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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CONSERVATION CONGRESS,
Plaintiff,
v.
UNITED STATES FOREST SERVICE,
Defendant.
and
SIERRA PACIFIC INDUSTRIES,
Defendant
Intervenor.

No. CIV. S-11-2605 LKK/EFB

ORDER

Plaintiff Conservation Congress sues defendant United States Forest Service and defendant-intervenor Sierra Pacific Industries, alleging that the Forest Service, in approving a challenged timber project, failed to adequately consider that project's impacts on the habitat of the northern spotted owl. Plaintiff's action arises under the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 *et seq.*
///

1 Plaintiff now moves for a temporary restraining order
2 enjoining the project. The parties stipulated to waive oral
3 argument (originally set for Wednesday, March 19, 2014) and
4 instead submitted the motion on the papers. (ECF No. 84.) Having
5 considered the parties' submissions and the record, the court
6 will deny the motion, for the reasons set forth below.

7 **I. BACKGROUND**

8 **A. Statutory Background**

9 The court begins by noting relevant aspects of NEPA and its
10 implementing regulations, in order to provide context for the
11 discussion that follows.

12 NEPA is intended to "ensure[] that federal agencies are
13 informed of environmental consequences before rendering decisions
14 and that the information is available to the public." Okanogan
15 Highlands Alliance v. Williams, 236 F.3d 468, 473 (9th Cir.
16 2000). "NEPA imposes only procedural requirements on federal
17 agencies with a particular focus on requiring agencies to
18 undertake analyses of the environmental impact of their proposals
19 and actions." Dep't of Transp. v. Pub. Citizen, 541 U.S. 752,
20 756-57 (2004).

21 Under NEPA, federal agencies must prepare an Environmental
22 Impact Statement ("EIS") prior to undertaking "major Federal
23 actions significantly affecting the quality of the human
24 environment." 42 U.S.C. § 4332(C). The EIS must address

25 (i) the environmental impact of the proposed
26 action,

27 (ii) any adverse environmental effects which
28 cannot be avoided should the proposal be
implemented,

- 1 (iii) alternatives to the proposed action,
2 (iv) the relationship between local short-
3 term uses of man's environment and the
4 maintenance and enhancement of long-term
5 productivity, and
6 (v) any irreversible and irretrievable
7 commitments of resources which would be
8 involved in the proposed action should it be
9 implemented.

8 Id.

9 Regulations promulgated under NEPA provide that an EIS must
10 consider "[i]mpacts, which may be (1) [d]irect; (2) indirect;
11 [or] (3) cumulative." 40 C.F.R. § 1508.25(c).¹ A "direct effect"
12 is one "caused by the action and occur[ring] at the same time and
13 place." 40 C.F.R. § 1508.8(a). An "indirect effect" is both:

14 caused by the action and ... later in time or
15 farther removed in distance, but [is] still
16 reasonably foreseeable. Indirect effects may
17 include growth inducing effects and other
18 effects related to induced changes in the
19 pattern of land use, population density or
20 growth rate, and related effects on air and
21 water and other natural systems, including
22 ecosystems.

19 40 C.F.R. § 1508.8(b). A "cumulative impact" is:

20 the impact on the environment which results
21 from the incremental impact of the action
22 when added to other past, present, and
23 **reasonably foreseeable** future actions
24 regardless of what agency (Federal or non-
25 Federal) or person undertakes such other
26 actions. Cumulative impacts can result from
27 individually minor but collectively

26 ¹ "Effects and impacts as used in these regulations are
27 synonymous." 40 C.F.R. § 1508.8. Accordingly, and in keeping with
28 the jurisprudence in this area, this order uses the terms
"effect" and "impact" interchangeably.

1 significant actions taking place over a
2 period of time.

3 40 C.F.R. § 1508.7 (emphasis added).

4 A cumulative impacts analysis "must be more than
5 perfunctory; it must provide 'a useful analysis of the cumulative
6 impacts of past, present, and future projects.'" Kern v. U.S.
7 Bureau of Land Mgmt., 284 F.3d 1062, 1075 (9th Cir. 2002)
8 (quoting Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d
9 800, 810 (9th Cir. 1999)). Nevertheless, "none of NEPA's
10 statutory provisions or regulations requires the Forest Service
11 to affirmatively present every uncertainty in its EIS." The Lands
12 Council v. McNair, 537 F.3d 981, 1001 (9th Cir. 2008) (en banc),
13 overruled on other grounds by Winter v. Natural Res. Def.
14 Council, Inc., 555 U.S. 7 (2008).

15 Review of an EIS is governed by the Administrative Procedure
16 Act ("APA"). Agency actions may be properly overturned where they
17 are "arbitrary, capricious, an abuse of discretion, or otherwise
18 not in accordance with law." 5 U.S.C. § 706(2)(A). "Review under
19 the arbitrary and capricious standard is narrow, and we do not
20 substitute our judgment for that of the agency." McNair, 537 F.3d
21 at 987 (internal quotation omitted).

22 **B. Factual & Procedural Background**

23 The following allegations are taken from (i) publicly-
24 available documents, (ii) the prior record herein, and (iii) the
25 declarations of the parties offered in support of, and in
26 opposition to, the instant motion.
27
28

1 The Mudflow Vegetation Management Project ("Mudflow
2 Project") was developed by defendant Forest Service, and is
3 directed at the McCloud Flats area of the Shasta-Trinity National
4 Forest. (MAR000195.)² The Mudflow Project is located in Siskiyou
5 County; the project is under the auspices of the Forest Service
6 office in Shasta County. (First Supplemental Complaint ¶ 10, ECF
7 No. 40.)

8 The final EIS for the Mudflow Project, dated May 2011
9 ("Final EIS"), identifies problems such as overstocking,
10 heightened risk of fire, and areas of root disease in the
11 designated Project area. (MAR000195-196.) The Forest Service
12 therein proposes to ameliorate these conditions by applying
13 various "treatments" to the area, such as thinning overstocked
14 stands of trees, sanitizing stands infected with disease,
15 restoring wet meadow ecosystems, and burning. (MAR000197.) The
16 Final EIS provides that the preferred plan would treat 2957 acres
17 (out of 13,830 total acres) in the Mudflow Project area.
18 (MAR000195.)

19 Late-successional forests, such as those found in the
20 Project area, provide habitat for the northern spotted owl. The
21 Fish & Wildlife Service listed the northern spotted owl as a
22 threatened species on January 15, 1992. 57 Fed.Reg. 1796-1838. No
23 northern spotted owls have been detected in surveys conducted in
24 the Mudflow Project area between 2004 and 2013. (MAR000585;
25 MAR0002421; MAR010628; Bachmann Decl. ¶ 5, ECF No. 85-1.)

26 ² Throughout this Order, the Forest Service administrative record
27 is cited as "MAR," followed by the relevant page number. The
28 administrative record was lodged with the court in February 2012.
(ECF No. 36.)

1 Defendant-intervenor Sierra Pacific is responsible for
2 carrying out various Mudflow Project treatments pursuant to a
3 timber sale contract with the Forest Service. (Bachmann Decl.
4 ¶ 6.)

5 Plaintiff initiated this action on October 3, 2011, naming
6 Fish & Wildlife and the Forest Service as defendants. (ECF
7 No. 1.) On November 21, 2011, Sierra Pacific moved to intervene;
8 on December 15, 2011, the court granted Sierra Pacific's motion.
9 (ECF Nos. 13, 22.)

10 On March 22, 2012, plaintiff filed the operative First
11 Supplemental Complaint. ("FSC," ECF No. 40.) The FSC set forth
12 claims under NEPA and the Endangered Species Act ("ESA"), brought
13 against Fish & Wildlife, the Forest Service, and Sierra Pacific.

14 On April 9, 2012, plaintiff moved for a preliminary
15 injunction under the ESA, claiming that the Forest Service
16 violated ESA Section 7(a)(2) by failing to engage in formal
17 consultation with Fish & Wildlife regarding the Mudflow Project.
18 (ECF Nos. 43, 44.) Plaintiff sought to enjoin both federal
19 agencies "from commencing or implementing the Mudflow Project or
20 any portion thereof until this case is fully resolved on the
21 merits." (ECF No. 45.) On June 19, 2012, the court denied the
22 motion, on the grounds that plaintiff had failed to establish a
23 probability of success on the merits of its ESA claims.

24 Conservation Congress v. U.S. Forest Service, No. CIV S-11-2605
25 LKK/EFB, 2012 WL 2339765, 2012 U.S. Dist. LEXIS 84943 (E.D. Cal.
26 Jun. 19, 2012). Specifically, the court held that neither the
27 Forest Service nor Fish & Wildlife had acted in an arbitrary and
28 capricious manner in determining that the Mudflow Project was not

1 likely to adversely affect the northern spotted owl, and on those
2 grounds, declining to enter into formal consultation. On June 13,
3 2013, the Ninth Circuit affirmed, finding that plaintiff's
4 "challenge to the district court's denial of its preliminary
5 injunction [wa]s premised on a misunderstanding of regulatory
6 terms, an unsupported reading of a duty to consider cumulative
7 effects under ESA section 7(a)(2), and selected portions of the
8 record taken out of context." Conservation Congress v. U.S.
9 Forest Service, 720 F.3d 1048, 1058 (9th Cir. 2013).

10 Subsequently, on February 10, 2014, plaintiff voluntarily
11 dismissed its ESA claims, and also dismissed Fish & Wildlife as a
12 defendant. (ECF No. 73.) At present, the Forest Service remains
13 as a defendant and Sierra Pacific remains as defendant-
14 intervenor; plaintiff's sole claim arises under NEPA.

15 To date, Sierra Pacific has completed work on approximately
16 1585 acres (out of 2957 total acres) proposed for treatment under
17 the Mudflow Project. (Bachmann Decl. ¶ 10.) Sierra Pacific had
18 previously ceased work on the Mudflow Project in mid-March 2013.
19 (Hadley Decl. ¶ 8, ECF No. 82.) On January 14, 2014, plaintiff's
20 counsel was informed that Sierra Pacific would not resume Mudflow
21 Project operations until "late summer" of 2014. (Dugan Decl. ¶ 3,
22 ECF No. 77-5.) She began working with opposing counsel on a
23 briefing schedule for cross-motions for summary judgment on
24 plaintiff's NEPA claims. (Id. ¶ 5.) On March 6, 2014, plaintiff's
25 counsel was informed that Sierra Pacific had changed its start
26 date for resuming operations, to March 13, 2014. (Id. ¶ 6.) On
27 March 11, 2014, plaintiff's counsel was informed that the date
28 had changed again, to March 24, 2014. (Id. ¶ 13.)

1 Sierra Pacific's Division Timber Manager justifies the new
2 start date as follows:

3 [Sierra Pacific] needs to resume Mudflow
4 operations now for several reasons. First,
5 whereas unusually adverse weather conditions
6 in California (severe drought followed by
7 torrential rains) have constrained [Sierra
8 Pacific]'s operations on other projects, the
9 Mudflow Project is currently operable.
10 Extremely heavy rains that have left other
11 projects with saturated soils have drained
12 from the Mudflow Project's sandy soils.
13 Because of the unusual weather constraints
14 elsewhere, [Sierra Pacific]'s logger
15 currently is without work, leaving at least
16 20 workers idle and unable to earn family
17 wages. This situation, coupled with the lack
18 of a snow pack on Mt. Shasta which bodes
19 extremely ill for the upcoming fire season
20 and likely will halt late summer operations,
21 calls for operating the Mudflow Project now.
22 (Hadley Decl. ¶ 9.)

23 On March 13, 2014, plaintiff filed the instant motion for a TRO,
24 seeking an order that would enjoin the Forest Service and Sierra
25 Pacific "from proceeding with the Mudflow timber sale pending a
26 final decision on the merits of this case. No bond is required."³
27 (Proposed Order, ECF No. 77-12.)

28 ³ While no means dispositive of the questions presented herein, it
bears mention that plaintiff is aware that this TRO is a long
shot. In its points and authorities in support of its 2012 motion
for a preliminary injunction, plaintiff wrote, "In candor, if
Conservation Congress cannot obtain preliminary injunctive relief
under the more generous standards provided by ESA, the premise of
its first two claims for relief, it would be unlikely to obtain
such relief under [NEPA], the premise of its third claim for
relief. [. . .] Conversely, because Conservation Congress
believes it satisfies the modified standard for injunctive relief
found in the ESA, arguing alternatively is unnecessary." (ECF No.
44 at 7 n. 1.) On appeal, in its opening brief to the Ninth
Circuit, plaintiff wrote, "Candidly, Conservation Congress moved
only on its ESA claims because it believed that if it could not
prevail on a motion for preliminary injunction under the more

1 **II. STANDARD**

2 The issuance of injunctions and of temporary restraining
3 orders is governed by Federal Rule of Civil Procedure 65.⁴ The
4 standard for issuing a temporary restraining order is essentially
5 the same as that for issuing a preliminary injunction. See
6 Stuhlbarg Int'l Sales Co. v. John D. Brush & Co., 240 F.3d 832,
7 839 n.7 (9th Cir. 2001) (stating that the analysis for temporary
8 restraining orders and preliminary injunctions is "substantially
9 identical"). The moving party must demonstrate that (1) it is
10 likely to succeed on the merits; (2) it is likely to suffer
11 irreparable harm in the absence of preliminary relief; (3) the
12 balance of equities tips in its favor; and (4) that the relief
13 sought is in the public interest. Winter v. Natural Res. Def.
14 Council, Inc., 555 U.S. 7, 20 (2008). The Ninth Circuit has held
15 that injunctive relief may issue, even if the moving party cannot
16 show a likelihood of success on the merits, if "serious questions
17 going to the merits and a hardship balance that tips sharply
18 toward the plaintiff can support issuance of an injunction,
19 assuming the other two elements of the Winter test are also met."
20 Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135
21 (9th Cir. 2011) (internal quotation omitted).

22 The moving party bears the burden of persuasion, and must
23 make a clear showing that it is entitled to such relief. Winter,

24
25 generous standards of the ESA, discussed below, it was unlikely
26 to do so under NEPA." (Pl. 9th Cir. Op. Br., 2012 WL 3342647 at
27 *10 n. 1.) In plaintiff's defense, it was not represented by its
28 current lead counsel at the time those briefs were authored.

⁴ Hereinafter, the term "Rule" refers to the applicable Federal Rule of Civil Procedure.

1 555 U.S. at 22.

2 In deciding whether to issue a TRO, the district court "may
3 give even inadmissible evidence [including hearsay] some weight,
4 when to do so serves the purpose of preventing irreparable harm
5 before trial." Flynt Distrib. Co. v. Harvey, 734 F.2d 1389, 1394
6 (9th Cir. 1984).

7 Every temporary restraining order must:

8 (A) state the reasons why it issued;

9 (B) state its terms specifically; and

10 (C) describe in reasonable detail – and not by
11 referring to the complaint or other document – the
act or acts restrained or required.

12 Rule 65(d)(1).

13 **III. ANALYSIS**

14 Plaintiff essentially makes two arguments for issuance of a
15 TRO: first, that the Forest Service failed to analyze the
16 cumulative impact of several major timber sales near the Mudflow
17 Project in the Final EIS, and second, that the Final EIS fails to
18 discuss cumulative impacts in any meaningful detail. These
19 arguments are addressed in turn below.

20 According to plaintiff, it is likely to succeed on the
21 merits of its NEPA claim because "[t]he Forest Service failed to
22 identify several major timber sales in the area, and failed to
23 conduct any analysis of their cumulative effects." (Mot. 19, ECF
24 No. 77.) Plaintiff claims to have identified "ongoing and
25 reasonably foreseeable timber sales in close geographic proximity
26 to the Mudflow [Project], which the Forest Service did not fully
27 identify or address in its cumulative impacts analysis." (Id.)
28

1 The timber sales in question, whose cumulative impacts plaintiff
2 claims the Final EIS does not adequately address, are termed:

- 3 1. Harris Vegetation Management Project
- 4 2. Porcupine Vegetation and Road Project
- 5 3. Thimbleberry I
- 6 4. Thimbleberry II
- 7 5. Bordertown (Mot. 20.)

8 As will be seen, plaintiff's argument does not support its
9 motion.

10 The Final EIS delineates the following cumulative effects
11 analysis area: "Cumulative effects for the northern spotted owl
12 are bounded by the Critical Habitat Unit (CHU) CA-2 which
13 encompasses approximately 89,028 acres of National Forest and
14 private lands." (MAR 000299.) A map on page 95 of the Final EIS
15 shows the Mudflow Project area in relation to CHU CA-2. (MAR
16 000300.) The Final EIS notes, accurately, that "the Mudflow
17 Project is almost entirely within" the boundaries of CHU CA-2.
18 (MAR 000301.)

19 Plaintiff does not raise a challenge under the APA to the
20 agency's determination of CHU CA-2 as the appropriate area for
21 the cumulative effects analysis (whether as arbitrary and
22 capricious, or as an abuse of discretion). Further, the Ninth
23 Circuit has recognized that challenges to the geographic scope of
24 an EIS are distinct from, rather than implicit in, a cumulative
25 impacts analysis. "In this appeal, Plaintiffs argue that the
26 geographic scope of the Service's EIS *for this project* is too
27 small. This does not appear to be a cumulative impact challenge."
28 Inland Empire Pub. Lands Council v. U.S. Forest Service, 88 F.3d

1 754, 764 (9th Cir. 1996) (emphasis in original). Finally, it is
2 well-settled that the determination of a cumulative effects
3 analysis area is a domain in which agencies are entitled to
4 deference. "Cumulative environmental impacts are, indeed, what
5 require a comprehensive impact statement. But . . .
6 identification of the geographic area within which they may
7 occur, is a task assigned to the special competency of the
8 appropriate agencies." Kleppe v. Sierra Club, 427 U.S. 390, 413-
9 14 (1976). Accord Native Ecosystems Council v. Dombeck, 304 F.3d
10 886, 902 (9th Cir. 2002) ("We acknowledge that the determination
11 of the scope of an analysis area requires application of
12 scientific methodology and, as such, is within the agency's
13 discretion") (citing Kleppe). More than twelve pages of the Final
14 EIS are devoted to an analysis of cumulative impacts within CHU
15 CA-2. (MAR000299 - MAR000312). The Forest Service therein
16 explains its choice of boundaries as follows:

17 Given the uncertainty around the [2008
18 northern spotted owl] Recovery Plan and the
19 designation of critical habitat for the
20 [northern spotted owl], the Forest [Service]
21 has chosen to use the larger and more
22 comprehensive 1992 critical habitat boundary
23 for cumulative effects analysis. This
24 boundary not only encompasses the 2008
 boundaries in this area, it also has the
 greatest probability of including as much of
 the upcoming proposed critical habitat
 boundary, expected within the next year.
 (MAR000300.)

25 This is a reasoned justification for the boundaries chosen. Given
26 the foregoing, and the absence of any argument to the contrary by
27 plaintiffs, the court declines to second-guess the Forest
28

1 Service's selection of CHU CA-2 as the appropriate cumulative
2 effects analysis area.

3 Having accepted the validity of the boundaries chosen by the
4 Forest Service, the court must reject plaintiff's argument that
5 the agency violated NEPA by failing to consider the cumulative
6 impacts of the Harris Vegetation Management Project and the
7 Porcupine Vegetation and Road Project. Defendant-intervenor
8 Sierra Pacific has provided maps showing the location of these
9 projects in relation to CHU CA-2. (Weiss Decl. Exhs. 2 & 3, ECF
10 Nos. 83-2 & 83-3.) Both Projects appear to be sited outside of
11 CHU CA-2's boundaries, and therefore, exempt from the cumulative
12 effects analysis. Similarly, while there is no question that the
13 Thimbleberry I timber harvesting project was publicly noticed on
14 October 9, 2009 (Dugan Decl. Exh. B, ECF No. 77-7), *i.e.*, well
15 before the May 2011 release of the Final EIS, nevertheless,
16 according to both the Forest Service and Sierra Pacific,
17 Thimbleberry I lies on land outside of the CHU CA-2 cumulative
18 effects analysis area. (Forest Service Oppo. 19; Sierra Pacific
19 Oppo. 20.) Accordingly, this project is also exempt from the
20 cumulative effects analysis.

21 What remains are the timber harvesting plans which plaintiff
22 terms Thimbleberry II and Bordertown. It appears that
23 Thimbleberry II was publicly noticed on January 8, 2014, and
24 Bordertown on August 1, 2013. (Dugan Decl. Exhs. A & C, ECF Nos.
25 77-6 & 77-8.) NEPA regulations define "reasonably foreseeable
26 future actions" as "[t]hose Federal or non-Federal activities not
27 yet undertaken, for which there are existing decisions, funding,
28 or identified proposals." 36 C.F.R. § 220.3. The Forest Service

1 is under no statutory or regulatory obligation to consider
2 actions which are not reasonably foreseeable in its cumulative
3 impacts analysis. Given that the Final EIS was issued on May
4 2011, the notice dates for Thimbleberry II and Bordertown
5 indicate that neither project was a reasonably foreseeable future
6 action at the time the Final EIS issued on May 2011.

7 Plaintiff also claims that "[y]et other projects are named
8 (Algoma, Moosehead, Elk, McCloud Flats), but not described or
9 analyzed" in the Final EIS. (Mot. 20.) This contention is
10 demonstrably false. A table on page 101 of the Final EIS
11 quantifies projected effects of the Algoma and Moosehead projects
12 on northern spotted owl habitat. (MAR 000306). A map on the
13 following page displays all four of the named projects in spatial
14 relation to CHU CA-2. (MAR 000307.) The accompanying text
15 provides that "[t]he USFWS consulted with the Forest on . . .
16 the . . . Algoma Vegetation Management Project[]; the other three
17 projects are in the planning and analysis stage." (Id.) Further
18 analysis of the Algoma Project is set forth on page 103 of the
19 Final EIS. (MAR000308.) As for the Elk and East McCloud Projects,
20 defendant Forest Service contends:

21 [T]he [] Final EIS explains that effects
22 analyses for the Elk and East McCloud
23 Projects were incomplete at the time of the
24 [] Final EIS, therefore the amount of habitat
25 affected, and the nature of those effects,
26 were not yet known. [MAR000101]. Forest
27 Service NEPA regulations define reasonably
28 foreseeable future actions as "Federal or
non-Federal activities not yet undertaken,
for which there are existing decisions,
funding, or identified proposals." 36 C.F.R.
§ 220.3. "Identified proposals" for Forest
Service actions are those where the Forest

1 Service "is actively preparing to make a
2 decision on one or more alternatives . . .
3 and the effects can be meaningfully
4 evaluated." 36 C.F.R. § 220.4(a)(1). Because
5 the Forest Service has not yet reached this
6 stage for either the Elk or East McCloud
7 Projects where no draft EIS had been prepared
8 yet for either project, the Forest Service
9 was not required to speculate regarding the
10 potential effects of either project. (Forest
11 Service Oppo. 20-21, ECF No. 85.)

8 The Forest Service's supporting citation to Envtl. Prot. Info.
9 Ctr. v. U.S. Forest Service, 451 F.3d 1005, 1014 (9th Cir. 2006)
10 (holding that it was not arbitrary and capricious for the Forest
11 Service to omit a project whose parameters were unknown from a
12 cumulative impacts analysis) appears apt. In short, the Final
13 EIS's treatment of the four challenged projects (Algoma,
14 Moosehead, Elk, and East McCloud) appears sufficient to meet NEPA
15 standards for a cumulative impact analysis. Plaintiff's argument,
16 that the Forest Service was required, but failed, to take these
17 projects into account in its analysis, is unavailing.

18 Plaintiff's second argument, that the Forest Service
19 "omitted any meaningful discussion of cumulative impacts from its
20 decision making" (Mot. 21), also appears to be without merit.
21 Plaintiff supports its argument by again asserting that the
22 Forest Service failed to include additional timber sales projects
23 within the cumulative effects analysis area. But as plaintiff
24 does not identify the allegedly-omitted sales projects with any
25 specificity, this assertion fails.

26 Plaintiff's final argument is difficult, if not impossible,
27 for this court to parse. It provides:
28

1 With respect to the [northern spotted owl],
2 the Forest Service concludes "[t]here will be
3 no direct effects to the northern spotted owl
4 under all action alternatives, there is no
5 activity proposed within 1/4 mile of any
6 known activity center." MAR000293. In fact,
7 the Forest Service takes the position that
8 removing understory will help [northern
9 spotted owls] fly through what it
10 characterizes as "dense and relatively
11 impassible." [sic] MAR 000293. The agency
12 asserts that the Preferred Alternative (Alt.
13 2) "will degrade 1,720 acres of existing
14 [northern spotted owl] foraging habitat by
15 reducing canopy cover but the habitat will
16 continue to function, and will be improved by
17 thinning treatments that open up the
18 understory." MAR000295. The Preferred
19 Alternative is 2,957 acres so about 60% of
20 the project would affect [northern spotted
21 owl] habitat. While the Forest Service
22 purported to evaluate the cumulative effects
23 of other areas on [northern spotted owl]
24 habitat under the ESA, it did not do so under
25 NEPA.⁵ MAR000299. Lastly, the Forest Service
26 recognized that since 2003, six projects
27 within CHU CA-2 have temporarily degraded
28 6,514 acres of foraging/dispersal habitat
(22% of the habitat). MAR000303. The Mudflow
[P]roject would degrade 6,465 more acres and
remove 673 acres, so another 22% of the CHU
will be affected. MAR000310. Despite nearly
50% of the [northern spotted owl]
foraging/dispersal habitat affected, the
Forest Service does not further evaluate
cumulative impacts. (Mot. 22-23.)

22 One can only speculate as to what this paragraph means. The
23 court's previous decision herein, as affirmed by the Ninth

24
25 ⁵ This may be a reference to a sentence in the Final EIS which
26 provides, "All private timber harvest plans must be reviewed by
27 the State of California with consultation from the U.S. Fish and
28 Wildlife Service (USFWS) under section 9 of the Endangered
Species Act for the possibilities of prohibited take."
(MAR000299.) This is the only reference to the ESA on the cited
page. It is also an inarguable statement of applicable law.


1 Circuit, made clear that plaintiff's argument therein "h[ung]
2 upon its conflation of the technical and colloquial meanings of
3 the word 'degrade.'" Conservation Congress, 2012 WL 2339765 at
4 *12, 2012 U.S. Dist. LEXIS 84943 at *38. Something similar
5 appears to be going on in this paragraph, given plaintiff's
6 interchanging of the terms "degrade" and "affect." The Final EIS
7 makes clear that "'degrading' is a categorical term used by the
8 [U.S. Fish & Wildlife Service] that does not necessarily refer to
9 a loss of habitat value. Habitat 'degradation' is used by the
10 USFWS in their [northern spotted owl] tracking system to denote
11 actions taken in habitat that maintain existing [northern spotted
12 owl] habitat functionality (i.e., 'degraded' foraging habitat
13 does remain fully functional as foraging habitat)." (MAR000303.)
14 In other words, the Forest Service's use of the term "degrade" in
15 the passages quoted by plaintiff is not alarming. And,
16 ultimately, nothing presented in the quoted paragraph convinces
17 the court that plaintiff has demonstrated any likelihood of
18 success on its cumulative impact claim under NEPA.

19 **IV. CONCLUSION**

20 In light of the foregoing, the court hereby orders that
21 plaintiff Conservation Congress's motion for a temporary
22 restraining order is DENIED.

23 IT IS SO ORDERED.

24 DATED: March 21, 2014.

25
26 
27 LAWRENCE K. KARLTON
28 SENIOR JUDGE
UNITED STATES DISTRICT COURT