting and trapping mortality through improved human access. There are other methods available to address unsustainable hunting and trapping mortality including changes to both State and Federal hunting and trapping regulations and increased enforcement.” 2008 Forest Plan FEIS, AR 603_1591, App. D at D-26. Plaintiffs do not explain why it is arbitrary and capricious for the Forest Service to rely on *site-specific* conditions when considering road densities for *specific projects*.

In fact, rather than demonstrating that the road density provisions of the 2008 Forest Plan Amendment are too weak, the Big Thorne Project FEIS explains how a timber project may be authorized consistent with those provisions and with maintenance of wolf viability. The FEIS explains how total road densities below 1,200 feet within the Project area WAAs under Alternative 3 (a somewhat larger-scale version of the final Selected Alternative) exceed the Forest Plan recommendation of 0.7 to 1.0 miles of roads per square mile but that Alternative 3 would only increase the road densities in each WAA by approximately 0.1 mile/square mile. Big Thorne FEIS, AR 736_2244, at 253 (Table WLD-27). Because total road densities are beyond the level at which increased densities may elevate wolf harvest rates (1.5 miles per square mile), Big Thorne FEIS, AR 736_2244, at 249; AR 736_0300 (Person and Russell 2008), the authorization of higher road densities is unlikely to increase wolf harvest substantially, Big Thorne FEIS, AR 736_2244, at 261. At the same time, as explained in Section II.C.3, above, the Big Thorne Project appropriately relies on road access restrictions and hunting and trapping regulation to address the potential effects of road densities in the Project area. Nothing about the Big Thorne Project suggests that the road density provisions of the 2008 Forest Plan Amendment are too weak.

Finally, Plaintiffs note that another judge of this Court has agreed that the 2008 Forest Plan amendment does not require preparation of a Wolf Habitat Management Plan before approval of a site-specific project. Pls.' Br. at 47 (citing *Tongass Conserv. Soc'y*, No. 3:10-cv-00006-TMB, ECF No. 106, slip op. at 19–20 (Tongass Forest Plan does not require preparation of a Wolf Habitat Management Plan prior to project approval), *aff'd*, 385 F. App'x 708 (9th Cir. 2010)). Plaintiffs therefore argue that because a Wolf Habitat Management Plan is not required prior to project approval, the Forest Plan's management of road densities is too weak, citing in support comments by the U.S. Fish and Wildlife Service. Pls. Br. at 47–48 (citing Pls.' Ex. 21, at 4 (AR 736_3156, at 4), Pls.' Ex. 36, at 3 (AR 736_4299, at 3)). But the USFWS simply recommended that the Forest Service consider further road management and especially that the Forest Service harmonize the Prince of Wales Access and Travel Management Plan with the Big Thorne FEIS. *See* AR 736_4299, at 3–4; AR 736_3156, at 3–4. The USFWS also recommended reconvening the interagency task force on wolf mortality that was assembled in connection with an earlier timber sale. *Id.* at 4. The Forest Service responded to the USFWS's concerns.

First, the Big Thorne ROD does, in fact, authorize key road closures to protect wolves and documents ongoing interagency work on road management, including the development of a wolf habitat management program. Big Thorne ROD, AR 736_2248, at 36; Big Thorne FEIS, AR 736_2244, at 849–53 (discussing road management and closures and development of wolf habitat management program). The Big Thorne FEIS also used analyses developed in connection with the Prince of Wales Access and Travel Management Plan for the Big Thorne Project Area. Big Thorne FEIS, AR 736_2244, at 44. And the Forest Service did reconvene the interagency task force, which recommended closure of roads within or immediately adjacent to the Honker Divide large OGR, which provides a core area of secure habitat for area wolf packs. Big Thorne ROD, AR 736_2248, at 11; Big Thorne FEIS, AR 736_2244, at 851 (citing Person and Russell 2008; Person and Logan 2012). The Forest Service adopted the task force recommendations. Big Thorne ROD, AR 736_2248, at 11–12. But even if the Forest Service's actions taken in response to the USFWS comments were not sufficient to address the concerns of the USFWS,

the Forest Service is not required to defer to the views of its sister agency, nor does their disagreement invalidate the Forest Service's Analysis. *See Alaska Survival*, 705 F.3d at 1087; *Akiak Native Cmty.*, 213 F.3d at 1146; *San Luis & Delta-Mendota Water Auth.*, 747 F.3d at 603–04.

In short, Plaintiffs' complaint that the 2008 Forest Plan Standards and Guidelines for deer habitat capability and road densities violate the NFMA because they allow for management flexibility find no support in record or the law.

III. REMEDY

As explained above, the Forest Service adequately analyzed and disclosed the impacts of the Big Thorne Project on deer and wolves. The Project also complies with the requirements of the Forest Plan and NFMA. Therefore, the Court should enter judgment for the Forest Service on all claims and deny Plaintiffs relief. But were Plaintiffs to prevail in whole or in part on any of their claims, they still fail to demonstrate entitlement to the remedies they demand. Instead, only tailored relief, if any, would be appropriate.

A. Plaintiffs Are Not Entitled to Vacatur of the Big Thorne Decision

Plaintiffs assume that should they prevail, they are entitled to vacatur of the Big Thorne Project decision under the APA. Pls.' Br. at 48. But that assumption ignores the relevant legal principles. The right of judicial review under the APA does not affect "other limitations on judicial review or the power or duty of the court to dismiss any action *or deny* relief on any other appropriate legal or equitable ground" 5 U.S.C. § 702 (emphasis added). The Court's formulation of a remedy under the APA is controlled by principles of equity. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157–58 (2010) (court must balance the equities and consider the public interest before issuing injunction in NEPA case); *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995) ("The court's decision to grant or deny injunctive or declaratory relief under APA is controlled by principles of equity."). The Court retains full discretion to consider what relief might be appropriate following a finding that an agency must

conduct further analysis on remand. *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1080–82 (9th Cir. 2010); *see also N. Cheyenne Tribe v. Norton*, 503 F.3d 836, 842 (9th Cir. 2007).

In particular, whether an agency decision should be vacated depends upon whether the deficiencies identified by the reviewing court may be corrected while the challenged decision is left in place and, conversely, whether vacating the decision pending further analysis would be unduly disruptive. *See Cal. Cmty. Against Toxics v. EPA.*, 688 F.3d 989, 992 (9th Cir. 2012) (per curiam) (leaving challenged rule in place pending remand); *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 755–56 (D.C. Cir. 2002) (whether vacatur is appropriate depends on seriousness of agency decision’s deficiencies weighed against potentially disruptive effects of vacatur); *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (same); *Conner v. Burford*, 848 F.2d 1441, 1460–62 (9th Cir. 1988) (order staying leases pending remand); *Native Vill. of Pt. Hope v. Salazar*, 730 F. Supp. 2d 1009, 1019 (D. Alaska 2010) (order remanding for further analysis without vacating leases); *Colo. Envtl. Coal. v. Office of Legacy Mgmt.*, 819 F. Supp. 2d 1193, 1224 (D. Colo. 2011) (order staying leases), *amended by* 2012 WL 628547 (D. Colo. Feb. 27, 2012); *see also Pit River Tribe*, 615 F.3d at 1080–82 (leases may be deemed capable of extension after compliance with NEPA, rather than being invalidated); *S. Utah Wilderness Alliance v. U.S. Dep’t of Interior*, No. 2:06CV342 DAK, 2007 WL 2220525, at *2 (D. Utah Jul. 30, 2007) (“suspension decision annulled any ‘irreversible and irretrievable commitment of resources’ from which Plaintiffs claim to have suffered harm under NEPA,” rendering case moot).

This Court in an earlier proceeding evaluated a large-scale sale of offshore oil and gas leases and, while finding that the agency failed to adequately document compliance with the “missing information” provisions of the NEPA regulations, 40 C.F.R. § 1502.22, nevertheless declined to vacate the leases. *Native Vill. of Point Hope*, 730 F. Supp. 2d at 1019. The same considerations are at play here: there is no reason to vacate the Agency’s decision when more tailored remedies might be employed. *See id.* (imposing limited injunction). There is simply no need for vacatur.

Federal Defendants anticipate Plaintiffs may argue in reply that leaving the Big Thorne ROD in place pending potential remand would create “bureaucratic momentum” that would potentially compromise the Agency’s objectivity as it undertakes any supplemental NEPA analysis that the Court might require, should it rule in Plaintiffs’ favor. That argument asks the Court to reject the ordinary presumption of regularity accorded agency actions, which presumption has been repeatedly recognized by the courts. *See Pit River Tribe*, 615 F.3d at 1082–83 (“While bureaucratic inertia may be a risk, we presume that agencies will follow the law”); *Vill. of False Pass v. Clark*, 733 F.2d 605, 615 (9th Cir. 1984) (“minor changes in the Secretary’s discretion because of a project’s momentum do not bar consideration of environmental information in stages”); *see also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (“the Secretary’s decision is entitled to a presumption of regularity”); *Akiak Native Cmty.*, 213 F.3d at 1146 (“deference is accorded agency environmental determinations . . . because the agency’s decision-making process is accorded a ‘presumption of regularity’” (citation omitted)); *Burford*, 848 F.2d at 1448 (“We cannot assume that government agencies will not comply with their NEPA obligations in later stages of development.”). Plaintiffs can provide no basis for overturning the presumption of regularity; thus, vacatur is not appropriate.

Finally, vacatur of the Big Thorne Project decision pending further analysis (if any) on remand would unnecessarily disrupt the planning efforts of both the Forest Service and the parties that have bid on the Big Thorne contracts. *See SEACC I*, Declaration of Forrest Cole, ECF No. 58-2, ¶¶ 3–6.

B. Plaintiffs Are Not Entitled to a Broad Injunction Against the Big Thorne Project

Plaintiffs in the alternative seek a broad injunction against implementation of the Big Thorne Project, Pls.’ Br. at 48–49, but they have not demonstrated entitlement to such expansive relief. Injunctive relief is an extraordinary remedy, not one a plaintiff is entitled to as a matter of course. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (An injunction is an “extraordinary remedy” that “should issue only where the intervention of a court of equity is

essential in order effectually to protect . . . against injuries otherwise irremediable.”) (quotations and citation omitted); *see also Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008) (“[An] injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.”). While Federal Defendants do not believe any equitable relief is appropriate, if the Court finds to the contrary any such relief must be carefully tailored to “be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.” *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see Monsanto* 561 U.S. at 165–66 (overturning nationwide injunction). Here, Plaintiffs have not demonstrated that all Project activities must be enjoined in order to vindicate their personal interests.

In considering an injunction a court will weigh the traditional four equitable factors: (1) irreparable injury to the Plaintiffs; (2) inadequate remedy at law; (3) the balance of the hardships; and (4) the public interest. *Monsanto*, 561 U.S. at 156–57. Federal Defendants recognize, however, that at this point it may be premature to undertake that analysis, both because Plaintiffs have yet to prevail on any aspect of any of their claims and because the parties have not had the opportunity to fully brief the relevant equities.⁴⁰ Accordingly, Federal Defendants respectfully request that, should the Court rule in Plaintiffs’ favor to the degree that a remedy must be fashioned, the Court allow the parties to further brief remedy issues.

C. The Court Should Not Reinstate the 1997 Tongass Forest Plan Provisions for Management of Wolf and Deer

Even if the Court were to find that the 2008 Tongass Forest Plan violates the NFMA, the Court should not reinstate the provisions of the 1997 Forest Plan as Plaintiffs request. Pls.’ Br. at 49. Rather, the appropriate remedy is to remand to the Agency so that it may determine what

⁴⁰ As explained in the Cole Declaration, however, an injunction against the Big Thorne Project would result in (1) the loss of revenue that the Forest Service could use to fund restoration and other environmental projects; (2) loss of such services directly provided by purchasers of the Big Thorne contracts; and (3) loss of tax revenue, jobs, and monies paid into the local economy. *Id.* ¶¶ 3–6.

course of action to take. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (if record does not support agency's action or agency has not considered all relevant factors, "the proper course, except in rare circumstances, is to remand to the agency"). By requesting that the Court reinstate the 1997 Tongass Forest Plan provisions, which are now over seventeen years old, Plaintiffs are asking it to make a decision that should be made by the Executive Branch agency that Congress has vested with that authority. The Court should reject Plaintiffs' invitation. If the Court were to rule in Plaintiffs' favor, the Forest Service may conclude that the appropriate course is to modify the 2008 Tongass Forest Plan to address the Court's concerns, rather than reinstating the provisions of a superseded Plan. Or the Agency may propose an entirely new Plan, or it may take some other action. That determination, however, is for the Agency to make in the first instance. *See Citizens for Better Forestry v. U.S. Dep't of Agric.*, 632 F. Supp. 2d 968, 982 (N.D. Cal. 2009) (recognizing that *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005), stated that the effect "effect of invalidating an agency rule is to reinstate the rule previously in force," but allowing the agency to choose which prior rule to reinstate); *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 481 F. Supp. 2d 1059, 1100 (N.D. Cal. 2007) (what course of action to take following injunction against rule "is a determination for the [the agency] to make in the first instance").

Thus, even if the Court finds that the 2008 Tongass Forest Plan is invalid, it should not reinstate the 1997 Forest Plan, but should allow the Agency on remand to determine what course of action to take to address the deficiencies identified in the Court's decision.

IV. CONCLUSION

For the reasons set forth above, the Court should deny Plaintiffs' motion for summary judgment and grant summary judgment to the Federal Defendants.

DATED: December 23, 2014

Respectfully submitted,

/s/David B. Glazer
DAVID B. GLAZER
Natural Resources Section

301 Howard Street, Suite 1050
San Francisco, California
Tel: (415) 744-6491
Fax: (415) 744-6476
E-mail: David.Glazer@usdoj.gov

Attorneys for Federal Defendants

OF COUNSEL

James Ustasiewski
Kate Baldrige
Office of General Counsel
U.S. Department of Agriculture

CERTIFICATE OF SERVICE

I, David B. Glazer, hereby certify that I have caused the foregoing to be served upon counsel of record through the Court's electronic service system.

For the Plaintiffs

Thomas S. Waldo, Esq.
twaldo@earthjustice.org
ikorhonen@earthjustice.org
ssaunders@earthjustice.org
Holly Anne Harris, Esq.
hharris@earthjustice.org
ikorhonen@earthjustice.org
ssaunders@earthjustice.org
Eric P. Jorgensen, Esq.
ericj@earthjustice.org
ikorhonen@earthjustice.org
ssaunders@earthjustice.org

For the State of Alaska

Thomas E. Lenhart, Esq.
tom.lenhart@alaska.gov
tj.duffy@alaska.gov
vanessa.lamantia@alaska.gov

For Proposed Intervenors Alaska Forest Ass'n, et al.

Howard S. Trickey, Esq.
howard.trickey@hklaw.com
jeanine.huston@hklaw.com
Julie A. Weis, Esq.
jweis@hk-law.com
atodd@hk-law.com

For Proposed Intervenors City of Craig, et al.

Steven W. Silver, Esq.
ssilver628@aol.com

I declare under penalty of perjury that the foregoing is true and correct.

Dated: December 23, 2014

/s/David B. Glazer
David B. Glazer