

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

NOV 25 2022

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

KLAMATH-SISKIYOU WILDLANDS
CENTER, et al.,

No. 22-35035

Plaintiffs-Appellants,

D.C. No. 1:19-cv-01810-CL

v.

MEMORANDUM*

BUREAU OF LAND MANAGEMENT, et
al.,

Defendants-Appellees,

and

MURPHY COMPANY,

Intervenor-Defendant-Appellee.

Appeal from the United States District Court
for the District of Oregon
Michael J. McShane, District Judge, Presiding

Argued and Submitted November 10, 2022
Portland, Oregon

Before: CLIFTON and H.A. THOMAS, Circuit Judges, and BAKER,**
International Trade Judge.

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The Honorable M. Miller Baker, Judge for the United States Court of
International Trade, sitting by designation.

Plaintiffs-Appellants Klamath-Siskiyou Wildlands Center, *et al.*, (collectively “KS Wild”) appeal from the district court’s grant of summary judgment in favor of Defendants-Appellees, comprising of the United States Bureau of Land Management (“BLM”) and United States Fish and Wildlife Service (“FWS”), *et al.* In 2018, BLM developed the North Landscape Project (“North Project”), a site-specific management approach for conducting annual timber sales in the Klamath Falls Resource Area in accordance with the 2016 Southwestern Oregon Resource Management Plan (“2016 RMP”) and Oregon & California Revested Lands Act. That same year, FWS issued a Biological Opinion (“BiOp”) concluding that the North Project will not jeopardize the Northern Spotted Owl (“NSO”) as a species, adversely modify its critical habitat, nor result in its incidental take. BLM concurrently conducted an Environmental Assessment (“EA”) for the North Project, which concluded that the action would have no direct effect on the NSO population and is consistent with the owl’s recovery as a species. The EA was revised in 2020 with additional information and retained that conclusion.

KS Wild alleges that the BiOp violated the Endangered Species Act (“ESA”), *see* 16 U.S.C. § 1536(a)(2), and the EA violated the National Environmental Policy Act (“NEPA”), *see* 42 U.S.C. § 4332(C). We have jurisdiction under 28 U.S.C. § 1291. We review *de novo* the district court's ruling

on cross-motions for summary judgment. *Hamby v. Hammond*, 821 F.3d 1085, 1090 (9th Cir. 2016). The agency’s compliance with the law is reviewed under the Administrative Procedure Act’s deferential “arbitrary and capricious” standard. 5 U.S.C. § 706(2)(A); *Friends of Animals v. U.S. Fish & Wildlife Serv.*, 28 F.4th 19, 28 (9th Cir. 2022). This standard requires us to “determine whether the agency considered the relevant factors and articulated a rational connection between the facts found and the choices made.” *Friends of Animals*, 28 F.4th at 28 (quoting *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep’t of Agric.*, 499 F.3d 1108, 1115 (9th Cir. 2007)). We affirm.

1. Endangered Species Act

The district court correctly held that the BiOp was not arbitrary and capricious under the ESA. *See* 16 U.S.C. § 1536(a)(2), (b). The BiOp analyzed the North Project’s impact on NSO critical habitat and conservation, which incorporates recovery of the species and is distinct from its mere survival. *See id.* § 1536(a)(2); *Def. of Wildlife v. Zinke*, 856 F.3d 1248, 1260 (9th Cir. 2017); Definition of Destruction or Adverse Modification of Critical Habitat, 81 Fed. Reg. 7214, 7216–17 (Feb. 11, 2016). For example, the BiOp examined the status of NSO critical habitat, the environmental baseline of the action area, the direct and indirect effects of the action, and the future cumulative effects of the action. It found that the North Project will affect only a small portion of the NSO’s critical

habitat in the Klamath Falls Resource Area and “less than 0.1 percent” of the NSO’s *total* habitat. The BiOp further considered the North Project’s effects on the life cycle of the NSO by noting the owl’s long lifespan, extensive range, and varied breeding ground. Contrary to KS Wild’s contention, the NSO is therefore distinguishable from anadromous fish whose breeding and migration cycles require an assessment of near-term habitat loss. *See, e.g., Pac. Coast Fed’n of Fishermen’s Ass’ns, Inc. v. Nat’l Marine Fisheries Serv.*, 265 F.3d 1028, 1037–38 (9th Cir. 2001); *Pac. Coast Fed’n of Fishermen’s Ass’ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1093 (9th Cir. 2005).

We also defer to FWS’s scientific judgment and the validity of its survey protocol in upholding the agency’s determination of no incidental take. *See San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 626 (9th Cir. 2014). KS Wild has not shown that determination was arbitrary and capricious. Although the North Project may preclude reoccupancy of NSOs in the action area for a prolonged period, habitat degradation from adverse effects does not always “equal harm” sufficient to constitute incidental taking. *See Ariz. Cattle Growers’ Ass’n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1238 (9th Cir. 2001). Nor has KS Wild shown that the survey protocol improperly deviates from past policy and practice and the best available science. An individual biologist’s “preliminary determination” that the survey protocol departs from prior procedure (which is

“later overruled at a higher level within the agency”) does not make the decision-making process arbitrary and capricious. *See Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 659 (2007). Similarly, internal agency emails that discuss Allowable Sale Quantity targets do not demonstrate that BLM or FWS, in their official capacity, unlawfully focused on economic factors in considering the North Project. *See Nat’l Wildlife Fed’n v. U.S. Army Corps of Eng’rs*, 384 F.3d 1163, 1174–75 (9th Cir. 2004).

2. National Environmental Policy Act

The district court correctly determined that BLM took a “hard look” at the environmental consequences of the North Project using the process provided by NEPA. *See Audubon Soc’y of Portland v. Haaland*, 40 F.4th 967, 980 (9th Cir. 2022) (quoting *N. Alaska Env’t Ctr. v. Kempthorne*, 457 F.3d 969, 975 (9th Cir. 2006)). First, the EA was not legally deficient when it tiered to the final environmental impact statement (“FEIS”) of the 2016 RMP. The FEIS contains project-level analysis—such as potential loss of NSO habitat within the action area and reduced future NSO occupancy. *See All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1120–21 (9th Cir. 2018). In the revised EA, BLM relied on this analysis and separately evaluated new owl demographic data for the action area that post-date the 2016 RMP and contemplate additional owl habitat. Additionally, the EA assessed the North Project’s indirect, direct, and cumulative

effects on the NSO—including NSO habitat refugia and barred owl competition—by tiering to the 2016 FEIS and conducting independent site-specific analysis. The EA was not required to assess the experimental barred owl control program because the program’s success was hypothetical and reliant upon data collection efforts that had not yet materialized. *See Jones v. Nat’l Marine Fisheries Serv.*, 741 F.3d 989, 1000 (9th Cir. 2013).

Second, BLM’s decision to prepare an EA instead of an Environmental Impact Statement for the North Project was not arbitrary or capricious. *See Env’t Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 872 (9th Cir. 2022). For reasons already stated, KS Wild did not show the North Project is highly controversial or uncertain, establishes binding precedent, or adversely affects the NSO. *See WildEarth Guardians v. Provencio*, 923 F.3d 655, 673–74 (9th Cir. 2019). Indeed, this court has previously upheld the 2016 RMP against ESA and NEPA complaints. *Rivers v. Bureau of Land Mgmt.*, 815 F. App’x 107, 110 (9th Cir. 2020) (unpublished). To the extent the North Project is precedential, this factor alone is “not dispositive,” and there is no evidence the North Project is binding on future proposed actions. *See WildEarth Guardians*, 923 F.3d at 674–75.

AFFIRMED.