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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

SIERRA FOREST LEGACY; CENTER,  
FOR BIOLOGICAL DIVERSITY;  
NATURAL RESOURCES DEFENSE  
COUNCIL, SIERRA CLUB, and THE  
WILDERNESS SOCIETY, non-profit  
organizations,

No. 2:05-cv-00205-MCE-GGH

Plaintiffs,

v.

ORDER DENYING PLAINTIFFS'  
MOTION FOR INJUNCTION  
PENDING APPEAL AND  
GRANTING PARTIAL STAY OF  
REMEDY ORDER

MARK REY, in his official capacity  
as Under Secretary of Agriculture,  
DALE BOSWORTH, in his official  
capacity as Chief of the United  
States Forest Service, JACK  
BLACKWELL, in his official capacity  
as Regional Forester, Region 5,  
United States Forest Service, and  
JAMES M. PENA, in his official  
capacity as Forest Supervisor,  
Plumas National Forest,

Defendants.

and

TUOLUMNE COUNTY ALLIANCE FOR  
RESOURCES & ENVIRONMENT, et al.;  
CALIFORNIA SKI INDUSTRY ASS'N; QUINCY  
LIBRARY GROUP, et al.; and  
CALIFORNIA CATTLEMEN'S ASS'N,

Defendants-Intervenors.

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1 This Court has resolved the liability issues raised in four  
2 related cases challenging the 2004 Sierra Nevada Forest Plan  
3 Amendment (also referred to as the "2004 Framework" or the  
4 "SNFPA"). Moreover, in separate proceedings, the Court has  
5 crafted an appropriate remedy.<sup>1</sup> Plaintiffs in this case, a group  
6 of environmental organizations, have appealed this Court's  
7 rulings and now seek an injunction requiring that Forest Service  
8 timber harvesting projects comply with the 2001 Framework pending  
9 completion of the appellate process. Plaintiffs also ask that  
10 the Court stay the portion of its order requiring the Forest  
11 Service to prepare a Supplemental Environmental Impact Statement  
12 ("SEIS") by May 1, 2010.

13 For the reasons set forth below, Plaintiffs' motion to  
14 enjoin projects inconsistent with the 2001 Framework pending  
15 resolution of their appeal is denied. As also explained below,  
16 Plaintiffs' motion to stay the Forest Service's obligation to  
17 complete a SEIS by May 1, 2010, which is not opposed by the  
18 Federal Defendants, will be granted.

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25 <sup>1</sup> See Sierra Nevada Forest Prot. Campaign ("SNFPC") v. Rey,  
26 573 F. Supp. 2d 1316 (E.D. Cal. 2008) [Dkt. No. 255]; California  
27 ("California") v. U.S. Dep't of Agric., No. 05-211, 2008 WL  
28 3863479 (E.D. Cal. Aug. 19 and Sept. 3, 2008) [Dkt. No. 175];  
Pacific Rivers Council ("PRC") v. U.S. Forest Serv., No. 05-953,  
2008 WL 4291209 (E.D. Cal. Sept. 18, 2008) [Dkt. No. 153];  
California Forestry Ass'n ("CFA") v. Bosworth, No. 05-905, 2008  
WL 4370074 (E.D. Cal. Sept. 24, 2008) [Dkt. No. 131].

1 STANDARD

2 A. Injunctions Pending Appeal

3  
4 Like any injunction, an injunction pending appeal is "an  
5 extraordinary remedy that should be granted sparingly." Arizona  
6 Contractors Ass'n, Inc. v. Candelaria, 2008 WL 486002, at \*1 (D.  
7 Ariz. 2008). As with a preliminary injunction, to qualify for an  
8 injunction pending appeal, the moving party must show: (1) that  
9 it is likely to succeed on the merits; (2) that it is likely to  
10 suffer irreparable harm in the absence of preliminary relief;  
11 (3) that the balance of equities tips in its favor; and (4) that  
12 an injunction is in the public interest. Winter v. NRDC, 129 S.  
13 Ct. 365, 374 (2008); Stormans, Inc. v. Selecky, 586 F.3d 1109,  
14 1127 (9th Cir. 2009), quoting Winter, 129 S. Ct. at 374.

15 Because it "is an extraordinary and drastic remedy," Munaf  
16 v. Geren, 128 S. Ct. 2207, 2219 (2008) (citation omitted), an  
17 injunction "should not be granted unless the movant, *by a clear*  
18 *showing*, carries the burden of persuasion." Mazurek v.  
19 Armstrong, 520 U.S. 968, 972 (1997) (citation omitted). If a  
20 plaintiff fails to meet its burden on any of the four  
21 requirements for injunctive relief, its request must be denied.  
22 Winter, 129 S. Ct. at 376 (denying motion for injunctive relief  
23 based on the public interest and balance of hardship factors  
24 alone, where court assumed a likelihood of success on the merits  
25 of NEPA claims and irreparable injury to endangered species).

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1           **B.    Stays Pending Appeal**

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3           While stays pending appeal and injunctions pending appeal  
4 are distinct, Nken v. Holder, 129 S. Ct. 1749, 1758 (2009), they  
5 involve substantially the same judicial inquiry. Id. at 1761  
6 (citing Winter, 129 S. Ct. 376-77). In determining whether a  
7 stay is appropriate, a court should consider: "(1) whether the  
8 stay applicant has made a strong showing that he is likely to  
9 succeed on the merits; (2) whether the applicant will be  
10 irreparably injured absent a stay; (3) whether issuance of the  
11 stay will substantially injure the other parties interested in  
12 the proceeding; and (4) where the public interest lies." Hilton  
13 v. Braunskill, 481 U.S. 770, 776 (1987).

14           "A stay is an 'intrusion into the ordinary processes of  
15 administration and judicial review,' and accordingly 'is not a  
16 matter of right, even if irreparable injury might otherwise  
17 result to the appellant.'" Nken, 129 S. Ct. at 1757 (citations  
18 omitted). "The party requesting a stay bears the burden of  
19 showing that the circumstances justify an exercise of that  
20 discretion." Id. at 1761.

21  
22                                       **ANALYSIS**

23  
24           Plaintiffs ask this Court to enjoin the Forest Service from  
25 implementing any timber harvest projects inconsistent with the  
26 2001 Framework pending appeal. Plaintiffs further request a stay  
27 of the Forest Service's obligation to prepare a SEIS pending  
28 appeal. As set forth below, Plaintiffs' first request is denied.

1 This Court has previously considered the merits of Plaintiffs'  
2 challenge and weighed the harms of imposing the injunctive relief  
3 they now seek. There is no basis for the Court to reconsider its  
4 prior conclusions at this time. Defendants do not oppose  
5 Plaintiffs' second request. Because Plaintiffs' appeal could  
6 ultimately alter the scope of the SEIS to be prepared by the  
7 Forest Service, this Court agrees that it makes sense to stay the  
8 Forest Service's obligation until the outcome of the appeal is  
9 known.

10  
11 **I. PLAINTIFFS ARE NOT ENTITLED TO AN INJUNCTION PENDING APPEAL**

12 **A. Plaintiffs Have Not Demonstrated a Likelihood of**  
13 **Success on the Merits of their Appeal.**

14 This Court has considered the legality of the 2004  
15 Framework in motions for summary judgment filed in each of the  
16 four related cases. See Sierra Nevada Forest Prot. Campaign  
17 ("SNFPC") v. Rey, 573 F. Supp. 2d 1316 (E.D. Cal. 2008);  
18 California ("California") v. U.S. Dep't of Agric., No. 05-211,  
19 2008 WL 3863479 (E.D. Cal. Aug. 19 and Sept. 3, 2008); Pacific  
20 Rivers Council ("PRC") v. U.S. Forest Serv., No. 05-953, 2008 WL  
21 4291209 (E.D. Cal. Sept. 18, 2008); California Forestry Ass'n  
22 ("CFA") v. Bosworth, No. 05-905, 2008 WL 4370074 (E.D. Cal.  
23 Sept. 24, 2008). With a single exception related to the range of  
24 alternatives, this Court has found that the SEIS prepared for the  
25 2004 Framework complied with the law.

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1 Plaintiffs now ask this Court to revisit its findings on  
2 summary judgment and hold - without advancing any new argument or  
3 explanation of how this Court erred - that Plaintiffs have  
4 demonstrated a likelihood of success on the merits of their  
5 appeal. This Court declines Plaintiffs' invitation to reconsider  
6 its prior decisions and concludes, consistent with its prior  
7 findings, that Plaintiffs fail to demonstrate a likelihood of  
8 success on the merits.

9 Plaintiffs fail to demonstrate a likelihood of success on  
10 their various challenges under the National Environmental Policy  
11 Act ("NEPA") to the Framework. Contrary to Plaintiffs'  
12 allegations, the Forest Service fully disclosed opposing views  
13 regarding the 2004 Framework's impacts on wildlife and properly  
14 disclosed the Framework's short-term impacts to wildlife. See  
15 SNFPC v. Rey, 573 F. Supp. 2d at 1338-45. Plaintiffs fail to  
16 identify any error in this Court's analysis and, by simply  
17 repeating their prior arguments, provide no grounds for this  
18 Court to revisit the conclusions reached in its summary judgment  
19 decision. See Lands Council v. Packard, 391 F. Supp. 2d 869, 871  
20 (D. Idaho 2005) (holding plaintiffs fail to demonstrate  
21 likelihood of success on the merits where they simply "restate[]  
22 the arguments previously raised").

23 While Plaintiffs did prevail on their claim that the SEIS  
24 failed to address a proper range of alternatives, the favorable  
25 outcome they obtained in that regard cannot support their motion  
26 for an injunction pending appeal. Federal Defendants have not  
27 appealed this Court's ruling on the range of alternatives and  
28 that issue is thus not before the Court of Appeals.

1 The adequacy of the range of alternatives analysis is thus  
2 irrelevant to the question of whether Plaintiffs have a  
3 likelihood of success on the merits of *their appeal*. Comm. on  
4 the Judiciary v. Miers, 575 F. Supp. 2d 201, 203 (D.D.C. 2008)  
5 (“[t]he stay pending appeal inquiry looks to the likelihood of  
6 success on the merits of the appeal itself.”).

7 Plaintiffs also fail to demonstrate a likelihood of success  
8 on their claims that the 2004 Framework violated the National  
9 Forest Management Act (“NFMA”). First, Plaintiffs’ broad  
10 substantive NFMA challenge cannot be brought against the  
11 Framework as a whole. Instead, NFMA claims are ripe only to the  
12 extent that they are brought in the context of a site-specific  
13 project. SNFPA v. Rey, 573 F. Supp. 2d at 1328-29. See also  
14 Ecology Ctr. v. Castaneda, 574 F.3d 652, 658 (9th Cir. 2009)  
15 (“Forest-wide management practices and monitoring efforts, or  
16 lack thereof, are generally not amenable to suit under the APA  
17 because they do not constitute final agency actions. Challenges  
18 to forest-wide management practices or claims must be made in the  
19 context of site-specific actions.”) (citations omitted). Second,  
20 assuming Plaintiffs’ programmatic NFMA claims are ripe, those  
21 claims fail on the merits as set forth in this Court’s prior  
22 findings on summary judgment. The record shows that the 2004  
23 Framework does not threaten the viability of the California  
24 spotted owl, the Pacific fisher or the American marten.

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1 Plaintiffs also fail to demonstrate a likelihood of success  
2 on the merits of their various challenges to the Basin Project.  
3 This Court previously rejected Plaintiffs' claim that the Basin  
4 Environmental Assessment ("EA") did not adequately consider  
5 cumulative impacts and that the Forest Service failed to  
6 adequately involve the public in the preparation of the EA.  
7 SNFPA v. Rey, 573 F. Supp. 2d at 1345-47. Plaintiffs present no  
8 grounds for revisiting those conclusions now. Finally,  
9 Plaintiffs' challenge to the Forest Service's monitoring of  
10 Management Indicator Species ("MIS") was mooted by a 2007  
11 Amendment to the Plumas National Forest LRMP. Id. at 1335-36.  
12 Even absent the 2007 Amendment, the Forest Service properly  
13 monitored the impacts of the Basin Project on applicable MIS.

14 In sum, because this Court believes its findings on summary  
15 judgment were proper and supported by the record, it concludes  
16 that Plaintiffs have not demonstrated a likelihood that they will  
17 prevail on the merits of their appeal.

18  
19 **B. Plaintiffs Will Not Be Irreparably Harmed in the**  
20 **Absence of an Injunction**

21 Plaintiffs assert, based solely on their prior filings in  
22 this matter, that in the absence of an injunction barring all  
23 timber harvest activities inconsistent with the 2001 Framework,  
24 "irreparable harm to old forests and wildlife will result."  
25 Pls.' Mot. for Inj. Pending Appeal at 2. This claim fails.

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1 First, Plaintiffs' generic and blanket assertion of harm fails to  
2 carry their burden of demonstrating that they face actual and  
3 imminent harm from projects that will proceed during the pendency  
4 of their appeal. Second, the record in this case makes clear  
5 that implementation of the 2004 Framework will not irreparably  
6 harm old-forest dependant wildlife. To obtain an injunction  
7 pending appeal, plaintiffs bear the burden of demonstrating that  
8 they are "'likely to suffer irreparable harm *before a decision on*  
9 *the merits can be rendered.*'" Winter, 129 S. Ct. at 375 (quoting  
10 11A C. Wright, A. Miller, & M. Kane, Federal Practice and  
11 Procedure § 2948.1, p. 139 (2d ed.1995)) (emphasis added).  
12 Assertions of harm cannot be generic: they must be precise and  
13 detailed enough to enable the Court to evaluate the "harms  
14 pertaining to injunctive relief in the context" of the scope of  
15 the injunction sought. Sierra Forest Legacy v. Rey, 577 F.3d  
16 1015, 1022 (9th Cir. 2009). Plaintiffs provide no such context.  
17 Indeed, Plaintiffs fail to even name projects likely to proceed  
18 during the pendency of their appeal, much less demonstrate that  
19 their members actually use the forest resource that will be  
20 impacted by any such projects and that their members' use and  
21 enjoyment of those resources is in imminent danger of being  
22 irreparably injured if the projects are not enjoined. C.f.  
23 Summers v. Earth Island Inst., 129 S. Ct. 1142 (2009) (holding  
24 plaintiff lacked standing where it failed to "allege that any  
25 particular timber sale or other project claimed to be . . .  
26 [unlawful] will impede a specific and concrete plan of  
27 [plaintiff's] to enjoy the National Forests." ).  
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1 In the absence of a showing that Plaintiffs face irreparable  
2 injury from a particular timber sale that will go forward during  
3 the pendency of their appeal, Plaintiffs have failed to carry  
4 their burden, and on this basis alone their motion for injunctive  
5 relief fails.

6 Even if Plaintiffs' request for injunctive relief could be  
7 adjudicated in the absence of an allegation that specific  
8 projects pose concrete and imminent harm to their interests  
9 during the pendency of their appeal, this Court concludes -  
10 consistent with its findings on summary judgment and its decision  
11 on remedy - that implementation of the 2004 Framework will not  
12 irreparably harm the owl, fisher or marten. See, e.g., SNFPC v.  
13 Rey, 573 F. Supp. 2d at 1137 (finding impacts of the Framework to  
14 old-growth habitat used by the old-forest species will be  
15 "minimal"); id. (noting that under the 2004 Framework, no  
16 treatments are expected in 86 percent of Old Forest Emphasis  
17 Areas ("OFEAs"), and only minimal amounts of the most important  
18 owl habitat areas, such as Protected Activity Centers ("PACs")  
19 and Home Range Core Areas ("HCRAs"), will be impacted).

20 Indeed, far from causing irreparable harm, the evidence  
21 demonstrates that - when measured in terms of impact to the owl,  
22 fisher and marten - management under the 2004 Framework is  
23 environmentally superior to management under the 2001 Framework.  
24 See SNFPC v. Rey, 573 F. Supp. 2d at 1139 ("[T]he amount of old  
25 forest is projected to increase across the bioregion" under the  
26 2004 Framework.); SNFPA 2996-97, 3040-42, 3049-51 (concluding  
27 that in the long term, the 2004 Framework will result in more  
28 habitat for old forest species than the 2001 Framework);

1 Declaration of Donald Yasuda [Dkt. No.270-4] at ¶ 22 ("it is my  
2 continued professional opinion that the old forest dependent  
3 species within the Sierra Nevada, such as the California spotted  
4 owl, are best provided for by continuing to implement the  
5 management strategy and direction in the 2004 Framework.");  
6 Declaration of Diane Macfarlane [Dkt. No.270-3] at ¶ 14 ("Having  
7 been a primary author of the 2001 Framework forest carnivore  
8 analysis, and having reviewed the effects analysis produced by  
9 Don Yasuda for the 2004 Framework SEIS, it is my professional  
10 opinion that old forest habitats for martens and fishers within  
11 the Sierra Nevada can be best retained by applying the 2004 SEIS  
12 management strategy....").

13         The Court concludes that Plaintiffs' claim of irreparable  
14 harm fails. As a threshold matter, Plaintiffs have failed to  
15 carry their burden of demonstrating that they in fact face  
16 imminent and irreparable harm during the pendency of their  
17 appeal. Second, it is clear that continued operation under the  
18 2004 Framework does not pose any risk of irreparable harm to the  
19 owl, fisher or marten.

20  
21             **C. The Balance of Equities and the Public Interest Weigh**  
22             **Against an Injunction Pending Appeal.**

23         In addition to demonstrating a likelihood of success on the  
24 merits and irreparable harm, Plaintiffs must demonstrate that the  
25 balance of equities tips in their favor and that an injunction is  
26 in the public interest. Winter v. NRDC, 129 S. Ct. at 374.

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1 They fail to do either: the balance of equities and public  
2 interest both militate against enjoining 2004 Framework projects  
3 during the pendency of Plaintiffs' appeal.

4  
5 **1. The Public Interest in Reducing the Threat of**  
6 **Severe Wildfire will be Harmed by an Injunction**  
7 **Pending Appeal.**

8 Enjoining the Forest Service from implementing fuel  
9 reduction projects pursuant to the 2004 Framework would impede  
10 the Forest Service's ability to address the threat of  
11 catastrophic wildfire. The reduction of the risk posed by  
12 catastrophic wildfire is undeniably in the public interest.  
13 Wildfire poses a risk to human life and to property, and  
14 constitutes the single greatest threat to the survival of the  
15 California spotted owl, Pacific fisher and American marten in the  
16 Sierra Nevada. See, e.g., 71 Fed. Reg. 29,886, 29,897 (May 24,  
17 2006) (U.S. Fish and Wildlife Service determined that  
18 catastrophic wildfire is a far greater risk to spotted owl  
19 viability than any short-term effects of fuel management  
20 activities on owl habitat); Declaration of Donald Yasuda [Dkt.  
21 No.270-4] at ¶¶ 6-7 (noting that from 2003 to the present, 33 owl  
22 PACs have been lost to fire); Declaration of Diane Macfarlane  
23 [Dkt. No.270-3] at ¶ 9 ("Large-scale environmentally stochastic  
24 events such as severe fire appear to pose a greater threat to the  
25 marten populations and distribution in the northern Sierra Nevada  
26 than carefully planned vegetation treatments that can be  
27 strategically designed to minimize and distribute effects to  
28 marten and fisher."); and id. at ¶ 13

1 ("The greatest threat to fisher persistence in the northern and  
2 southern Sierra Nevada was habitat modification due to severe  
3 wildfire....").

4 The record shows that the risk of wildfire cannot be  
5 adequately addressed by projects consistent with the 2001  
6 Framework. While the 2001 Framework's 20" diameter limit and 50%  
7 minimum canopy cover may, in the abstract, generally be adequate  
8 to meet fuel reduction needs, the 2001 Framework contains a  
9 series of overlapping standards and guidelines which cumulatively  
10 mean the maximum permitted treatments levels are rarely attained.  
11 See Declaration of Bernhard Bahro [Dkt. No.270-9] at ¶ 11.

12 Moreover, as this Court has already recognized, the 2004  
13 Framework is more effective at modifying fire behavior. PRC,  
14 2008 WL 4291209, at \*17 (noting the differences in rate of  
15 spread, flame length, scorch height, and projected mortality).  
16 The 2004 Framework is also more effective at fire risk reduction  
17 than the 2001 Framework because it "provides more flexibility to  
18 strategically locate treatments across the landscape." PRC, 2008  
19 WL 4291209, at \*17. See also SNFPA 3291 (noting the 2001  
20 Framework establishes "a complex set of standards and guidelines  
21 that create an incentive to locate treatments to avoid areas  
22 where treatment intensity would be restricted," rather than in  
23 the most effective pattern for fire risk reduction).

24 Finally, contrary to Plaintiffs apparent assumption,  
25 projects developed under the 2004 Framework cannot simply be  
26 "implemented" consistent with the 2001 Framework.

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1 As Forest Service employee Angela Parker explained in her  
2 declaration during the remedy proceedings, "[m]uch of the  
3 existing NEPA analysis and wildlife surveys for these [eleven  
4 currently planned HFQLG] projects would likely not be compliant  
5 with the 2001 Framework, due to different land allocations and  
6 standards and guidelines....[, and] if new wildlife surveys and  
7 supplemental NEPA documentation were required, the cost to  
8 re-analyze these 11 NEPA documents alone would be approximately  
9 \$12 million, and the time to re-analyze these projects could take  
10 up to 18 months per project." Declaration of Angela Parker  
11 [Dkt. No.270-6] at ¶ 6. Given the cost and length of time needed  
12 to reconfigure existing projects to make them consistent with the  
13 2001 Framework, an injunction obligating the Forest Service to  
14 adhere to the 2001 Framework pending appeal is likely to be  
15 tantamount to a shut-down of major forest management projects on  
16 all eleven national forests for the duration of the appeal.

17 Thus, it is clear that the 2004 Framework allows for more  
18 effective fire reduction than its predecessor, and an injunction  
19 prohibiting the Forest Service from implementing projects  
20 consistent with the 2004 Framework will harm the Forest Service's  
21 ability to reduce fire risk and the public's interest in having  
22 such work accomplished during the pendency of Plaintiffs' appeal.

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1                   **2. The Public Interest in Implementation of the**  
2                   **HFQLG Act Pilot Project will be Harmed by an**  
3                   **Injunction Pending Appeal**

4                   An injunction pending appeal which limits the Forest Service  
5 to implementing projects consistent with the 2001 Framework would  
6 also harm the public's interest in seeing the results of the  
7 Congressionally mandated Herger-Feinstein Quincy Library Group  
8 ("HFQLG") pilot project.

9                   This Court has previously concluded that only the 2004  
10 Framework allows full implementation of the HFQLG pilot project,  
11 and the Court now concludes that full and timely implementation  
12 of the HFQLG pilot project is in the public interest. The pilot  
13 project represents a Congressionally mandated experiment designed  
14 to test several timber management techniques while promoting  
15 economic stability in local communities, and the management  
16 lessons it may teach are of value to the public at large. The  
17 project, however, has fallen far behind its congressionally  
18 established timeline, and is now - after two extensions by  
19 Congress - scheduled to end on September 30, 2012. Declaration  
20 of Angela Parker [Dkt. No.270-6] at ¶¶3-5. Yet, as of the end of  
21 2007, only about 39 percent of the pilot project acreage had been  
22 treated. Id. at ¶ 4.

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1 Given the time and expense of reconfiguring the planned HFQLG  
2 area projects to insure consistency with the 2001 Framework, *id.*  
3 at ¶ 6, an injunction lasting the duration it will likely take to  
4 resolve Plaintiffs' appeal would mean a temporary shut-down of  
5 pilot project work, and would mean the congressionally directed  
6 goals of the pilot project will not be met within the existing  
7 statutory deadline.<sup>2</sup> The public's interest in seeing pilot  
8 project work completed and in benefitting from the lessons to be  
9 learned therefore weighs strongly against an injunction pending  
10 appeal.

11  
12 **3. The Public Interest in Forest Health will be**  
13 **Harmed by an Injunction Pending Appeal.**

14 Plaintiffs' motion for an injunction pending appeal is  
15 silent as to the impacts of their request on forest health  
16 concerns beyond addressing the threat of wildfire. Their  
17 requested injunction nevertheless impacts forest health issues  
18 beyond wildfire, including the stresses caused by climate change,  
19 drought and insect damage. In order to effectively design  
20 management activities to address these forest health concerns,  
21 the Forest Service needs the flexibility to remove trees of  
22 larger diameter than allowed under the 2001 Framework and to  
23 reduce canopy cover below the levels allowed in the 2001  
24 Framework.

25  
26 <sup>2</sup> See United States Court of Appeals for the Ninth Circuit,  
27 Frequently Asked Questions, [http://www.ca9.uscourts.gov/  
28 content/view.php?pk\\_id=0000000084](http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000084), (indicating oral argument is  
approximately 12-20 months after notice of appeal and "most cases  
are decided within 3 months to a year" after oral argument).



1 See Declaration of Kathleen Morse [Dkt. No.270-5] at ¶ 3  
2 (imposition of the 2001 Framework would "impede management  
3 activity to such a degree that critical fuel reduction, forest  
4 health and ecosystem restoration objective cannot be attained");  
5 Declaration of Joe Sherlock [Dkt. No. 270-13] at ¶ 9 (responding  
6 to drought may require removal of trees over 20" in diameter and  
7 reduction of canopy cover below 50%); Declaration of Nancy Grulke  
8 [Dkt. No.270-14] at ¶ 10 ("Depending on the microenvironment and  
9 the density of the stand, it may be appropriate to harvest trees  
10 over 20" and/or reduce canopy cover less than 50% to allow the  
11 removal of a sufficient number of trees to reduce competition,  
12 promote tree health, reduce the level of drought stress  
13 experienced, and reduce tree mortality from both drought stress  
14 and bark beetle outbreaks."); and Declaration of Christopher J.  
15 Fettig Decl. [Dkt. No. 270-15] at ¶ 13 (reducing stand  
16 susceptibility to beetle infestation may require lower stand  
17 density and removal of larger trees than necessary to reduce fire  
18 risk). An injunction restricting the Forest Service to projects  
19 consistent with the 2001 Framework would restrict the ability of  
20 land managers to address the multitude of concerns involved in  
21 developing and retaining healthy and resilient forests, and given  
22 the time required to reconfigure existing projects to make them  
23 2001 compliant likely means a shutdown of major forest management  
24 projects during the duration of the appeal.

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1                   **4. Plaintiffs' Injunction Pending Appeal will Harm**  
2                   **the Local Timber and Biomass Industries.**

3                   An injunction restricting the Forest Service to  
4 implementation of projects consistent with the 2001 Framework  
5 will also harm both the local timber and local biomass industry.  
6 Reducing harvest to the levels contemplated in the 2001 Framework  
7 will lead to closures of some of the few remaining sawmills in  
8 the Sierra Nevada as well as some biomass power plants. See  
9 Declaration of Donald Golnick [Dkt. No.270-16] at ¶¶ 11, 13.  
10 This harm is not purely economic: commercial timber mills and  
11 biomass facilities provide the infrastructure necessary to remove  
12 and process forest products without which the Forest Service's  
13 ability to manage its lands is compromised. See id.

14  
15                   **5. The General Public Interest in NEPA Compliance**  
16                   **Does Not Support Plaintiffs' Motion for an**  
17                   **Injunction Pending Appeal**

18                   Plaintiffs suggest that the public interest "expressed by  
19 Congress through enactment of NEPA supports an injunction"  
20 pending appeal. Pls.' Mot. for Inj. Pending Appeal at 2. To the  
21 extent that Plaintiffs are asserting that injunctions are somehow  
22 favored where violations of NEPA are alleged they err. The  
23 Supreme Court and the Ninth Circuit have made clear that the  
24 traditional test for injunctive relief is not altered by  
25 invocation of NEPA.

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1 Winter, 129 S. Ct. at 381 (even assuming violation of NEPA, the  
2 entry of a preliminary injunction was contrary to the public  
3 interest and therefore an abuse of discretion); Lands Council v.  
4 McNair, 537 F.3d 981, 1005 (9th Cir. 2008) (en banc) (“[o]ur law  
5 does not...allow us to abandon a balance of harms analysis just  
6 because a potential environmental injury is at issue.”). Indeed,  
7 in an early round of this litigation, the Ninth Circuit found  
8 Plaintiffs had demonstrated a likelihood of success on the merits  
9 of a NEPA claim, but nonetheless remanded the matter to this  
10 Court to assess the other injunction factors, “express[ing] no  
11 opinion as to whether an injunction should issue in this action.”  
12 577 F.3d at 1024 (citation omitted).

13  
14 **6. The Balance of Harms and Public Interest Favor**  
15 **Denial of Plaintiffs’ Motion for an Injunction**  
16 **Pending Appeal.**

17 For the reasons set forth above, this Court concludes that  
18 the injunction sought by Plaintiffs is not in the public  
19 interest, and the balance of harms - which includes impacts to  
20 wildlife, fire reduction, the HFQLG pilot project, forest health,  
21 timber production, and industry and local communities - tips  
22 decidedly against the imposition of Plaintiffs’ proposed  
23 injunction. Indeed, this Court has already weighed the harms and  
24 concluded reimposition of the 2001 Framework is not appropriate:

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1 The balancing of hardships required in assessing  
2 injunctive relief does not appear to favor Plaintiffs'  
3 position...the 2004 Framework offers better long-term  
4 forest health, increased protection to species in the  
5 long run by improved forest management, reduced fire  
6 risk to people and communities, and economic benefits  
7 to stagnating forest industries in the form of  
8 increased treatment facilities.

9 Memorandum and Order, 05-cv-00205-MCE [Dkt. No. 304] at 10.

10 There is no cause to revisit this conclusion in response to  
11 Plaintiffs' Motion for Injunction pending appeal. In fact, as  
12 discussed above, Plaintiffs' arguments are even less compelling  
13 now, given the difficulty, if not impossibility, of converting  
14 2004-Framework projects to 2001-Framework projects during the  
15 pendency of the appeal and actually implementing them on the  
16 ground.

17 **II. PLAINTIFFS' REQUEST TO STAY THE FOREST SERVICE'S OBLIGATION**  
18 **TO PREPARE A SEIS BY MAY 1, 2010 IS GRANTED**

19 This Court has directed the Forest Service to complete a  
20 SEIS addressing the limited procedural defects in the 2004  
21 Framework EIS by May 1, 2010. Memorandum and Order, 05-cv-00205  
22 [Dkt. No. 304] at 14. In their motion for an injunction pending  
23 appeal, Plaintiffs also ask that this Court stay the Forest  
24 Service's obligation to prepare a SEIS to avoid expenditure of  
25 federal, state and private resources on the preparation of a  
26 document whose scope may be altered by the resolution of their  
27 appeal.

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1 Federal Defendants have indicated they do not oppose this  
2 request and acknowledge that the outcome of the Plaintiffs'  
3 appeal could alter the scope of the supplemental NEPA analysis to  
4 be prepared by the Forest Service. The Court concurs that it  
5 makes sense to postpone the expenditure of time and resources on  
6 the NEPA process until after the resolution of this matter on  
7 appeal, when the full parameters of the necessary NEPA analysis  
8 are known and can be addressed in a single document.

9 Federal Defendants have requested that, should the Court  
10 stay the obligation to prepare a SEIS, it clarify its order to  
11 make clear that the SEIS process be completed at least six-months  
12 after the stay is lifted. Otherwise, the Forest Service faces  
13 the risk that the stay is lifted shortly before or after the May  
14 1 deadline, leaving the Forest Service unable to comply with the  
15 Court's Order. The Court finds this modification appropriate.

16  
17 **CONCLUSION**  
18

19 Given the foregoing, the Court makes the following orders:

20 1. Plaintiffs' motion for an injunction pending appeal is  
21 DENIED, and

22 2. Plaintiffs' motion to stay the requirement that the  
23 Forest Service complete a SEIS by May 1, 2010, is GRANTED, and

24 3. The Forest Service is directed to complete the SEIS  
25 process six months after this Court's stay is lifted, and

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1           4.    Should the resolution of the appeal process or other  
2 intervening circumstances make compliance with the deadline for  
3 completion of the SEIS impracticable, the Forest Service shall  
4 promptly notify the Court and seek appropriate relief.

5           IT IS SO ORDERED.

6           Dated: February 26, 2010

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10 MORRISON C. ENGLAND, JR.  
11 UNITED STATES DISTRICT JUDGE  
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