

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CONSERVATION CONGRESS and
CITIZENS FOR BETTER FORESTRY,

Plaintiffs,

v.

UNITED STATES FOREST SERVICE
and UNITED STATES FISH AND
WILDLIFE SERVICE,

Defendants,

AMERICAN FOREST RESOURCE
COUNCIL,

Defendant-
Intervenor.

No. 2:13-cv-00934-JAM-DB

**ORDER DENYING PLAINTIFFS' MOTION
TO SUPPLEMENT THE ADMINISTRATIVE
RECORD; DENYING PLAINTIFFS'
MOTION TO STRIKE; DENYING
PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT; AND GRANTING DEFENDANT
AND DEFENDANT-INTERVENOR'S
MOTIONS FOR SUMMARY JUDGMENT**

For nearly a decade, the parties have argued over the impact the Pettijohn Project would have on the Shasta-Trinity National Forest's Northern Spotted Owl ("spotted owl") population and its wildfire management efforts. Conservation Congress and the Citizens for Better Forestry (collectively, "Plaintiffs") believe the project will destroy critical old-growth forest that the spotted owls need to survive. The United States Forest Service

1 ("the Forest Service"), the United States Fish and Wildlife
2 Service ("Fish and Wildlife"), and the American Forest Resource
3 Council ("the Resource Council") contend the project will reduce
4 the likelihood of major wildfires and will have minimal short-
5 term effects on the spotted owls and their critical habitat.

6 This dispute has finally come to a head with the filing of
7 cross-motions for summary judgment by all parties involved. See
8 Pls.' Mot. Summ. J., ECF No. 62; Defs.' Mot. Summ. J., ECF No.
9 73; Def-Interv.'s Mot. Summ. J., ECF No. 76. In addition,
10 Plaintiffs have filed a motion to supplement the administrative
11 record, see Mot. to Supp. Admin. Record, ECF No. 66-1, and a
12 motion to strike, see Mot. to Strike, ECF No. 79. For the
13 reasons set forth below, the Court DENIES Plaintiffs' motion to
14 supplement the administrative record; DENIES Plaintiffs' motion
15 to strike; DENIES Plaintiffs' motion for summary judgment; GRANTS
16 the Forest Service and Fish and Wildlife's motion for summary
17 judgment; and GRANTS the Resource Council's motion for summary
18 judgment.¹

19
20 I. STATUTORY, FACTUAL, AND PROCEDURAL BACKGROUND

21 A. The National Environmental Policy Act

22 The National Environmental Policy Act ("NEPA") "is a
23 procedural statute that requires the federal government to
24 carefully consider the impacts of and alternatives to major
25 environmental decisions." Native Ecosystems Council v. Weldon,

26
27 ¹ These motions were determined to be suitable for decision
28 without oral argument. E.D. Cal. L.R. 230(g). The hearing was
scheduled for January 12, 2021.

1 697 F.3d 1043, 1051-52 (9th Cir. 2012) (citing 42 U.S.C.
2 §§ 4321, 4331). NEPA requires that federal agencies take a
3 “hard look” at the environmental consequences of their proposed
4 actions and then inform the public about the agency’s decision-
5 making process. Kern v. U.S. Bureau of Land Mgmt., 284 F.3d
6 1062, 1066 (9th Cir. 2002). “NEPA is concerned with process
7 alone and merely prohibits uninformed—rather than unwise—agency
8 action.” Turtle Island Restoration Network v. U.S. Dep’t of
9 Commerce, 878 F.3d 725, 730 (9th Cir. 2017) (internal quotation
10 marks and citation omitted). Judicial review of agency
11 decision-making is “at its most deferential” when reviewing
12 scientific judgments and technical analyses within the agency’s
13 expertise. N. Plains Res. Council, Inc. v. Surface Transp. Bd.,
14 668 F.3d 1067, 1075 (9th Cir. 2011).

15 B. The National Forest Management Act

16 The National Forest Management Act (“the NFMA”) “charges
17 the Forest Service with the management of national forest land,
18 including planning for the protection and use of the land and
19 its natural resources.” All. for the Wild Rockies v. U.S.
20 Forest Serv., 907 F.3d 1105, 1109 (9th Cir. 2018). The Forest
21 Service develops land and resource management plans (“forest
22 plans”), 16 U.S.C. § 1604, that summarize the “broad, long-term
23 plans and objectives for the entire forest.” Weldon, 697 F.3d
24 at 1056. Forest plans include guidelines to help achieve the
25 NFMA’s goals, including consideration of both economic and
26 environmental concerns, preservation of diversity in plant and
27 animal communities, and research on the effects of forest
28 management. 16 U.S.C. § 1604(g) (3).

1 "After a forest plan is approved, the Forest Service
2 implements the forest plan when approving or denying site-
3 specific projects." Weldon, 697 F.3d at 1056. Courts must defer
4 to the Forest Service's reasonable interpretation of its own
5 guidelines, overturning the agency's decision only if it is
6 plainly erroneous or inconsistent with the forest plan. Forest
7 Guardians v. U.S. Forest Serv., 329 F.3d 1089, 1098 (9th Cir.
8 2003). "A project is consistent if it conforms to the applicable
9 'components' of the forest plan, including the standards,
10 guidelines, and desired conditions that are set forth in the
11 forest plan and that collectively establish the details of forest
12 management." All. for the Wild Rockies, 907 F.3d at 1109-10.
13 Although a forest plan's "standards" require strict adherence,
14 the Forest Service may deviate from the plan's "guidelines" if
15 the agency documents the rationale for the deviation. Id.

16 C. The Healthy Forest Restoration Act

17 The Healthy Forest Restoration Act ("HFRA") aims to reduce
18 "wildfire risk to communities, municipal water supplies, and
19 other at-risk Federal land," address "threats to forest and
20 rangeland health, including catastrophic wildfire," and protect,
21 restore, and enhance forest ecosystem components "to promote the
22 recovery of threatened and endangered species." 16 U.S.C.
23 § 6501(1), (3), (6). To achieve these goals, HFRA provides for
24 the implementation of "authorized hazardous fuel reduction
25 projects" on federal land that contains habitat for threatened
26 and endangered species where the project "will provide enhanced
27 protection from catastrophic wildfire" for species or its
28 habitat. 16 U.S.C. § 6512(a)(5)(B).

1 D. The Endangered Species Act

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

12 Agency actions that "may affect" a listed species require
13 the acting agency to formally consult with the federal agency
14 responsible for protecting that species. 50 C.F.R. § 402.14(a);
15 Grand Canyon Tr. v. U.S. Bureau of Reclamation, 691 F.3d 1008,
16 1011-12 (9th Cir. 2012), as amended (Sept. 17, 2012). If a
17 listed species is present in the area of a proposed action, the
18 acting agency—here, the Forest Service—must conduct a Biological
19 Assessment ("BA"), "for the purpose of identifying any endangered
20 species or threatened species which is likely to be affected by
21 such action." 16 U.S.C. § 1536(c).

22 At the end of the formal consultation process, the Secretary
23 of the consulting agency—here, Fish and Wildlife—must issue a
24 Biological Opinion ("BiOp"). Id. § 1536(b)(3)(A). A BiOp is a
25 "written statement setting forth the Secretary's opinion, and a
26 summary of the information on which the opinion is based,
27 detailing how the agency action affects the species or its
28 critical habitat." Id. If the consulting agency believes that

1 the project will jeopardize a listed species or adversely modify
2 the species' habitat, "the Secretary shall suggest those
3 reasonable and prudent alternatives which he believes would not
4 violate subsection (a)(2) and can be taken by the Federal agency
5 or applicant in implementing the agency action." Id. If the
6 acting agency subsequently modifies the action "in a manner that
7 causes an effect to the listed species or critical habitat that
8 was not considered in the [BiOp]," the agencies must reinitiate
9 formal consultation. 50 C.F.R. § 402.16.

10 E. The Shasta-Trinity National Forest and Clear Creek
11 Late Successional Reserve

12 The Shasta-Trinity National Forest is a 2.1-million-acre
13 mixed conifer forest located in northern California. FS-AR
14 005320. The forest provides habitat for certain species listed
15 as threatened or endangered under the ESA. FS-AR 004809-12. The
16 spotted owl was listed as threatened in 1990. FS-AR 004811-12;
17 55 Fed. Reg. 26,194 (June 26, 1990). Pursuant to the Northwest
18 Forest Plan ("NWFP"), portions of the forest are classified as
19 Late Successional Reserves ("LSR"). FS-AR 003240; FS-AR 005852.
20 LSRs are intended to "maintain a functional, interactive, late-
21 successional and old-growth forest ecosystem" that "serve[s] as
22 habitat for late-successional and old-growth related species
23 including the [spotted owl]." FS-AR 005856. Programmed timber
24 harvesting is prohibited in LSRs, however, the NWFP allows for
25 "thinning or other silvicultural treatments . . . to reduce risks
26 of large-scale disturbance" in LSRs "east of the Cascades and in
27 Oregon and California Klamath Provinces." FS-AR 005858.

28 The Clear Creek LSR is in the Shasta-Trinity National Forest

1 and consists of approximately 84,000 acres primarily in the
2 Klamath Province, 35,000 acres of which are privately owned and
3 managed for timber production. FS-AR 003570; FS-AR 003206; FS-AR
4 003193; FS-AR 001954. A 1997 assessment of the Clear Creek LSR
5 concluded that decades of fire suppression and logging "shifted
6 the fire regime within the area [] and increased the potential
7 for partial to complete stand-replacing² fires within mature
8 conifer and hardwood stands." FS-AR 003573. As a result, the
9 assessment recommended prioritizing activities that would thin
10 overstocked young to mature conifer stands in the LSR. See FS-AR
11 003595-601. The thinning treatment would reduce the risk of
12 large-scale losses of dense young to mature stands, and adjacent
13 older stands, from stand-replacing crown fires by thinning out
14 the vegetation below them. FS-AR 003597. It would also enhance
15 late successional and old-growth stand development by
16 "concentrating growth on fewer individual trees to provide larger
17 conifers with larger fuller crowns." Id.

18 F. The Pettijohn Late Successional Reserve Habitat
19 Improvement and Fuels Reduction Project

20 In December 2008, the Forest Service initiated NEPA's
21 scoping process by publishing a notice of intent to prepare an
22 environmental impact statement ("EIS") for a proposed action in
23 the Pettijohn area of the Clear Creek LSR under HFRA. See FS-AR
24 001671. The Forest Service's proposed action for the Pettijohn
25 area would thin mature stands to reduce the risk of stand-

26 ² A stand-replacing fire is a fire which kills all or most of the
27 living overstory trees in a forest and initiates forest
28 succession or regrowth. See
<https://www.nwcg.gov/term/glossary/stand-replacing-fire>.

1 replacing wildfire, foster late-successional and old-growth
2 conditions, and promote fire suppression activities. Id. The
3 action contemplates thinning from below on 1,155 acres of overly
4 dense conifer stands. FS-AR 001672. Thinning from below is a
5 silvicultural technique in which a desired stand density is
6 identified, and the stand is thinned by removing the smallest
7 and least healthy trees, while retaining the largest and
8 healthiest ones, until the desired density is achieved. Id.
9 The action also provides for the creation of fuel management
10 zones ("FMZs") on 1,995 acres. Id. FMZs are roadside areas
11 where fuels are reduced, and hazard trees are removed. Id.

12 After receiving public comment on a draft EIS assessing the
13 potential environmental effects of the proposed action, the
14 Forest Service published a final EIS ("FEIS") in May 2012. See
15 FS-AR 000891-1350 (draft EIS); FS-AR 000343-890 (FEIS). The
16 FEIS analyzed the potential environmental effects of the
17 proposed action, including potential effects on fire and fuels,
18 wildlife, silviculture, air quality, and climate change. See
19 FS-AR 000401-18 (fire and fuels); FS-AR 000418-45 (wildlife);
20 FS-AR 000445-56 (silviculture); FS-AR 000523-30 (air quality);
21 FS-AR 000543 (climate change). After an objection period, the
22 Forest Service approved the Pettijohn Late Successional Reserve
23 Habitat Improvement and Fuels Reduction Project ("the Pettijohn
24 Project") with a record of decision ("ROD") in March 2013. FS-
25 AR 000307-330.

26 The Pettijohn Project area encompasses 13,162 acres of
27 federal land and 8,409 acres of private land. FS-AR 000311.
28 The area also includes 14,347 acres of spotted owl critical

1 habitat. FS-AR 022777. Contained within the critical habitat
2 is 11,103 acres of nesting, roosting, and foraging habitat of
3 which 3,518 acres are old-growth, high-quality nesting and
4 roosting habitat and 7,858 acres are mature, moderate-quality
5 nesting and roosting habitat. FS-AR 000422. Under the ROD, the
6 Pettijohn Project will thin 958 acres of overly dense conifer
7 stands and create 1,846 acres of FMZs along thirty-six miles of
8 road. FS-AR 00313. Appendix H of the FEIS details the thinning
9 prescriptions designed by an interdisciplinary team to "maintain
10 the densest canopy [] sustainable with late summer fire events
11 while maintaining large/old trees, large snags/logs[,] and
12 viable understory hardwoods." FS-AR 000791. The project also
13 provides for prescribed burning on 101 acres; hand thinning,
14 piling, and burning on eleven acres; decommissioning 2.3 miles
15 of road; creating thirty-six short-term cut timber landings; and
16 construction of 0.95 miles of temporary roads to access the
17 landings. FS-AR 000313-14.

18 Before approving the Pettijohn Project, the Forest Service
19 formally consulted with Fish and Wildlife under Section 7 of the
20 ESA. See FS-AR 002092-93. As part of that process, the Forest
21 Service transmitted an April 2011 BA and 2012 BA supplement to
22 Fish and Wildlife. See FS-AR 002705-820; FS-AR 002672-99. The
23 BA determined that the project is likely to adversely affect the
24 spotted owl and its designated critical habitat by reducing some
25 of its quality. FS-AR 002754-55. It also found that the
26 project is likely to benefit the spotted owls by "reducing the
27 risk and hazard of catastrophic loss of suitable habitat to
28 late-season wildfire." Id. Fish and Wildlife's resulting May

1 2012 BiOp assessed the potential effects of the Pettijohn
2 Project on the spotted owl and its critical habitat, finding the
3 project was not likely to jeopardize the continued existence of
4 the spotted owl or adversely modify its critical habitat. FS-AR
5 001996-97.

6 In June 2013, the Forest Service reinitiated consultation
7 with Fish and Wildlife due to revisions of the spotted owl's
8 critical habitat and the presence of barred owls in the project
9 area. See FS-AR 022790. In June 2017, the Forest Service
10 transmitted a supplemental information report to Fish and
11 Wildlife that addressed: barred owls, changes to spotted owl
12 occupancy and activity centers in the project area, the 2012
13 Critical Habitat Rule, the 2011 Revised Recovery Plan, and the
14 spotted owl's use of burned habitat. FS-AR 022790-850. In
15 response, Fish and Wildlife issued a supplemental BiOp in April
16 2018, concluding the project would not jeopardize the existence
17 of the spotted owl or adversely modify its critical habitat.
18 FS-AR 022942.

19 In March 2019, the Forest Service prepared a supplemental
20 information report ("SIR"), explaining that the information in
21 the BA supplement and BiOp supplement did not constitute
22 significant new information warranting a supplemental EIS under
23 NEPA. FS-AR 022774-85. The SIR also explained that the
24 Pettijohn Project's total treatments would be reduced by an
25 additional 121 acres in light of spotted owl movement and new
26 activity centers. FS-AR 022785-86. The project will, instead,
27 thin from below 908 acres and create FMZs on 1,775 acres. FS-AR
28 022786.

1 G. Procedural Posture

2 Plaintiffs filed suit in May 2013, challenging the Pettijohn
3 Project under the ESA, the NFMA, NEPA, HFRA, and the
4 Administrative Procedures Act ("the APA"). See Compl. ¶¶ 2, 10,
5 ECF No. 1. The parties stipulated to stay the proceedings after
6 the Forest Service requested additional consultation with Fish
7 and Wildlife. See ECF Nos. 11, 13. Six years later, the Forest
8 Service issued the SIR modifying the project. First Am. Compl.
9 ("FAC") ¶ 60, ECF No. 32. In response, Plaintiffs filed an
10 amended complaint, alleging the project still violates the ESA,
11 the NFMA, NEPA, HFRA, and the APA. See FAC.

12 On February 10, 2020, Plaintiffs filed a motion to
13 supplement the administrative record. See ECF No. 38. The Court
14 granted it in part and denied it in part. See Order, ECF No. 55.
15 The administrative record for Plaintiffs' NEPA failure-to-
16 supplement claim was supplemented with a September 2016 update to
17 the Forest Service's Resource Planning Act Assessment and a June
18 2016 resource detailing how to account for climate change when
19 conducting a NEPA analysis. Id. The administrative record for
20 Plaintiffs' ESA claim was supplemented with a December 2018 paper
21 on the interim baseline adjustment for spotted owl critical
22 habitat. Id.

23 The parties now move for summary judgment. Plaintiffs also
24 move to supplement the administrative record and move to strike.

25
26 II. OPINION

27 A. Motion to Supplement Administrative Record

28 The APA "provides a right to judicial review of all 'final

1 agency action of which there is no other adequate remedy in a
2 court.'" Bennett v. Spear, 520 U.S. 154, 175 (1997).
3 Generally, "courts reviewing an agency decision are limited to
4 the administrative record." Lands Council v. Powell, 395 F.3d
5 1019, 1029 (9th Cir. 2005) (citing Fla. Power & Light Co. v.
6 Lorion, 470 U.S. 729, 743-44 (1985)). A "records review" case
7 "typically focuses on the administrative record in existence at
8 the time of the [agency's] decision and does not encompass any
9 part of the record that is made initially in the reviewing
10 court." Id. at 1029-30 (quoting Southwest Ctr. for Biological
11 Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1450 (9th Cir.
12 1996)).

13 The Forest Service and Fish and Wildlife lodged
14 administrative records with the Court on December 9, 2019. See
15 Notice of Lodging, ECF Nos. 34, 59. The Court entered a
16 scheduling order on January 6, 2020, setting forth deadlines by
17 which Plaintiffs were required to move to supplement or complete
18 the administrative records. See Stip. of Joint Briefing
19 Schedule and Order ¶ 1, ECF No. 37. The scheduling order also
20 set a briefing schedule for cross-motions for summary judgment
21 in the event a motion to supplement the administrative record
22 was not filed. Id. ¶ 2. Plaintiffs filed a motion to
23 supplement the administrative record on February 10, 2020, which
24 vacated the summary judgment briefing schedule. See Mot. to
25 Supp. Admin. Record, ECF No. 38. The Court decided that motion
26 on May 28, 2020. See Order, ECF No. 55. Then, on June 12,
27 2020, the Court adopted the parties' proposed briefing schedule
28 for cross-motions for summary judgment. See Stip. and Order,

1 ECF No. 58. That schedule did not provide for additional
2 motions to supplement the administrative record. Id.

3 Plaintiffs now request that the administrative record be
4 supplemented with two additional documents. See Mot. to Supp.
5 Admin. Record at 2; Reply at 2, ECF No. 80 (withdrawing a third
6 document from Plaintiffs' request). Plaintiffs filed this
7 motion concurrent with their motion for summary judgment.
8 Plaintiffs did not move to alter the scheduling order to permit
9 a second motion to supplement the briefing schedule. Thus,
10 Defendants filed their motions for summary judgment per the
11 briefing schedule and while this request to supplement was still
12 pending. As a result, Defendants did not consider these
13 additional documents in preparing their motions for summary
14 judgment. Moreover, Plaintiffs make no attempt to identify good
15 cause for this delay or otherwise explain why the documents with
16 which they now seek to supplement the administrative record were
17 not included in their original motion to supplement. See Fed.
18 R. Civ. P. 16(b)(4) ("A schedule may be modified only for good
19 cause and with the judge's consent."); Hardy v. Cnty. of El
20 Dorado, No. 2:07-cv-0799-JAM-EFB, 2008 WL 3876329, at *1 (E.D.
21 Cal. 2008) (noting "good cause" standard for modifying a
22 scheduling order).

23 Simply put: Plaintiffs missed their window of opportunity
24 for filing this motion and fail to present a reason for the
25 Court to excuse this delay. Accordingly, Plaintiffs' motion to
26 supplement the administrative record is DENIED.

27 B. Motion to Strike

28 Plaintiffs move to strike a portion of the Forest Service

1 and Fish and Wildlife's memorandum in support of their cross-
2 motion for summary judgment that they argue "advances a post hoc
3 argument in support of the Forest Service's action" that is not
4 found in the 2012 FEIS and "relies on scientific references not
5 found in the administrative records." Mot. to Strike at 2.
6 Specifically, Plaintiffs request that the Court strike the
7 portion of the memorandum that begins on line eleven of page
8 eighteen and ends on line twenty-two of the same page. Id.
9 That portion of the memorandum argues that the Forest Service
10 considered and rejected the position that thinning would result
11 in greater fire intensity. See Defs.' Mot. Summ. J. at 18. In
12 so arguing, Defendants reference two studies: Estes et al. 2012
13 and Weatherspoon 2006, and cite to FS-AR 00000061. Id.

14 The parties agree that, "courts may not accept appellate
15 counsel's post hoc rationalizations for agency action." See
16 Defs.' Opp'n Strike at 4, ECF No. 87 (quoting Or. Nat. Res.
17 Desert Ass'n v. Bureau of Land Mgmt., 625 F.3d 1092, 1120 (9th
18 Cir. 2010) (internal quotation marks and citation omitted)).
19 And that "[i]t is well established that an agency's action must
20 be upheld, if at all, on the basis articulated by the agency
21 itself." Id. Nonetheless, the Forest Service and Fish and
22 Wildlife oppose the motion, arguing that their response
23 regarding thinning and fire intensity is not a post hoc
24 rationalization because it predates the Forest Service's
25 approval of the Pettijohn Project by seven months and came from
26 the agency itself. Defs.' Opp'n Strike at 4. Thus, it does not
27 reflect a post-decisional litigation position developed by
28 counsel. Id. The Court agrees.

1 The Forest Service approved the Pettijohn Project through a
2 final ROD in March 2013. FS-AR 000307-30. Nine months prior,
3 the Forest Service released an FEIS, which was subject to the
4 Forest Service's pre-decisional administrative review process.
5 FS-AR 000340-41; 36 C.F.R. § 218.5 (2012); see generally 36
6 C.F.R. pt. 218, subpt. A (2012). Plaintiffs submitted
7 objections to the FEIS on July 3, 2012, as part of that process.
8 FS-AR 000130-75. Plaintiffs objected to the Forest Service's
9 claim that the increased risk of higher surface fire caused by
10 the thinning is negligible when compared to the "desirable
11 effects of reductions in ladder fuels and potential wildfire
12 threats to older larger trees." FS-AR 000061. In response, the
13 Forest Service explained that, in terms of fire risk, any
14 reduction in canopy cover by the Pettijohn Project will be
15 outweighed by the reduction in live and dead fuel loading and
16 cited to Estes et al. 2012 and Weatherspoon 2006. Id. This
17 response came seven months before the project was approved by
18 the final ROD. See FS-AR 000326-27.

19 Forest Service and Fish and Wildlife quote to this response
20 in the contested portion of their memorandum. See Defs.' Mot.
21 Summ. J. at 18 (quoting FS-AR 000061). They were not wrong to
22 do so. The Forest Service's response to Plaintiffs' objections
23 during the administrative process did not assert a new rationale
24 for the Pettijohn Project. The FEIS acknowledged the
25 possibility that thinning might "result in faster mid-flame wind
26 speeds and decreased fuel moistures, which can effect fire
27 behavior." FS-AR 000878. The FEIS also noted that thinning
28 from below retains the overstory canopy, which would "minimiz[e]

1 the potential changes to the fire environment post-treatment,"
2 while decreasing the potential for crown fires. Id. The
3 studies cited to by the Forest Service merely confirm that the
4 project's effect on surface fuel moisture will be negated by the
5 degree to which it reduces ladder fuels. See FS-AR 000061 ("The
6 conclusion presented in the fire and fuel specialist report is
7 consistent with the findings of these studies.").

8 Moreover, the Forest Service and Fish and Wildlife did not
9 rely on extra-record evidence in their memorandum. The lines
10 Plaintiffs seek to strike are found in the Forest Service's
11 administrative record. See Defs.' Mot. Summ. J. at 18 (quoting
12 FS-AR 000061). Thus, the Court finds no issue with the Forest
13 Service and Fish and Wildlife relying on that portion of the
14 record to oppose Plaintiffs' hard-look NEPA claim. See 5 U.S.C.
15 § 706 (noting "the court shall review the whole record or those
16 parts of it cited by a party" in reviewing agency action under
17 the APA). The fact that the studies themselves were omitted
18 from the administrative record is of no consequence. See Defs.'
19 Opp'n Strike at 5. The studies are sufficiently summarized in
20 the Forest Service's response to Plaintiffs' objection and they
21 were considered by the decision-maker before the project was
22 authorized. See Keli McElroy Decl. ¶¶ 3-4, ECF No. 87-1. This
23 suffices for them to be considered part of the administrative
24 record under the APA. See Thompson v. U.S. Dep't of Labor, 885
25 F.2d 551, 555 (9th Cir. 1989) ("The whole administrative record,
26 therefore, consists of all documents and materials directly or
27 indirectly considered by agency decision-makers")
28 (emphasis in original) (internal quotation marks and citation

omitted)).

Thus, the Forest Service and Fish and Wildlife did not err in referring to their response to Plaintiffs' objections and citing the Estes and Weatherspoon studies. Accordingly, Plaintiffs' motion to strike is DENIED.

C. Cross-Motions for Summary Judgment

Plaintiffs move for summary judgment on their claims against the Forest Service and Fish and Wildlife. See Pls.' Mot. Summ. J. They argue that the Forest Service violated NEPA by failing to take a hard look at the effects of the project and failing to prepare a supplemental EIS; that the project is inconsistent with standards set forth in the NFMA and HFRA; and that Fish and Wildlife failed to use the best available scientific data available, erroneously determined no adverse modification of critical habitat would occur, and failed to reinitiate consultation, in violation of the ESA. Id. at 7-25. The Forest Service, Fish and Wildlife, and the Resource Council dispute this and argue that each of Plaintiffs' claims fail. See Defs.' Mot. Summ. J.; Def-Interv.'s Mot. Summ. J.

1. Standard of Review

Agency decisions that allegedly violate the ESA, the NFMA, NEPA, and HFRA are reviewed under the APA. See All. for the Wild Rockies, 907 F.3d at 1112. A court conducting APA judicial review does not resolve factual questions, but instead determines "whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." Sierra Club v. Mainella, 459 F.Supp.2d 76, 90 (D.D.C. 2006) (quoting Occidental Eng'g Co. v. INS, 753 F.2d

1 766, 769 (9th Cir. 1985)). In a case involving review of a
2 final agency action under the [APA] . . . the standard set forth
3 in Rule 56(c) does not apply because of the limited role of a
4 court in reviewing the administrative record." Id. at 89. In
5 this context, summary judgment becomes the "mechanism for
6 deciding, as a matter of law, whether the agency action is
7 supported by the administrative record and otherwise consistent
8 with the APA standard of review." Id. at 90.

9 The APA directs reviewing courts to "hold unlawful and set
10 aside agency action, findings, and conclusions found to
11 be . . . arbitrary, capricious, an abuse of discretion, or
12 otherwise not in accordance with law." 5 U.S.C. § 706(2) (A)-
13 (D). Judicial review under the "arbitrary and capricious"
14 standard is narrow and deferential. Motor Vehicle Mfrs. Assn of
15 U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43
16 (1983). A court may not "substitute its judgment for that of
17 the agency." Id. "This deference is highest when reviewing an
18 agency's technical analyses and judgments involving the
19 evaluation of complex scientific data within the agency's
20 technical expertise." League Of Wilderness Defs. Blue Mountains
21 Biodiversity Project v. Allen, 615 F.3d 1122, 1130 (9th Cir.
22 2010) (citation omitted).

23 Agencies are required to "examine the relevant data and
24 articulate a satisfactory explanation for its action." Turtle
25 Island, 878 F.3d at 732 (internal quotation marks and citation
26 omitted). An action is arbitrary and capricious where "the
27 agency has relied on factors which Congress has not intended it
28 to consider, entirely failed to consider an important aspect of

1 the problem, offered an explanation for its decision that runs
2 counter to the evidence before the agency, or if the agency's
3 decision is so implausible that it could not be ascribed to a
4 difference in view or the product of agency expertise." Id. at
5 732-33 (internal quotation marks and citation omitted).

6 2. Analysis

7 a. Abandoned Claim

8 As an initial matter, Plaintiffs have abandoned one of
9 their ESA claims against Fish and Wildlife. See Pls.' Mot. for
10 Summ. J. at 19, n.8. Plaintiffs withdraw Claim IV, which
11 alleges Fish and Wildlife violated § 1536(b)(4) of the ESA by
12 issuing an arbitrary and capricious incidental take statement.
13 Id.; see also FAC ¶¶ 137-47. Plaintiffs have nine remaining
14 claims. Each is analyzed below.

15 b. NEPA Claims

16 Plaintiffs' seventh and ninth claims assert that the Forest
17 Service violated NEPA by failing to take a hard look at the
18 Pettijohn Project's direct, indirect, and cumulative impacts and
19 failing to prepare a supplemental analysis based upon
20 significant new information or circumstances. See FAC ¶¶ 166-
21 96, 203-16. Plaintiffs argue the Forest Service inadequately
22 analyzed the project's alternatives and failed to consider the
23 actual risk of catastrophic wildfire, the effects of fire and
24 tree removal on spotted owl habitat, and the impact on
25 greenhouse gas emissions. Pls.' Mot. for Summ. J. at 7-16.
26 Plaintiffs also argue the Forest Service failed to consider new
27 information in the environmental baseline and should have
28 conducted supplemental analysis using that new information. Id.

at 16-17.

(i) Reasonable Alternatives

While Plaintiffs' FAC alleges two NEPA claims and an HFRA old growth conditions claim, see FAC ¶¶ 166-196, 197-202, 203-216, Plaintiffs argue in their motion for summary judgment that the Forest Service also "failed to give full and meaningful consideration to all reasonable alternatives." Pls.' Mot. for Summ. J. at 7-9. The Forest Service and Fish and Wildlife counter that because Plaintiffs did not allege a reasonable range of alternatives NEPA claim in their FAC, they cannot pursue such a claim for the first time now. Defs.' Mot. for Summ. J. at 10. The Court agrees.

NEPA's regulations require an agency to "[rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14. This obligation to consider alternatives under NEPA has been modified by HFRA, which directs the Forest Service to consider no more than three alternatives: (1) the proposed action; (2) no action; and, in certain cases, (3) an action alternative. 16 U.S.C. § 6514(c)(1)(C). A reasonable alternatives claim is distinct from a hard-look claim under NEPA. See Te-Moak Tribe of Western Shoshone of Nev. v. U.S. Dep't of the Interior, 608 F.3d 592, 599-602 (9th Cir. 2010) (analyzing hard-look and reasonable alternatives claims separately).

Reasonable alternatives are not mentioned in Plaintiffs' HFRA claim. See FAC ¶¶ 197-202. Nor are they mentioned in

1 Plaintiffs' NEPA claims. See FAC ¶¶ 166-96, 203-16. However,
2 Plaintiffs do discuss the no-action alternative in one NEPA
3 claim. See FAC ¶ 172. There, Plaintiffs argue the Forest
4 Service "failed to adequately analyze the no-action
5 alternative." Id. This allegation is different in kind from
6 one that alleges the Forest Service did not conduct sufficient
7 analysis of reasonable alternatives. Plaintiffs did not seek
8 leave to amend the FAC to add a reasonable alternatives claim,
9 and the Forest Service was not on notice that Plaintiffs
10 intended to bring this claim. Summary judgment "is not a
11 procedural change to flesh out inadequate pleadings." Wasco
12 Products v. Southwall Technologies, 435 F.3d 989, 993 (9th Cir.
13 2006). Thus, to the extent Plaintiffs seek to assert a
14 reasonable alternatives claim under NEPA or HFRA, that claim is
15 procedurally barred.

16 By contrast, the Court considers the no-action alternative
17 claim sufficiently pled. See Fed. R. Civ. P. 8(a) (requiring a
18 short and plain statement of the claim showing the pleader is
19 entitled to relief). Nonetheless, the Forest Service considered
20 the no-action alternative in the FEIS. FS-AR 000380. And
21 adequately so. "Although brief, the [Forest Service's]
22 discussion [is] sufficient because the No Action Alternative
23 maintains the status quo" Te-Moak, 608 F.3d at 602
24 (finding defendant's one-paragraph consideration of the no-
25 action alternative sufficient). Moreover, Plaintiffs do not
26 contest the adequacy of the Forest Service's consideration of
27 the no-action alternative in their briefing. See Pls.' Mot. for
28 Summ. J. at 7 ("In this case, the USFS considered only the

1 'proposed' and 'no-action' alternatives."); Opp'n to Fed. Defs.'
2 Mot. at 4-6. Thus, the failure to adequately consider the no-
3 action alternative claim fails.

4 (ii) Hard Look

5 In assessing whether an agency took a hard look at a
6 proposed action, courts "employ a rule of reason standard to
7 determine whether the EIS contains a reasonably thorough
8 discussion of the significant aspects of the probable
9 environmental consequences." Allen, 615 F.3d at 1130 (internal
10 quotation marks, citation, and alterations omitted). Courts
11 "must uphold the agency decision as long as the agency has
12 considered the relevant factors and articulated a rational
13 connection between the facts found and the choice made." Id.
14 (internal quotation marks and citation omitted). Here, the
15 analyses in the FEIS and the supporting specialist reports on
16 the Pettijohn Project's effects on fire, fuels, and wildlife
17 amount to a sufficiently thorough discussion of the probable
18 environmental consequences. See FS-AR 000401-44 (FEIS); FS-AR
19 002348-87, FS-AR 002341-47 (fire and fuels specialist report and
20 supplement); FS-AR 002705-820, FS-AR 002672-99 (BA and
21 supplement).

22 The Forest Service relied on scientific literature and
23 conducted two types of modeling to assess the project's
24 potential impact on fire behavior. See FS-AR 000401-04
25 (modeling); FS-AR 000591-94 (modeling and scientific
26 literature); FS-AR 002381-84 (scientific literature). One model
27 examined the potential effects at the scale of the entire
28 21,500-acre project area immediately following project

1 implementation, and the other considered effects at a treatment-
2 level scale over time. FS-AR 000401. Both models concluded
3 that the Pettijohn Project would reduce the risk of stand-
4 replacing wildfires that burn at high intensity through the
5 crowns of the trees. See FS-AR 000411-15.

6 Plaintiffs argue that the Forest Service ignored relevant
7 science and should have applied its expertise differently with
8 respect to the model that examined the project's effect on fire
9 behavior over the entire project area. See Pls.' Mot. for Summ.
10 J. at 9-13. Plaintiffs question the Forest Service's decision
11 to use 90th percentile fuel moisture, wind, and weather data,
12 arguing that there is "conflicting scientific opinion about the
13 severity of fires in the Klamath Mountains" Id. at 10.
14 Plaintiffs also assert that the Forest Service ignored relevant
15 science by not modeling higher surface fuel temperature under
16 the proposed action. See id. at 10-13.

17 However, regarding the severity of fires in the area, the
18 FEIS expressly addressed the two studies cited by Plaintiffs
19 (Miller, 2012; Odion et al., 2004). See FS-AR 000406; FS-AR
20 000004-07 (the Forest Service's review of both studies). The
21 Forest Service considered each study, but ultimately decided to
22 rely on its own "[s]ite-specific observations of fuels
23 conditions [which] support the likelihood of risk of higher
24 severity fires due to changes in species compositions and size-
25 and age-class structures." Id. And 90th percentile conditions,
26 which model late summer fires, were used "because this is the
27 driest time of the year and the period when most catastrophic
28 wildfires occur in the project vicinity." FS-AR 000403.

1 As for the surface fuel temperatures used in the modeling,
2 the Forest Service considered whether thinning would increase
3 surface fuel temperatures and result in greater fire intensity.
4 See FS-AR 0000061. Relying on recent studies, the Forest
5 Service concluded that the surface fuel moisture differences
6 between unthinned and thinned stands are minor and the negative
7 effects on microclimate of thinning the stand are outweighed by
8 the reduction in live and dead fuel loading. Id. (citing Estes
9 et al., 2012; Weatherspoon, 2006). The FEIS explains, "thinning
10 with proper fuels consideration can reduce fire-induced
11 mortality to lower levels than would be expected without
12 treatment." FS-AR 000407 (citing Graham et al., 1999; Raymond
13 and Peterson, 2005).

14 The Court's review of the Forest Service's modeling and its
15 consideration of scientific literature is subject to significant
16 deference. See, e.g., Lands Council v. McNair, 629 F.3d 1070,
17 1074 (9th Cir. 2010) (holding courts apply their most
18 deferential standard of review in "reviewing scientific
19 judgments and technical analyses within the agency's
20 expertise"). Under this deferential approach, courts do not
21 "act as a panel of scientists, instructing the agency, choosing
22 scientific studies, and ordering the agency to explain every
23 possible scientific uncertainty." Id. (internal quotation marks
24 and citation omitted). This is true even when conflicting
25 opinions exist. EPIC v. U.S. Forest Serv., 451 F.3d 1005, 1017
26 (9th Cir. 2006) ("When specialists express conflicting views, we
27 defer to the informed discretion of the agency."). Thus, the
28 Forest Service's application of 90th percentile conditions in

1 its modeling and its determination that surface fuel moisture
2 differences are minimal are both permissible. These decisions
3 were informed and reasonable. See Allen, 615 F.3d at 1130.

4 It is similarly within the Forest Service's discretion to
5 rely on studies it deems reliable. See Weldon, 697 F.3d at 1043
6 (courts "defer to agency decisions so long as those conclusions
7 are supported by studies that the agency deems reliable."). In
8 doing so here, the Forest Service did not act arbitrarily or
9 capriciously. See EPIC, 451 F.3d at 1016-17 (rejecting the
10 argument that the Forest Service failed to address the
11 scientific literature that directly disputes the allegations
12 that commercial logging in mature stands will decrease fire
13 danger).

14 Regarding the effect of fire on the spotted owl and its
15 habitat, Plaintiffs argue that the Forest Service ignored
16 scientific literature indicating that spotted owls continue to
17 use recently burned forests and the model examining the
18 potential effects on the entire project area forecasted only
19 seven percent fewer burned acres of forest. Pls.' Mot. for
20 Summ. J. at 13. However, the FEIS and BA examined the Pettijohn
21 Project's potential effects on the spotted owl and its habitat.
22 See FS-AR 000435-42; FS-AR 002736-50. Notably, the Forest
23 Service considered the study cited by Plaintiffs, explaining
24 that, although the study showed spotted owls used recently
25 burned habitat because it made prey more accessible by opening
26 understory habitat, the study also showed that spotted owls
27 "avoided high and moderate burn severity areas for roosting, and
28 presumably for nesting." FS-AR 000835 (citing Bond, 2009).

1 This satisfies NEPA's hard-look mandate. See Conservation Cong.
2 v. U.S. Forest Serv., No. 2:12-cv-02800-TLN-CKD, 2014 WL
3 2092385, at *14 (E.D. Cal. May 19, 2014) (rejecting the argument
4 that the Forest Service insufficiently responded to studies
5 showing the benefits of wildfire to spotted owl habitat).
6 Moreover, rather than claiming that burned areas provide no
7 habitat for the spotted owls, the FEIS notes that the "loss of
8 overstory structure to high severity fire [] reduce[s] the
9 quality of nesting/roosting habitat. This finding is consistent
10 with the Roberts, et al. (2011) study." FS-AR 000835.

11 As for Plaintiffs' assertion that the model demonstrates
12 the project will have an insignificant effect on the number of
13 acres burned, the model did not only project active crown fires
14 would decrease by seven percent across the entire project area.
15 See FS-AR 000411-12. The model also demonstrates that the
16 project would decrease passive crown fires by eight percent,
17 while increasing surface-level fires by fifteen percent. Id.
18 In addition, the modeling of treatment-level effects supports
19 the FEIS's conclusion that fire events in the thinned stands
20 would burn at much lower intensity and would largely preserve
21 enough canopy cover to retain spotted owl nesting and roosting
22 habitat. FS-AR 000413-15. Thus, evidence in the record
23 supports the FEIS's finding that the project would benefit
24 spotted owl habitat in the long-term by reducing the risk of
25 stand-replacing wildfires.

26 Insofar as Plaintiffs contend the Forest Service's analysis
27 of greenhouse gas effects is flawed and inadequate, this
28 argument is procedurally precluded. See Pls.' Mot. for Summ. J.

1 at 14-16. Plaintiffs did not raise any issues related to
2 greenhouse gas emissions during the administrative process.
3 Thus, Plaintiffs failed to "structure their participation in the
4 agency's decision[-]making process so as to alert the agency to
5 the parties' position and contentions, in order to allow the
6 agency to give the issue meaningful consideration." Protect our
7 Cmtys. Found. v. LaCounte, 939 F.3d 1029, 1036 (9th Cir. 2019).
8 This failure to notify precludes Plaintiffs from challenging the
9 FEIS's analysis of those emissions for the first time here.
10 Id.; see also McNair, 629 F.3d at 1076. Plaintiffs concede this
11 point. Pls.' Opp'n to Fed. Defs.' Mot. for Summ. J. & Reply
12 ("Opp'n to Fed. Defs.' Mot.") at 6 n.7, ECF No. 78.

13 Plaintiffs go to great lengths to challenge different
14 aspects of the Forest Service's analyses of wildfires and tree
15 removal and their effects on spotted owl habitat and greenhouse
16 gas emission, but in doing so, they miss the forest for the
17 trees. So long as the Forest Service considered the relevant
18 factors and articulated a rational connection between the facts
19 found and choices made, the Court must uphold the agency
20 decision. See Allen, 615 F.3d at 1130. Here, the Forest
21 Service met that requirement. Its analysis is reasoned; it took
22 a hard look at the probable environmental consequences of the
23 Pettijohn Project. As a result, the Court gives the Forest
24 service the deference to which it is entitled.

25 (iii) Supplemental Analysis

26 NEPA's implementing regulations require supplementation of
27 an EIS when "[t]here are significant new circumstances or
28 information relevant to environmental concerns and bearing on

1 the proposed action or its impacts.” 40 C.F.R.
2 § 1502.9(c)(1)(ii). However, supplementation is not required
3 “every time new information comes to light after an EIS is
4 finalized.” Marsh v. Or. Res. Council, 490 U.S. 360, 373
5 (1989). Requiring otherwise “would render agency decisionmaking
6 intractable, always awaiting updated information only to find
7 the new information outdated by the time a decision is made.”
8 Id. Here, too, courts apply a “rule of reason” in assessing
9 whether “the new information is sufficient to show that the
10 remaining action will affect the quality of the human
11 environment in a significant manner or to a significant extent
12 not already considered.” Id. at 374 (internal quotation marks
13 and citation omitted). “Whether new information requires
14 supplemental analysis is a ‘classic example of a factual dispute
15 the resolution of which implicates substantial agency
16 expertise.’” Tri-Valley CAREs v. U.S. Dep’t of Energy, 671 F.3d
17 1113, 1130 (9th Cir. 2012) (quoting Marsh, 490 U.S. at 376).

18 Plaintiffs first argue that the Forest Service failed to
19 consider new information in the environmental baseline. See
20 Pls.’ Mot. for Summ. J. at 16-17. In December 2018, Fish and
21 Wildlife released an updated accounting of the spotted owl
22 habitat loss from wildfires in the Shasta-Trinity National
23 Forest. See FWS-AR SUPAR-001. This interim baseline adjustment
24 reduced the estimated amount of nesting, roosting, and foraging
25 habitat in the forest. FWS-AR SUPAR-008, Table 6. Plaintiffs
26 argue this affects the FEIS’s analysis of the direct and
27 indirect effects of the project’s fuel management activities on
28 spotted owl habitat.

1 This argument lacks merit. To assess the project's
2 potential effects on spotted owl habitat, the FEIS examined a
3 25,274-acre spotted owl action area, reflecting a "1.3-mile
4 buffer around all areas containing suitable nesting or roosting
5 habitat that are proposed for treatment." FS-AR 000419. None
6 of the area affected by wildfires considered in the interim
7 baseline adjustment overlap with the 25,274-acre spotted owl
8 action area. Defs.' Mot. for Summ. J. at 24. Plaintiffs do not
9 dispute this. Id.; see also Opp'n to Fed. Defs.' Mot. at 11-12.
10 As a result, the information in the interim baseline adjustment
11 had no effect on the FEIS's analysis of the project's potential
12 effects on spotted owl habitat. Thus, the Forest Service's
13 decision to not supplement the FEIS in response to the interim
14 baseline adjustment was neither arbitrary nor capricious.

15 Plaintiffs also argue that the Forest Service should have
16 updated the project's greenhouse gas analysis in a supplemental
17 EIS considering the agency's "updated guidance" for assessing
18 greenhouse gas emissions. See Pls.' Mot. for Summ. J. at 17.
19 Yet, Plaintiffs do not explain how this guidance constitutes new
20 information affecting the FEIS's assessment of greenhouse gas
21 emissions in a way not previously considered. Plaintiffs fail
22 to identify new information sufficient to show that the
23 Pettijohn Project will affect the environment in a significant
24 way that is not already addressed by the FEIS.

25 In sum, the Forest Service has elucidated the possible
26 impacts of the Pettijohn Project with a sufficient degree of
27 detail. It has adequately analyzed the no-action alternative,
28 taken a hard look at the different impacts of the project, and

1 did not need to conduct the supplemental analyses Plaintiffs
2 allege. The Pettijohn Project's FEIS is not arbitrary,
3 capricious, an abuse of discretion, or otherwise not in
4 accordance with the law. See 5 U.S.C. § 706(2). The Court
5 GRANTS summary judgment in favor of the Forest Service, Fish and
6 Wildlife, and the Resource Council and against Plaintiffs on
7 Plaintiffs' seventh and ninth NEPA claims.

8 c. NFMA Claims

9 The relevant land management plan in this case is the
10 Shasta-Trinity National Forest Land and Resource Management Plan
11 ("LRMP"). Plaintiffs' fifth, sixth, and tenth claims assert
12 that the Forest Service violated the NFMA by failing to satisfy
13 the standards set forth in the LRMP for snags, down logs, and
14 old-growth retention, and for failing to ensure the Pettijohn
15 Project is consistent with the 2011 Recovery Plan. See FAC
16 ¶¶ 148-65, 217-21. Plaintiffs argue the Pettijohn Project will
17 not maintain snags and down logs at naturally occurring levels
18 and that the Forest Service has failed to establish the
19 project's fire reduction efforts will focus on younger stands.
20 Pls.' Mot. for Summ. J. at 17-18.

21 Regarding snags and down logs, the parties agree that the
22 LMRP directs the Forest Service to maintain "dead/down material,
23 hardwoods, and snags at naturally occurring levels." See Pls.'
24 Mot. for Summ. J. at 18 (citing FS-AR 004866); Defs.' Mot. Summ.
25 J. at 25. This standard applies across all LSRs in the Shasta-
26 Trinity National Forest. See FS-AR 004773 (the LMRP
27 "establishes Forest-wide standards and guidelines to fulfill the
28 NFMA requirements"). Thus, it is not restricted to a project

1 area or the specific areas within the FMZs from which snags will
2 be removed. Under the Pettijohn Project, no snags will be
3 removed as part of the thinning treatment. Pls.' Mot. for Summ.
4 J. at 18 (citing FS-AR 00984; FS-AR 001164). Snags up to 24
5 inches in diameter within 150 feet of a road in a FMZ will be
6 cut and left on the ground for safety purposes. FS-AR 000792
7 (FMZ prescriptions). Beyond that 150 feet, the size class of
8 snags that may be cut is progressively smaller. Id.

9 " 'It is well-settled that the Forest Service's failure to
10 comply with the provisions of a Forest Plan is a violation of
11 [the] NFMA' and for an agency action to comply with the NFMA, a
12 reviewing court must be '[a]ble to determine from the
13 [administrative] record that the agency is complying with the
14 forest plan standard[s].'" Conservation Cong. v. U.S. Forest
15 Serv., No. 2:14-cv-02228-GEB-AC, 2015 WL 1295914, at *10 (E.D.
16 Cal. March 23, 2015) (quoting Native Ecosystems Council v. U.S.
17 Forest Serv., 418 F.3d 953, 961-62 (9th Cir. 2005)). The thin-
18 from-below treatments provide for no snags other than hazards to
19 be cut, and only snags within certain distances of roads and
20 meeting certain diameter thresholds to be cut in the FMZs.
21 Neither prescription violates the LRMP. See Conservation Cong.
22 v. U.S. Forest Serv., 686 Fed.Appx. 392, 394 (9th Cir. 2017) (no
23 violation of the LRMP snag standard where snags would only be
24 removed if deemed a safety hazard); Conservation Cong., 2014 WL
25 2092385, at *12 (no violation of the LRMP snag standard where
26 removal would occur in 150-foot FMZ corridor).

27 Plaintiffs' reliance on Or. Nat. Res. Council Fund v.
28 Brong, 492 F.3d 1120 (9th Cir. 2007) is misplaced. See Opp'n to

1 Fed. Defs.' Mot. at 14-15. There, the relevant forest plan
2 expressly limited the removal of large snags in LSRs. Id. at
3 1128. And the project in question allowed for the removal of a
4 significant number of large snags in LSRs. Id. That is not the
5 case here. Only hazards will be cut in the treatment areas and
6 only smaller snags will be removed from roadside areas and the
7 FMZs. See FS-AR 00984; FS-AR 001164; FS-AR 000792.

8 In addition, Brong's snag-retention analysis was "grossly
9 misleading" because the agency determined the amount of large
10 snag retention was sufficient by averaging salvaged and non-
11 salvaged areas together across all the acres included in the
12 logging. 492 F.3d at 1129-30. This finding is also inapposite
13 because, here, the Forest Service analyzed snag retention at the
14 project-level. An agency silviculturist used "forest stand-
15 level vegetation and fuels data collected during stand exams" to
16 quantitatively assess "changes in amount of snag and down log
17 assemblage habitat" from the project. FS-AR 002659. The data
18 was also used to qualitatively assess any "changes in density of
19 snags and/or down logs." Id. That analysis found that the
20 project's removal of snags would be insignificant in the thinned
21 stands and would not meaningfully affect snag density at the
22 landscape scale in the FMZs. FS-AR 002660. Thus, the Forest
23 Service did not arbitrarily conclude that the Pettijohn Project
24 complied with the NFMA's snag and down log standards.

25 The FEIS also notes that, "[a]llthough the FMZs would
26 experience a reduction in standing snags as a result of the
27 Pettijohn Project, Forest-wide aerial survey data indicates an
28 additional 591,000 acres of snag and down log habitat has been

1 created on the Forest since 1994 due to wildfire and insect and
2 disease." FS-AR 00434. And modeling "indicates that ongoing
3 tree mortality within adjacent untreated stands as well as
4 within the thinned stands would provide relatively high snag
5 densities throughout the project area." FS-AR 000804.

6 Therefore, it was reasonable for the Forest Service to conclude
7 that, while "overall snag density would be reduced," it would
8 remain "well within Forest Plan guidelines." FS-AR 000436.
9 This conclusion is "entitled to substantial deference." Weldon,
10 697 F.3d at 1056.

11 Regarding the NWFP's requirement that silvicultural fire-
12 reduction activities focus on younger stands, see FS-AR 005989,
13 there is no evidence in the record that the Pettijohn Project
14 runs afoul of that requirement. The NWFP acknowledged the
15 increased risk of fire in the Klamath Province and, as a result,
16 allowed for fire-reduction efforts that include controlled
17 logging. See FS-AR 005988-89; see also Allen, 615 F.3d at 1131
18 ("[T]he NWFP permits logging activities in LSRs . . .").
19 Plaintiffs argue logging and thinning "will decrease moisture
20 content and increase the likelihood of fire." Pls.' Mot. for
21 Summ. J. at 18. However, as discussed in the NEPA section
22 above, those claims were adequately considered and properly
23 rejected by the Forest Service. The relevant analyses concluded
24 the project will promote old-growth conditions and reduce the
25 risk of stand-replacing wildfire. Thus, the Forest Service
26 determined the project would comply with the NWFP and the
27 Regional Ecosystem Office concurred. FS-AR 002069. "Far from
28 conflicting with the protection of LSRs, carefully controlled

1 logging is a tool expressly authorized by the NWFP for long-term
2 LSR maintenance.” Allen, 615 F.3d at 1131. This determination
3 “goes to the very heart of the Forest Service’s expertise.” Id.
4 at 1134.

5 Accordingly, with respect to the project’s effects on snags
6 and down logs and its compliance with old-growth standards, the
7 Court does not find that the Forest Service acted arbitrarily or
8 capriciously in failing to comply with the NFMA. Its decision-
9 making is neither erroneous nor inconsistent with the LRMP. See
10 Forest Guardians, 329 F.3d at 1098. The Court GRANTS summary
11 judgment in favor of the Forest Service, Fish and Wildlife, and
12 the Resource Council and against Plaintiffs on Plaintiffs’
13 fifth, sixth, and tenth NFMA claims.

14 d. HFRA Claim

15 Plaintiffs’ eighth claim asserts that the Forest Service
16 violated HFRA by failing to ensure the Pettijohn Project
17 maintains or restores old-growth forests. See FAC ¶¶ 197-202.
18 Plaintiffs argue that approximately seventy-five percent of the
19 areas to be treated are mature and old-growth stands and the
20 project will treat “roughly 2,916 acres by ‘thinning from
21 below,’ removing larger, fire-resilient trees, decreasing
22 moisture in surface fuels, and increasing fire risk.” Pls.’
23 Mot. for Summ. J. at 19.

24 Plaintiffs’ argument lacks merit. Of the thinning approved
25 by the Pettijohn Project, approximately twenty-five percent will
26 be in younger, mature stands and seventy-five percent will be in
27 “mature and selected old-growth.” FS-AR 002561. This does not
28 violate HFRA. The silviculture specialist report explains that,

1 "[t]rees selected for removal will be suppressed trees and those
2 specifically designated to release the growth of desirable
3 species and tree sizes." Id. As a result, "[g]rowth is
4 expected to accelerate on the residual stand component." Id.
5 Thinning will also lead to "[i]ncreased stand vigor, reduced
6 stand mortality, and reduced stand susceptibility to insect and
7 disease." Id. Rather than harming old-growth stands, the
8 thinning of younger trees will contribute to the development of
9 old-growth characteristics and improve stand resiliency. Id.

10 Plaintiffs argue that, critical to the HFRA inquiry is
11 whether the project will promote "fire resilient stands." Opp'n
12 to Fed. Defs.' Mot. at 16 (citing 16 U.S.C. § 6512(f)(1)). As
13 illustrated by portions of the record discussed above, the
14 project meets that requirement. See FS-AR 000411-15. There is
15 evidence that the project will reduce fire intensity and the
16 risk of stand-replacing wildfires. Id. Plaintiffs also argue
17 that "the only way to get the amount of timber to be produced
18 from this project is to log large trees." Opp'n to Fed. Defs.'
19 Mot. at 16. However, Plaintiffs cite to no evidence supporting
20 this contention. By contrast, the Forest Service references
21 portions of the record indicating the project will not remove
22 old-growth trees. See FS-AR 000434; FS-AR 000420. And that 99
23 percent of the trees to be removed in the spotted owl nesting
24 and roosting habitat are below 24 inches in diameter. FS-AR
25 000738, Figure A6-1.

26 The Forest Service's determination that the project
27 complies with HFRA "is entitled to substantial deference."
28 Native Ecosystems Council v. Marten, 807 F. App'x 658, 661 (9th

1 Cir. 2020). Based upon the evidence in the record, the
2 Pettijohn Project is HFRA compliant. The Court GRANTS summary
3 judgment in favor of the Forest Service and Fish and Wildlife,
4 and against Plaintiffs on Plaintiffs' eighth HFRA claim.

5 e. ESA Claims

6 Plaintiffs' first and second claims assert that the Forest
7 Service and Fish and Wildlife violated § 7(a)(2) of the ESA by
8 failing to use the best available science and failing to avoid
9 jeopardizing, destroying, or adversely modifying spotted owl
10 critical habitat. See FAC ¶¶ 103-25. Plaintiffs' third claim
11 asserts that the Forest Service and Fish and Wildlife failed to
12 reinstate consultation in violation of 50 C.F.R. § 402.16(b), an
13 implementing regulation of the ESA. See FAC ¶¶ 126-36.
14 Plaintiffs argue Fish and Wildlife failed to use the best
15 available science in two parts of its 2018 supplemental BiOp and
16 used outdated guidelines to determine the habitat values and
17 thresholds incorporated into its critical habitat effects
18 analysis and determination. Pls.' Mot. for Summ. J. at 19-23.
19 As a result, the Pettijohn Project will destroy and adversely
20 modify spotted owl critical habitat. Id. at 23-24. Plaintiffs
21 also argue Fish and Wildlife should have reinitiated
22 consultation over effects on critical habitat given it had
23 access to updated data. Id. at 25.

24 (i) Best Available Science

25 In making a § 7 adverse modification determination, Fish
26 and Wildlife is required to use the "best available scientific
27 and commercial data available." 16 U.S.C. § 1536(a)(2); 50
28 C.F.R. § 402.14(g)(8); Locke, 776 F.3d at 995. "Under this

1 standard, an agency must not disregard [] available scientific
2 evidence that is in some way better than the evidence [it]
3 relies on.” Id. at 995. Plaintiffs contend that Fish and
4 Wildlife’s 2009 “Regulatory and Scientific Basis for U.S. Fish
5 and Wildlife Service Guidance for Evaluation of Take for NSOs on
6 Private Timberlands in California’s Northern Interior Region”
7 (“2009 Take Guidance”), see FWS-AR 016935-17012, is not the best
8 available science for determining what habitat metrics would
9 provide for population growth and recovery. See Pls.’ Mot. for
10 Summ. J. at 20-23. Rather, Plaintiffs argue Fish and Wildlife
11 should have consulted and followed the habitat metrics outlined
12 in the 2011 Recovery Plan, the 2012 Critical Habitat Rule, and
13 the 2018 Forest Service Technical Report. Id.

14 This argument fails because Fish and Wildlife did, in
15 effect, consider these habitat metrics. Fish and Wildlife used
16 the 2009 Take Guidance as a starting point in its
17 stand/treatment unit level analysis to obtain a field-verified
18 baseline for the quality or condition of the spotted owl habitat
19 proposed for treatment and the likely effects of the proposed
20 treatment on the specific habitat in the treatment units. FWS-
21 AR 004054-57; FWS-AR 001510-13. Notably, the 2009 Take Guidance
22 is consistent with the recovery guidelines outlined in both the
23 habitat retention recommendations of the 2011 Recovery Plan and
24 the nesting and roosting metrics in the 2012 Critical Habitat
25 Rule. Compare FWS-AR 017007, 017010 (the 2009 Take Guidance
26 uses a recommended retention standard of 400 acres or 80 percent
27 suitable nesting, roosting, and foraging habitat in a 500-acre
28 area and 40 percent suitable habitat in a home range) with FS-AR

1 020357-60 (the 2011 Recovery Plan recommends prioritizing
2 spotted owl sites that have at least 50 percent suitable habitat
3 in the core and at least 40 percent suitable habitat in the home
4 range); compare also FWS-AR 016948 (the 2009 Take Guidance
5 describes high quality nesting and roosting conditions having at
6 least 60 percent canopy cover) with 77 Fed. Reg. 71,876, 71,905
7 (Dec. 4, 2012) (the 2012 Critical Habitat Rule outlines that
8 high quality nesting and roosting habitat contains 65-89 percent
9 canopy cover).

10 As for the 2018 Forest Service Technical Report, that
11 document post-dates Fish and Wildlife's April 2018 BiOp. See
12 Ex. A to Mot. to Supp. Admin. Record, ECF No. 66-2. Thus, it
13 was not considered in the agency's decision-making process and
14 is not properly part of the record.

15 Plaintiffs also argue that Fish and Wildlife's failure to
16 consider information in 2018 interim baseline adjustment
17 resulted in a skewed baseline accounting of available critical
18 habitat in the subunit and unit and invalidates Fish and
19 Wildlife's adverse modification analysis. Pls.' Mot. for Summ.
20 J. at 21-22. Here, too, this document post-dates Fish and
21 Wildlife's April 2018 BiOp. See FWS-AR SUPAR-001 (dated
22 December 20, 2018). Thus, it was not available for
23 consideration. Fish and Wildlife's adverse modification
24 analysis used a habitat baseline that incorporated all
25 information up until the end of the 2017 fire season. FWS-AR
26 004063-65; FWS-AR 004166. The only information in the 2018
27 interim baseline adjustment not considered by the April 2018
28 BiOp was the change in critical habitat in the unit and subunit

1 caused by the 2018 fire season, which did not exist in April
2 2018. Defs.' Mot. for Summ. J. at 32.

3 Fish and Wildlife could not have considered information
4 that did not exist, and fire events that had not occurred, when
5 it prepared its April 2018 BiOp. And there is no § 7 violation
6 where the information was not available. See Locke, 776 F.3d at
7 995 ("Under this standard, an agency must not disregard []
8 available scientific evidence") (emphasis added).
9 Moreover, as explained below, the information from the 2018 fire
10 season would have minimally impacted the April 2018 BiOp.

11 (ii) Adverse Modification Determination

12 Plaintiffs challenge Fish and Wildlife's determination that
13 the Pettijohn Project would not result in adverse modification
14 of critical habitat. Pls.' Mot. for Summ. J. at 22-25. To
15 avoid adverse modification, the proposed treatments cannot
16 directly or indirectly alter the spotted owl's habitat in a way
17 that appreciably diminishes the conservation or recovery value
18 of the entire critical habitat designation. Rock Creek Alliance
19 v. FWS, 663 F.3d 439, 442-43 (9th Cir. 2011); 50 C.F.R.
20 § 402.02. Thus, Fish and Wildlife analyzed the potential
21 effects the proposed project's treatments of 2,013 acres of
22 habitat might have on the spotted owl's overall 9,577,969 acres
23 of critical habitat. See FWS-AR 004103-13; 16 U.S.C.
24 § 1536(a)(2); 50 C.F.R. § 402.14(g).

25 First, Fish and Wildlife identified the relevant critical
26 habitat unit, subunit, and action area, and then calculated a
27 baseline inventory of spotted owl critical habitat (i.e.,
28 designated nesting, roosting, foraging, and dispersal habitat

1 types) within each area. FWS-AR 004106; FS-AR 022825-26. The
2 Pettijohn Project is located within the Interior Coastal
3 California Critical Habitat Unit ("Unit 11") and wholly within
4 subunit ICC-7. FWS-AR 004105. Unit 11 encompasses 941,568
5 acres of critical habitat, subunit ICC-7 consists of 119,742
6 acres, and the project's action area contains 14,347 acres of
7 designated critical habitat. FWS-AR 004105-06.

8 Upon obtaining this baseline information, Fish and Wildlife
9 analyzed the project's potential effects on several different
10 scales and varying physical and biological features ("PBFs") of
11 critical habitat.³ At the stand/treatment unit scale, which
12 consists of the 2,013 acres selected for treatment, Fish and
13 Wildlife reviewed field-verified spotted owl habitat metrics
14 specific to the area. See FWS-AR 016935-17012 (Fish and
15 Wildlife "has conducted a thorough review and synthesis of
16 published literature, unpublished data sets, and direct
17 communication with [spotted owl] researchers in support of a
18 rigorous process for evaluating the effects of habitat
19 management on [spotted owls]"). It acknowledged that the
20 proposed treatments would have adverse effects on certain
21 stand/treatment units. See FS-AR 022826-28. However, Fish and
22 Wildlife also determined that these adverse effects would
23 primarily be short-term and were not likely to prevent spotted
24 owls in these specific treatment units from nesting and
25 foraging. FWS-AR 001456-66; FWS-AR 004075-79; FWS-AR 004093-96.

26
27 ³ PBFs are used to characterize the key components of critical
28 habitat that provide for the conservation of the listed species.
FWS-AR 004104.

1 Using the information from the treatment unit analysis,
2 Fish and Wildlife assessed whether the project's proposed
3 treatments on the 2,013 acres compromised the capability of
4 critical habitat within the project's action area to fulfill its
5 intended recovery function. FWS-AR 004105-09. The action area
6 consists of 14,347 acres of critical habitat that is meant to
7 allow for long-term reproduction, connectivity to other habitat
8 in subunit ICC-7, and recruitment of high-quality spotted owl
9 habitat. Id. Here, too, the anticipated adverse effects from
10 the project's treatments would primarily be short-term and only
11 impact a relatively small portion of the nesting, roosting, and
12 foraging habitat available in the action area. FWS-AR 004107-
13 09. In addition, treatments would produce more fire-resistant
14 and sustainable habitat, consistent with the spotted owl's 2011
15 Recovery Plan. FWS-AR 004112; FS-AR 022841-43.

16 Next, Fish and Wildlife looked to the project's impact on
17 critical habitat within subunit ICC-7, which consists of 119,635
18 acres of critical habitat. FWS-AR 004109-10. The effects at
19 the subunit ICC-7 scale were minimal as the proposed treatments
20 affect only two percent of available nesting, roosting, and
21 foraging habitat in that area. FWS-AR 004109. Fish and
22 Wildlife determined that the project's treatments were, thus,
23 unlikely to impair the ability of the critical habitat in
24 subunit ICC-7 to contribute to its larger conservation and
25 recovery purpose. Id.

26 Finally, at the broadest scale, the project's anticipated
27 short-term adverse effects became nearly undetectable. FWS-AR
28 004109-10 ("The selected alternative, at that [] scale, is []

1 not reasonably likely to cause an adverse effect to the []
2 larger CHU 11.""). The project would temporarily adversely
3 impact only 0.28 percent of critical habitat available at the
4 Unit 11 level and "a fraction of a percent of the 12 million
5 acres of critical habitat rangewide." FWS-AR 004112-13.

6 Ultimately, Fish and Wildlife determined that the project
7 would not compromise the subunit and unit's ability to
8 contribute to the range-wide critical habitat's overall
9 conservation and recovery purpose. FWS-AR 004111-13; Rock Creek
10 Alliance, 663 F.3d at 442-43 (finding that Fish and Wildlife did
11 not err by conducting a large-scale analysis and by relying on
12 the relative size of the critical habitat to evaluate the
13 project's impact on the species). Moreover, Fish and Wildlife
14 concluded that the project would help create more high-quality,
15 fire-resistant spotted owl habitat, consistent with the spotted
16 owl's 2011 Recovery Plan and the 2012 Critical Habitat Rule.
17 FWS-AR 004111-13. Fish and Wildlife made these determinations
18 having conducted extensive analysis on all aspects of the
19 Pettijohn Project. Thus, the adverse modification analysis, and
20 the conclusions drawn from it, are complete, reasonable, and
21 sufficiently supported by the record. See FWS-AR 004103-13.

22 (iii) Reinitiating Consultation

23 Lastly, Plaintiffs argue that the agencies must reinitiate
24 consultation based on new information in the 2018 interim
25 baseline adjustment. See Pls.' Mot. for Summ. J. at 25. "If
26 the data is new and the new data may affect the jeopardy or
27 critical habitat analysis, then [Fish and Wildlife] [is]
28 obligated to reinitiate consultation pursuant to 50 C.F.R.

1 § 402.16.” Gifford Pinchot Task Force v. U.S. Fish & Wildlife
2 Serv., 378 F.3d 1059, 1077 (9th Cir. 2004). However, the
3 additional data from the 2018 interim baseline adjustment does
4 not affect Fish and Wildlife’s critical habitat analysis. See
5 Defs.’ Mot. for Summ. J. at 32-33.

6 The April 2018 BiOp analyzed the Pettijohn Project’s
7 effects on 1,546 acres of nesting, roosting, and foraging
8 habitat designated as critical habitat. See FWS-AR 004107-09.
9 That acreage represented 1.29 percent of the total critical
10 habitat in subunit ICC-7 and 2.46 percent of the total nesting,
11 roosting, and foraging habitat in ICC-7. FWS-AR 004106, Table
12 21. Using the additional data from the 2018 interim baseline
13 adjustment in the analysis, the effect of treating 1,546 acres
14 of nesting, roosting, and foraging habitat in ICC-7 represents
15 2.81 percent of the same habitat available in ICC-7. FWS-AR
16 SUPAR-008 (total nesting, roosting, and foraging in subunit goes
17 down to 55,004 acres). That is a difference of 0.35 percent
18 from the April 2018 BiOp’s evaluation.

19 With regard to the larger unit, the April 2018 BiOp
20 assessed that the treated 1,546 acres of nesting, roosting, and
21 foraging habitat would affect 0.28 percent of the total nesting,
22 roosting, and foraging habitat in the unit. FWS-AR 004106,
23 Table 21. Considering the 2018 interim baseline adjustment, the
24 project affects 0.33 percent of the total nesting, roosting, and
25 foraging habitat in the unit. FWS-AR SUPAR-008 (total nesting,
26 roosting, and foraging in larger unit goes down to 55,004
27 462,186 acres). A difference of 0.05 percent. Thus, even with
28 these revised numbers, the conclusions drawn from Fish and

1 Wildlife's analysis remains essentially the same: The
2 Pettijohn's Project's treatments would not appreciably reduce
3 the spotted owl's prospects for recovery and, therefore, would
4 not likely result in adverse modification. See FWS-AR 004111-
5 13. Accordingly, reinitiating consultation was not warranted.

6 In sum, the Court finds: (1) Fish and Wildlife used the
7 best available science in conducting its critical habitat
8 analysis; (2) the Pettijohn Project will not adversely modify
9 spotted owl critical habitat; and (3) there was no need to
10 reinitiate consultation. Fish and Wildlife's § 7 critical
11 habitat analysis was consistent with the ESA, reasonable, and is
12 supported by the administrative record. The Court, therefore,
13 GRANTS summary judgment in favor of the Forest Service, Fish and
14 Wildlife, and the Resource Council and against Plaintiffs on
15 Plaintiffs' first, second, and third ESA claims.

16 III. ORDER

17 For the reasons set forth above, the Court:

18 (1) DENIES Plaintiffs' Motion to Supplement the
19 Administrative Record; (2) DENIES Plaintiffs' Motion to Strike;
20 (3) DENIES Plaintiffs' Motion for Summary Judgment; (4) GRANTS
21 the Forest Service and Fish and Wildlife's Motion for Summary
22 Judgment; and (5) GRANTS the Resource Council's Motion for
23 Summary Judgment.

24 IT IS SO ORDERED.

25 Dated: May 17, 2021

26
27 
28 JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE