

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION**

ALLIANCE FOR THE
WILD ROCKIES,

CV 08-168-M-DWM-JCL

Plaintiff,

vs.

FINDINGS & RECOMMENDATION
OF UNITED STATES
MAGISTRATE JUDGE

TOM TIDWELL, Regional Forester of
Region One of the United States Forest
Service, UNITED STATES FOREST
SERVICE, an agency of the U.S.
Department of Agriculture, and
UNITED STATES FISH & WILDLIFE
SERVICE, an agency of the U.S.
Department of the Interior,

Defendants.

Plaintiff Alliance for the Wild Rockies (“Plaintiff”) commenced this action seeking judicial review under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706, of a decision by the Defendants, Tom Tidwell and the United States Forest Service approving the Invasive Plant Management Project in the Kootenai

National Forest. Plaintiff advances several claims against the Forest Service under the National Forest Management Act (“NFMA”), 16 U.S.C. § 1600 et seq., and the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 et seq. Plaintiff also alleges that both the Forest Service and the United States Fish & Wildlife Service acted in violation of the Endangered Species Act (“ESA”), 16 U.S.C. § 1533 et seq.

This matter is before the Court on the parties cross-motions for summary judgment. The motions should be granted in part and denied in part as set forth below.

I. Factual Background

The Invasive Plant Management Project (“Project”) area is located within the Kootenai National Forest (“KNF”), which encompasses approximately 2,225,000 acres in northwestern Montana. AR 2:15 at 1-3. As with much of the western United States in recent decades, the KNF “has increasingly been impacted by the spread of invasive plant species, including noxious weeds.” AR 2:15 at iii, 1-3. These invasive plant populations, which have increased in number, type, and aerial extent, threaten “the health of native ecosystems on the forest by changing plant communities, which are the foundation upon which ecosystems are built.” AR 2:15 at 1-3.

The challenged Project represents the Forest Service's most recent effort to address the threat posed by noxious weed infestations in the KNF. The Forest Service designed the Project for the stated purpose of preventing the introduction and spread of new invader weed species, limiting the spread of established noxious weeds, restoring native plant communities, and improving forage areas for wildlife. AR 2:57 at 1-8. The Project implements "an integrated and adaptive management approach to the management of invasive plant species on the Forest," and authorizes a variety of weed treatments including ground and aerial herbicide application, biological control, weed pulling, and seeding. AR 2:57 at 12-13. The Project specifies that 40-45,000 acres may be subject to ground application of herbicides, while 30-35,000 acres may be subject to aerial spraying. AR 2:57 at 12. The Forest Service has explained that it will not treat all of those acres every year, anticipating instead that "5,000 to 6,000 of the administered forest acres [will] be treated annually" over the Project's 15-year implementation period, approximately 4,000 acres by ground treatment and 2,000 acres by aerial treatment. AR 2:57 at 7, 12-13.

The Forest Service incorporated design criteria for herbicide application, including several criteria applicable specifically to aerial spraying. AR 2:16 at 2-13, 2-14. Those criteria limit aerial spraying operations to two days annually per

Bear Management Unit¹ (“BMU”) and provide that “[a]djacent undisturbed displacement areas would be provided during air operations in grizzly habitat.” AR 2:16 at 2-14. The design criteria also specify that aerial spraying would only “be performed when wind speeds are less than 6 mph and blowing away from sensitive areas,” and “would not be conducted in known spring habitats for grizzly bears during the spring use period.” AR 2:16 at 2-14.

The Forest Service also completed a biological assessment of the Project’s potential impacts on threatened, endangered, and proposed species. AR 6:25. The biological assessment concluded that the Project “may affect, but is not likely to adversely affect” the grizzly bear population in the KNF. AR 6:25 at 3. As required by the ESA and its implementing regulations,² the Forest Service consulted with the United States Fish & Wildlife Service (“FWS”), which later concurred in the Forest Service’s determination that the Project may affect, but is not likely to adversely affect, the grizzly bear. AR 6-46.

The Forest Service issued a Final Environmental Impact Statement (“FEIS”) in March 2007, and approximately one month later issued the Record of Decision

¹ A bear management unit is equivalent “to the size of a female grizzly home range.” AR 2:17 at 3-77.

² See 50 C.F.R. § 402.14(b)(1).

(“ROD”) approving the Project. AR 2-15; 2-57. Following an unsuccessful administrative appeal, Plaintiff commenced this action seeking judicial review of the Forest Service’s decision approving the Project. Complaint (Jan. 14, 2009).

Plaintiff challenges the Forest Service’s FEIS and ROD for the Project, as well as the FWS’s concurrence in the Forest Service’s determination that the Project is not likely to adversely affect grizzly bears. Plaintiff’s Complaint sets forth eight claims for relief, alleging that: (1) the Forest Service’s determination that the Project is not likely adversely affect the grizzly bear, and the FWS’s concurrence in that determination, violated the ESA because they were not based on the best available science; (2) the Project will result in unauthorized take of grizzlies, in violation of the ESA; (3) the Project’s FEIS violated NEPA and NFMA because it did not consider an alternative that included preventative measures addressing the causes of noxious weed infestations; (4) the Project’s ROD violated NEPA because the Project does not require annual site-specific environmental assessments; (5) the Forest Service violated NFMA and NEPA because the Project allows activities that are not compatible with the needs of the grizzly bear; (6) the Forest Service violated NEPA and NFMA because the FEIS failed to take the requisite hard look at the Project’s impact on the viability of migratory songbirds; (7) the Forest Service violated NEPA because the FEIS did

not take a hard look at the adequacy of the mitigation measures for aerial herbicide drift in the EIS; (8) the Forest Service violated NEPA because it did not candidly disclose the human health effects of herbicides in the FEIS.

II. Standards of Review

A. Standard of Review under the APA

The APA governs the Court's review of agency decisions under the ESA and NFMA. *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 9544, 953 (9th Cir. 2003). Under the APA, the court can set aside an agency's decision only if it is "arbitrary, capricious, an abuse of discretion, or otherwise contrary to law." *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005). Pursuant to this standard, the court can set aside agency action "if the agency fails to consider an important aspect of a problem, if the agency offers an explanation for the decision that is contrary to the evidence, if the agency's decision is so implausible that it could not be ascribed to a difference in view or be the product of agency expertise, or if the agency's decision is contrary to the governing law." *Lands Council*, 395 F.3d at 1026 (internal citations omitted) (*citing* 5 U.S.C. § 706(2)). The court must ask "whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment, and "must determine whether the [agency] articulated a rational connection between the facts

found and the choice made.” *Ocean Advocates v. U.S. Army Corps. Of Engineers*, 361 F.3d 1108, 1119 (9th Cir. 2004) . “The court is not empowered to substitute its judgment for that of the agency.” *Arrington v. Daniels*, 516 F.3d 1106, 1112 (9th Cir. 2008) (*quoting Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

B. Summary Judgment Standard

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), Fed. R. Civ. P.; *see also, Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Summary judgment is particularly applicable to cases involving judicial review of final agency action. *Occidental Engineering Co. v. INS*, 753 F.2d 766, 770 (9th Cir. 1985). Summary judgment is appropriate in this case because the issues presented address the legality of the Forest Service’s actions based on the administrative record, and do not require resolution of factual disputes.

C. National Forest Management Act

NFMA sets forth the statutory framework for managing our nation’s forests, and establishes a two-step “tiering” process for forest planning. *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1376 (9th Cir. 1998); 16 U.S.C. § 1604(a). At the first step, NFMA directs the Forest Service to develop a

Land and Resource Management Plan, also known as a “forest plan.” *Lands Council*, 395 F.3d at 1032-33. The development of a forest plan takes place within a public review process conducted in accordance with NEPA. 16 U.S.C. § 1604(g)(1); 36 C.F.R. § 219.10(b). Once a forest plan has been approved, the second step for forest planning under NFMA involves implementation of the forest plan through site-specific projects. *Neighbors of Cuddy Mountain*, 137 F.3d at 1376. All site-specific projects, such as the Project at issue here, “must be consistent with the stage-one, forest-wide plan.” *Inland Empire v. U.S.F.S.*, 88 F.3d 754, 757 (9th Cir. 1996); 16 U.S.C. § 1604(I).

NFMA also imposes substantive obligations on the Forest Service, including the requirement “to provide for diversity of plant and animal communities.” 16 U.S.C. § 1604(g)(3)(B); *Neighbors of Cuddy Mountain*, 137 F.3d at 1376.

D. National Environmental Protection Act

Unlike NFMA, which imposes both procedural and substantive requirements on government agencies, NEPA imposes only procedural requirements. *Lands Council*, 395 F.3d at 1026. NEPA is intended “to force agencies to publicly consider the environmental impacts of their actions before going forward.” *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 963 (9th

Cir. 2002). To fulfill this goal, NEPA requires a federal agency to prepare an EIS detailing the environmental impacts of every “major federal action...significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). NEPA further requires that a federal agency “inform the public that it has indeed considered environmental concerns in its decisionmaking process.” *Lands Council*, 395 F.3d at 1026 (quoting *Earth Island Inst. v. United States Forest Serv.*, 351 F.3d 1291, 1300 (9th Cir. 2003)).

To “accomplish this, NEPA imposes procedural requirements designed to force agencies to take ‘a hard look’ at environmental consequences.” *Lands Council*, 395 F.3d at 1027 (quoting *Earth Island*, 351 F.3d at 1300). “General statements about ‘possible’ effects and ‘some risk’ do not constitute a ‘hard look’ absent a justification regarding why more definitive information could not be provided.” *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1380 (9th Cir. 1998). Only if the agency’s analysis of the environmental impact is “arbitrary and capricious” or “contrary to the procedures required by law” can the reviewing court conclude that the agency did not take the requisite “hard look”. *Kleppe*, 427 U.S. at 410 n. 21; *Inland Empire*, 88 F.3d at 763.

E. Endangered Species Act

The ESA “sets forth a comprehensive program to limit harm to endangered

species within the United States.” *California ex rel. Lockyer v. U.S. Dept. of Agriculture*, 575 F.3d 999, 1018 (9th Cir. 2009). Recently described by the Ninth Circuit as “the heart” of the ESA, § 7(a)(2) requires each federal agency to “insure that any action authorized, funded or carried out by” the agency “is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” the species’ critical habitat. 16 U.S.C.A. 1536(a)(2); *California ex. rel. Lockyer*, 575 F.3d at 1018.

To carry out Section 7's “substantive mandate, agencies must engage in a consultation process with the appropriate expert wildlife agency on the effects of any federal action to listed species.” *California ex. rel. Lockyer*, 575 F.3d at 1018. This consultation process is triggered if the agency proposing the action determines that the action “may affect” a listed species or critical habitat. 50 C.F.R. § 402.14(a). If the agency finds that the proposed action is “likely to adversely affect” a listed species, then formal consultation is required. 50 C.F.R. § 402.14. Formal consultation requires that the agency issue a biological opinion on the question of “whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat...” 50 C.F.R. 402.14(h)(3). If the agency determines that the proposed action is not likely to jeopardize the listed species but may result in an incidental

take of the species, it must include an incidental take statement with its biological opinion. 50 C.F.R. § 402.14(i).

If, on the other hand, the agency “determines, with the written concurrence of the [FWS] that the proposed action is not likely to adversely affect any listed species or critical habitat,” then no formal consultation is necessary. 50 C.F.R. § 402.14(b)(1). Under those circumstances, informal consultation is sufficient. Informal consultation “includes all discussions, correspondence, etc., between the [FWS] and the agency.” 50 C.F.R. § 402.13(a).

The ESA also makes it unlawful for any person to “take” any endangered species “within the United States or the territorial sea of the United States.” ESA § 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B). Section 9 defines “take” as meaning “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19).

III. Discussion

A. The Grizzly Bear

1. Adverse effects determination

Plaintiff’s first claim arises under Section 7 of the ESA, and is governed by the overarching judicial review provisions of the APA. *See Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 891 (9th Cir. 2002). Plaintiff alleges the

Forest Service's determination that the Project "may, but is not likely to, adversely affect the grizzly bear" was arbitrary and capricious, and violates the ESA because it is not based on the best available science and runs counter to the evidence of record. Plaintiff challenges the FWS' concurrence in the Forest Service's determination on the same grounds. Compl. ¶¶ 37-43.

The ESA indeed requires that each agency "use the best scientific and commercial data available" in determining whether a proposed action is likely to adversely affect a listed species or critical habitat. 16 U.S.C. § 1536(a)(2). The agency abuses its discretion if it offers "an explanation for its decision that runs counter to [that] evidence." *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008). Using the best scientific and commercial data available also means that the agency cannot simply ignore available biological information. *See Connor v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988). Plaintiff argues the Forest Service ignored evidence indicating that the Project at issue here is likely to adversely affect the grizzly bear, and should have formally consulted with the FWS.

Before turning to the merits of the Plaintiff's claim, the Court notes that the parties are engaged in a threshold dispute over who bears the burden of proof when it comes to an adverse effects determination. Plaintiff argues that "[u]nder the ESA, it is the agencies' burden to prove that the [Project] will not adversely

impact the Cabinet-Yaak grizzly bear.” Dkt. No. 26, at 3. For support, Plaintiff relies on *Washington Toxics Coalition v. EPA*, 413 F.3d 1024, 1035 (9th Cir. 2005), in which the Ninth Circuit discussed the propriety of granting injunctive relief pending an acting agency’s compliance with the ESA’s consultation requirements. The lower court in *Washington Toxics* found that the Environmental Protection Agency had not complied with the ESA’s consultation requirements, and enjoined the agency from using certain pesticides until it completed the consultation process. *Washington Toxics*, 413 F.3d at 1030-31.

The Ninth Circuit affirmed the lower court’s use of injunctive relief, explaining “that the appropriate remedy for violations of the ESA consultation requirements is an injunction pending compliance with the ESA.” *Washington Toxics*, 413 F.3d at 1035. As the Ninth Circuit recognized, however, agency actions that are non-jeopardizing to endangered or threatened species may be allowed to proceed during the consultation process. *Washington Toxics*, 413 F.3d at 1035. On the question of which party “bears the burden of showing that the action is non-jeopardizing” in those circumstances, the Ninth Circuit concluded that “the burden should be on the agency, the entity that has violated its statutory duty.” *Washington Toxics*, 413 F.3d at 1035. The court determined that “[p]lacing the burden on the acting agency to prove the action is non-jeopardizing

is consistent with the purpose of the ESA,” and reiterated the notion that “[i]t is not the responsibility of the plaintiffs to prove, nor the function of the courts to judge, the effect of a proposed action on an endangered species *when proper procedures have not been followed.*” *Washington Toxics*, 413 F.3d at 1035 (emphasis added) (quoting *Thomas v. Peterson*, 753 F.2d 754, 765 (9th Cir. 1985)).

Unlike *Washington Toxics*, however, the Plaintiff in this case has not yet established that the Forest Service violated the ESA’s consultation requirements. While Plaintiff challenges the Forest Service’s adverse effects determination and claims the agency should have formally consulted with the FWS, whether this is so remains to be seen. The *Washington Toxics* court simply addressed the propriety of granting injunctive relief once a plaintiff has shown a procedural violation, and in doing so said nothing about placing the burden of establishing such an underlying violation on the acting agency. It is only after a plaintiff establishes an underlying violation of the ESA’s consultation requirements that it falls upon the agency to show its action is “non-jeopardizing” if it wants to continue implementing that action pending compliance with ESA. *Washington Toxics*, 413 F.3d at 1034-35.

Plaintiff indeed seeks to establish such an underlying violation by way of this litigation. Plaintiff claims that the Forest Service acted arbitrarily and

capriciously in determining that the Project is not likely to adversely affect the grizzly, and that its conclusion runs counter to the evidence of record. Plaintiff alleges the Forest Service was thus obligated under Section 7 of the ESA to formally consult with FWS, and the FWS was in turn required to “publish a Biological Opinion that determines whether the Project will cause jeopardy to the Cabinet-Yaak grizzly bear.” Dkt. 5, p. 13.

Plaintiff claims the agencies acted arbitrarily and capriciously because their effects determination runs counter to portions of the November 2006 biological assessment, the Forest Service’s “Guide to the Effects Analysis of Helicopter Use in Grizzly Bear Habitat,” and a National Park Service survey of scientific literature addressing the effects of overflights on wildlife (“NPS Survey”). AR 6:25, 6:60, 6:111. For example, Plaintiff argues the agencies’ effects determination is inconsistent with the biological assessment’s statement that “[g]rizzly bears have been noted to panic and flee areas from over-flights in nearly all cases where they have been observed.” AR 6:25 at 10. Plaintiff also cites the biological assessment for the proposition that aerial herbicide spray operations would likely displace individual bears up to one mile, which it claims contradicts the Forest Service’s effects determination. AR 6:25 at 10. Plaintiff points to similar statements in the NPS Survey addressing the effects of overflight, such as the notion that grizzly

bears do not become tolerant of helicopters even with frequent exposure and may abandon areas that are subject to overflights. AR. 6:111 at 17, 21.

In Plaintiff's view, these documents establish that grizzly bears will permanently abandon any habitat that is subject to the aerial spraying contemplated by the Project. Plaintiff thus argues the agencies' determination that aerial spraying will result only "in a short-term avoidance of the treatment area by a bear or bears for one to two days"³ runs counter to the evidence of record. But none of the excerpts on which Plaintiff relies specifically discusses the duration of the grizzly bear's displacement response and whether it continues once overflights have ceased. Plaintiffs have not pointed to any evidence that grizzly bears will permanently avoid habitat that was at one point subject to overflights, and the agencies' determination that the aerial spraying contemplated by the Project will result in only "short-term avoidance of the treatment area" is consistent with the evidence of record.

Plaintiff next argues that, even assuming aerial spraying would only temporarily displace any grizzly bears in the area, such a temporary effect is sufficient to warrant a "likely to adversely affect" conclusion. The Forest Service does not dispute that aerial spraying in core habitat would temporarily displace

³ AR 2:17 at 3-81.

any grizzly bears in the immediate area. AR 2:17 at 3-81. Nor does the Forest Service dispute that temporary displacement may, in certain cases, constitute an adverse effect within the meaning of the ESA.⁴ But the Forest Service argues this is not one of those cases, and claims it has adequately mitigated any potentially adverse impact that the aerial spraying contemplated by the Project may have on the grizzly bear.

The Forest Service indeed incorporated various measures in an effort to mitigate the effects of aerial spraying on the area's grizzly bear population. AR 2:16 at 2-14. For example, the Forest Service has specified that "[a]erial treatments would not be conducted in known spring habitats for grizzly bears during the spring use period" from April 1 through June 15. AR 2:16 at 2-14. The criteria also limit any aerial spraying operations to two days annually per BMU, and state that "[a]djacent undisturbed displacement areas would be provided during air operations in grizzly habitat." AR 2:16 at 2-14. In view of

⁴ At oral argument, defense counsel engaged in the following colloquy with the Court:

Court: Is the government's position that the displacement must be permanent?

Defense Counsel: No, your honor.

Court: It can be temporary and still could have an adverse effect even if temporary.

Defense Counsel: That is correct.

these mitigation measures and based on their evaluation of the materials of record discussing the effects of aerial overflights on wildlife, the Forest Service ultimately determined after consulting informally with the FWS that the Project “may affect but is not likely to adversely affect” the grizzly bear. AR 2:57 at 21.

Plaintiff claims that the Forest Service’s determination in this regard runs counter to its own guidance document, which provides in part that “the appropriate effects determination for low altitude and high frequency or extended duration helicopter use is ‘may affect, likely to adversely affect.’” AR 6:60 at 4. Low altitude flights are those at or below 500m. AR 6:60 at 3. High frequency means more than one overflight per day, and extended duration refers to use lasting more than one day. AR 6:60 at 3.

The Project at issue here authorizes low altitude aerial spraying, with “multiple passes in one treatment area within a BMU over the course of one day, not to exceed 2 days.” AR 2-17 at 3-81. In other words, the Project clearly authorizes helicopter use that is low altitude, high frequency, and of potentially extended duration. According to the Forest Service’s own guidance document, such use “will generally lead to a ‘likely to adversely affect’ determination.” AR 6:60 at 4. The Forest Service found otherwise however, concluding that the low altitude, high frequency spraying of potentially extended duration authorized by

the Project may, but is not likely to adversely affect the grizzly bear.

The Forest Service maintains this effects determination is consistent with the general directives of the guidance document, which cautions in closing that it “should not be thought of as a ‘cook book’ or ‘one size fits all’ approach.” AR 6:60 at 6. While the guidance document instructs that low altitude and high frequency or extended duration aerial overflights will generally result in a “may affect, likely to adversely affect” determination, it recognizes that “[t]hese effects can often be mitigated...” AR 6:60 at 4. The document explains, for example, that “[w]hen the activity occurs in grizzly bear secure core habitat, one mitigation technique is to provide replacement secure core habitat prior to the disturbing activity.” AR 6:60 at 5-6. The Forest Service has undertaken similar mitigation here, making clear in the FEIS that “[a]djacent undisturbed displacement areas would be provided during air operations in grizzly habitat.” AR 2:16 at 2-14. The Forest Service has also undertaken to prohibit aerial spraying in known grizzly bear habitat during the spring use period and limit any aerial spraying operations to two days annually per BMU. AR 2:16 at 2-14.

Citing these mitigation measures, the Forest Service argues that “the potential displacement of grizzly bears is insufficient to warrant a ‘likely to adversely affect’ determination because such displacement would be made

discountable or insignificant....” Dkt. No. 30, at 2-3. While there can be no dispute that the Forest Service has incorporated some basic mitigation measures, it “entirely failed to consider an important aspect of the problem” when it set about crafting those measures. *Lands Council*, 395 F.3d at 1026. Noticeably absent from the record is any discussion of the specific number of overflights possible on any given day of aerial spraying within a BMU and the corresponding efficacy of the mitigation measures. Importantly, the Biological Assessment Supplement states: “Little research has been conducted regarding long-term impacts of frequent over-flights; however, indications are that frequent and repeated over-flights may impose a burden on the energy and nutrient supply for animals [USDI National Park Service 1994].” AR 6:44, at 6..

The Project simply authorizes “multiple passes” over a BMU’s treatment area for up to two days annually, without any discussion of the actual number of times a single treatment area within a BMU may be subject to overflights. “Multiple passes” might mean two overflights or twenty, or any other conceivable number for that matter. This means that if one or more of the Cabinet-Yaak Ecosystem’s estimated 35 grizzly bears⁵ happens to be in the treatment area on any given day of aerial spraying, there is no telling how many times that bear would be

⁵ AR 6:025 at 7.

temporarily displaced, and the potential adverse effects of multiple displacements.

At oral argument, the Forest Service suggested that if a grizzly bear flees the area after a single overflight, it is not likely that additional overflights would have any further impact on that particular bear because it will presumably have had the foresight to seek refuge in one of the adjacent undisturbed displacement areas.

While it might well be true that a displaced bear would find itself in one of those designated areas, it seems equally likely that the bear might flee in a different direction only to find the area it has sought refuge in still lies within the treatment area. If that area is then subject to an unspecified number of additional overflights, it stands to reason that the bear could be repeatedly displaced in the same manner each time. The potential for such a scenario simply illustrates the significance of the Forest Service's failure to more specifically discuss the frequency with which overflights will be allowed during any given aerial application period and whether the mitigation measures it is relying on to counteract the impact of those overflights will be sufficient to protect the grizzly bear.

The Forest Service is quick to point out that it has no immediate plans to begin aerial spraying, and aerial spraying will be used only "in the event that a large, widespread weed infestation is discovered." AR 2:17 at 3-80. And as the

Forest Service also notes, “field observation would be needed to determine the necessity of aerial application.” AR 2:17 at 3-80. While that may well be true, the Forest Service has identified 100 potential aerial spray areas with nearly 29,000 estimated aerial treatment acres. AR 2:47 at C-4. Many of those individual areas that may be subject aerial spraying are more than 1,000 acres in size. AR 2:47 at C-4. If the Forest Service determines at some point during the Project’s implementation period that aerial application is necessary in a particular area, it has given itself the green light to carry out that application with an unspecified number of “multiple overflights” during a one to two day period. Noticeably absent from the record is any discussion of whether the impact on the grizzly bear will vary depending on the number and frequency of those overflights during that period. Also lacking is any specific discussion of whether the mitigation measures set forth above will be sufficient to protect the grizzly bear, regardless of the number of overflights in any given treatment area. By failing to specifically address these critical issues, the Forest Service has run afoul of its own guidance document, which states the rationale for finding low altitude, high frequency aerial use “‘not likely to adversely affect’...should be carefully assessed and documented by the biologist.” AR 6:60 at 4.

Because the agencies failed to consider an important aspect of the problem,

namely, the specific frequency with which overflights make take place during any given period of aerial spraying, their determination that the aerial spraying contemplated by the Project is not likely to adversely affect the grizzly bear is arbitrary and capricious. This matter should be remanded to the Forest Service so that the agencies may specifically discuss the frequency with which overflights will be allowed during any given aerial application period and whether the aerial application contemplated by the Project is likely to adversely affect the grizzly bear.

2. Unauthorized take

Plaintiff's second claim for relief arises under section 9 of the ESA. Plaintiff asserts that the Project will result in unauthorized take of grizzlies, in violation of the ESA. Compl. ¶¶ 44-47.

It is unlawful under the ESA to "take any [listed] species within the United States." 16 U.S.C. § 1538(a)(1)(B). The ESA defines "take" to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to attempt to engage in such conduct." 16 U.S.C. § 1532(19). The applicable implementing regulations in turn define "harass" as "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not

limited to, breeding, feeding, or sheltering.” 50 C.F.R. § 17.3.

Plaintiff argues that the Project will significantly disrupt the grizzly bear’s breeding, feeding, and sheltering activities, and in doing so result in a “take” of the species. Plaintiff maintains that this “take” violates the ESA because the Forest Service did not obtain an incidental take permit from the FWS. 16 U.S.C. § 1538(a)(1)(B); 16 U.S.C. § 1536(b)(4).

a. *Effect on reproductive capacity*

Citing a toxicity table, Plaintiff first claims that the Project will disrupt breeding, thereby resulting in a take, because certain herbicides authorized by the Project may degrade the reproductive capacity of male bears. AR 7:008 at 2-3. The table to which Plaintiff cites simply indicates that, with respect to the herbicide 2,4-D, “[s]tudies on experimental animals support a concern for effects on male reproductive capacity.” AR 7:008 at 2-3. The Project specifies a 1 pound per acre application rate for 2,4-D. AR 2:17 at 3-65. The table says nothing about the rate at which 2,4-D would have to be applied to cause such an effect on a male bear.

The Forest Service specifically addressed these concerns, but ultimately found based on the scientific evidence of record that applying 2,4-D at the rate and in the manner specified by the Project would not be likely to result in a take. AR

2:17 at 3-80 - 3-83. In doing so, the Forest Service recognized that it was possible for the herbicide 2,4-D to have “mild toxicity effects on grizzly bears” at certain levels. AR 2:17 at 3-83. But based on the Syracuse Environmental Research Associates, Inc. (“SERA”) studies of record, the Forest Service determined that application of 2,4-D at the specified rate”would pose acceptably low risk to wildlife in general.” With specific respect to the grizzly bear, the Forest Service found that “[b]ecause of the high mobility of grizzly bears and the disturbance associated with human travel corridors,” where most herbicide application would occur, “the likelihood of a 100% herbicide contaminated diet would be very low” and the grizzly bear would not likely suffer any adverse affects or be subject to an unauthorized take. AR 2:17 at 3-82, 3-83. The toxicity table to which Plaintiff points does not contradict the Forest Service’s assessment.⁶

b. *Effect on foraging*

Plaintiff next maintains that the Project will disrupt feeding, thereby

⁶ Plaintiff also points to a February 20, 2009, letter from the United States Environmental Protection Agency to the United States Fish and Wildlife Service as evidence of 2,4-D’s potentially adverse effects on endangered species. Dkt. 26, Ex. 1. As Plaintiff concedes, however, this letter was not before the agencies at the time they made their decision. Plaintiff argues it would have presented the letter in public comments if the Forest Service had completed an annual site-specific NEPA assessment of its 2009 or 2010 implementation project as Plaintiff maintains it should have. As discussed below, however, Plaintiff’s NEPA claims are without merit.

resulting in an unauthorized take, because it allows herbicide spraying that will eliminate spring forage at a stage of the bear's life cycle when it may be consuming a diet consisting entirely of vegetation. For support, Plaintiff cites to that portion of the biological assessment addressing the environmental consequences of the proposed Project on the grizzly bear. AR 6:25 at 9.

The biological assessment recognizes that areas treated with nonselective herbicides "would have reduced foraging capacity for grizzly bears because some non-target plants would be killed by these broad-spectrum herbicides." It says nothing about foraging being eliminated, however, as Plaintiffs claim. And as the assessment goes on to say, "[a] return of an increase in foraging capacity would occur within 2-3 years of herbicide treatment." AR 6:25 at 9-10.

To reduce any potentially negative impacts, the Forest Service incorporated mitigating measures limiting application of herbicides in spring habitats for grizzly bears. For example, aerial spraying would be prohibited during the spring use period and "high application rates" of 2,4-D "would not occur on potential spring forage habitat because of potential impacts on human health," AR 6:25 at 9. While the Forest Service recognized there may be "short-term reduction in spring forage occurring on and along roads," it found that the proposed herbicide application "would result in no decrease in habitat effectiveness for the bear." AR

2:17 at 3-82, 3-84, AR 6:25 at 10. Plaintiff has not pointed to any evidence that the temporary reduction in spring foliage along travel corridors will significantly disrupt the grizzly bear's feeding patterns, particularly in light of the fact that the grizzly bear is "highly mobil[e]" and would in any event likely avoid "the disturbance associated with human travel corridors." AR 3-17 at 3-83.

c. *Displacement*

Finally, Plaintiff argues that aerial spraying will disrupt the grizzly bear's sheltering activities, thereby resulting in a take. In Plaintiff's view, the duration of a grizzly bear's displacement response to aerial spraying is irrelevant. According to Plaintiffs, displacement alone results in a take, regardless of duration, because any displacement at all can be said to impact a bear's sheltering and feeding activities.

While harassment of a listed species constitutes a take, the activity at issue must "significantly disrupt normal behavioral patterns" such as sheltering. 50 C.F.R. § 173. According to the Forest Service, any aerial spraying would result only in short-term avoidance for a maximum period of two days annually per BMU. AR 2:17 at 3-081. The Forest Service determined that such infrequent and short-term displacement "would not affect feeding, sheltering or breeding to a measurable extent," in light of the Project's mitigating measures. AR 2:17 at 3-

081.

The Forest Service maintains that Plaintiff “has simply repackaged its ESA Section 7 argument,” and takes the position that “[i]f the agencies properly concluded that the Project is not likely to adversely affect grizzly bears...then it logically follows that the Project will not result in effects that rise to the level of ‘take’.” Dkt. 24-2, at 17. As discussed above, however, this matter should be remanded to the Forest Service for purposes of determining whether the aerial herbicide application contemplated by the Project is likely to adversely affect the grizzly bear. By the Forest Service’s own logic, if it alters its effects determination on remand, it might likewise find that those effects could rise to the level of a take within the meaning of the ESA. If the Forest Service indeed alters its effects determination on remand, it must necessarily determine whether the aerial spraying contemplated by the Project will create “the likelihood of injury to [the grizzly bear] by annoying it to such an extent as to significantly disrupt normal behavioral patterns,” including “breeding, feeding, or sheltering,” thereby resulting in a take. 50 C.F.R. §17.3.

3. Compliance with the Forest Plan

Plaintiff alleges in its fifth claim for relief that the Forest Service violated NFMA and NEPA because the Project allows activities that are not compatible

with the needs of the grizzly bear. Specifically, Plaintiff argues that the Forest Service violated NFMA by approving a Project that is incompatible with the Forest Plan, which requires the following:

Management decisions will favor the needs of the grizzly bear when grizzly habitat and other land use values compete. Land uses which can affect grizzlies and/or their habitat will be made compatible with grizzly needs or such uses will be disallowed or eliminated. Grizzly/human conflicts will be resolved in favor of grizzlies unless the bear involved is determined to be a nuisance.

AR 25:2 at 293.

“It is well-settled that the Forest Service’s failure to comply with the provisions of a Forest Plan is a violation of NFMA.” *Native Ecosystems Council v. U.S. Forest Service*, 418 F.3d 953, 961 (9th Cir. 2005).

Reiterating its ESA arguments, Plaintiff alleges that the Forest Service violated this mandate by approving a Project authorizing herbicide application that will displace grizzly bears, eliminate spring forage, and disrupt reproductive capacity in male bears. Dkt. 20, at 15. Plaintiff maintains that such adverse impacts are not “compatible with grizzly needs” because they disrupt sheltering, feeding, breeding and other normal behavioral functions.

As discussed above, however, the Forest Service properly found that the Project will not result in a take by eliminating spring forage or disrupting

reproductive capacity in male bears. The Project is thus compatible in these respects with the needs of the grizzly bear as required by the Forest Plan. Whether any displacement effects caused by the aerial spraying contemplated by the Project are likewise compatible with the needs of the grizzly bear depends on whether the Forest Service alters its effects determination on remand.

B. Preventive measures

1. NEPA claim

In its third claim for relief, Plaintiff alleges that the Forest Service failed to examine a reasonable range of project alternatives because it did not consider an alternative that included preventive measures addressing the causes of noxious weed infestations. Compl. ¶ 54. Specifically, Plaintiff maintains that the Forest Service's own land management activities, such as logging, cattle grazing, and road building, are causing weed infestations, and claims the Forest Service should have considered an alternative restricting those activities. Pl.'s Opening Br. 16-19. Shifting its focus slightly in response to the Forest Service's motion, Plaintiff also argues that incorporating the best management practices for weed prevention was not a meaningful consideration of preventive measures because those measures are unenforceable. Pl.'s Response 18-19 (Sept. 14, 2009).

a. *Range of alternatives*

An environmental impact statement “must rigorously explore and objectively evaluate all reasonable alternatives.” 40 C.F.R. § 1502.14(a). The Court is to evaluate the reasonableness of the range of alternatives in light of “the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.” *City of Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997).

The stated purpose of this Project encompasses weed prevention, as well as weed treatment and control. AR 2:15 at 1-8. The Forest Service does not dispute that it was thus required to consider at least one alternative incorporating weed prevention measures, and claims it did so. In fact, the Forest Service maintains that each of the three alternatives it considered in detail included many weed prevention measures.

The record indeed reflects that all three alternatives incorporated the weed prevention measures set forth in the Forest Service’s Best Management Practices (“BMPs”) for weed control AR 2:16 at 2-16, AR 2:45 at App. A. These BMPs address the management activities Plaintiffs claim should have been considered and curtailed in at least one alternative, including road building and maintenance, logging, and grazing. AR 2:45 at A-1,3,5-7,9-10. The BMPs set forth several weed prevention measures applicable specifically to roads, logging, and grazing.

AR 2:45 at A-3,6,7. Thus, to the extent Plaintiff claims the Forest Service failed to consider an alternative included preventive measures addressing the causes of noxious weed infestations, it is mistaken.

In what amounts to a challenge to the BMPs themselves, Plaintiff nevertheless argues that because the Forest Service's BMPs have thus far failed to curtail weed infestations in the Kootenai National Forest, the Forest Service should have considered an alternative with more drastic weed prevention measures, such as permanently eliminating livestock grazing in certain areas or setting aside old growth forest reserves. But the Forest Service need not consider alternatives that did not "satisfy the agency's reasonable goal of striking an appropriate balance between recreational and ecological values." *Hells Canyon Alliance v. U.S. Forest Service*, 227 F.3d 1170, 1181 (D. Or. 2000). To the extent Plaintiff simply disagrees with the Forest Service's management practices, that disagreement is "not the proper subject of a NEPA action." *Northwest Coal. for Alternatives to Pesticides v. Lyng*, 844 F.2d 588, 591 (9th Cir. 1988).

Plaintiff also relies on *Blue Mountains Biodiversity Project v. U.S. Forest Service*, 229 F.Supp.2d 1140 (D. Ore. 2002) in an effort to demonstrate that the Forest Service failed to consider a reasonable range of alternatives. At issue in *Blue Mountains* was whether the agency had considered an adequate range of

alternatives for a proposed action with the stated purpose of controlling and eradicating noxious weeds. *Blue Mountains*, 229 F.Supp.2d at 1144. The agency admitted that it had not focused on weed prevention, choosing instead to emphasize weed eradication. *Blue Mountains*, 229 F.Supp.2d at 1146. The court concluded the agency failed to “weigh an obviously reasonable alternative” because it did not consider an alternative that “promoted preventative measures for controlling weed infestation.” *Blue Mountains*, 229 F.Supp.2d at 1146.

Unlike *Blue Mountain*, the Forest Service in this case did in fact consider alternatives that promote preventative measures. While Plaintiff apparently believes those measures are insufficient, that does not mean that the range of alternatives was deficient. To the contrary, the record reflects that the Forest Service considered a reasonable range of alternatives.

b. *Enforceability*

As noted above, the Project incorporates the weed prevention measures set forth in the BMPs for weed control. AR 2:16 at 2-16, AR 2:45 at App. A. Plaintiff contends that the Forest Service’s incorporation of these BMPs from the Forest Service Manual was not a meaningful consideration of preventive measures because those measures are unenforceable.

For support, Plaintiff relies on *Western Radio Service Co., Inc. v. Espy*, 79

F.3d 899, 901 (9th Cir. 1996), in which a company challenged the Forest Service's issuance of a special use permit allowing a competitor to construct and maintain a new radio communications facility. The plaintiff alleged, among other things, that the decision violated NFMA because the Forest Service "failed to comply with applicable regulations," which it claimed included the guidelines set forth in the Forest Service's manual and handbook. *Western Radio*, 79 F.3d at 899-900.

Plaintiff maintained that the manual and handbook had "the independent force and effect of law," and even if they did not, the fact that applicable sections from the Code of Federal Regulations adopted the manual and handbook by reference rendered them binding. *Western Radio*, 79 F.3d at 901. The Ninth Circuit rejected the notion that the manual and handbook had the independent force and effect of law, and instead characterized them as procedural guidelines. *Western Radio*, 79 F.3d at 902. The court also explained that even if the Secretary of Agriculture's regulations incorporated those materials, "[m]ere incorporation does not convert a procedural guidelines into a substantive regulation." *Western Radio*, 79 F.3d at 902.

Unlike *Western Radio*, however, this case does not involve a claim by Plaintiff that the Forest Service has somehow violated applicable regulations. The issue is not, as it was in *Western Radio*, whether a Forest Service manual and

handbook are enforceable or have the “independent force and effect of law.”

Western Radio, 79 F.3d at 901. Rather, the issue in this case is whether the Forest Service considered an alternative that included preventive measures addressing the causes of noxious weed infestations. As discussed above, the Forest Service incorporated its BMPs for weed control into the three alternatives it seriously considered, including the one it ultimately selected, and in doing so considered alternatives including preventive measures.

Plaintiff has also submitted a recent decision by Judge Molloy as supplemental authority in support of its position. *See Greater Yellowstone Coalition v. Servheen*, CV-07-134-M-DWM, slip op. (Sept. 21, 2009). As in *Western Radio*, however, the issue in *Greater Yellowstone* was the legal enforceability of the regulatory mechanisms relied on by the agency, not the adequacy of the range of alternatives considered. The plaintiff in *Greater Yellowstone* claimed, among other things, that the United States Fish and Wildlife Service’s decision removing the grizzly bear population from the threatened species list violated the ESA because there were inadequate regulatory mechanisms to protect the grizzly bear once it was delisted. *Greater Yellowstone*, CV-07-134-M-DWM, slip op. 2. Under the ESA, regulatory mechanisms must be enforceable. *Greater Yellowstone*, CV-07-134-M-DWM, slip op. 14-15. The

Court concluded that such regulatory mechanisms as a Conservation Strategy, Forest Plan amendments, and state plans were not adequate regulatory mechanisms because they were legally unenforceable. *Greater Yellowstone*, CV-07-134-M-DWM, slip op. at 24.

Unlike *Greater Yellowstone*, where the Court was faced with determining whether the agency's regulatory mechanisms were legally enforceable as required by the ESA, the question in this case is not whether the Forest Service's BMPs are legally enforceable but whether the agency considered an alternative addressing the causes of noxious weed infestations. As discussed above, the Forest Service did just that by incorporating its BMPs on weed control. *See e.g., Wildwest Institute v. Bull*, 468 F.Supp.2d 1234, 1251-52 (D. Mont. 2006) (in considering whether hazardous fuel reduction project violated NEPA, court effectively approved of Forest Service's use of BMPs designed to reduce possible sedimentation).

2. NFMA claim

Plaintiff argues that the Forest Service's failure to consider an alternative addressing the causes of noxious weed infestations violated NFMA's substantive requirement to "provide for diversity of plant [] communities" and avoid irreversible damage to soils. 16 U.S.C. § 1604(g)(3)(B),(E). But because the

Forest Service did in fact consider alternatives incorporating weed prevention measures relating to logging, grazing, and roads, Plaintiff's argument is without merit.

For the first time in its reply brief, Plaintiff suggests that the Forest Plan itself is flawed. For example, Plaintiff argues that the Defendants "fail to provide any explanation how the Forest Plan could provide for native plant diversity without enforceable standards that prevent new noxious weed infestation." Dkt. 26, at 20. To the extent Plaintiff takes issue with the Forest Plan itself, it has not pled any such claim in its Complaint, and any such challenge is not properly before the Court.

C. Site-specific analysis

In its fourth claim for relief, Plaintiff alleges that the Forest Service violated NEPA because it did not conduct a site-specific analysis and because the Project does not require annual site-specific environmental assessments during the implementation period. Compl. ¶¶ 56-60.

Contrary to the Plaintiff's argument, the FEIS in this case represents the site-specific analysis required under NEPA. Although the project area includes the entire KNF, the FEIS identifies and maps all potential treatment sites and evaluates the direct, indirect, and cumulative effects of herbicide exposure to all

resources. AR 2:16 at 2-9, 2-22, 3-21- 3-147. The record thus reflects that the Forest Service has conducted the requisite site specific analysis.

Plaintiff next maintains that annual site-specific NEPA analysis is required and the Project's call for an "annual review" of herbicide application proposals is insufficient. Plaintiff cites *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1357 (9th Cir. 1994) for the proposition that the "cumulative effects of herbicide exposure particular to a site-specific project must be considered in the preparation of site-specific environmental assessments and impact statements." Pl.'s Opening Br. 20; Pl.'s Response 24 (quoting *Salmon River*). Plaintiff reads *Salmon River* as requiring annual NEPA analysis during the Project's fifteen year implementation period, and maintains the Forest Service's plan to conduct an "annual review" of the herbicide application proposals is insufficient.

Contrary to Plaintiff's reading, *Salmon River* does not stand for the proposition that future NEPA analyses will necessarily be required. The plaintiffs in *Salmon River* challenged a programmatic reforestation FEIS that "evaluate[d] the use of herbicides as part of the vegetation management plan" for an entire region consisting of approximately six million acres. *Salmon River*, 32 F.3d at 1349. The court explained that such a "comprehensive programmatic impact statement generally obviates the need for a subsequent site-specific impact

statement, unless new and significant environmental impacts arise that were not previously considered.” *Salmon River*, 32 F.3d at 1356. The court concluded that “the FEIS’s analysis of the cumulative impact of non-specific herbicide applications” in the region complied with NEPA, and noted that because the Forest Service represented it would “fully comply with NEPA in evaluating future applications of herbicides” the agency would be judicially estopped “from later arguing that it ha[d] no further duty to consider the cumulative impact of site-specific programs.” *Salmon River*, 32 F.3d at 1357, 1358.

Here, the Forest Service has already undertaken a site-specific analysis. To determine whether future NEPA analysis is required, the Forest Service will perform annual reviews of the herbicide application proposals to determine whether there are potentially new and significant environmental effects beyond those considered in the FEIS. AR 2:15 at 1-1. If the Forest Service finds during one of those annual reviews that there are potential resource effects beyond those analyzed in the FEIS, it will perform additional NEPA analysis and prepare a supplemental FEIS. As in *Salmon River*, the Court “assume[s] that government agencies will...comply with their NEPA obligations in later stages of development.” *Salmon River*, 32 F.3d at 1358 (quoting *Conner v. Burford*, 848 F.2d 1441, 1448 (9th Cir. 1988)).

D. Migratory songbirds

Plaintiff's sixth claim for relief asserts that the Forest Service violated NEPA and NFMA⁷ by failing to take the requisite hard look at the Project's impact on the viability of migratory songbirds. Compl. ¶¶ 66-69. According to Plaintiff, the Forest Service has admitted that application of 2,4-D may have adverse impacts on migratory birds, but failed to analyze whether those adverse impacts will threaten the viability of the affected bird species.

As the Ninth Circuit explained in *Sierra Club v. Bosworth*, 510 F.3d 1016, 1030 (9th Cir. 2007), taking a "hard look" means providing more than just conclusory statements. An "impacts analysis must also contain 'some quantified or detailed information.'" *Bosworth*, 510 F.3d at 1030. Plaintiff maintains the Forest Service failed to provide a sufficiently detailed analysis, and should have provided "quantified or detailed information" assessing the impact of habitat loss via defoliation on migratory songbirds.

Despite Plaintiff's argument to the contrary, review of the record indicates that the Forest Service engaged in a sufficiently detailed evaluation of the Project's anticipated effects on migratory songbirds. The FEIS discusses the

⁷ NFMA requires that the Forest Service "provide for diversity of plant and animal communities." 36 C.F.R. § 219.19.

direct, indirect and cumulative effects of the Project on migratory birds at some length. AR 2:17 at 3-94 to 3-95. The Forest Service indicated that its assessment was based on the SERA risk assessments and the loss/change in bird habitat resulting from the spread of noxious weeds.” AR 2:17 at 3-95. The Forest Service recognized the potential for adverse effects on migratory birds consuming a diet of 100% contaminated insects, but determined that “[t]he benefits of maintaining native plant communities by controlling weeds” included “providing a diversity of insects that depend on those native plant communities.” AR 2:17 at 3-96.

As Plaintiff notes, the Forest Service discusses elsewhere in the FEIS that the Project may have short term effects on non-target native vegetation. AR 2:17 3-28. In its discussion regarding migratory birds, however, the Forest Service explained that it was selecting the alternative that would result in the lowest cumulative loss of native plant communities. AR 1:17 at 3-97. The Forest Service recognized the importance of maintaining “[d]iverse native plant communities,” which “provide seeds and fruits and the habitat needed for diverse insect populations all of which are critical to the survival of migratory bird populations.” AR 2:17 at 3-96.

Absent a specific goal or standards for migratory birds in the KNF, the

Forest Service found that the Project would comply with the Forest Plan's more general goal of maintaining "diverse age classes of vegetation for viable populations of all existing" wildlife species, including migratory songbirds.

The Court is thus satisfied that the Forest Service took the requisite "hard look" and complied with NEPA by considering and disclosing the potential effects of the Project on migratory birds.

E. Mitigation measures for aerial drift

In its seventh claim for relief, Plaintiff charges that the Forest Service violated NEPA because the FEIS did not take a hard look at the adequacy of the mitigation measures for aerial herbicide drift. Compl. ¶¶ 70-73. In particular, Plaintiff claims the Forest Service failed to explain why it did not adopt the mitigation measures suggested in the so-called "Felsot study" on aerial herbicide drift. AR 7:58. Felsot described the following "meteorological conditions" as favorable for herbicide spraying: "wind speed is around 3 mph; wind direction is away from sensitive sites; no spraying during an inversion; no forecasted rain for 24 hours." AR 3:50 at 35. Plaintiff does not argue that the Forest Service necessarily should have adopted those measures, but takes the position that it was required to explain its rationale for not doing so.

Although the Forest Service did not incorporate all of these measures, it

specified in the Project's design criteria that aerial application of herbicide take place when the wind is blowing away from sensitive sites, and when wind speeds are less than 6 miles per hour. AR 2:16 at 2-14. In settling on those criteria, the Forest Service discussed and considered the Felsot study, along with several other aerial drift studies, and sufficiently explained its rationale. AR 2:17 at 120, 125-127; AR 7:53 (1992 Risk Assessment for Herbicide Use); 07:62 (Mormon Ridge Field Drift Monitoring). The Forest Service developed its aerial spray design criteria accordingly, including not only the wind speed/direction criteria noted above, but also buffer zones and use of drift reduction agents. AR 2:17 at 3-128; 2:16 at 2-14. And as Felsot also recommended, the Forest Service required that "weather conditions would be monitored on-site" before any aerial spraying could take place. AR 2:16 at 2-14. Finally, the Forest Service specified that "[a]ll herbicide users are required to follow the label directions for application rate and usage," which in turn reflect and incorporate "the numerous scientific studies and regulatory reviews generated by the EPA registration process" and provide reasonable assurance that "when used according to label directions, it will not cause unreasonable adverse effects on humans, fish, and wildlife or the environment." AR 2:17 at 3-124. Those labels provide specific instructions regarding wind speed and weather inversions, and in doing so implement or

address some of the measures listed in the Felsot study. See AR 9:1 through AR 9:39.

The Forest Service adequately explained its rationale for selecting the design criteria set forth in the FEIS and took a sufficiently hard look at the adequacy of the mitigation measures for aerial herbicide drift.

F. Human health effects

Plaintiff's eighth and final claim is that the Forest Service violated NEPA because it did not candidly disclose the human health effects of herbicides in the FEIS. Compl. ¶¶ 74-77. Plaintiff acknowledges that the FEIS discusses and discloses certain potential adverse health effects, but nevertheless maintains that the FEIS is inadequate in that regard because it does not specifically disclose various concerns mentioned in comments to the DEIS and the Nature Conservancy's Weed Control Handbook. Pl.'s Opening Br. 26-27 (citing excerpts from AR 1:38 and AR 3:261).

It is well-established that one of NEPA's primary purposes is "to permit informed public comment on proposed action and any choices or alternatives that might be pursued with less environmental harm." *Lands Council v. Powell*, 395 F.3d 1019, 1027 (9th Cir. 2005). The Forest Service does not dispute that it was thus required to disclose potential human health effects, but claims it did so in

sufficient detail. This Court agrees.

The FEIS contains a lengthy section discussing and disclosing the human health effects of the herbicides to be used in conjunction with the Project. AR 2:17 at 3-118 to 3:133. The Forest Service analyzed any potentially adverse human health effects in light of the anticipated application rates, and disclosed those effects accordingly. AR 2:17 at 3-118 to 3:133. The FEIS describes the “primary reference literature” used “to analyze potential human health risks associated with ground and aerial applications of herbicides.” AR 2:17 at 3-120. The FEIS also explains that a “full discussion of the toxicity endpoints evaluated and a review of the relevant toxicological literature is presented in the SERA documents” and refers the reader wishing to review those SERA documents to a Forest Service website. AR 2:17 at 3-121.

Plaintiff has cited the Ninth Circuit’s recent decision in *National Parks Conservation Ass’n v. Bureau of Land Management*, 586 F.3d 735 (9th Cir. 2009) as supplemental authority in support of its argument that the Forest Service did not adequately disclose the human health effects of the herbicides at issue. The court in that case explained that “[i]n determining whether an EIS fosters informed decision-making and public participation, we consider not only its content, but also its form.” *National Parks*, 586 F.3d at 750. According to the Ninth Circuit,

a discussion requiring a reader to “cull through entirely unrelated sections of the EIS and then put the pieces together” in order to find information on an issue could “not service as a ‘reasonably thorough’ discussion” under NEPA. Unlike *National Parks*, however, the FEIS in this case contains a lengthy and discrete specifically discussing the topic at issue – the human health effects of the herbicides to be used in conjunction with the Project. AR 2:17 at 3-118 to 3:133. Thus, *National Parks* is of no help to the Plaintiff.

The Forest Service was not required to specifically discuss and disclose every risk or study in the record. *See Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1360 (9th Cir. 1994) (approving the notion that “[a]n EIS need not quantify every risk, particularly less likely risks”). The agency’s discussion of the potential for adverse human health effects was adequate, and complies with NEPA’s disclosure requirements.

IV. Conclusion

Based on the foregoing,

IT IS RECOMMENDED that the parties cross-motions for summary judgment be GRANTED IN PART and DENIED IN PART. Specifically,

IT IS RECOMMENDED that Plaintiff’s motion for summary judgment be GRANTED to the extent it claims the Defendants acted arbitrarily and

capriciously in determining that the aerial spraying contemplated by the Project is not likely to adversely affect the grizzly bear and DENIED in all other respects.

IT IS FURTHER RECOMMENDED that Defendants' motion for summary judgment be DENIED to the extent it seeks judgment as a matter of law on the claim identified above. Defendants' motion should be GRANTED in all other respects.

IT IS FURTHER RECOMMENDED that this matter be remanded to the Forest Service for purposes of addressing the frequency with which overflights will be allowed during any given aerial application period and whether the aerial application contemplated by the Project is likely to adversely affect the grizzly bear. The Project should be allowed to go forward as planned in all other respects.⁸

Dated this 23rd day of December, 2009

/s/ Jeremiah C. Lynch
Jeremiah C. Lynch
United States Magistrate Judge

⁸ Because the Forest Service has no immediate plans to conduct aerial spraying, remanding this matter to the agency for the limited purpose set forth above should have no immediate effect on the agency's ability to implement the Project.

