UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. **CV 22-2781-JFW (SKx)** Date: July 19, 2023

Title: Los Padres Forestwatch, et al. -*v*- United States Forest Service, et al.

Consolidate with:

CV 22-2802-JFW (SKx)
County of Ventura -v- United States Forest Service, et al.

CV 22-2800-JFW (SKx)
City of Ojai -v- United States Forest Service, et al.

PRESENT:
HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

Shannon Reilly	**None Present**
Courtroom Deputy	**Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:	**ATTORNEYS PRESENT FOR DEFENDANTS:**
None	None

PROCEEDINGS (IN CHAMBERS): **ORDER DENYING PLAINTIFF LOS PADRES FORESTWATCH, ET AL.'S MOTION FOR SUMMARY JUDGMENT [filed 3/10/23; Docket No. 94]; and**

ORDER GRANTING FEDERAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [filed 4/17/23; Docket No. 105]

On March 10, 2023, Plaintiffs Los Padres ForestWatch, Keep Sespe Wild Committee, Earth Island Institute, American Alpine Club, Center for Biological Diversity, Patagonia Works, and California Chaparral Institute, County of Ventura, and City of Ojai (collectively, "Plaintiffs") filed a Motion for Summary Judgment. Docket No. 94. On March 10, 2023, Plaintiff City of Ojai filed a Supplemental Opening Brief in Support of Motion for Summary Judgment. Docket Nos. 95 and 100. On March 10, 2023, Plaintiff County of Ventura filed a Supplemental Opening Brief in Support of Motion for Summary Judgment. Docket Nos. 97 and 99. On April 17, 2023, Defendants United States Forest Service ("USFS"), Karina Medina ("Medina"), Tom Vilsack ("Vilsack"), United States Department of Agriculture ("USDA"), and United States Fish and Wildlife Service ("FWS") (collectively, "Defendants") filed their Combined Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment. Docket No. 105. On May 12, 2023, the City of Ojai filed

its Reply and Response Brief in Support of Cross Motions for Summary Judgment. Docket Nos. 109 and 112. On May 12, 2023, the County of Ventura filed its Combined Supplemental Reply in Support of Summary Judgment and Opposition to Defendants' Cross-Motion for Summary Judgment. Docket No. 111. On May 12, 2023, Plaintiffs filed their Combined Memorandum in Opposition to Defendants' Cross-Motion for Summary Judgment and Reply to Defendants' Opposition to Plaintiffs' Motion for Summary Judgment. Docket No. 113. On June 9, 2023, Defendants filed their Reply in Support of Cross-Motion for Summary Judgment. Docket No. 115. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court found these matters appropriate for submission on the papers without oral argument. The matters were, therefore, removed from the Court's July 17, 2023 hearing calendar and the parties were given advance notice. After considering the moving, opposing, and reply papers, and the arguments therein, the Court rules as follows:

I. Factual and Procedural Background

In this case, Plaintiffs challenge the USFS's September 30, 2021 Decision approving the Reyes Peak Forest Health and Fuels Reduction Project (the "Project").

A. The Reyes Peak Forest Health and Fuels Reduction Project

Nearly a century of fire suppression in the Los Padres National Forest has led to unstable forest conditions, including high stand density, widespread woody fuels accumulation, understory growth, and unprecedented bark beetle activity. Existing hazardous fuel loads and extreme drought in recent years have increased the risk of wildfires in the area. Since 1972 there have been fifty-eight fires within two miles of the Project area as well as additional large-scale fires in the vicinity. The Project area has not experienced a large-scale fire in more than eighty years, putting it at greater risk for stand-replacing wildfire.[1]

On May 27, 2020, the USFS announced the Project by issuing a scoping letter and associated Project proposal. The Project will implement stewardship activities on 755 acres within the Los Padres National Forest with the goal of improving forest health by reducing wildfire risk, reducing forest mortality, and providing strategic shaded fuel breaks for fire suppression. The Project area runs east to west along Pine Mountain, approximately three miles south of the community of Camp Scheideck. Although approximately forty-one percent of the Project area is within the Sespe-Frazer Inventoried Roadless Area, less than 0.29 percent of the Sespe-Frazer Inventoried Roadless Area is implicated by the Project. The Project does not include any road construction, and there are no wilderness areas in the Project area.

Vegetation within the Project area consists primarily of Jeffrey Pine, Sierra Nevada mixed-conifer, white fir, chaparral, and canyon live oak. Vegetation condition classes define the divergence of current conditions from historical conditions. Seventy-five percent of the Project area is classified as Vegetation Condition Class II (thirty-four to sixty-six percent departure from historical) and thirteen percent classified as Vegetation Condition Class III (sixty-seven to one hundred percent departure from historical). Generally, uncharacteristically high tree densities

[1] A stand-replacing wildfire is a wildfire that kills most of the trees in the area, resulting in those trees needing to be replaced by new trees.

increase stress on larger trees due to competition for resources and increased susceptibility to bark beetles. The mixed conifer stands in the Project area are experiencing elevated levels of bark beetle activity, and the National Insect and Disease Forest Risk Assessment of 2012 identified the Project area as at a heightened risk for pests that could destroy up to twenty-five percent of basal area.[2]

The Project involves the mechanical and hand thinning of tree stands, removal of downed material, and prescribed burning to reduce surface/ladder fuels, decrease fire intensity, improve the health of the remaining trees and improve forest resilience, and create a fuel break to provide for firefighter and public safety. Mixed conifer stands are projected to be thinned to a range of sixty to one hundred square feet basal area per acre with a target of eighty square feet basal area in order to provide a high degree of protection from bark beetle infestations. Trees up to twenty-four inch diameter at breast height ("DBH") may be thinned to achieve the desired density. Trees larger than twenty-four inches that pose safety hazards or are infested with dwarf mistletoe may also be removed. However, there have not been any such trees identified for removal. The Project area is heterogeneous – some areas will require little to no thinning because of low density, while other areas with higher density will need to be thinned.

The May 27, 2020 scoping letter stated that the agency did not plan to prepare an Environmental Assessment ("EA") or an Environmental Impact Statement ("EIS") because USFS believed that the Project was covered by "Section 603 of HFRA (16 U.S.C. 6591b), Insect and Disease Infestation; Section 605 of HFRA (16 U.S.C. 6591d), Wildfire Resilience."

B. Response to the Scoping Letter and The USFS's Decision Memo

After the scoping letter was issued, approximately 16,000 comments were submitted to the USFS, and many of those comments opposed to the Project. Plaintiffs, along with other organizations, businesses, and individuals, submitted comment letters discussing their belief that the Project would harm the forest, wildlife, Native American cultural sites, and the Sespe-Frazier IRA. Many of the comment letters also requested that an EA or EIS be conducted, particularly in light of the commenters' belief that the Project allows some of the biggest and oldest trees in the area to be logged.

On September 30, 2021, the USFS issued the Decision Memo approving the Project pursuant to regulatory and statutory categorical exclusions designed to improve timber stand health and reduce wildfire risk. The Forest Service relied on three categorical exclusions from further analysis under the National Environmental Policy Act: (1) 36 C.F.R. § 220.6(e)(6) ("CE-6"); (2) the Healthy Forest Restoration Act ("HFRA"), 16 U.S.C. § 6591b ("Insect and Disease Infestation"); and (3) HFRA, 16 U.S.C. § 6591d ("Wildfire Resilience"). The USFS determined that the entire Project fails within the scope of CE-6, which categorically excludes "[t]imber stand and/or wildlife habitat improvement activities that do not include the use of herbicides or do not require more than 1 mile of low standard road construction." 36 C.F.R. § 220.6(e)(6). In addition, the USFS determined that eighty-eight percent of the Project area falls within the scope of one of the

[2] Basal area is defined as the "cross sectional area of a tree measured at breast height (4.5 feet or 1.37 meters above the ground) . . . expressed in either square feet per acre or square meters per hectare. A way of measuring how much a site is occupied by trees."

HFRA categorical exclusions, which categorically excludes certain forest restoration projects that reduce hazardous fuels or the risk of insect and disease. 16 U.S.C. §§ 6591b and 6591d. The USFS also determined that no extraordinary circumstances would prevent the use of a categorical exclusion.

In this case, although environmental review under categorical exclusions is ordinarily less detailed than in an EIS, the USFS engaged in extensive review. After scoping the Project with the public, the USFS reviewed thousands of comments and issued the forty-eight page September 30, 2021 Decision Memo fully explaining the need for the Project and assessing the environmental effects, mitigation measures, and application of the categorical exclusions. In addition, the Decision Memo is supported by an Administrative Record of more than 12,000 pages, which includes numerous technical reviews and consultation with the FWS.

C. National Environmental Policy Act

The NEPA "is a procedural statute that requires the federal government to carefully consider the impacts of and alternatives to major environmental decisions." *Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1051–52 (9th Cir. 2012); 42 U.S.C. §§ 4321, 4331; 40 C.F.R. § 1501.1.[3] NEPA requires that federal agencies take a "hard look" at the environmental consequences of their proposed actions and then inform the public about the agency's decision-making process. *Kern v. U.S. Bureau of Land Mgmt*., 284 F.3d 1062, 1066 (9th Cir. 2002); *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (noting that NEPA serves two aims: (1) informing agency decision-makers of the environmental effects of proposed federal actions; and (2) ensuring that relevant information is made available to the public). NEPA "does not mandate particular results, but simply prescribes the necessary process." *Robertson,* 490 U.S. at 350. Indeed, "NEPA is concerned with process alone and merely prohibits uninformed – rather than unwise – agency action." *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 878 F.3d 725, 730 (9th Cir. 2017) (internal quotation marks and citation omitted). Judicial review of agency decision-making is "at its most deferential" when reviewing scientific judgments and technical analyses within the agency's expertise. *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1075 (9th Cir. 2011). As a result, a "court must avoid passing judgment on the substance of an agency's decision. Its focus must be on ensuring that agencies took a 'hard look' at the environmental consequences of their decisions." *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 865 (9th Cir. 2004) (*citing Robertson*, 490 U.S. at 350).

NEPA and its implementing regulations require the preparation of an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.11. An agency need not complete an EIS or EA for projects falling within a categorical exclusion, absent extraordinary circumstances. 40 C.F.R. § 1508.4. Application of a categorical exclusion is "a form of NEPA compliance." *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1096 (9th Cir. 2013). Congress may issue a categorical exclusion or an agency may

[3] The Council on Environmental Quality ("CEQ") promulgated regulations implementing NEPA in 1978, 43 Fed. Reg. 55,978 (Nov. 29, 1978), and a minor substantive amendment to those regulations in 1986, 51 Fed. Reg. 15,618 (Apr. 25, 1986). More recently, CEQ published a new rule, effective September 14, 2020, further revising the 1978 regulations. The claims in this case arise under the 1978 regulations, as amended in 1986.

adopt one in its NEPA handbook, following consultation with CEQ and public comment. 73 Fed. Reg. 43,084, 43,091 (July 24, 2008).

D. Endangered Species Act

The Endangered Species Act ("ESA") "reflects a conscious decision by Congress to give endangered species priority over the primary missions of federal agencies." *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011) (internal quotations marks and citation omitted). The ESA tasks federal agencies with ensuring that any "agency action" is not likely to jeopardize the continued existence of any listed species. 16 U.S.C. § 1536(a)(2). In addition, agency action may not destroy or adversely modify the critical habitat of any listed species. *Id*.

If the agency determines that the proposed action "may affect" listed species or critical habitat, the agency must pursue either informal or formal consultation with FWS. 50 C.F.R. §§ 402.13-402.14(g), (h). Informal consultation is appropriate if the action is "not likely to adversely affect" a listed species, and the process concludes with FWS's concurrence with such a determination. 50 C.F.R. § 402.13. If formal consultation is required, FWS must prepare a Biological Opinion stating whether the proposed action is likely to "jeopardize the continued existence of" any listed species or destroy or adversely modify critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14.

E. The Roadless Area Conservation Rule

The Forest Service's 2001 Roadless Area Conservation Rule ("Roadless Rule") governs when timber harvesting may occur in inventoried roadless areas.[4] Special Areas; Roadless Area Conservation; Final Rule, 66 Fed. Reg. 3,244 (Jan. 12, 2001). Specifically, the Roadless Rule was established to "initiate a nationwide plan to protect inventoried and uninventoried roadless areas" within national forests. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1105 (9th Cir. 2002). An "Inventoried Roadless Area" ("IRA") is an area that "provide[s] large, relatively undisturbed landscapes that are important to biological diversity and the long-term survival of many at risk species." Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3245 (Jan. 12, 2001); *see also* 36 C.F.R. § 294.11.

The Roadless Rule generally prohibits timber cutting, sale, or removal in IRAs because those activities "have the greatest likelihood of altering and fragmenting landscapes resulting in immediate, long-term loss of roadless area values and characteristics." Special Areas; Roadless Area Conservation, 66 Fed. Reg. at 3244. However, the Roadless Rule provides some exceptions. For example, "timber may be cut, sold or removed" in IRAs if the Responsible Official determines:

> (1) The cutting, sale, or removal of generally small diameter timber is needed for one of the following purposes and will maintain or improve one or more of the roadless area characteristics as defined in § 294.11.

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[4] On March 26, 2021, the Acting Deputy Regional Forester signed a Decision Memo concluding that the Project is consistent with the 2001 Roadless Rule.

> (i) To improve threatened, endangered, proposed, or sensitive species habitat; or
>
> (ii) To maintain or restore the characteristics of ecosystem composition and structure, such as to reduce the risk of uncharacteristic wildfire effects, within the range of variability that would be expected to occur under natural disturbance regimes of the current climatic period[.]

36 C.F.R. § 294.13.

The Roadless Rule defines "roadless area characteristics" as "[r]esources or features that are often present in and characterize" IRAs, including: (1) High quality or undisturbed soil, water, and air; (2) Sources of public drinking water; (3) Diversity of plant and animal communities; (4) Habitat for threatened, endangered, proposed, candidate, and sensitive species and for those species dependent on large, undisturbed areas of land; (5) Primitive, semi-primitive non-motorized and semi-primitive motorized classes of dispersed recreation; (6) Reference landscapes; (7) Natural appearing landscapes with high scenic quality; (8) Traditional cultural properties and sacred sites; and (9) Other locally identified unique characteristics. 36 C.F.R. § 294.11.

F. The National Forest Management Act

The National Forest Management Act ("NFMA") "charges the Forest Service with the management of national forest land, including planning for the protection and use of the land and its natural resources." *Alliance for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1109 (9th Cir. 2018). The Forest Service develops land and resource management plans ("forest plans"), 16 U.S.C. § 1604, that summarize the "broad, long-term plans and objectives for the entire forest." *Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1056 (9^{h} Cir. 2012). Forest plans include guidelines to help achieve the NFMA's goals, including consideration of both economic and environmental concerns, preservation of diversity in plant and animal communities, and research on the effects of forest management. 16 U.S.C. § 1604(g)(3).

"After a forest plan is approved, the Forest Service implements the forest plan when approving or denying site-specific projects." *Weldon*, 697 F.3d at 1056. Courts must defer to the Forest Service's reasonable interpretation of its own guidelines, overturning the agency's decision only if it is plainly erroneous or inconsistent with the forest plan. *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1098 (9th Cir. 2003). "A project is consistent if it conforms to the applicable 'components' of the forest plan, including the standards, guidelines, and desired conditions that are set forth in the forest plan and that collectively establish the details of forest management." *Alliance for the Wild Rockies*, 907 F.3d at 1109–10. Although a forest plan's "standards" require strict adherence, the Forest Service may deviate from the plan's "guidelines" if the agency adequately documents the rationale for the deviation. *Id.*

G. Healthy Forests Restoration Act

The HFRA was enacted in 2003 with the principal purpose "to reduce wildfire risk to communities, municipal water supplies, and other at-risk Federal land through a collaborative

process of planning, prioritizing, and implementing hazardous fuel reduction projects." 16 U.S.C. § 6501(1). The statute was motivated in part by the perception that such projects were often stymied by "the extraordinarily lengthy procedural and documentation requirements that federal land managers face," which were viewed as "a maze of procedural and analytical requirements that do little to inform constructive decision-making." H.R. Rep. No. 108-96, pt. 1, at 3 (2003). Finding that HFRA as originally enacted did not allow the Forest Service to be adequately responsive to the hazardous fuels loads created by insect outbreaks, Congress amended HFRA in 2014 to speed up the project authorization process even further "to give forest managers greater opportunity to identify and manage risk in the forest." *Center for Biological Diversity v. Ilano*, 928 F.3d 774, 777-78 (9th Cir. 2019) (*quoting* S. Rep. No. 113-88 at 18); *see also id.* at 777 (noting that Congress amended HFRA "to allow the United States Forest Service greater flexibility in managing the health of forest lands threatened by insect and disease infestation").

In the HFRA, as amended, Congress categorically excluded from further NEPA review certain forest restoration projects that reduce hazardous fuels or lower the risk of insect and disease outbreak. 16 U.S.C. §§ 6591b, 6591d. A categorically excluded HFRA project should: (1) maximize retention of old-growth and large trees, "as appropriate for the forest type, to the extent that the trees promote stands that are resilient" to insects and disease or wildfires; (2) consider "the best available scientific information to maintain or restore the ecological integrity"; and (3) be developed and implemented by a collaborative process. *Id.* In addition, Projects must be less than 3,000 acres and within Vegetation Condition Classes II or III in Fire Regime Groups I, II, or III. 16 U.S.C. §§ 6591b, 6591d. HFRA requires the USDA to prepare annual reports to Congress on the use of HFRA categorical exclusions. 16 U.S.C. §§ 6591b(g), 6591d(g).

H. Procedural History

On April 27, 2022, Plaintiffs filed a Complaint against Defendants, alleging causes of action for: (1) violation of NEPA for failure to scope the Project's Reliance on 36 C.F.R. § 220.6(e)(6); (2) violation of NEPA for wrongful reliance on 36 C.F.R. § 220.6(e)(6); (3) violation of NEPA and HFRA for wrongful reliance on 16 U.S.C. §§ 6591b and 6591d; (4) violation of NEPA for failure to prepare an EA or EIS despite the presence of extraordinary circumstances; (5) violation of NEPA for failure to prepare an EIS; (6) violation of the ESA for an arbitrary and capricious "not likely to adversely affect" determination; (7) violation of the Roadless Rule for failure to comply with the requirement to only log "generally small diameter trees"; (8) violation of NFMA, NEPA, and HFRA for failure to comply with forest plan; and (9) violation of HFRA for failure to prepare and submit annual reports. On July 28, 2022, Defendants filed an Answer.

On August 22, 2022, the Court entered an Order Consolidating Cases pursuant to a Stipulation by the parties. In the Order Consolidating Cases, this action, *Los Padres ForestWatch, et al., v. U.S. Forest Service, et al.,* Case No. 22-2781-JFW (SKx), was consolidated with *City of Ojai v. U.S. Forest Service, et al.,* Case No. 22-2800-JFK (SKx), and *County of Ventura v. U.S. Forest Service et al.,* Case No. 22-2802-JFW (SKx).

II. Legal Standard

"When reviewing agency decisions under the APA, a court may only set aside a final agency decision if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with

law,' or 'unsupported by substantial evidence.'" *Kim v. Baran*, 2014 WL 12573361, *2 (C.D. Cal. 2014) (*quoting* 5 U.S.C. § 706). An agency decision is "arbitrary and capricious" when "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Beno v. Shalala*, 30 F.3d 1057, 1073 (9th Cir. 1994) (*quoting Motor Vehicle Mfr. Ass'n v. State Farm Ins.*, 463 U.S. 29, 44 (1983)). Under this "narrow" standard of review, the court "is not to substitute its judgment for that of the agency," and must "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-14 (2009). An agency does not violate the arbitrary and capricious standard where it articulates "a rational relationship between its factual findings and its decision." *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1132 (9th Cir. 2010).

"In a case involving review of a final agency action under the [APA] . . . the standard set forth in Rule 56(c) does not apply because of the limited role of a court in reviewing the administrative record." *Sierra Club v. Mainella*, 459 F.Supp. 2d 76, 89 (D.D.C. 2006). "Th[e] court is not required to resolve any facts in a review of an administrative proceeding." *Occidental Eng'g Co. v. I.N.S.*, 753 F.2d 766, 769 (9th Cir. 1985); *see Northwest Motorcycle Ass'n v. U.S. Dep't of Agric.,* 18 F.3d 1468, 1472 (9th Cir. 1994) (holding that, on summary judgment in an APA case, "resolution of th[e] matter does not require fact finding on behalf of th[e reviewing] court" because "the court's review is limited to the administrative record"). An agency's factual findings are reviewed under the "extremely deferential" "substantial evidence" standard, which requires the court to "uphold the [agency]'s findings unless the evidence presented would *compel* a reasonable finder of fact to reach a contrary result." *See Monjaraz-Munoz v. I.N.S.*, 327 F.3d 892, 895 (9th Cir. 2003), *amended by,* 339 F.3d 1012 (2003) (emphasis in original). "[W]hile formal findings are not required, the record must be sufficient to support the agency action, show that the agency has considered the relevant factors, and enable the court to review the agency's decision." *Beno*, 30 F.3d at 1074.

III. Discussion

In their Motion for Summary Judgment, Plaintiffs argue they are entitled to summary judgment declaring unlawful, vacating, and setting aside the USFS's approval of the Project and the FWS's decision that the Project is not likely to adversely affect California condors or their critical habitat. Plaintiffs also seek declaratory relief concerning the violations alleged in their Complaint and injunctive relief prohibiting Defendants from proceeding with the Project without first issuing a final EIS and completing formal consultation under the ESA. Specifically, Plaintiffs argue that the USFS's approval of the Project violated the NEPA because: (1) the USFS failed to conduct a lawful scoping process with respect to CE-6; (2) CE-6 does not cover all of the activities covered by the Project; (3) the USFS authorized the logging of old-growth and large trees, ignored the best available science, and failed to adequately collaborate with stakeholders, and, as a result, the HFRA CEs do not cover this Project; and (4) even if the Project met the terms of the CEs relied on by the USFS, reliance on a CE is unlawful in this case because "extraordinary circumstances" exist due to the Project's potential harm to local "resource conditions," including cultural sites, rare species, and the Sespe-Frazier IRA. Plaintiffs also argue that although the USFS conducted an ESA consultation with the FWS concerning the Project's effects on the endangered California condor, the FWS arbitrarily concluded the Project would "not likely adversely affect" condors or

their critical habitat based on the unfounded assertion that large trees (on which condors rely) would be retained. In addition, Plaintiffs argue that the USFS violated the Roadless Rule, which limits logging in IRAs, by authorizing the unlimited logging of trees up to sixty-four inches in diameter in the Sespe-Frazier IRA and failing to protect its wild character. Finally, Plaintiffs argue that the USFS failed to prepare and submit annual reports concerning its use of CEs as required by HFRA.

In their Motion for Summary Judgment, Defendants argue that they are entitled to summary judgment on Plaintiffs' Complaint because Plaintiffs cannot satisfy their burden of proving that Defendants' actions were arbitrary, capricious, or a violation of law. Specifically, Defendants argue that: (1) the USFS satisfied the requirements of the NEPA in authorizing the Project; (2) Defendants satisified the requirements of the ESA in analyzing the impacts on the California condor; (3) the USFS complied with the Roadless Rule in authorizing the Project; (4) the USFS complied with the NFMA; and (5) the USDA's compliance with the HFRA is not judicially reviewable. In addition, Defendants argue that the County of Ventura and the City of Ojai lack standing to bring their claims against Defendants and all of the Plaintiffs lacks standing to challenge the HFRA annual reporting requirement.

A. Standing

1. Legal Standard

Courts must determine if all the parties have standing under Article III "before proceeding to the merits of a case." *Department of Education v. Brown*, 600 U.S. __, 143 S.Ct. 2343 (2023) ("[B]ecause we conclude that Brown and Taylor lack standing, 'this case begins and ends with standing'") (*quoting Carney v. Adams*, 592 U.S. ___, 141 S.Ct. 493, 498 (2020). For Article III standing, "a plaintiff needs a 'personal stake' in the case." *Biden v. Nebraska*, 600 U.S. ___, 143 S.Ct. 2355 (2023) (*quoting TransUnion LLC v. Ramirez*, 594 U.S. ___, 141 S.Ct. 2190 (2021)). Specifically, a plaintiff must demonstrate that it is under threat of an "injury in fact" that is: (1) "concrete and particularized"; (2) "actual and imminent"; (3) "fairly traceable to the challenged action of the defendant"; and (4) redressable by a favorable decision. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (*citing Friends of Earth, Inc. v. Laidlaw Env't Serv. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)). "Allegations of possible future injury" are insufficient. *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). In addition to Article III standing, a plaintiff must demonstrate prudential standing. *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 937 (9th Cir. 2005) ("Grafted on top of this constitutional backbone [of Article III standing] are prudential standing requirements consisting of 'several judicially self-imposed limits on the exercise of federal jurisdiction'") (citation omitted). To demonstrate prudential standing in an APA case, the alleged injury must be "within the zone of interests to be protected or regulated" by the statute in question. *Port of Astoria v. Hodel*, 595 F.2d 467, 474 (9th Cir. 1979) (holding that the port district's "pecuniary losses and frustrated financial expectations" outside NEPA's zone of interest).

2. The County of Ventura and the City of Ojai Lack Standing to Bring Their Claims

Defendants argue that the County of Ventura and the City of Ojai lack standing to bring their claims because their alleged injuries are speculative. The County of Ventura and the City of Ojai

argue that they have standing based on the potential increase in wildfire risk from the Project. The County of Ventura and the City of Ojai argue that wildfires threaten the health and safety of their citizens and emergency personnel, and pose a risk to their natural resources. The City of Ojai also argues that wildfires could adversely affect tourism to the area, which could potentially leading to the loss of tax revenue.

The Ninth Circuit has held that "political subdivisions, such as cities and counties, whose power is derivative and not sovereign, cannot sue as *parens patriae*, although they might sue to vindicate such of their own proprietary interests as might be congruent with the interests of their inhabitants." *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31,* 481 F.2d 122, 131 (9th Cir. 1973). A municipality has a proprietary interest in its ability to enforce land-use regulations, its powers of revenue collection and taxation, and its proprietary interest in protecting natural resources from harm. *See City of Sausalito v. O'Neill*, 386 F.3d 1186, 1198 (9th Cir. 2004) (*citing Scotts Valley Band of Pomo Indians of Sugar Bowl Rancheria v. United States*, 921 F.2d 924, 928 (9th Cir. 1990) (land-use); *Colorado River Indian Tribes v. Town of Parker*, 776 F.2d 846, 848–49 (9th Cir. 1985) (revenue collection and taxation); *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 944 (9th Cir. 2002) (natural resources). In addition, the Ninth Circuit has determined that an increased risk of wildfire is sufficient to support standing. *See Delta Water Agency v. United States*, 306 F.3d 938, 949–50 (9th Cir. 2002) (agreeing with the D.C. Circuit that a substantial risk of wildfire is a threat of injury that entitles plaintiffs to be heard). Moreover, a county may assert an injury to its proprietary interests where "land management practices of federal land could affect adjacent" county-owned land. *Douglas County*, 48 F.3d at 1501. To survive a motion for summary judgment raising standing, the County of Ventura and the City of Ojai must set forth "specific facts" by affidavit or by other admissible evidence demonstrating that they have suffered an "injury in fact" as a result of the Project. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *Friends of the Earth, Inc. v. Laidlaw Environmental Serices (TOC), Inc.*, 528 U.S. 167, 180–81 (2000).

In this case, the County of Ventura and the City of Ojai have failed to assert any definitive and impending injury associated with the Project. Instead, they merely speculate that their economic interests could be impaired and the risk of wildfires increased if USFS is allowed to proceed with the Project. As a result, the County of Ventura and the City of Ojai have failed to demonstrate that they face both a substantial increased risk of wildfires from the Project and a substantial probability that the increased risk will harm their propriety interests. *See W. Expl., LLC v. U.S. Dep't of Interior*, 250 F.Supp.3d 718, 734 (D. Nev. 2017) (holding that an "alleged potential harm in the future [of increased wildfire] is not actual or imminent") (citation and internal quotations omitted); *see, also, Swanson Grp. Mfg. LLC v. Jewell*, 790 F.3d 235, 242 (D.C. Cir. 2015) (holding that a logging company's attestations that it "may not be able to continue to operate its facility and keep its current work force employed" if the challenged action was implemented constituted "the kind of uncertain and unspecific prediction of future harm that is inadequate to establish Article III standing"). In addition, the Administrative Record does not support the County of Ventura's and the City of Ojai's assertion that the Project is likely to increase wildfire risk. To the contrary, the Administrative Record reflects that the Ventura County Fire Department lists the Project as part of its Fire Plan. Moreover, although their argument relies on several comment letters in the Administrative Record that generally suggest thinning projects generally do not reduce wildfire risk, none of the analysis contained in those comment letters is specific to the Project. Furthermore, the City of Ojai did not identify any City-owned property that may be impacted by the Project and the

nearest County-owned parcel of land is approximately ten miles from the Project site. As a result, the County of Ventura has failed to allege how any specific aspect of the Project may harm County-owned property. *See e.g., W. Exploration, LLC v. U.S. Dep't of the Interior*, 250 F. Supp. 3d 718, 732-33 (D. Nev. 2017) (finding general statements of harm "insufficient to withstand a motion for summary judgment" on standing and requiring "specific facts" that county suffered injury in fact).

With respect to the City of Ojai's argument that it could potentially lose tax revenue if wildfires adversely affect tourism to the area, the Court concludes that the potential loss of tax revenue is a purely economic interest and a purely economic interest is outside the zone of interests protected by NEPA. *See Nevada Land Action Ass'n v. U.S. Forest Serv*., 8 F.3d 713, 716 (9th Cir. 1993) ("A plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA.") (citations omitted). In addition, the City of Ojai has offered no causal connection that a forest thinning project outside of the City limits will affect the City's tourism industry or otherwise reduce tax revenue. As a result, the alleged injury is wholly speculative. *City of Rohnert Park v. Harris*, 601 F.2d 1040, 1045 (9th Cir. 1979) (rejecting the city's alleged proprietary interest as "speculative") (citation omitted).

Accordingly, the Court concludes that the County of Ventura and the City of Ojai lack standing and, as a result, Defendants are entitled to summary judgment against the County of Ventura and the City of Ojai.[5]

3. All of the Plaintiffs Lack Standing to Challenge the HFRA Annual Reporting Requirement

Defendants argue that all of the Plaintiffs lack standing with respect to their challenge of the HFTA Annual Reporting requirement. Plaintiffs argue that the USDA's failure to meet its reporting obligation has caused Plaintiffs an "informational injury."

"A plaintiff sustains a cognizable informational injury in fact when agency action cuts her off from 'information which must be publicly disclosed pursuant to a statute.'" *Animal Legal Def. Fund v. U.S. Dep't of Agric*., 935 F.3d 858, 867 (9th Cir. 2019) (citation omitted). The plaintiff must also demonstrate "actual harm" resulting from the informational injury. *Lundstrom v. Young*, 2022 WL 15524624, at *15, 16 (S.D. Cal. Oct. 27, 2022) (finding a plaintiff pled more than a "bare procedural violation" where he alleged his employer's failure to provide information required under ERISA harmed him because he did not know the processing procedures or timelines).

In this case, the Court concludes that Plaintiffs have failed to establish any informational injury. The HFRA was enacted in 2003 with the principal purpose "to reduce wildfire risk to communities, municipal water supplies, and other at-risk Federal land through a collaborative process of planning, prioritizing, and implementing hazardous fuel reduction projects." 16 U.S.C. § 6501(1). Pursuant to the HFRA, the USDA is required to prepare annual reports to Congress on the use of HFRA categorical exclusions. 16 U.S.C. §§ 6591b(g), 6591d(g). However, the HFRA

[5] In the alternative, the Court concludes that even if the County of Ventura and City of Ojai had standing, Defendants would be entitled to summary judgment on the merits of their claims for the reasons stated in this Order.

does not require public disclosure of the USDA's annual reports. *Compare* 16 U.S.C. §§ 6591b(g); 6591d(g) (requiring reporting to Congressional committees and the Government Accountability Office) *with, e.g.*, 42 U.S.C. § 8253(f)(9)(B) ("The Director shall make the scorecards required under this paragraph available to Congress, other Federal agencies, and the public through the Internet"). Indeed, Plaintiffs acknowledge that they have sought these annual reports through Freedom of Information Act requests, not through direct publication.

In addition, Plaintiffs have failed to establish how they have been harmed by the USDA's alleged failure to produce the annual reports. Although Plaintiffs argue that they "rel[y] on these reports in order to effectively achieve [their] mission," they failed to provide any legal or factual support demonstrating how they have been harmed by the lack of annual reporting, how their "mission" is impaired, or how they specifically rely on an annual report that they claim that the USDA has never produced.

Because the HFRA does not require public disclosure of the USDA's annual reports, and Plaintiffs have not demonstrated how they have been harmed by the USDA's alleged failure to produce annual reports, the Court concludes that Plaintiffs have not established standing with respect to their HFRA reporting claim. Accordingly, the Court concludes that Defendants are entitled to summary judgment on Plaintiffs' ninth cause of action for violation of HFRA.

B. Defendants Are Entitled to Summary Judgment on Plaintiffs' NEPA Claims

Plaintiffs argue that the USFS violated NEPA because they failed to scope CE-6, they failed to complete an EIS or EA, CE-6 does not apply to the Project, the HFRA categorical exclusions to not apply to the Project, and there are extraordinary circumstances that preclude the use of a categorical exclusion. Defendants argue that the USFS complied with NEPA by authorizing the Project pursuant to the applicable categorical exclusions and, therefore, the USFS was not required to complete an EIS or EA. Specifically, Defendants argue that the USFS conducted proper scoping of the Project, engaged in pre-scoping collaboration, received and reviewed public comments, determined that no extraordinary circumstances prevent the use of a categorical exclusion, and fully documented its analysis and conclusions in the Decision Memo, as supported by the Administrative Record. Defendants argue that, as a result, the USFS's decision that the Project fit within three categorical exclusions is entitled to deference and Plaintiffs' NEPA claims fail because they have failed to demonstrate that USFS's decision was arbitrary, capricious, or a violation of law.

1. Additional Scoping was not Required for CE-6

Plaintiffs argue that the USFS cannot rely on CE-6 because the original scoping letter and Project proposal referenced only the HFRA categorical exclusions, not CE-6. However, Forest Service regulations require scoping[6] of the ***project***, not the applicability of a specific categorical

[6] "Scoping" is defined in 40 C.F.R. § 1501.9(a) as "an early and open process" used by agencies "to determine the scope of issues for analysis in an environmental impact statement, including identifying the significant issues and eliminating from further study non-significant issues. Scoping may begin as soon as practicable after the proposal for action is sufficiently developed for agency consideration. Scoping may include appropriate pre-application procedures or work

exclusion. *See* 36 C.F.R. § 220.4(e)(1) (stating that "scoping is required for all Forest Service proposed actions, including those that would appear to be categorically excluded from further analysis and documentation in an EA or an EIS"). Plaintiffs have failed to cite any authority that requires scoping of a specific CE, and courts cannot impose a requirement "not found in any relevant statute or regulation." *The Lands Council v. McNair*, 537 F.3d 981, 991 (9h Cir. 2008) (*en banc*). Indeed, one district court recently recognized that it would be impractical to require an agency to re-scope a project every time a public comment led to consideration of a different or additional categorical exclusion. *See Friends of Inyo v. U.S. Forest Serv.*, 2023 WL 2432814, *10 (E.D. Cal. Mar. 9, 2023). In *Friends of Inyo*, the court concluded that the USFS had "no obligation to engage in further public consultation" when its decision relied on an additional categorical exclusion because "if an agency were required to solicit and review public comments every time a comment led to any change in its thinking about categorical exclusions, the agency could be forced into a vicious cycle of renotice and revision." *Id.*; *see also Earth Island Inst. v. Elliott*, 318 F. Supp. 3d 1155, 1178 (E.D. Cal. 2018) (confirming deference to agency where USFS relied on an additional categorical exclusion in revised decision). In addition, in this case, the USFS notified the public of the potential applicability of CE-6 during the public comment period. Specifically, on June 26, 2020, the USFS issued a press release notifying the public that the public comment period on scoping for the Project had been extended until August 14, 2020. In the press release, the USFS stated that the Project may not require an EIS or EA under HFRA and subsequent laws, and that "[c]ertain timber stand and/or wildlife habitat improvement activities may be categorically excluded from the need for an EA or EIS as outlined under NEPA Handbook direction, specifically Chapter 30, Categorical Exclusions." In addition, the Project website was updated on June 29, 2020, and further clarified that CE-6 and/or HRFA would apply to the Project. After the press release was issued and the website updated, the USFS held two additional public meetings before the close of the public comment period, which afforded the public ample opportunity to comment on the applicability of CE-6 to the Project. The Court concludes that this public engagement is sufficient under NEPA. *See* 36 C.F.R. § 220.4(e) ("Because the nature and complexity of a proposed action determine the scope and intensity of analysis, no single scoping technique is required or prescribed"); *see also Donohoe v. U.S. Forest Serv.*, 2022 WL 911376, *3 and *6 (D. Mont. Mar. 29, 2022) (*quoting* 40 C.F.R. § 1501.9 (2020)) (holding that agencies complete scoping by using various "means to communicate with those persons or agencies who may be interested or affected" and concluding that the "administrative record demonstrates that the USFS clearly engaged in scoping efforts through phone calls, emails, and letters").

Accordingly, the Court concludes that the USFS properly scoped the Project notwithstanding its reliance of CE-6.

2. Application of the Categorical Exclusions is Supported by the Record

Plaintiffs argue that certain aspects of the Project fall outside the scope of the three categorical exclusions relied on by the USFS. Specifically, Plaintiffs argue, among other things, that removal of dead and downed trees falls outside the scope of CE-6. Defendants argue that all aspects of the Project fit within the scope of one of the three categorical exclusions. Specifically, Defendants argue that the USFS determined CE-6 applies to the entire Project area and the HFRA categorical exclusions apply to eight-eight percent of the Project area, and the USFS's

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conducted prior to publication of the notice of intent."

determination is entitled to deference.

The Court agrees with Defendants. The USFS is not precluded from utilizing more than one categorical exclusion to address different aspects of a project, and CE-6 and the HFRA categorical exclusions that the USFS relied on in this case are not mutually exclusive. *See, e.g., Friends of Inyo*, 2023 WL 2432814, *9 (E.D. Cal Mar. 9, 2023) ("[A] patchwork theory of categorical exclusions might be reasonable in some circumstances"); *Earth Island Inst. v. Elliott*, 318 F. Supp. 3d 1155, 1183 (E.D. Cal. 2018) ("USFS may rely on one or more CEs to avoid preparing an EA or EIS"); *Earth Island Inst. v. Elliott*, 290 F. Supp. 3d 1102, 1109, 1114 (E.D. Cal. 2017) (noting that when the "USFS determined that the project fit into three CEs," the court's inquiry is whether "the agency reasonably determined that a particular activity is encompassed within the scope of a categorical exclusion"); *Mountain Communities for Fire Safety v. Elliott*, 25 F.4th 667, 680 (9th Cir. 2022) ("'CEs may overlap,' and the fact that a project fits into one CE 'does not mean that it could not also have fit into another one'") (*quoting Earth Island Inst.*, 318 F. Supp. 3d at 1180-81).

a. The Forest Service Properly Relied on CE-6

Plaintiffs argue that the USFS violated NEPA by relying on CE-6 because the Project authorizes the removal of large trees containing dwarf mistletoe, snags, and downed material and CE-6 cannot apply to those activities. Defendants argue that those activities are timber stand improvement activities that fall squarely within CE-6.

In the Decision Memo, the USFS explained how and why CE-6 applied to the Project. Specifically, the Decision Memo explains that the removal of snags and other dead and downed material by burning is necessary to "reduce current fire hazard [and] avoid an increase in fire hazard from project activity-generated fuels." AR11825; *see also* AR11804 ("[D]ead and downed materials would be removed to reduce the fire effects."); AR 10501 ("Implementation of the proposed action would remove most dead and down material, including snags"); AR11801 (noting that "dead and down woody material would be piled by hand or by machine and subsequently burned"). The Decision Memo also explains that:

> The project will use prescribed fire and understory burning to treat fuels created by project activities, to reduce natural fuel build-up once the initial treatments are completed and support the reintroduction of fire as a natural process in areas where the project is at desired conditions. These uses of fire are akin to activities identified in one of the regulatory examples for the category: "Prescribed burning to reduce natural fuels build-up and improve plant vigor." 36 C.F.R. 220.6(e)(6)(iv).

AR11825. The Decision Memo concludes that these thinning activities are permitted under 36 C.F.R. § 220.6(3)(6)(ii), which provides for "[t]hinning or brush control to improve growth or to reduce fire hazard." *See* AR11825. In addition, the Decision Memo concludes that the removal of trees infested with dwarf mistletoe also falls within the scope of CE-6 because it reduces fire hazard and improves forest health. *See, e.g.*, AR02243 ("Fuel accumulations were often heavier in dwarf mistletoe-infested areas because of fallen witches' broom and dead trees"); AR07779 ("Tree growth and vigor are reduced on infected trees with moderate to high dwarf mistletoe ratings"); AR07781 (noting stand health declines in overstocked stands with "dwarf mistletoe-infested trees," which in turn increases fuel loading).

In this case, it is undisputed that CE-6 does not limit thinning activities by tree size. Indeed, the "CE-6 exemption unambiguously allows the Forest Service to thin trees, including larger commercially viable ones, to reduce fire hazard without having to conduct an EIS or EA." *Mountain Communities for Fire Safety v. Elliott*, 25 F.4th 667, 680 (9th Cir. 2022) ("Because the Cuddy Valley Project authorizes thinning to reduce 'stand density, competing vegetation, and fuels' and will not require the use of herbicides or any road construction, the Forest Service reasonably determined that it falls within the scope of CE-6"). In addition, "[w]hen reviewing an agency's application of its own regulation, the agency's interpretation of its regulation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Alaska Ctr. for Env't v. U.S. Forest Service*, 189 F.3d 851, 857 (9th Cir. 1999) ("We agree that an agency's interpretation of the meaning of its own categorical exclusion should be given controlling weight unless plainly erroneous or inconsistent with the terms used in the regulation").

Accordingly, the Court concludes that the USFS has fully explained the basis for its determination that CE-6 applies to the Project and its determination is entitled to deference, and Plaintiffs have failed to demonstrate that the USFS's determination is plainly erroneous.

b. The USFS Properly Relied on HFRA Categorical Exclusions

Plaintiffs also argue that the USFS violated NEPA by applying HFRA categorical exclusions to the Project. Plaintiffs argue that the Project does not maximize retention of large trees, the USFS failed to consider the best available science, the Project was not developed through a sufficient collaborative process, and the Decision Memo did not include a map demonstrating that the Project area was within both Vegetation Condition Classes II and III and Fire Regime Group I, II, and III. Defendants argue that the Project complies with the HFRA because it maximizes retention of old-growth and large trees to the extent they promote resilience, considers the best available science, and was developed by a transparent public process that included multiple and diverse interests. Defendants also argue that the Project is significantly less than the allowable 3,000 acres, and eight-eight percent of the Project area is located within Vegetation Condition class II or III in Fire Regime Groups I, II, or III.

HFRA "directs the [Forest Service] to take action to 'reduce wildfire risk' and 'enhance efforts to protect watersheds and address threats to forest and rangeland health.'" *WildWest Inst. v. Bull*, 547 F.3d 1162, 1165 (9th Cir. 2008) (*quoting* 16 U.S.C. § 6501(1), (3)). A categorically excluded HFRA project should: (1) maximize retention of old-growth and large trees, "as appropriate for the forest type, to the extent that the trees promote stands that are resilient" to insects and disease or wildfires; (2) consider "the best available scientific information to maintain or restore the ecological integrity"; and (3) be developed and implemented by a collaborative process. 16 U.S.C. §§ 6591b, 6591d. In addition, projects must be less than 3,000 acres and within Vegetation Condition Classes II or III in Fire Regime Groups I, II, or III. *Id.* In this case, for the reasons discussed below, the Court agrees with Defendants and concludes that Plaintiffs have failed to meet their burden of demonstrating that the USFS's decision to apply HFRA categorical exclusions to the Project was arbitrary, capricious, or a violation of the law.

i. The Project Maximizes Retention of Large Trees

Plaintiffs argue that the Project conflicts with the HFRA because it does not maximize

retention of large trees and, to the contrary, allows for the logging of an "unlimited" and "unknown number" of large trees at the USFS's discretion.

A project categorically excluded under the HFRA "maximizes the retention of old-growth and large trees, as appropriate for the forest type, to the extent that the trees promote stands that are resilient to insects and disease, and reduce the risk or extent of, or increase the resilience to, wildfires." 16 U.S.C. § 6591d(b)(1)(A). Retention of trees is "specifically conditioned on that resilience." *Native Ecosystem Council v. Marten*, 807 F. App'x. 658, 661 (9th Cir. 2020). In addition, the HFRA gives the USFS discretion to determine how best to promote stands resilient to insects, disease, and wildfires. *Alliance for the Wild Rockies v. Marten*, 464 F. Supp. 3d 1169, 1176 (D. Mont. 2020); *Native Ecosystem Council v. Erickson*, 330 F. Supp. 3d 1218, 1245 (D. Mont. 2018). Indeed, the "HFRA does not require that all healthy large trees be retained." *Native Ecosystem Council*, 330 F. Supp. 3d at 1245. Moreover, the HFRA does not require an inventory of which trees may be removed. *See Navickas v. Conroy*, 575 F. App'x 758, 760 (9th Cir. 2014) (holding that the USFS has "no obligation to identify the specific trees that would be removed as part of the Project."); *Earth Island Inst. v. U.S. Forest Serv.*, 2022 WL 4123991, at *13 (E.D. Cal. Sept. 9, 2022) ("Nor is the USFS required [to] identify with specificity the exact number of medium or large trees that may be removed").

In addition, the HFRA gives the USFS discretion to determine how best to promote stands resilient to insects, disease, and wildfires. *All. the Wild Rockies v. Marten*, 464 F. Supp. 3d 1169, 1176 (D. Mont. 2020) ("This language vests the Forest Service with considerable discretion to weigh various factors, including the characteristics of the project area and risk of insects and disease, when identifying old-growth and large trees"); *Erickson,* 330 F. Supp. 3d at 1245 (holding that the HFRA "calls for the exercise of Forest Service expertise in determining what is appropriate to maximize retention.") (*citing Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Moreover, agency discretion to determine which trees to remove does not render the decision arbitrary, capricious, or a violation of law. *See Los Padres ForestWatch v. U.S. Forest Serv.*, 2020 WL 4931892, at *7 (C.D. Cal. Aug. 20, 2020) ("But the plan put in place by the Forest Service favors the retention of larger trees and snags and, though it has not been determined exactly which trees will be cut, the Decision Memo sets guidelines, which the Court presumes the workers will follow, to leave the larger trees in place"), *vacated in part on other grounds and remanded sub no.*, 25 F.4th 649 (9th Cir. 2022); *Wild Watershed v. Hurlocker*, 393 F. Supp. 3d 1086, 1098-99 (D.N.M. 2019) (finding the project would retain large trees, consistent with HFRA, "unless specific conditions" require removal), *aff'd,* 961 F.3d 1119 (10th Cir. 2020).

In this case, the Decision Memo clearly states that the USFS intends to retain and promote large and old growth trees. AR11750 (refencing Land and Resource Management Plan strategy emphasizing relative abundance of large diameter trees); AR11810 (Table 7 showing trees to be removed by diameter class, and stating that "[n]o trees in the greater than 24-inch diameter classes are planned to be removed"); AR11820 ("Thinning of forests should favor the retention of large-diameter trees"); AR11830 ("The larger-diameter trees between 24-in and 64-inch diameter breast height will be retained within the conifer forests in the project area"). In addition, the Project defines the basal area retention guideline of between sixty to one hundred square feet with a target of eighty square feet basal area per acre, which defeats Plaintiffs' "unlimited" logging claim. Moreover, the USFS concluded that removing smaller trees will reduce competition for limited

resources and minimize the impacts of crown and ground fires, which will improve the potential success of the remaining larger trees. Indeed, according to the Decision Memo, the Project will increase the average class size from 22.2 inches to 27.7 inches DBH. The Project does allow for the removal of select large trees for safety or disease on a case-by-case determination within the discretion of the field crews on site during implementation. AR11801 ("The removal of hazard trees (live or dead) of all sizes would occur along roads, trails, campgrounds, and landings to provide for safety of personnel and the public"); AR11801 (noting that trees infested with parasitic dwarf mistletoe may also be removed if necessary). However, the USFS determined that any incidental removal of large trees will not result in significant environmental impacts. *See* AR11804 ("Any incidental removal of the larger trees will be insignificant and will not result in the degradation of the existing nesting habitat").

Accordingly, the Court concludes that because the HFRA does not prohibit the removal of any old growth or large trees and the Project is specifically designed to retain and promote large trees, the Project satisfies the HFRA requirement of "maximiz[ing] retention of old-growth and large trees, as appropriate for the forest type." 16 U.S.C. § 6591d(b)(1)(A).

ii. The USFS Considered the Best Available Science

The HFRA directs the Forest Service to consider "the best available scientific information to maintain or restore the ecological integrity, including maintaining or restoring structure, function, composition, and connectivity." 16 U.S.C. §§ 6591b(b)(1)(B), 6591d(b)(1)(B). Courts defer to agency expertise in interpreting scientific literature. *Erickson*, 330 F. Supp. 3d at 1236 (holding Forest Service did not ignore best available science by disputing interpretation of paper promoted by the plaintiffs).

In this case, the USFS utilized an interdisciplinary team consisting of scientific experts in forestry, fuels management, botany, and hydrology, among others, to compile specialized reports citing a wide variety of robust and credible scientific literature. AR11830. The interdisciplinary team also reviewed scientific information submitted by the public. *Id.* The USFS concluded that the best available science supports the thinning Project to reduce wildfire risk and beetle kill. *See, e.g.*, AR11791 ("Thinning higher density Jeffrey pine stands reduces susceptibility to bark beetles (Fettig et al. 2012) will create more favorable conditions for the remaining trees"); *id*. ("Thinning to remove ladder fuels and reduce canopy cover is generally recommended to minimize crown fire hazard (Scott and Reinhardt)"); AR11794 ("Modeling indicates that thinning treatments of trees at 12, 20, and 30 in dbh could yield a similar reduction of burn probability (Collins et al. 2011b), so removal of smaller trees, rather than large ones important to CSO habitat, should be prioritized").

Accordingly, the Court concludes that the USFS relied on the best available science regarding the improvement of forest stand resilience, and concludes that Plaintiffs have failed to demonstrate that the USFS's reliance on and interpretation of the best available science is arbitrary or capricious.

iii. The USFS Developed the Project Through A Collaborative Process

Plaintiffs argue that the USFS failed to engage in a formal collaborative process. The HFRA

directs the USFS to engage in a collaborative process in Project development. *See* 16 U.S.C. §§ 6591b, 6591d. However, the HFRA only requires an informal collaboration. *See Greater Hells Canyon Council v. Stein*, 796 F. App'x. 396, 399 (9th Cir. 2020) ("Although the [plaintiff] argues the Forest Service must engage in a formal collaborative group process, this contention is not supported by the text of the statute or its legislative history"); *see also Greater Hells Canyon Council v. Stein*, 2018 WL 3966289, at *15 (D. Or. June 11, 2018) ("Contrary to plaintiffs' arguments, this does not require a structured nonexclusive working group from initial design stage nor widespread dissemination of every piece of information on Project design and impacts at every stage of the development process"), *report and recommendation adopted*, 2018 WL 3964801 (D. Or. Aug. 17, 2018), *aff'd*, 796 F. App'x 396 (9th Cir. 2020). In addition, a reasonable, informal collaborative process is entitled to deference. *Id.* (*citing Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 832 (9th Cir. 2012)).

In this case, the planning process began in 2006 when the USFS began discussions with individuals and groups to complete the Mt. Pinos Communities Wildfire Protection Plan. AR11831. In 2015, the Project area was designated under the HFRA. AR09610. In 2019 and 2020, the USFS engaged with the Ventura County Fire Department and federally recognized tribes regarding Project planning. AR09610-1. In addition, the USFS sent letters to tribes, inviting them to meetings at two potential project sites within the Los Padres National Forest. *See* AR04022, AR04024, AR04026, AR04028, AR04030, AR04034, and AR09610. In 2020, the USFS hosted several field trips to the Project site. *See* AR04637 and AR11832. Indeed, Los Padres ForestWatch, one of the Plaintiffs in this action, was invited to attend a site visit in mid-June and September 2020, but failed to respond to the invitation.[7] *See* AR09607 ("Ranger Smith invited Forest Watch, specifically Mr. Kuyper and Mr. Baker to a field trip . . . To date no response and no further requests to collaborate and visit the project site have been receive although we received requests for information and scoping comments on the project") and AR11832. The USFS also held three virtual public scoping meetings, which were widely advertised. AR11831-AR11832. The USFS also conducted numerous phone calls with a variety of interested individuals and media outlets. *See* AR09611; *see also* AR04633 (noting that the Director of Los Padres Forest Association expressed that he looked forward to collaborating with the USFS on the Project). Although the COVID-19 pandemic severely limited the USFS's ability to conduct safe, in-person meetings and large field trips, the USFS still received thousands of comment letters during the planning process. AR 09611, AR11813, AR11831, and AR11832. As a result, the Court concludes that the USFS engaged in a collaborative process that included parties with diverse interest and that was "transparent and nonexclusive." 16 U.S.C. §§ 6591b(b)(1)(C)(ii)(I); 6591d.

Accordingly, the Court concludes that Plaintiffs have failed to demonstrate that the USFS's collaborative efforts were arbitrary, capricious, or a violation of law.

iv. The Project Satisfies the HFRA's Location Requirements

Plaintiffs argue that the Decision Memo lacks a map demonstrating that the Project area

[7] Instead, Los Padres ForestWatch expressed its intent to sue before the scoping comment period for the Project closed. AR05377 ("The public comment period for the proposal is slated to end Aug. 14, at which point Los Padres ForestWatch and the Chaparral Institute are prepared to file an injunction to stop the project from moving forward").

consists of Vegetation Classes II and III within Fire Regime Groups I, II, and III, and, as a result, the USFS failed to provide adequate information to demonstrate that the HFRA categorical exclusions apply to the Project. However, the HFRA does not require the inclusion of such a map in the Decision Memo. Instead, the HFRA only requires that the Project be within Vegetation Condition Class II or III and within Fire Regime Group I, II, or III. 16 U.S.C. § 6591d(c)(2)(B). In this case, the USFS's Decision Memo includes tables and a map clearly demonstrating that eighty-eight percent of the Project area is within both Vegetation Condition Class II or III and within Fire Regime Group I, II, or III. 16 U.S.C. § 6591d(c)(2)(B); AR11791-95. The USFS determined that 98.6 percent of the Project area is classified as Fire Regime Group I, II, and III, and eight-eight percent of the Project area consists of Vegetation Condition Class II or III. As a result, the USFS determined that, at most, there are 10.69 acres, or 1.4 percent of the total Project area, where these vegetation condition classes and fire regime groups potentially do not overlap.

Accordingly, the Court concludes that the maps, evidence, and analysis contained in the Decision Memo support the USFS's determination that eight-eight percent of the Project satisfies the requirements of the HFRA categorical exclusions, and Plaintiffs have failed to demonstrate that the USFS's determination was arbitrary, capricious, or a violation of law.

3. No Extraordinary Circumstances Preclude Use of a Categorical Exclusion

Plaintiffs argue that the USFS is required to complete an EIS or EA for the Project and cannot rely on categorical exclusions because of the presence or existence of extraordinary circumstances. Specifically, Plaintiffs argue that the Project may result in a significant impact on the environment with respect to cultural resources, sensitive species, and wilderness or inventoried roadless areas.

An "extraordinary circumstance" is a circumstance "in which a normally excluded action may have a significant effect" on certain enumerated resource conditions. 40 C.F.R. § 1508.4; *Utah Env't Cong. v. Bosworth*, 443 F.3d 732, 742-43 (10th Cir. 2006) ("[W]e conclude that an extraordinary circumstance is found only when there exists a potential for a significant effect on a resource condition"). However, the mere presence or existence of an extraordinary circumstance does not preclude use of a categorical exclusion. Instead, there must be a causal connection as well as a significant degree of impact. 36 C.F.R. § 220.6(b)(2). In addition, "[o]nce the agency considers the proper factors and makes a factual determination on whether the impacts are significant or not, that decision implicates substantial agency expertise and is entitled to deference." *Alaska Ctr. for Env't v. U.S. Forest Service*, 189 F.3d 851, 859 (9th Cir. 1999). Moreover, design elements of a project that mitigate potential environmental impacts can further justify the lack of an EA or EIS. *Id*. ("This court has held that 'conditions mitigating the environmental consequences of an action may justify an agency's decision not to prepare an environmental impact statement'") (*quoting Jones v. Gordon*, 792 F.2d 821, 829 (9th Cir. 1986)). In addition, extraordinary circumstances review only applies to CE-6 and 16 U.S.C. § 6591d, not section 6591b. *See, e.g., Conservation Cong. v. U.S. Forest Serv.*, 2019 WL 2369919, at *5 (E.D. Cal. June 5, 2019) ("The Forest Service was not required to perform extraordinary circumstances review for a qualifying project under section 6591b").

In this case, the Decision Memo demonstrates that the USFS fully considered the effects of

the Project on wildlife and botanical species, inventoried roadless areas, Native American religious or cultural resources, and archeological sites, as set forth in 36 C.F.R. § 220.6(b), and determined that there were no extraordinary circumstances that prevented the application of a categorical exclusion. *See* AR11804. The USFS's determination is entitled to deference, and the Court concludes that Plaintiffs have failed to demonstrate that there are any extraordinary circumstances that prevent the application of a categorical exclusion.

a. The Project Will Not Significantly Affect Cultural Resources

Plaintiffs argue that the potential presence of artifacts or a connection to the landscape prohibits the use of a categorical exclusion. Specifically, Plaintiffs rely on the comment letters of the Coastal Band of the Chumash Nation and the Barbareno/Ventureno Chumash Band of Mission Indians, non-federally recognized tribes. However, neither Plaintiffs nor the non-federally recognized tribes any identify specific cultural resources that will be significantly affected by the Project. Instead, they argue that the land itself is a cultural resource. In addition, Plaintiffs fail to offer any legal authority to support their argument that general areas and landscapes must be evaluated as cultural resources as a part of the extraordinary circumstances review.

In concluding that the Project "will have no adverse effect on any cultural resources," the USFS completed a heritage resource inventory, which included an analysis of surveys of the Project area and a cultural resource report. AR11680-83, AR 11698, and AR11687. The cultural resource report assessed each of the five known sites and recommended a buffer of twenty meters and avoidance of ground disturbing activities. *Id.* The USFS also consulted with federally recognized tribes and engaged in scoping communications with non-federally recognized tribes. In 2019, the USFS sent letters to federally recognized Santa Ynez Band of Chumash Indians ("SYBCI") and Tejon Tribe. AR11684. In March 2020, the USFS met with SYBCI Elders Council regarding the Project and provided the draft cultural resources report. *Id.* The USFS also sent scoping notices to non-federally recognized tribes. *Id*. In addition, Forester Gregory Thompson ("Thompson") participated in a phone call with a member of the Barbareno/Ventureno Chumash Band of Mission Indians, and answered all questions about the Project. *Id*. In August and September 2020, formal consultation with federally recognized tribes occurred. *Id.* In November 2020, the USFS led a joint field trip of federally recognized and non-federally recognized tribes. *Id.* Following the field trip, the SYBCI "agree[d] that this project should move forward." AR11632. Similarly, the Tejon Tribe expressed its appreciation for the Forest Service's commitment to stewarding "resources in alignment with best practices that are guided by meaningful tribal consultation." AR10275.

As a result of these consultations, the USFS concluded that the Project would not impact any Native American cultural or religious resources. AR11812. In addition, the Decision Memo specifically provides that "if unanticipated resources are discovered, [the Forest Service will] cease project work in the area and notify the Forest Archeologist and Tribal Liaison immediately. . . . Project work in the area of the unanticipated discovery would not resume until the discovery has been secured and evaluated." AR11820.

Accordingly, the Court concludes that the USFS's determination that the Project would not impact any Native American cultural or religious resources is entitled to deference, and Plaintiffs have failed to demonstrate how the Project might significantly impact any Native American cultural

or religious resources.

b. The Project Will Not Significantly Affect Sensitive Species

Plaintiffs argue that the Project may adversely affect the California condor and other USFS sensitive species, relying on their mistaken belief that the Project allows for the unlimited logging of large trees.[8] Under the relevant regulations, the USFS is required to consider whether the Project may cause a significant effect on sensitive species. 40 U.S.C. § 1508.4; 36 C.F.R. § 220.6(b)(2). Because the agency is entitled to deference in its analysis, mere uncertainty about the impact on sensitive species "is not enough to conclude that the finding of no extraordinary circumstances was arbitrary or capricious." *Wildlands Def. v. Bolling*, 2020 WL 5042770, at *11 (D. Idaho Aug. 25, 2020) (*quoting Ctr. For Biological Diversity v. Ilano*, 261 F. Supp. 3d 1063, 1070 (E.D. Cal. 2017), *aff'd.,* 928 F.3d 774 (9th Cir. 2019)).

In the Decision Memo, the USFS fully analyzed the potential impact on California condors and other sensitive species and details the reasons why the Project is unlikely to significantly impact the California condor, including the absence of active nests and roost sites. The Decision Memo also relies on the Biological Assessment, which provides additional reasons why the Project is unlikely to adversely affect the California condor and its critical habitat. *See* AR 10477, AR11804-05, and AR11822-24. With respect to critical habitat, the USFS wildlife biologist concluded that "[b]ased on the lack of historic nest sites and low nesting habitat suitability for the action area, [the Project] would not result in a measurable effect to suitable nesting habitat in the Sespe-Piru Critical Habitat Unit." AR10501. The Biological Assessment concludes that the potential removal of some large hazard trees and those infested with dwarf mistletoe (if any) will have no "measurable effect" on condor conservation or the species because of the lack of historic nest sites and active roosts. *Id*. In addition, the "proposed project would benefit California condors by treating fuels to help prevent large, high intensity, stand replacing wildland fire that could eliminate nesting or roosting habitat over a larger area." *Id.* The USFS also determined that the Project would not impact other sensitive species, including the Northern goshawk, California spotted owls, pallid bat, or any of the sensitive plant species, because they are not present in the Project area. *See* AR11805-08; *see also* AR11756 (noting the goshawk is a "rare and intermittent breeder in the Los Padres NF"); AR11808 ("Since no regional forester sensitive species are in the project area, it is anticipated that no impact would result"); AR11737 ("If [chickweed oxytheca is] found, the area will be flagged and avoided to achieve no impact to this species").

In reaching these determinations on the lack of potentially significant impacts on California condors and other sensitive species, the Court concludes that the USFS properly focused its analyses on species and population level impacts. *See, e.g., Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1010 (9th Cir. 2006) ("NEPA regulations direct the agency to consider the degree of adverse effect on a species, not the impact on individuals of that species"); *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1240 (9th Cir. 2005) ("[I]t does not follow that the presence of some negative effects necessarily rises to the level of demonstrating a significant effect on the environment").

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[8] As previously discussed, the Project does not allow for the unlimited logging of large trees.

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Accordingly, the Court concludes that the USFS has fully explained why the Project will not have a significant impact on any of the identified sensitive species, and Plaintiffs have failed to demonstrate that the USFS's determination that there would be no substantial impact on any particular species is arbitrary, capricious, or a violation of law. *See Los Padres ForestWatch v. U.S. Forest Service*, 2020 WL 4931892, *5 (C.D. Cal. Aug. 20, 2020) (after the USFS determined "that because the project was not likely to adversely affect the condors and did not involve critical habitat . . . further analysis was not warranted," the court concluded that "[t]he Forest Service did not err in doing so").

c. The Project Will Not Significantly Affect Wilderness or Inventoried Roadless Areas

Plaintiffs also argue that the Project will have a significant effect on proposed wilderness areas. Specifically, Plaintiffs argue that a legislative proposal to designate wilderness is sufficient to require the USFS to engage in an extraordinary circumstances review. However, the Court agrees with Defendants and concludes that proposed legislation to designate areas as wilderness does not automatically require the USFS to engage in an extraordinary circumstances review. Instead, the extraordinary circumstances review only applies to "Congressionally designated areas[,]" "[i]nventoried roadless area[s,] and potential wilderness area[s]," not merely areas proposed for wilderness designation by expired legislation. 36 C.F.R. § 220.6(b)(1)(iii), (iv). "Potential wilderness" is a term of art, and the USFS, in the Forest Service Handbook, has established procedures for recommending inclusion of areas in the wilderness system. *See* U.S. Forest Serv. Handbook 1909.12, ch. 70 (2015). These procedures include regular inventorying of areas suitable for inclusion in the National Wilderness Preservation System, evaluation including public comment, analysis, and recommendation. *Id*.

In this case, the USFS has reviewed the Project area and concluded it is not suitable for inclusion in the National Wilderness Preservation System. *See* AR09755 ("Overall, the Sespe-Frazier IRA has low wilderness values and characteristics with uses that cannot be effectively managed as wilderness"); *see also* AR03217 ("It is not needed as part of the national wilderness preservation system, particularly with more than 850,000 acres of lightly-visited existing wilderness within 20 miles of this IRA"). As a result, the USFS has not recommended wilderness status for any portion of the Project area, and the Forest Plan does not identify it as potential wilderness. AR11808.

In addition, the USFS analyzed the Project impacts, including the diameter of trees to be cut, acreage of the Project area within the inventoried roadless area, restoration of stand characteristics to "pre-suppression-era composition," stand resilience to insects, disease, and wildfires, wildlife and habitat conservation, scenic qualities, and the threat of uncharacteristic, large-scale wildfires. AR11808-12. The USFS concluded that the Project treatments would not affect any wilderness or roadless qualities of the Project area. AR11812 ("[T]he treatments will have insignificant adverse impacts, since the project design maintains roadless area characteristics in the treated areas and does not include the building of any roads").

Accordingly, the Court concludes that the USFS considered the appropriate factors in its determination that the Project will not significantly impact Inventoried Roadless Areas or potential wilderness areas and, as a result, the Court concludes that the USFS's determination is entitled to deference and Plaintiffs have failed to demonstrate that the USFS's determination was arbitrary,

capricious, or a violation of law.

4. Defendants Are Entitled to Summary Judgment

Accordingly, the Court concludes that Defendants are entitled to summary judgment on Plaintiffs' first cause of action for violation of NEPA for failure to properly scope the Project, second cause of action for violation of NEPA for wrongful reliance on 36 C.F.R. § 220.6(e)(6), third cause of action for violation of NEPA (and HFRA) for wrongful reliance on 16 U.S.C. §§ 6591b and 6591d, fourth cause of action for violation of NEPA for failure to prepare an EA or EIS despite the presence of extraordinary circumstances, and fifth cause of action for violation of NEPA for failure to prepare an EIS.

C. Defendants Are Entitled to Summary Judgment on Plaintiffs' Claim for Violation of the ESA

Plaintiff argues that the FWS violated the ESA because it could not have "reasonably conclude[d]" that the Project was "not likely to adversely affect" the California condor or its critical habitat because the Project authorizes the logging of an unlimited number of large trees that contain any amount of dwarf mistletoe and an unlimited number of snags. Defendants argue that the Decision Memo, as supported by the Administrative Record, does not authorize the logging of an unlimited number of large trees, but, instead, allows for the removal of large trees in the rare circumstance that it is necessary to address safety issues or trees "impacted" by dwarf mistletoe "infestations." Defendants argue that, based on the Decision Memo and Administrative Record, the FWS reasonably concluded that the Project was not likely to adversely affect the California condor or its critical habitat.

The Court concludes that the FWS properly analyzed and rationally determined that the Project's effect on the California condor and its critical habitat was virtually nonexistent based on the information available to the FWS that the Project would remove few, if any, large trees (greater than 24 inches DBH). *See, e.g.*, FWS AR946 (recognizing that the Project "proposes to remove trees in the 1- to 24-inch size class" and "would retain trees greater than 24-inch [DBH] unless removal is needed for safety reasons or if the trees are impacted by dwarf mistletoe"). In addition, FWS's determination that the Project was "not likely to adversely affect" the California condor and its critical habitat is amply supported by the tracking data contained in the Administrative Record that demonstrates that California condors do not use the Project area for nesting (the most recently used nest in the last thirty years is more than twenty miles to the west) and daytime roosting activity within two miles of the Project area "is exceptionally low." Moreover, the Project area includes only 193 acres "where condor activity is currently low" out of 176,175 acres (0.1 percent) of the relevant critical habitat unit. Although the entire 755 acre Project footprint is modeled as roosting habitat, the surrounding area within three miles of the Project "contains 40,480 acres of modeled roosting habitat" or, in other words "an abundance of roosting habitat available for California condor." As a result, based on these facts and other relevant information in the Administrative Record, the FWS rationally determined that the Project was "not likely to adversely affect California condors and its critical habitat" for several reasons, including the fact that the California condor activity in the Project area is "low," the Project area "will continue to provide roosting habitat for California condors in a manner similar to current conditions," and the surrounding area "provides an abundance of California condor habitat." Indeed, the FWS concluded that not only would the Project not adversely affect the California condor, it will "benefit"

the California condor "by treating fuels to help prevent large, high-intensity fires that eliminate California condor roosting habitat over a larger area or pose a threat to condors roosting in the area." FWS AR949 (noting that the 2020 Dolan fire near Big Sur "killed 9 California condors" roosting in a canyon that burned with high intensity, and that "[r]educing fuel loads in condor roosting habitat would help prevent these kind of catastrophic events from happening").

This case is similar to *Los Padres ForestWatch v. U.S. Forest Service*, 2020 WL 4931892 (C.D. Cal. Aug. 20, 2022), where the district court upheld the agencies' determinations that the similar Tecuya Ridge Shaded Fuelbreak Project (also in the Los Padres National Forest) was not likely to adversely affect the California condor, even though that Project was more than twice as large (1,626 acres) and the Project area involved substantially more (albeit still "infrequent") roosting activity. In that case, the agencies' determinations were rational because "[t]here will still be large trees in the project area for the condors to use" because the Project "favors the retention of larger trees and snags," even if it "has not been determined exactly which trees will be cut." *Id.* Similarly, in this case, the FWS reasonably and rationally concluded that "[a]ny effects to California condor and its critical habitat as a result of [P]roject activities will be insignificant or beneficial," and the FWS's conclusions are entitled to substantial judicial deference. *See, e.g., Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) (*en banc*) ("[W]e are to conduct a particularly deferential review of an agency's predictive judgments about areas that are within the agency's field of discretion and expertise . . . as long as they are reasonable") (quotations omitted).

Accordingly, the Court concludes that Defendants are entitled to summary judgment on Plaintiffs' sixth cause of action for violation of the ESA.

D. Defendants Are Entitled to Summary Judgment on Plaintiff's Claims for Violation of the Roadless Rule and the NFMA

The USFS determined that the Project is consistent with the Roadless Rule. Plaintiffs argue that the Project violates the Roadless Rule because the Decision Memo does not limit logging to only "generally small diameter trees" in the Project area. Defendants argue that Plaintiffs have failed to demonstrate that the Project violates the Roadless Rule. In addition, Defendants argue that Plaintiffs have made their own determination of what constitutes "small" and "medium" sized trees for purposes of the Roadless Rule that is not based in law or fact.

The 2001 Roadless Rule applies when timber harvesting may occur in inventoried roadless areas and allows for the "cutting, sale, or removal of generally small diameter timber" if it will "maintain or improve one or more of the roadless area characteristics" and is needed to "maintain or restore the characteristics of ecosystem composition and structure, such as to reduce the risk of uncharacteristic wildfire effects." 36 C.F.R. § 294.13(b) (2001). What constitutes "generally small diameter timber" varies depending on "stand characteristics between vegetation types in different areas." 66 Fed. Reg. at 3,257. As a result, "[s]uch determinations are best made through project specific or land and resource management plan NEPA analyses, as guided by ecological considerations." *Id.* (noting that the determinations should consider how cutting would impact future stand development). Indeed, the Roadless Rule does not prescribe any particular method for determining what constitutes a "small diameter" tree and it does not limit cutting to exclusively small diameter trees. Instead, the Roadless Rule provides that cutting is "generally" limited to small diameter trees. Specifically, as Plaintiffs acknowledge, the preamble to the Roadless Rule states that logging should "focus on" removing small diameter trees. 66 Fed. Reg. at 3,258).

In this case, the USFS determined that trees smaller than 24 inches DBH in the Project area will be considered "small diameter" trees. In order to support that determination, the USFS conducted stand exams, measured basal area, tree heights and diameters, trees per acre, and ages within the Project area. The Project area contains three dominant tree species – Jeffrey Pine, sugar pine, and white fir – which have a growth potential of up to 80 to 117 inches DBH. At the time that the USFS conducted the stand exams, the trees in the Project area ranged from 1 inch to 64 inches DBH, with approximately half of the trees greater than 24 inches DBH. In the Decision Memo, the USFS determined that "[o]f the stands to be treated, the quadradic mean diameter of the trees to be removed between the 4- to 24-inch dbh class is 11.2 inches" and concluded that "no trees greater than 24-inch-diameter classes are planned to be removed" (unless removal is necessary for safety reasons or dwarf mistletoe infestations).

Plaintiffs, citing *Los Padres ForestWatch v. U.S. Forest Serv.*, 25 F.4th 649 (9th Cir. 2022), argue that trees between 12 to 24 inches DBH constitute "medium size" trees. However, the Ninth Circuit did not determine that trees between 12 to 24 inches DBH constitute "medium trees" or prescribe any particular method for the USFS to determine what constitutes a "small diameter" tree. *Id.* at 659. Instead, the Ninth Circuit simply remanded to the USFS to explain its "small diameter" determination. *Id.* Following remand, the USFS supported its conclusion that small diameter trees in the Tecuya Ridge area are less than 21 inches based on stand exams and the dominant conifer species, Jeffrey Pine, which grows to 90 inches DBH. *See Los Padres ForestWatch v. U.S. Forest Serv.*, 2022 WL 18356465, *2 and *7 (C.D. Cal. Dec. 5, 2022). After the USFS provided this information to support its conclusion, the district court concluded that the USFS had not violated the Roadless Rule and had "provided the information lacking in its initial Decision Memo to explain its rationale for classifying trees up to 21-inches DBH as 'generally small timber.'" *Id.* (quotation marks and citation omitted). Therefore, as the court did in *Los Padres ForestWatch*, 2022 WL 18356465, the Court concludes that the USFS has provided the information necessary to support its determination in the Decision Memo that trees smaller than 24 inches DBH in the Project area are "small diameter" trees.

In addition, the USFS's determination is consistent with the Land and Resource Management Plan, or Forest Plan, applicable to the Project area. *See* AR11749 (noting the USFS's "interpretation of the Land and Resource Management Plan [i.e., the Forest Plan] is that all trees less than 24 inches diameter at breast height are considered small diameter trees"); *see also Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1056 (9th Cir. 2002) ("[T]he Forest Service's interpretation and implementation of its own forest plan is entitled to substantial deference").

Accordingly, the Court concludes that Defendants are entitled to summary judgment on Plaintiffs' seventh cause of action for violation of the Roadless Rule and eighth cause of action for violations of NFMA, NEPA, and HFRA.

E. Defendants Are Entitled to Summary Judgment on Plaintiffs' Claim for Violation of the HFRA

Although the Court has concluded that all of the Plaintiffs lack standing to assert an HFRA violation for the USDA's alleged failure to submit annual reports to Congress, the Court also concludes, in the alternative, that even if Plaintiffs did have standing, any alleged violation of the HFRA reporting requirement is not judicially reviewable under the APA as a failure to act or a final

agency action. 5 U.S.C. § 706(1), (2). Annual reporting is not a final agency action subject to review. 16 U.S.C. § 6591b(g); 5 U.S.C. § 704. To be "final," an agency action must be: (1) the "consummation of the agency's decisionmaking process"; and (2) "one from which legal consequences flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks and citations omitted). Annual reports to Congress are for informational purposes only and "primarily a tool for [Congress'] own use, without cognizable legal consequences[,]" and "therefore not subject to judicial review under the APA." *American Small Bus. League v. Contreras-Sweet*, 712 F. App'x. 667, 668 (9th Cir. 2018) (*quoting Guerrero v. Clinton*, 157 F.3d 1190, 1195, 1197 (9th Cir. 1998)); *see also Renee v. Duncan*, 686 F.3d 1002, 1017 (9th Cir. 2012) ("Nothing in [the Act] provides that the Secretary's reports to Congress have any legal consequences"). As a result, only Congress can demand reporting compliance, and Congress has ample means of enforcing the reporting requirement without the assistance of the judicial branch, including holding hearings, passing legislation, and controlling agency budgets. *See Guerrero v. Clinton*, 157 F.3d 1190, 1195 (9th Cir. 1998) ("Having requested the report, Congress, not the judiciary, is in the best position to decide whether it's gotten what it wants"); *see also Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) ("And, of course, we hardly need to note that an agency's decision to ignore congressional expectations may expose it to grave political consequences"). Moreover, Congress did not make annual reporting a prerequisite to the USFS's use of the HFRA's categorical exclusions, and Plaintiffs have failed to demonstrate any nexus between annual reporting and the Project. *See* 16 U.S.C. §§ 6591b and 6591d.

Accordingly, the Court concludes that Defendants are entitled to summary judgment on Plaintiffs' ninth cause of action for violation of HFRA.

IV. Conclusion

For all the foregoing reasons, Plaintiffs' Motion for Summary Judgment is **DENIED** and Defendants' Cross-Motion for Summary Judgment is **GRANTED**. The parties are ordered to meet and confer and agree on a joint proposed Judgment which is consistent with this Order. The parties shall lodge the joint proposed Judgment with the Court on or before July 24, 2023. In the unlikely event that counsel are unable to agree upon a joint proposed Judgment, the parties shall each submit separate versions of a proposed Judgment along with a Joint Statement setting forth their respective positions on or before July 24, 2023.

IT IS SO ORDERED.

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