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

Attorneys for Federal Defendant

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

SOUTHEAST ALASKA CONSERVATION COUNCIL, *et al.*, Plaintiffs, v. UNITED STATES FOREST SERVICE, *et al.*, Defendants.	No. 1:14-cv-00014-RRB FEDERAL DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT Hon. Ralph R. Beistline

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Rules

TABLE OF ACRONYMS

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

Federal Defendants U.S. Forest Service ("Forest Service"), U.S. Department of Agriculture, Thomas L. Tidwell, Beth Pendleton, and Forrest Cole submit this brief in opposition to Plaintiffs' motion for summary judgment, ECF No. 26, and in support of their cross-motion for summary judgment.

I. OVERVIEW

Plaintiffs bring a facial challenge to the 2008 Tongass Forest Plan Amendment without challenging a project-level decision. That challenge is not justiciable, both because Plaintiffs lack standing and because their challenge is not ripe. Beyond that, Plaintiffs have failed to meet their burden of demonstrating that the Forest Service's disclosure and analysis of the limited issues Plaintiffs raise are inadequate under the National Environmental Policy Act ("NEPA") and the National Forest Management Act ("NFMA"). Finally, Plaintiffs have failed to demonstrate that the narrow issues they raise are enough to support the broad relief they seek.

II. BACKGROUND

A. Statutory Background

The Federal Defendants have set out the relevant statutory background in their summary judgment brief filed in the companion case, *Southeast Alaska Conservation Society v. U.S. Forest Service*, No. 1:14cv00013-RRB ("*SEACC I*"), ECF No. 58, at 2–5, and will not repeat it here.

B. The 1997 Tongass Forest Plan Revision and 2008 Forest Plan Amendment

The 2008 Amendment to the 1997 Tongass Forest Plan Revisions was adopted to respond to a Ninth Circuit decision, *Natural Resources Defense Council v. U.S. Forest Service*, 421 F.3d 797 (9th Cir. 2005), which concerned timber harvest demand and other matters not at issue in this case. *See* 2008 Forest Plan Final Environmental Impact Statement ("FEIS"), AR 603_1591

at 1-2.[1] In the course of adopting the 2008 Amendment, the Forest Service did make some minor changes to the Standard and Guideline governing deer habitat capability, "to reflect new information from wolf research in Southeast Alaska," which is the focus of Plaintiffs' complaint here. *See* 2008 ROD AR 603_1606, at 24.

The NFMA requires that forest plans "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area." 16 U.S.C. § 1604(g)(3)(B). The forest planning regulations in force at the time the 1997 Forest Plan revision was issued called for forest plan provisions directing that "[f]ish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area." 36 C.F.R. §§ 219.19; *id.* § 219.27(a)(6) (1983). A "viable" population is one that "has the estimated number and distribution of reproductive individuals to insure its continued existence is well distributed in the National Forest." 2008 Forest Plan, AR 603_1593, at 7-47 (Glossary). Implementing that requirement, both the 1997 Tongass Forest Plan Revision and 2008 Amendment directed the Forest Service to provide habitat to support viable populations of native and desired species. *See* 1997 Forest Plan, AR 10_006454, at 4-110 (WILD112.II.B) ("Provide the abundance and distribution of habitat necessary to maintain viable populations of existing native and desirable introduced species well-distributed in the planning area."); 2008 Forest Plan, AR 603_1593, at 4-89 (WILD1.II.B) ("Provide the abundance and distribution of habitat necessary to maintain viable populations of existing native and desirable introduced species well-distributed in the planning area (*i.e.*, the

[1] Federal Defendants here use the same Administrative Record citation conventions as in their *SEACC I* brief. *See* ECF No. 58, at 5 n.3. However, the Court may find it preferable to view the on-line version of the 1997 Forest Plan FEIS and Appendices, which are available at http://www.fs.usda.gov/detail/tongass/landmanagement/planning/?cid=stelprdb5445359.

Tongass National Forest).").

The Tongass Forest Plan provides for the viability of species that depend on old growth forest by implementing its Old Growth Conservation Strategy. 1997 Forest Plan Record of Decision ("ROD"), AR 10_009819, at 32–33; 2008 Forest Plan ROD AR 603_1606, at 20–22. That strategy consists of two components. The first is a habitat reserve network that protects the integrity of old growth forest; that system establishes Old Growth Reserves ("OGRs") of various sizes that are allocated to the Old Growth Habitat Land Use Designation ("LUD") or other non-development LUDs. 1997 Forest Plan FEIS, AR 10_006971, App. N at N-16. The second component is the management of "matrix" lands—that is, those land use designations where commercial timber harvest may occur. *Id.* Within such areas, ecological components are addressed by "Standards and Guidelines" to provide an array of habitat features for wildlife that include elements associated with old growth forest. *Id.* at N-16, N-22; *see also* 2008 Forest Plan FEIS, AR 603_1592, App. D at D-2–D-3, D-6, D-10 (discussing this two-prong "coarse filter"/"fine filter" approach).

Thus the 1997 Forest Plan developed a conservation framework for wildlife that employed direction established by the now-superseded 1982 forest planning regulations and integrated several elements into its conservation strategy. The Forest Service reviewed ecosystem recommendations from the available scientific literature and reports of interagency committees and determined that a reserve system was an appropriate approach to ensure the viability of a wide range of species associated with old-growth forest. 1997 Forest Plan FEIS, AR 10_006971, at 3-11–3-12, *id.* App. N and N-20; 2008 Forest Plan FEIS, AR 603_1592, App. D at D-6. The strategy was further strengthened through the addition of species-specific elements, which included Standards and Guidelines for certain individual species. 1997 Forest

Plan FEIS, AR 10_006971, at 3-11. Among such species are "management indicator species" ("MIS"), which are "species whose response to land management activities can be used to predict the likely response of other species with similar habitat requirements." *Id*. at 3-351. MIS were chosen from five broad categories of species and used to develop forest plan objectives, analyze how plan alternatives meet those objectives, and further monitor the effect of plan implementation. *Id.*; 1982 NFMA Planning Regulations, 36 CFR § 219.19(a)(1)-(6) (superseded), AR 603_0004, at 24. The Forest Service assembled panels of wildlife experts who assessed the population viability of MIS species. *Id.* at 3-362–3-363. The Sitka black-tailed deer and gray (or Alexander Archipelago) wolf are MIS for the purposes of the Tongass Forest Plan. 1997 Forest Plan FEIS, AR 10_006971, at 3-351. The viability of the Alexander Archipelago wolf was assessed by panels in 1995 and 1997; the results of those assessments are generally consistent. 1997 Forest Plan FEIS, AR 10_006971, App. N at N-7; 2008 Forest Plan FEIS, AR 603_1592, App. D at D-51–D-52, D-63.

The 1997 viability assessment panel determined that the Selected Alternative for the 1997 Forest Plan Revision would maintain viable wolf populations far into the future. To reach that conclusion, panelists assigned numerical rankings to the likelihood of several outcomes after 100 years of full Forest Plan implementation under each of the analyzed alternatives, ranging from the condition where the "[h]abitat is of sufficient quality, distribution, and abundance to allow the species to maintain well distributed, breeding populations" to that where the "[h]abitat conditions result in species extirpation from federal land." 1997 Forest Plan FEIS, AR 10_006971, at 3-382. Of a possible one hundred points being assigned to each scenario, the 1997 panel concluded not only that the Selected Alternative had a mean outcome between 83 and 97 for the "likelihood of maintaining habitat to support viable and well distributed wolf populations," 1997

Forest Plan FEIS, AR 10_006971, App. N at N-7 (Table 3 & n.1), but also that "there was virtually no chance of extirpation of the wolf from the Tongass National Forest," *see* 2008 Forest Plan FEIS, AR 603_1592, App. D at D-63. In fact, the Selected Alternative was given a "high rating[]" of 58 for the most favorable outcome, with only one point being assigned to the extirpation outcome. *Id*. at D-63, D-64 (Table D-11).

The 2008 Forest Plan FEIS assigned viability ratings to the alternatives it considered based on the 1995 and 1997 panel assessments, with Alternative 6 adopted as the Selected Alternative. 2008 Forest Plan ROD, AR 603_1606, at 2. Alternative 6 is similar to the Alternative 11 (the Selected Alternative) from the 1997 FEIS. 2008 Forest Plan FEIS, AR 603_1592, App. D. at D-80. Alternative 6 was given a "high rating" (between 81 and 90 points) for the likelihood of maintaining habitat to support viable and well distributed wolf populations. 2008 Forest Plan FEIS, AR 603_1592, App. D at D-81 (Table D-17).

The Forest Service developed a species-specific wolf-conservation approach based upon an interagency conservation assessment document, *The Alexander Archipelago Wolf: A Conservation Assessment* (Person *et al*. (1996)), AR 603_0190, developed cooperatively by the Alaska Department of Fish and Game ("ADFG"), the Forest Service, and the U.S. Fish and Wildlife Service ("USFWS"). That assessment identified three principal management considerations, which have been incorporated in the Forest Plan to promote both near-term and long-term wolf viability: (1) long-term deer habitat capability; (2) habitat reserves; and (3) wolf mortality management. 1997 Forest Plan FEIS, AR 10_006971, App. N at N-30.

The Forest Service estimates deer habitat capability using the Deer Model first developed in 1988 and then refined over the years.[2] 1997 Forest Plan FEIS, AR 10_006971, at 3-365–3-369, App. N at N-30–N-31. The Model only estimates long-term habitat carrying capacity; it is not meant to project actual deer density. *Id*. at N-31. Model results are used to compare management alternatives, generally at the biogeographic province scale (which encompasses one or more Wildlife Analysis Areas ("WAAs")).[3] *See* 2008 Forest Plan FEIS, AR 603_1591, at 3-283. Alternatives are evaluated against the deer habitat capability value provided in the Forest Plan Standards and Guidelines, which in 1997 directed the Forest Service to

> [p]rovide sufficient deer habitat capability to first maintain sustainable wolf populations, and then to consider meeting estimated human deer harvest demands. This is generally considered 13 deer per square mile ["/mi.^{2}"] in biogeographic provinces where deer are the primary prey of wolves. Use the most recent version of the interagency deer habitat capability model and field validation of local deer populations to estimate deer habitat capability.

1997 Forest Plan, AR 10_006454, at 4-114 (WILD112.XI.A.3). The 2008 Forest Plan contains an almost identical Standard and Guideline, which directs the Agency to provide

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

2008 Forest Plan, AR 603_1593, at 4-95 (Standard and Guideline WILD1.XIV.A.2). In both

---

[2] The Deer Model is described in detail in Federal Defendants' response brief in *SEACC I*, ECF No. 58, at 12–14.

[3] The model was meant to be used at the planning area scale, which is the Tongass National Forest, whereas a WAA represents the smallest scale at which the Model could "reasonably be (Footnote continued)

versions of the Standard and Guidelines, the deer habitat capability value was never a threshold that established the minimum value projected to ensure wolf population viability, but rather has always been a value that may allow for both wolf predation and human harvest of deer.[4] 1997 Forest Plan FEIS, AR 10_006971, App. N at N-31–N-32; 2008 Forest Plan FEIS, AR 603_1591, at 3-283. The 13 deer/mi.^{2} value provided in the 1997 Forest Plan Revision was later adjusted to 17 deer/mi.^{2}, *id.* at N-33; AR 603_1929, at 20, and then to 18 deer/mi.^{2}, *see* 2008 Forest Plan, AR 603_1593, at 4-95; 2008 Forest Plan FEIS, 603_1591, at 3-283.[5] At all times, though, the value was projected to provide more than wolf population viability. Maintaining viability avoids the potential need to list a species under the Endangered Species Act, 16 U.S.C. § 1531 *et seq*., *see* 2008 Tongass Forest Plan, AR 603_1593, at 2-1, while the Tongass Forest Plan sets a *further* goal of "[m]aintain[ing] habitat capability sufficient to produce wildlife populations that support the use of wildlife resources for sport, subsistence, and recreational activities," *id*. at 2-9. Therefore, a viable population may exist even if other uses, such has sport and subsistence

---

expected to give a useable representation of deer activity." AR 603_2253.

[4] Modeled deer habitat capability below 18 deer/mi.^{2} would not in itself suggest a wolf viability or sustainability concern; the Standard and Guideline was designed to maintain equilibrium populations of wolves and deer while providing for a sustainable harvest of deer by humans and wolves (Person *et al*. (1996)) and is therefore higher than what is necessary to maintain a viable and well-distributed wolf population. *See* 1997 Forest Plan FEIS, AR 10_006971, at 3-405 ("Maintaining habitat to support current relatively high wolf populations and current human deer harvest is unlikely a viability issue for wolves."); *id*. App. N at N-31 ("Deer densities less than 13 deer/mile^2 but greater than 5 deer/mile^2 may indicate that wolves are viable but that human deer harvest could decline.").

[5] The value of 18 deer/mi.^{2} refers to the habitat capability sufficient to support an estimated deer density of *13* deer/mi.^{2} 2008 Forest Plan FEIS, AR 603_1591, at 3-283. However, deer density does not represent actual population density and is not directly related to wolf viability. It does represent the functioning of the predator-prey system dynamic, 2008 Forest Plan FEIS, AR 603_1591, at 3-282, and is used to estimate changes the number of deer available to sustain both wolves and human harvest, 1997 Forest Plan FEIS, AR 10_006971, at 3-405, App. N at N-31, and to rank project alternatives accordingly, 2008 Forest Plan FEIS, AR 603_1591, at 3-232, 3-283.

hunting, are reduced.

Deer habitat capability modeled in the 1997 Forest Plan FEIS indicated that 34 of the 43 WAAs in the region of some concern for wolf viability in Southeast Alaska (that is, portions of Game Management Units 2 and 3) would maintain long-term deer habitat that is likely to support both wolves and current human deer harvest over a period of 100 years of full Forest Plan implementation. 1997 Forest Plan FEIS, AR 10_006971, App. N at N-31. After 100 years of Forest Plan implementation, at least 80 percent of the WAAs on Prince of Wales/Kosciusko and Kuiu/Kupreanof/Mitkof Islands would have estimated deer habitat capability values that meet or exceed 13 deer/mi.^{2}. *Id*. at N-33. Model outputs over that time period also indicated that all 43 WAAs would maintain habitat capable of producing at least 5 deer/mi.^{2}, which is the estimated value to maintain viable wolf populations (that is, without considering human harvest of deer).[6] *Id*. at N-31; Kirchhoff (1993), AR 603_0008, at 161, 169. When the analysis was repeated using the deer habitat capability value of 17 deer/mi.^{2}, 13 of the 25 WAAs on Prince of Wales/Kosciusko and 11 of the 18 WAAs on Kuiu/Kurpreanof/Mitkof were projected to be capable of supporting 17 or more deer/mi.^{2} mile after 100 years of full Forest Plan implementation. *Id*. at N-33. Thus, the 1997 Forest Plan FEIS disclosed that 24 of 43 WAAs (56 percent) would have sufficient deer habitat capability in 100 years to support sustained harvest of deer by wolves and humans, or a reduction from the earlier projection of 80 percent of WAAs meeting the 13 deer/mi.^{2} value. *Id*. at N-33–N-34. The FEIS noted, however, that because of the variability in model inputs and uncertainty of how close current deer populations are to carrying capacity, the 17 deer/mi.^{2} value and the lower value of 13 deer/mi.^{2} would serve to express a

[6] As explained in the Federal Defendants' *SEACC I* brief, the Deer Model is conservative in its projections of deer habitat capability. ECF No. 58, at 14; *see also* 1997 Forest Plan FEIS, AR (Footnote continued)

range of relative risk, rather than an absolute threshold necessary to support sustained harvest of deer by wolves and humans.[7] *Id*. at N-34.

As noted above, however, the deer habitat capability Standard and Guideline is only one component designed to ensure the viability of wolves. A second, important component is the system of habitat reserves, which provide relatively secure wolf populations that in turn "would provide surplus individuals to disperse and support less secure populations in non-reserved lands *within the matrix*." 1997 Forest Plan FEIS, AR 10_006971, App. N at N-34 (emphasis added). Prince of Wales/Kosciusko and Kuiu/Kupreanof/Mitkof Islands exceed the recommended acreage of habitat reserves suggested in Person *et al*. (1996). *Id*. at N-35:

Table 9.
The number of reserves in portions of Game Management Units 2 (Kosciusko and Prince of Wales Island) and 3 (Kuiu, Mitkof, and Kupreanof Islands) needed, according to Person et al. (1996), to reduce long-term risks to wolf viability.[1]

Area	Reserves needed	Acres needed	Reserves present	Total acres	Deer habitat capability deer/mi^2
Prince of Wales/ Kosciusko	9	437,000	Calder Holdbrook	56,546	22.8
			Honker/Karta	200,584	17.8
			South POW	199,945	21.4
Total				**457,075**	
Kupreanof/Mitkof/Kuiu	7	350,000	Tebenkof/South Kuiu	233,346	29.6
			Petersburg/Salt Chuck Wilderness	91,747	17.3
			East Rocky Pass	52,297	21.2
Total				**377,390**	

[1] Contiguous reserves are listed with their respective total area in acres. The estimated current deer habitat capability is also presented for each reserve.

Finally, management of human-caused wolf mortality through the administration of road access

10_006971, at 3-404–3-405, App. N at N-33.

[7] Plaintiffs claim that the Forest Service's analysis did not assume full Forest Plan implementation, including the maximum allowable harvest. Pls.' Br., ECF No. 26, at 8. It plainly did, as disclosed in the cited pages of the FEIS, which explain that the 13 deer/mi.^{2} value would be maintained in most WAAs *even at* the maximum allowable harvest. *See* 1997 Forest Plan FEIS, AR 10_006971, at 3-378 n.5 (Pls.' Ex. 38, at 10 n.5); *see also id*., App. N at N-26.

and regulation of hunting and trapping provides an additional means for ensuring continued wolf viability. 1997 Forest Plan FEIS, AR 10_006971, App. N. at N-35–N-36; 2008 Forest Plan FEIS, AR 603_1591, at 3-238; *id*. (Vol. 2) AR 603_1592, App. D at D-26.

Considering all components of the wolf conservation strategy together, the 1997 Forest Plan FEIS concluded that the Forest Plan would maintain viable populations of wolves in the planning area. *Id*. at N-37. The FEIS for the 2008 Forest Plan Amendment drew similar conclusions by comparing the alternatives analyzed in that FEIS with comparable ones from the 1997 FEIS. *See* 2008 Forest Plan FEIS, AR 603_1591, at 2-45 (Table 2-18) 2-46–2-48 (Table 2-19), 2-55; AR 603_1592, App. D at D-80 (Table D-16), D-83. The 2008 Forest Plan Amendment ROD determined that the Selected Alternative would thus maintain wolf population viability. AR 603_1606, at 19–20, 24.

III. ARGUMENT

A. Plaintiffs' Challenge to the Tongass Forest Plan is Not Justiciable

Although Plaintiffs challenge the Forest Service's approval of the Big Thorne Project under the Tongass Forest Plan in *SEACC I*, here they challenge the Plan on its face, without tying that challenge to any project-level decision. Such a facial challenge is not justiciable, and Plaintiffs' complaint must therefore be dismissed for lack of Article III jurisdiction.

1. Plaintiffs Lack Standing

As the party invoking federal jurisdiction, a plaintiff bears the burden of establishing its constitutional standing to sue. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("*Defenders*"). To establish Article III standing, Plaintiffs must show (1) that they have suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that the injury is fairly traceable to the defendant's challenged action; and (3) that it is likely, as opposed to merely speculative, that a favorable judicial decision will

prevent or redress the injury. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

When the court resolves a standing challenge on motions for summary judgment, a plaintiff must set forth "specific facts" by affidavits or otherwise supporting each element of standing; the plaintiff cannot merely rely on allegations in its pleadings. Fed. R. Civ. P. 56(e); *Defenders*, 504 U.S. at 561; *see Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 884–85 (1990). To be constitutionally cognizable, an alleged injury-in-fact must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Defenders*, 504 U.S. at 560 (citations and internal quotation marks omitted). "The presence of a particularized risk of injury to the plaintiff's interests requires even more exacting scrutiny when the challenged government action is not one located at a particular 'site,'" such as when a broad rulemaking is at issue. *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 667 (D.C. Cir. 1996) (en banc).

This lawsuit involves solely the Tongass Forest Plan, without any challenge to a site-specific project. Instead, Plaintiffs challenge the Standards and Guidelines relating to species viability, particularly for the wolf. The Tongass Forest Plan, however, does not itself authorize any timber harvest, road-building, or any other on-the-ground activities that implicate the challenged Plan provisions. The Tongass Forest Plan contains Standards and Guidelines that apply to management of the Tongass National Forest and resources on the Tongass. The Supreme Court has made clear that such land management allocations themselves do not have any on-the-ground impact. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998) ("[T]he plan does not give anyone a legal right to cut trees, nor does it abolish anyone's legal authority to object to trees being cut."). A decision to build a road, harvest timber, or authorize mineral development requires separate agency action, which would be accompanied by public review and evaluation under NFMA, NEPA, and other applicable law. Under certain

circumstances, that action would then be subject to judicial review in federal court.

Moreover, because the Tongass Forest Plan—and the particular Forest Plan provisions at issue here—do not govern the conduct of the Plaintiffs themselves, but rather "govern only the conduct of Forest Service officials engaged in project planning," standing is "'substantially more difficult' to establish." *Summers*, 555 U.S. at 493 (quoting *Defenders*, 504 U.S. at 562). Plaintiffs "can demonstrate standing only if application of the [challenged action] by the Government will affect *them* in the manner [causing injury]." *Id.* Thus, Plaintiffs must demonstrate that the Tongass Forest Plan has been applied in the approval of a site-specific project that "will impede a specific and concrete plan" of their members to enjoy a specific area or "parcel" in a National Forest. *Id*. at 495;[8] *Defenders*, 504 U.S. at 564 (evidence that a plaintiff "'had visited' the areas of the projects before the projects commenced proves nothing"); *Nat'l Wildlife Fed'n*, 497 U.S. at 889 (evidence that a member "uses unspecified portions of an immense tract of territory, on some portions of which [an] activity has occurred or probably will occur" is insufficient under Article III). If and when Plaintiffs do demonstrate harm from a specific application of the Tongass Forest Plan through a site-specific project, the focus of the Court's inquiry will be on the site-specific project rather than the Forest Plan itself.[9]

None of the standing declarations submitted by Plaintiffs show harm arising from the Tongass Forest Plan itself. At best, some of the declarations allege injury from site-specific projects implementing the Forest Plan, but because Plaintiffs did not bring any claims against

---

[8] This approach comports with the Ninth Circuit's statement in *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094 (9th Cir. 2002), that any challenges to a promulgated rule's exceptions should be adjudicated when the exceptions are applied, which would "provide a more precise way to tailor the . . . Rule's application to local areas" and allow the court to provide "appropriate declaratory relief in view of the claims in issue." *Id.* at 1123 n.28.

[9] Of course, Plaintiffs have brought a separate site-specific challenge in *SEACC I*. But that does (Footnote continued)

these projects in their complaints, they cannot rely on such projects to establish standing to challenge the Forest Plan, because they fail to complete the causal links required by the Supreme Court in *Summers*, 555 U.S. at 493. For example, Robert Claus states that his "concerns about the Plan have been expressed in timber sales such as Logjam, Big Thorne, Navy, Mitkof, Central Kupreanof and others." Claus Decl. ¶¶ 8, 14, ECF No. 26-41. However, not one of the site-specific projects that he mentions forms the basis of any claim in Plaintiffs' complaint. Other harms that Mr. Claus asserts based on the Plan concerning expansions in the logging road system or protection of deer habitat, *id.* ¶ 10, are presented in only a general manner that similarly does not satisfy the specificity and imminence standards of *Summers*. Thus, Mr. Claus fails to show harm from the Plan itself in a concrete and particularized way.

Likewise, the declarations of Robert Lindekugel ¶¶ 4, 6, 7, ECF No. 26-43, and Dan Ritzman ¶ 6, ECF No. 26-46, assert harm only from the Tongass Forest Plan through implementation of projects *not* named in the complaint; the declarations therefore fail to establish standing in *this* case. Although Eric Lee asserts that the Tongass Forest Plan authorized the Tonka timber sale and Mitkof timber sale, Lee Decl. ¶¶ 10, 11, ECF No. 26-44, he is incorrect. Those sales were authorized not through the ROD for the Forest Plan, but through separate, project-level decisions after further environmental analysis. *See Tongass National Forest, U.S. Forest Service*, http://www.fs.usda.gov/projects/tongass/landmanagement/projects (last visited Dec. 18, 2014). Plaintiffs' other standing declarations fare even more poorly when measured against the relevant standards. Nathaniel Lawrence, ECF No. 26-42; Richard Nelson, ECF No. 26-44; Mike Sallee, ECF No. 26-47; and Cindy Shogan, ECF No. 26-48, allege no specific injury arising from the Forest Plan and make no mention whatsoever of any site-specific project on the

---

not render *this* case justiciable; it simply makes it superfluous.

Tongass. *See* ECF No. 26-42.

As a result, Plaintiffs cannot establish Article III standing to challenge the Tongass Forest Plan, and this case should be dismissed for lack of subject matter jurisdiction.

2. Plaintiffs' Facial Challenge is Not Ripe

Plaintiffs in this lawsuit ask the Court to rule on the validity of the Tongass Forest Plan without challenging a site-specific project. *See* Pls.' Br., ECF No. 26, at 24–38. Supreme Court precedent, however, prohibits this Court from reaching the merits of a facial challenge to a forest plan in the absence of a challenge to a project that implements the plan. Forest plans are rules of general applicability that provide standards and guidelines for future management of forest resources and govern the long-term management of the national forests to which they apply. *See* 16 U.S.C. 1604(a), (e), (g); 36 C.F.R. 219.1(c) (2012); *Ohio Forestry*, 523 U.S. at 729–30. Challenges to forest plans are therefore not ripe until they have been applied in the context of a site-specific action and the scope of the controversy is reduced to those provisions that will actually affect a particular plaintiff. *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 668 (9th Cir. 2009) ("Forest-wide management practices and monitoring efforts, or lack thereof, are generally not amenable to suit under the APA because they do not constitute final agency actions. Challenges to forest-wide management practices or claims that the Forest Plan does not comply with NFMA must be made in the context of site-specific actions." (emphasis added, citations omitted)); *Idaho Sporting Cong. v. Rittenhouse*, 305 F.3d 957, 974 (9th Cir. 2002) (determination of whether future projects issued under challenged forest plan violate NFMA must be made "in the context of site specific actions, if and when they actually arise."). Because Plaintiffs here bring their Forest Plan challenge without any project-specific context, their complaint must be dismissed.

In *Ohio Forestry*, the Supreme Court barred challenges to the lawfulness of a forest plan—when made without challenge to a timber sale implementing the plan—as unripe. Much as Plaintiffs here allege that the Tongass Forest Plan relies on improper analysis, the plaintiffs in *Ohio Forestry* alleged that "erroneous analysis leads the Plan wrongly to favor logging and clear-cutting." 523 U.S. at 731. The Court held that such a challenge is not ripe—a rule that governs here—for three reasons.

First, the Court noted that withholding review does not harm plaintiffs because forest plans, of themselves,

> do not create adverse effects of a strictly legal kind . . . [T]hey do not command anyone to do anything or to refrain from doing anything; they do not grant, withhold, or modify any formal legal license, power or authority; they do not subject anyone to any civil or criminal liability; they create no legal rights or obligations. Thus, for example, the Plan does not give anyone the right to cut trees, nor does it abolish anyone's legal authority to object to trees being cut.

523 U.S. at 733; *see also Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 71 (2004) ("a land use plan is generally a statement of priorities; it guides and constrains actions, but does not (at least in the usual case) prescribe them"). Here, the 2008 Tongass Forest Plan governs the Forest Service's, not Plaintiffs' conduct. Plaintiffs suffer no legal injury from the mere existence of an allegedly illegal forest plan. Injury may arise in the context of a site-specific decision authorizing some use of the forest under the plan. "Even if [Plaintiffs] were to name some specific agency actions as examples of the agenc[y's] alleged wrongdoing, it remains that the challenge is directed at the federal agenc[y's] broad policies and practices." *Alabama-Coushatta Tribe of Texas v. United States*, 757 F.3d 484, 491 (5th Cir. 2014).

Second, the *Ohio Forestry* Court found that allowing a plaintiff to challenge a forest plan in the absence of a project-level decision implementing the plan "could hinder agency efforts to refine its policies" through either plan revision or by adjusting site-specific proposals. 523 U.S.

at 735 (citations omitted). For example, the Forest Service may address the challenged provisions of the Tongass Forest Plan by re-examining them in the context of site-specific projects. The Agency might also conduct further analysis at the programmatic or project level that would cure the alleged deficiencies before it takes a site-specific action.

Finally, the Supreme Court in *Ohio Forestry* found that review of a forest plan threatens to involve the courts in "the kind of 'abstract disagreements over administrative policies' that the ripeness doctrine seeks to avoid." 523 U.S. at 736 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967)). Judicial review is more appropriate once the "factual components [are] fleshed out, by some concrete action." *Id*. at 737 (quoting *Nat'l Wildlife Fed'n*, 497 U.S. at 891).

The *Ohio Forestry* Court acknowledged that it would "be easier, and certainly cheaper, to mount one legal challenge against the Plan now[] than to pursue many challenges to each site-specific logging decision to which the plan might eventually lead," but noted that "this is the traditional, and remains the normal, mode of operation of the courts." 523 U.S. at 734–35 (quoting *Nat'l Wildlife Fed'n*, 497 U.S. at 894). The Supreme Court's earlier decision in *National Wildlife Federation* similarly announced a prohibition on programmatic challenges that seek "wholesale improvement" of an agency's programs by court decree, rather than through Congress or the agency itself, where such changes are normally made. *Nat'l Wildlife Fed'n*, 497 U.S. at 890–91 (holding that the petitioners' challenge to the entirety of a "land withdrawal review program" is "not [a challenge to] an 'agency action' within the meaning of [Administrative Procedure Act ("APA")] § 702, much less a 'final agency action' within the meaning of [APA] § 704"); *see also Sierra Club v. Peterson*, 228 F.3d 559, 566 (5th Cir. 2000) (discussing *National Wildlife Federation*). Here, by bringing allegations of past, ongoing, and future

harms—thereby seeking "wholesale improvement," *National Wildlife Fed'n*, 497 U.S. at 891, of land management on the Tongass National Forest—Plaintiffs have failed to challenge specific "agency action" under the APA. 5 U.S.C. § 702; *see* 5 U.S.C. § 551(13) (defining "agency action" as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act"). Because the United States' waiver of sovereign immunity under APA § 702 is a limited one and requires an "agency action," Plaintiffs' facial challenge to the Forest Plan is not justiciable.

As a limited waiver of sovereign immunity, the APA does not authorize immediate judicial review of *every* agency action, but only of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Except where Congress specifically authorizes immediate review of an agency action or where the agency action governs plaintiffs' primary conduct and imposes penalties for violations, judicial review apart from a concrete application of the agency action is unavailable. *Nat'l Wildlife Fed'n*, 497 U.S. at 891. In addition to regulations, "rules of general applicability" may "announc[e], with respect to vast expanses of territory," that an agency will grant permission for certain activities or restrict or withhold such permission; but such decisions are also not ripe for review until further site-specific actions occur. *See id.* at 892. By withholding review until there has been a concrete application of a rule or regulation that threatens to harm a plaintiff, the controversy is "reduced to more manageable proportions" and the factual components are "fleshed out." *Id.* at 891.

Absent one of the circumstances identified in *National Wildlife Federation* (direct statutory review or threatened penalties), an agency regulation itself is not reviewable under the APA even after the regulation has been applied in the course of making a site-specific decision.

497 U.S. at 891. Rather, the agency action that is the proper focus of judicial review is the site-specific decision to which the regulation has been applied. To the extent that the site-specific decision turns on the validity of the broader rule, the plaintiff may assert that the rule is unlawful; but the action that the court ultimately upholds or sets aside is the site-specific decision rather than the rule itself. In these circumstances, judicial review of the Forest Plan's application in the Big Thorne Project decision supplies the appropriate lens for viewing any alleged defect in the Plan. *See Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 60–61 (1993); *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 165 (1967).

Plaintiffs may argue that their NEPA claim against the Tongass Forest Plan should be heard by the Court even if their NFMA claim is not ripe, relying on dictum from *Ohio Forestry* that a NEPA claim "can never get riper" after an alleged violation arises. 523 U.S. at 737. But the Court's dictum presupposed a situation where a plaintiff had demonstrated its standing. *Id.* But NEPA creates only procedural, not substantive, rights, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989), and Plaintiffs here lack Article III standing because, as discussed above, they challenge no site-specific project. Under *Ohio Forestry*, a NEPA claim, like any other procedural claim, must await a proper plaintiff alleging a concrete injury.

In sum, Plaintiffs' attempt to secure direct judicial review of the Tongass Forest Plan fails both because Plaintiffs lack standing and because their claims are not ripe.

B. The 2008 Forest Plan Amendment Adequately Disclosed Potential Impacts on Wolves

Even if Plaintiffs' challenge to the Tongass Forest Plan were justiciable (which it is not), the FEIS for the 2008 Forest Plan Amendment adequately disclosed potential impacts on deer habitat capability where deer may serve as the primary prey of wolves.

Plaintiffs' claim that the 2008 Forest Plan FEIS failed to disclose potential impacts to deer habitat capability in areas where wolves are found and where timber may be harvested makes much over little. *See* Pls.' Br. at 25–33. While long on repetitive narrative, it is conspicuously short on legal analysis that explains how the 2008 FEIS fails under NEPA's "rule of reason." *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004); *League of Wilderness Defenders-Blue Mts. Biodiversity Project v. Allen*, 615 F.3d 1122, 1130 (9th Cir. 2010) ("[w]e employ a rule of reason [standard] to determine whether the [EIS] contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences." (quoting *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1166 (9th Cir. 2003) (internal quotation marks omitted) (second alteration in original)).

Plaintiffs first claim that the 2008 FEIS was inadequate because it failed to include a table or other display that showed the results of the deer habitat capability model separately for each WAA. Plaintiffs observe that the 1997 FEIS included a table that did display that information, Pls.' Br. at 25 (citing Pls.' Ex. 38, at 8–10 (Table 3-112) (1997 Forest Plan FEIS, AR 10_1591, at 3-376–3-378 (Table 3-112), while they note that the 2008 FEIS did not, Pls.' Br. at 26–30. The 2008 FEIS *did* disclose—for *every* WAA—the percentage decline in deer habitat capability from pre-harvest conditions in 1954, assuming the maximum allowable harvest under each alternative. *See* 2008 Forest Plan FEIS, AR 603_1591, at 3-269–3-273 (Table 3.10-7) (comparing 82% maintenance of deer habitat capability over 100 years under the Selected Alternative versus 86% for the no action alternative). Plaintiffs do not argue that those figures are incorrect; they complain only that the analysis presented is in a format somewhat different from that displayed in the 1997 FEIS. That difference in presentation, however, does not violate NEPA; the Agency is free to choose its mode of analysis as long as the Agency has reason to

believe that it is reliable. *Native Ecosys. Council v. Weldon*, 697 F.3d 1043 1051–52 (2012); *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1124 (9th Cir. 2012); *Lands Council v. McNair*, 537 F.3d 981, 994 (9th Cir. 2008) (en banc). The Agency is similarly free to choose how to display the information disclosed as long as the Agency's rationale can be discerned. *See Bowman Transp. Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974) ("we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned"). NEPA's function is only to ensure that the Agency and the public have before them the information reasonably necessary to evaluate the alternatives being considered. *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 768 (2004). Plaintiffs have not demonstrated that the difference in presentation between the 1997 and 2008 FEISs hindered the Agency's ability to evaluate alternatives or significantly reduced the public's ability to understand the Agency's analysis. *See City of Sausalito v. O'Neill*, 386 F.3d 1186, 1206–07 (9th Cir. 2004) ("Our review of an EIS is limited to a rule of reason that asks whether an EIS contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences.") (internal quotation marks and citation omitted).

Similarly, the 2008 FEIS is not deficient merely because the administrative record for the 2008 Plan Amendment contains a spreadsheet that displays modeled deer habitat capability in each WAA, while the FEIS did not separately display that information. *See* Pls.' Br. at 27–28 (citing Pls. Ex. 25 (AR 603_0935)). Not only did the FEIS disclose the changes from 1954 deer habitat capability in every WAA under each alternative, 2008 Forest Plan FEIS, AR 603_1591, at 3-269–3-273 (Table 3.10-7), but—as explained at length, above—deer habitat capability is only one component of the Forest Plan's overall wolf conservation strategy and, at best, represents only a part of the picture. The 2008 Plan Amendment tiered to the 1997 Forest Plan,

including critical components of the wolf conservation strategy, which support the conclusion that the amended Forest Plan will provide a high likelihood of maintaining viable wolf populations in Southeast Alaska. *See* 2008 Forest Plan ROD, AR 603_1606, at 24.

In its simplest terms, the deer habitat capability model projects only an estimate of the modeled ability of analysis areas to support prey[10] in those areas where deer are the primary prey of wolves.[11] The Forest Plan's Old Growth Conservation Strategy provides habitat reserves specifically to support core wolf populations as recommended in the Wolf Conservation Assessment. 1997 Forest Plan FEIS, AR 10_006971, App. N at N-34; 2008 Forest Plan ROD, AR 603_1606, at 16 ("the amended Forest Plan will protect 91 percent of the existing productive old-growth habitat on the Tongass"); *id*. at 20 ("92 percent of the productive old-growth forest that ever existed on the Tongass remains today" and 97 percent of that would remain "even if timber is harvested at the maximum rate allowed under the amended Forest Plan" for the next 15 years). The spreadsheet on which Plaintiffs rely therefore represents only one way (displaying deer habitat values rather than percentage differences) to express changes to only one component (deer habitat capability) of a broader conservation strategy. The 2008 FEIS thus cannot be deemed to violate NEPA's "rule of reason" simply because it did not copy deer habitat capability values from the spreadsheet. *League of Wilderness Defenders*, 615 F.3d at 1130.

---

[10] The deer habitat capability model assigns a numerical value to the ability of each alternative to support deer populations capable of both maintaining sustainable wolf populations and meeting human harvest demands, in order to compare alternatives to each other. 1997 Forest Plan FEIS, AR 10_006971, at 3-405, App. N at N-31, 2008 Forest Plan FEIS, AR 603_1591, at 3-232, 3-283. Model outputs provide no indication of actual deer populations and "cannot be used to predict changes in the prey base available to wolves and hunters." 2008 Forest Plan FEIS, AR 603_1591, at 3-282, 3-283.

[11] Wolves range widely, Person *et al.* (1996), AR 10_00096, at 4, and eat a variety of animals other than deer, 2008 Forest Plan FEIS, AR 603_1591, at 3-283; Person *et al*. (1996), AR 10_00096, at 8.

Plaintiffs further claim that the 2008 FEIS failed to reveal that timber harvest would likely be concentrated in areas of potential wolf habitat. Pls.' Br. at 30–31. That is not true. On the contrary, the Forest Plan discloses the effect on deer habitat capability under each alternative in every WAA, and that analysis is designed to evaluate potential consequences for wolves. 2008 Forest Plan FEIS, AR 603_1591, at 3-269–3-273 (Table 3.10-7); *id.*, at 3-283 (discussing cumulative effects from past harvests in those areas). As Plaintiffs acknowledge, Pls.' Br. at 2–3, the 2008 FEIS does explain that wolf populations are principally located on the largest of the islands south of Frederick Sound in Southeast Alaska. 2008 Forest Plan FEIS, AR 603_1591, at 3-236–3-237. The 2008 FEIS further identifies which WAAs are located on those islands. AR 603_0658 (map). Those disclosures provide all the information that an interested person would need to compare changes to deer habitat capability in each WAA and to understand how WAAs overlap with wolf populations. Finally, the 1997 FEIS discloses that the largest of the southern islands, where wolf populations are concentrated, are the areas most suitable for economic timber harvest and where the most timber harvest (95 percent) has been scheduled. AR 10_006971, App. N at N-26. The 2008 FEIS similarly displays the percentage of high quality deer winter range suitable for timber harvest in each WAA. 2008 Forest Plan FEIS, AR 603_1591, at 3-274–3-277 (Table 3.10-8). The 2008 FEIS then explains that logistics in South-east Alaska influence where and when timber is economic to harvest and that the high cost of access and transportation between the timber supply spread throughout the Tongass and proces-sing mills mostly located in the southern portions of the Forest reduces the likelihood that the needs of mill owners will be met where those distances are great. *Id.* at 3-509. Those disclo-sures complete the loop that Plaintiffs assert the 2008 FEIS failed to close, allowing the reader to understand that timber will be harvested principally in areas where wolves are located.

Plaintiffs next assert that the Forest Service failed to explain how wolf viability would be maintained if deer habitat capability fell below the levels projected to support both wolf predation and human harvest of deer. Pls.' Br. at 31–32. But as explained in Section II.B, above, the deer habitat capability model does not yield a biological threshold below which wolf population viability is uncertain. Rather the value identified in the Standard and Guideline (now 18 deer/mi.^{2}) provides an index to compare alternatives and is intended to indicate when habitat is sufficient to support deer populations capable of sustaining both wolf and human harvest. The Standard and Guideline is well above the value thought necessary to support viable populations of wolves alone (5 deer/mi.^{2}). Plaintiffs appear to reject the latter value, relying on Person *et al*. (1996). Pls. Br. at 32 (citing Pls.' Ex. 20, at 35 (AR 603_0190, at 35)). But the Wolf Conservation Assessment authors only stated that they could not "suggest a minimum deer population because [they did] not know what would constitute a minimum viable wolf population either demographically or genetically." *Id*. The Forest Service considered that document, along with other studies, when it determined that a minimum deer habitat capability value of 5 deer/mi.^{2} would support wolf viability, while higher values would further support wolf predation and human harvest of deer.[12] 1997 Forest Plan FEIS, AR 10_006971, App. N at N-31; *see also* Kirchhoff (1993), AR 603_0008 at 161, 169. In any event, the Agency adequately explained that the Forest Plan would, considering all three legs of the wolf conservation strategy—deer habitat capability, habitat reserves, and regulation of road access and hunting and trapping—result in continued viable wolf populations.[13] *See id*. at N-37; 2008 Forest Plan FEIS, AR 603_1591, at

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

[13] Given the mobility of wolves, Person *et al*. (1996), AR 10_00096, at 29, the deer habitat (Footnote continued)

2-55; 2008 Forest Plan ROD, AR 603_1606, at 19–20.

Finally, Plaintiffs charge that the FEIS fails to disclose that the deer habitat capability Standard and Guideline was "non-binding." Pls.' Br. at 32. Yet the Standard and Guideline on its face states that the Agency should provide

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

2008 Forest Plan, AR 603_1593, at 4-95 (Standard and Guideline WILD1.XIV.A.2) (emphasis added). It is plain from the language of that Forest Plan provision that it is meant to be applied *where possible*, that meeting human demands is not an absolute requirement, and that factors other than modeled deer habitat capability values are relevant. Two opinions from this Court and another from the Ninth Circuit have upheld that interpretation, *Greenpeace v. Cole*, No. 3:08-cv-00162-RRB, 2014 U.S. Dist. LEXIS 136026, at *9 (D. Alaska Sept. 26, 2014); *Tongass Conserv. Soc'y v. U.S. Forest Serv.*, No. 3:10-cv-00006 TMB, ECF No. 106, at 22 n.56 (March 8, 2010), *aff'd*, 455 F. App'x 774 (9th Cir. 2011);[14] *Tongass Conservation Soc'y v. U.S. Forest Serv.*,

---

capability Standard and Guideline is generally best employed at the biogeographic scale (covering one or more WAAs), 1997 Forest Plan, AR 10_006454, at 4-114 (WILD112.XI.A.3); 2008 Forest Plan, AR 603_1593, at 4-95 (Standard and Guideline WILD1.XIV.A.2). At the project level, on the other hand, the Standard and Guideline may indicate whether other management actions should be taken, such as consideration of hunting at trapping restrictions. *See* 2008 Forest Plan FEIS, AR 603_1591, at 3-428–3-429.

[14] The district court opinion in *Tongass Conservation Society* was previously submitted to the Court with the Federal Defendants' opposition to the Plaintiffs' motion for summary judgment in *SEACC I*, ECF No. 58-1.

385 F. App'x 708, 711 (9th Cir. 2010) (affirming *Tongass Conserv. Soc'y*, No. 3:10-cv-00006 TMB)). No one until now has claimed to have been taken by surprise by the Forest Service's interpretation.

The deer habitat capability Standard and Guideline as reissued in 2008 thus plainly provides for discretion in its implementation and clearly recognizes the need to combine the results of the deer model with other information when evaluating outcomes. Such discretion has *always* been implicit in implementation of the deer habitat capability provision. Since 1997, the Forest Service has disclosed that the deer habitat capability value would not be met in all WAAs over the course of 100 years of full Plan implementation. 1997 Forest Plan FEIS, AR 10_006971, App. N at N-33–N-34. Indeed, the 1997 Plan Revision contemplated that a *range* of values from 5 to 13 deer/mi.^{2} would "express a range of relative risk, rather than an absolute threshold necessary to support the current equilibrium." *Id*. at N-34. It is just not credible for Plaintiffs to complain today after years of Plan implementation[15] that the Agency has changed course.

In sum, the Forest Service fully disclosed the impacts of anticipated logging on wolf populations under the 2008 Forest Plan Amendment, and Plaintiffs have therefore failed to meet their burden on their NEPA claims.

C. The 2008 Forest Plan Complied With the Species Diversity Requirements of the NMFA

Plaintiffs' NFMA claims should be dismissed because Plaintiffs lack standing and their claims are not ripe. Beyond that, Plaintiffs' claims fail on the merits, because the 2008 Forest Plan Amendment adequately addresses the species viability provisions of NFMA.

[15] Plaintiffs waited almost six years before filing suit challenging the 2008 Plan Amendment, even though other projects implementing the deer habitat capability Standard and Guideline have been proposed. *See Greenpeace*, No. 3:08-cv-00162-RRB; *Tongass Conserv. Soc'y*, No. 3:10-cv-00006 TMB.

Plaintiffs' argument that the 2008 Forest Plan Amendment violated the species diversity requirements of the NFMA, Pls.' Br. at 33–38, largely reiterates points they made at length in arguing their NEPA claim. Plaintiffs contend the Agency was arbitrary and capricious in concluding that the 2008 Plan Amendment satisfies NFMA's viability requirements because, according to the Plaintiffs, the conclusion erroneously rested on assumptions carried forward from the 1997 Forest Plan FEIS. Pls.' Br. at 35–38. They draw that inference by comparing the spreadsheet of deer habitat capability by WAA prepared for the 2008 Amendment, AR 603_0935, with Table 3-112 from the 1997 Forest Plan FEIS, AR 10_1591, at 3-376–3-378, pointing out an apparent decline in overall deer habitat capability.[16] That focus on modeled deer habitat capability, which (as explained above) is only one component of a multi-part wolf conservation strategy, does not demonstrate that the Forest Plan Amendment violates the species viability requirements of NFMA, merely because modeled deer habitat in particular WAAs falls below the value set to provide for sustained deer harvest by wolves *and* humans.[17]

Plaintiffs assume because the Agency interprets the deer habitat capability Standard and Guideline as a flexible "guideline" for sustainability rather than a fixed "standard" for viability,

---

[16] Repeating its initial analysis with the 17 deer/mi.^{2} (rather than 13 deer/mi.^{2}) deer habitat capability value, 1997 Forest Plan FEIS disclosed that 24 of 43 WAAs (56 percent) would have sufficient deer habitat capability after 100 years of full Forest Plan implementation to sustain continued deer harvest by wolves and humans; that is a reduction from the original projection of 80 percent of WAAs meeting the deer habitat capability value of 13 deer/mi.^{2}. AR 10_006971, App. N at N-33–N-34. Plaintiffs thus exaggerate the difference in modeled deer habitat capability between the 1997 and 2008 analysis efforts.

[17] Because of changes to the Deer Model settings in the 2008 FEIS, 2008 Forest Plan FEIS, 603_1592, App. B at B-31–B-32, differences in deer habitat capability values between the 1997 and 2008 analyses do not necessarily indicate actual changes in winter deer habitat quality or deer or wolf populations on the ground. *See* 2008 Forest Plan FEIS, AR 603_1591, at 3-238, 3-265–3-266, 3-283. Although outputs from the deer model are useful for estimating changes that result from proposed projects, they do not reflect actual known deer numbers and in fact believed to overestimate the effects of harvest. *Id.* at 3-266, 3-283.

there is no mechanism in the 2008 Forest Plan Amendment for ensuring the viability of wolf populations. But the extensive system of habitat reserves and other non-development LUDs provides areas where stable populations of wolves augment populations in matrix areas. 1997 Forest Plan FEIS, AR 10_006971, App. N at N-34 (emphasis added). In addition, management of human-caused wolf mortality, including road management and restrictions on sport and subsistence hunting, further addresses viability concerns where deer habitat capability is estimated to be lower than the value referenced in the Standard and Guideline.[18] *See* 2008 Forest Plan FEIS, AR 603_1591, at 3-238, 3-428–3-429. Plaintiffs have not shown how that *multi-part* strategy is an arbitrary and capricious approach to addressing the NFMA species diversity requirements. *See Perkins v. Bergland*, 608 F.2d 803, 806 (9th Cir. 1979) (the multiple use mandate governing the administration of National Forest Lands "breathe[s] discretion at every pore.") (citation omitted).

Finally, Plaintiffs acknowledge the decisions, including this Court's order in *Greenpeace v. Cole*, that have recognized that the Forest Service interprets the Standard and Guidelines governing wolf habitat as being flexible. Pls.' Br. at 22. But Plaintiffs fail to appreciate the import of that controlling precedent: the very aspect of the 2008 Plan Amendment that Plaintiffs challenge here has already withstood judicial review elsewhere. *Greenpeace*, 2014 U.S. Dist. LEXIS 136026, at *9; *Tongass Conserv. Soc'y*, No. 3:10-cv-00006 TMB, ECF No. 106, at 22 n.56; *Tongass Conserv. Soc'y*, 385 F. App'x at 711. The Agency's decision to employ a wolf sustainability Standard and Guideline that is implemented with appropriate flexibility cannot

[18] Because the Deer Model does not consider spring fawn production and resulting net fall deer populations available for sport or subsistence uses (which may be up to 50 percent greater than winter habitat capability suggests), the Model may underestimate the availability of deer for sport and subsistence uses year round. 1997 Forest Plan FEIS, AR 10_006971, at 3-405, App. N (Footnote continued)

therefore be arbitrary and capricious or a violation of the NFMA.[19]

D. Plaintiffs Are Not Entitled to the Relief They Seek

As argued above, Plaintiffs' claims are both non-justiciable and fail on the merits. However, should the Court find that the Tongass Forest Plan is deficient in any respect that might afford Plaintiffs relief, such relief should be narrowly tailored to address any such deficiency.

Plaintiffs ask the Court to enter a partial injunction that will prevent large-scale logging in areas where the modeled deer habitat capability value of 18 deer/mi.^{2} would not be met, at least until the Forest Service cures any failings the Court may identify in the Tongass Forest

---

at N-33; AR 603_1941, at 3.

[19] Plaintiffs suggest somewhat misleadingly that the Forest Service's interpretation of the deer habitat capability Standard and Guideline contradicts Agency representations that the 2008 Standards and Guidelines were expressly established to prevent a "continuous 'sea of second growth.'" Pls. Br. at 38 (citing Pls.' Ex. 34, at 125 (2008 Forest Plan FEIS, AR 603_1592, App. D at D-14)). Plaintiffs take their "sea of second growth" quotation out of context. The Agency was actually discussing limitations on timber harvest generally, not the deer habitat capability Standard and Guideline specifically. The full quotation in context is below:

> Regarding the matrix, it was noted that the allocation of forest stands and landscapes to some form of timber harvest *did not mean that all trees and stands would be harvested leaving only a continuous "sea of second growth*." There are numerous standards and guidelines limiting timber harvest in these matrix lands to protect specific resource and landscape components. *An average of at least 57 percent (Appendix 8 to Appendix N of the 1997 FEIS) of the original (pre-1954) POG in these landscapes (the three timber harvest LUDs) would not be harvested and would remain standing throughout the planning horizon of 100 years*, even with application of the maximum allowable timber harvest under the Forest Plan. A total of 69 percent of all existing POG in the matrix would remain after full plan implementation.

2008 Forest Plan FEIS, AR 603_1592, App. D at D-14 (emphasis added). The Forest Service was not suggesting that the deer habitat capability Standard and Guideline sets a fixed value and that unwavering compliance with that value is the only thing that prevents a "continuous sea of second growth."

Plan.[20] Pls.' Br. at 38–46. Plaintiffs' proposed partial injunction would allow three exceptions: (1) for individual sales or logging of less than one million board feet of timber, i.e., small volume timber operations; (2) for second growth logging operations; and (3) for timber already under contract as of August 22, 2014, when this lawsuit was commenced. Pls.' Br. at 39, 43. Despite Plaintiffs' characterization of this relief as merely a "partial injunction," their proposed remedy in reality would impose broad and invasive relief that cannot be justified in this case. Federal Defendants address remedy briefly below, but respectfully request that if the Court finds any legal defect in the Tongass Forest Plan, it hold separate proceedings on remedy to insure that any relief granted is narrowly tailored to the injuries demonstrated by Plaintiffs.

1. The Court Should Withhold Injunctive Relief Concerning Agency Decisions That Are Not Before It

Plaintiffs bring a facial challenge to the validity of the Tongass Forest Plan. As argued in Section III.A, above, that facial challenge is not justiciable. But even if the Court were to find that the Plan is unlawful in any respect, the Court should not accept Plaintiffs' invitation to reach out and address the validity of Forest Service decisions that are not before it. Enjoining projects not named in this lawsuit merely because they are issued under the Tongass Forest Plan would go far beyond the appropriate scope of relief. As discussed below, if Plaintiffs believe that certain project decisions violate the Forest Plan, it is their obligation to challenge those decisions on the project-by-project basis that the APA and Supreme Court precedent require. The Court should not afford Plaintiffs relief concerning unidentified projects where the ordinary jurisdictional prerequisites of standing and ripeness have not been met.

[20] Notably, Plaintiffs do not seek vacatur of the 2008 Tongass Forest Plan Amendment.

To challenge agency action, a plaintiff must bring suit under the APA. Section 702 of the APA, 5 U.S.C. § 702, waives federal sovereign immunity for certain challenges to federal agency action for nonmonetary relief. Suit under the APA is further limited to "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704; *see Nat'l Wildlife Fed'n*, 497 U.S. at 882. The Tongass Forest Plan is not made reviewable by any separate statute and therefore is reviewable only under the "non-statutory" review provision of Section 704 ("final agency action for which there is no other adequate remedy"). Because APA review is limited to specific "final agency action" based on the agency record for that action, *Camp v. Pitts*, 411 U.S. 138, 142 (1973), Plaintiffs cannot obtain relief under the APA regarding agency actions other than the one challenged in this case, the Tongass Forest Plan. For the Court to find otherwise would result in "reaching beyond the issues presented to the district court for resolution." *See Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 438 (4th Cir. 2003) (vacating the district court's injunction and declaratory relief).

Here, Plaintiffs have brought only a facial challenge to the Tongass Forest Plan and have not challenged any site-specific project decision that implemented the Plan. Without reviewing specific actions issued under the Forest Plan, the Court cannot determine whether they are in fact arbitrary or capricious or should be set aside. Those determinations must be made "in the context of site specific actions, if and when they actually arise." *Idaho Sporting Cong.*, 305 F.3d at 974; *see also Ecology Ctr.*, 574 F.3d at 668 (same). Contrary to Plaintiffs' assumption, the mere fact that the Forest Service may issue decisions under the Tongass Forest Plan does not mean that they are arbitrary or capricious simply because Plaintiffs claim to have identified a defect in the Plan. *See, e.g., Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 50–51 (D.C. Cir.

1999) (finding that agency could engage in "further efforts to fulfill its NEPA obligations" at the site-specific decision stage). The Court's determination of whether any project-level decisions are themselves defective must await a project-level challenge by Plaintiffs.

Not only are the merits of any site-specific projects not before the Court, but considering an injunction now against unidentified projects that implement the Forest Plan would make it impossible for the Court to apply the required four-factor equitable test reaffirmed in *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156–57 (2010). The Court would therefore be unable to make the necessary determinations that are essential prior to imposing the "extraordinary" remedy of an injunction. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22, 32 (2008); *Idaho Sporting Cong*., 305 F.3d at 966. In *Idaho Sporting Congress*, the plaintiffs challenged two specific timber sales and a Forest Plan standard. The court found the plan standard invalid and held that the two sales should be set aside and enjoined. *Id.* at 974. However, the court explicitly refused to extend relief beyond the two projects challenged by plaintiffs, noting that the "sweeping remedy" of "a forest-wide injunction of all logging" was not warranted. *Id.* That precedent should govern the Court's exercise of its equitable discretion in this case.

2. Equitable Relief Is Not Warranted

By insisting that the Court issue a broad injunction now against unidentified project-level decisions, Plaintiffs are seeking to avoid their evidentiary burdens. Equitable relief, whether in the form of vacatur or an injunction, does not issue automatically upon a finding of legal error. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (An injunction is an "extraordinary remedy" that "should issue only where the intervention of a court of equity is essential in order effectually to protect . . . against injuries otherwise irremediable") (quotations omitted); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) ("[W]hen equity demands, the regulation can be left in place while the agency follows the necessary proce-

dures."). To establish that injunctive relief is warranted, Plaintiffs must demonstrate their entitlement to injunctive relief under four factors: (1) irreparable injury; (2) inadequate remedy at law; (3) the balance of the hardships; and (4) the public interest. *Monsanto*, 561 U.S. at 156–57; *eBay Inc. v. MercExchange*, 547 U.S. 388, 391 (2006) (factors governing issuance of injunctive relief); *Cent. Me. Power Co. v. FERC*, 252 F.3d 34, 48 (1st Cir. 2001) (factors governing vacatur); *Idaho Farm Bureau Fed'n*, 58 F.3d at 1405 (same).

Here Plaintiffs' request for equitable relief falters at the first step, because they have failed to show any "irreparable injury" from the Tongass Forest Plan. As argued in Section III.A.1, above, Plaintiffs have not identified any injury-in-fact caused by the Tongass Forest Plan, much less the *irreparable* injury needed to justify injunctive relief. Merely reiterating their claims about wolf populations, Pls.' Br. at 39–41, is no substitute for a site-specific challenge, which they have elected not to bring in this lawsuit.

Nor have Plaintiffs shown that other remedies at law are not adequate. *See Steffel v. Thompson*, 415 U.S. 452, 466 (1974) ("Congress plainly intended declaratory relief to act as an alternative to the strong medicine of the injunction"). Should the Court find the Tongass Forest Plan invalid in any respect, declaratory relief affords Plaintiffs an adequate remedy. Plaintiffs can challenge a project implementing the Tongass Forest Plan that they believe will cause them injury and seek to enjoin that project based on the weight of any declaratory relief obtained here and ordinary principles of stare decisis. *See, e.g., Nat'l Wildlife Fed'n*, 497 U.S. at 894 (case-by-case challenges are "understandably frustrating . . . . [b]ut this is the traditional, and remains the normal, mode of operation of the courts."); *United States v. Am. Friends Serv. Comm.*, 419 U.S. 7, 11 (1974) (a full and fair opportunity to litigate claims in a separate suit constitutes an adequate remedy at law, thereby undercutting "the existence of irreparable injury").

Finally, Plaintiffs cannot demonstrate at this point that the balance of the equities or the public interest implicated by any site-specific projects weighs in their favor. While they clearly do not like the way in which they believe the Forest Plan is being and may be implemented in the future, that does not replace the consideration that the Court must give the equitable factors under *Monsanto*.

3. Any Injunctive Relief Must Be Narrowly Tailored

While Federal Defendants do not believe any equitable relief is appropriate, if the Court finds to the contrary, any such relief must be carefully tailored to "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *See Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Courts commonly leave regulations or program-level decisions in place pending the agency's correction of legal errors. *See, e.g., N. Cheyenne Tribe v. Norton*, 503 F.3d 836, 844-45 (9th Cir. 2007) (allowing some oil and gas development to proceed pending completion of an EIS); *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 638, 642–43 (9th Cir. 2004) (allowing limited access by commercial outfitters and guides to wilderness areas pending completion of further NEPA review); *Idaho Watersheds Proj. v. Hahn*, 307 F.3d 815, 833–34 (9th Cir. 2002) (allowing grazing activities to continue under conditions proposed by agency pending further NEPA review); *Idaho Farm Bureau Fed'n*, 58 F.3d at 1405 (remanding without vacating rule); *Int'l Union, United Mine Workers v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 967 (D.C. Cir. 1990) (same); *Native Vill. of Pt. Hope v. Salazar*, 730 F. Supp. 2d 1009, 1019 (D. Alaska 2010) (order remanding for further analysis without vacating leases).

Federal Defendants understand that Defendant-Intervenors' brief may address in greater detail the economic burdens that a broad injunction would impose on them. Nevertheless, if this

Court identifies any legal error in the 2008 Tongass Forest Plan, Federal Defendants urge that separate proceedings be held to determine the appropriate remedy.

IV. CONCLUSION

Plaintiffs' facial challenge to the 2008 Tongass Forest Plan Amendment is not justiciable, fails on the merits, and does not support the equitable relief Plaintiffs seek. Accordingly, the Court should deny Plaintiffs' motion for summary judgment and grant the Federal Defendants' cross-motion.

If the Court nevertheless rules in Plaintiffs' favor on any issue, Federal Defendants respectfully request that the Court provide for further proceedings before issuing a remedy order.

DATED: December 19, 2014

Respectfully submitted,

/s/*David B. Glazer*
DAVID B. GLAZER
Natural Resources Section
301 Howard Street, Suite 1050
San Francisco, California
Tel: (415) 744-6491
Fax: (415) 744-6476
E-mail: David.Glazer@usdoj.gov

Attorneys for Federal Defendants

OF COUNSEL

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

CERTIFICATE OF SERVICE

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

For the Plaintiffs

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

For the State of Alaska

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

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

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

For Proposed Intervenors City of Craig, *et al.*

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

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

Dated: December 19, 2014 /s/*David B. Glazer*
David B. Glazer