UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

San Francisco Division

SPRAWLDEF, et al.,

Plaintiffs,

v.

FEDERAL EMERGENCY MANAGEMENT AGENCY, et al.,

Defendants.

Case No. 15-cv-02331-LB

ORDER GRANTING THE DEFENDANTS' MOTION TO DISMISS

Re: ECF No. 96

INTRODUCTION

In this National Environmental Policy Act ("NEPA") case, SPRAWLDEF and Sierra Club sued over the Federal Emergency Management Agency's ("FEMA") funding of a fire-prevention project in the East Bay Hills of Alameda County, California.[1] The plaintiffs allege that FEMA violated NEPA's public disclosure mandate by adopting a fire-prevention method — the "unified methodology" — that was not adequately described or analyzed.[2] The two plaintiffs therefore sued

[1] First Amended Compl. ("FAC") — ECF No. 29, ¶ 1. Record citations refer to material in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the top of documents.

[2] Id. ¶¶ 1–2.

to "require forthright environmental review of FEMA's plans to fund fire protection at the East Bay lands."[3]

In the related case Hills Conservation Network v. FEMA, et al., No. 3:15-cv-01057, the plaintiff and FEMA settled a similar dispute.[4] Under the settlement agreement, FEMA withdrew its authorization of the unified methodology and the grants funding the projects implementing it.[5] FEMA now argues — in this case — that the withdrawal of the unified methodology moots SPRAWLDEF and Sierra Club's claims.[6] The court agrees.

STATEMENT

"Residential development in the 'East Bay Hills' along the east side of the San Francisco Bay is subject to grave and unique fire threats."[7] The threats are caused by "[a] long urban-wildland interface, steep topography, accumulation of very low-moisture fuels . . . , and periodic, recurring conditions of extremely hot, dry 'Diablo' winds."[8] Nonnative tree species — including eucalyptus and Monterey pine — also contribute to the hazardous conditions.[9] Eucalyptus, with highly flammable tops "subject to torching" and "constantly shed[ding] bark [that] provides a ubiquitous fire tinder," "has increased in density and spread prolifically" in the area.[10] "Thousands of homes adjoin undeveloped natural areas which have repeatedly and disastrously been engulfed in fires."[11]

In response to these threats, defendants East Bay Regional Park District, City of Oakland, and the Regents of the University of California — each an owner of undeveloped land next to the at-

[3] Id. ¶ 3.

[4] See Compl., Case No. 3:15-cv-01057 — ECF No. 1; Notice of Settlement, Case No. 3:15-cv-01057 — ECF No. 107.

[5] Amended Record of Decision — ECF No. 96-3; Notices of Termination — ECF No. 96-2.

[6] Motion to Dismiss — ECF No. 96.

[7] FAC ¶¶ 23.

[8] Id.

[9] Id. ¶ 30.

[10] Id.

[11] Id. ¶ 23.

risk residential developments — "sought federal disaster money for activities to mitigate wildland fire hazards on public lands."[12] Before funding the projects, though, "FEMA was required to conduct [an] environmental review of the [proposed] project."[13]

FEMA issued a draft Environmental Impact Statement under NEPA.[14] "A key fire prevention goal of the draft [Impact Statement] involved replacing the highly flammable eucalyptus and pine 'overstory' with natural plant community restoration."[15] There was a "highly charged period of public comment on the draft [Impact Statement]."[16] Environmental groups like the plaintiffs here urged "place-by-place restoration of native plant communities" and protection of threatened animal species, such as the California red-legged frog, the Alameda whipsnake, and the pallid manzanita.[17] FEMA also consulted with the United States Fish & Wildlife Service; Fish & Wildlife issued a Biological Opinion (after completion of the draft Impact Statement), which analyzed the biological effects of the project.[18]

Following this period of public comment, and after Fish & Wildlife's Opinion, FEMA issued the final Environmental Impact Statement.[19] The final Impact Statement "adopt[ed] an undefined 'unified methodology'" that "was not analyzed in the draft [Impact Statement]," "not addressed in the [Fish & Wildlife] Biological Opinion, and not subjected to the public review NEPA requires."[20] The new methodology would "focus[] on temporary thinning rather than natural restoration, and by the end of 10 years complete removal to achieve both fire risk reduction and whipsnake mitigation goals."[21] The unified methodology "would be applied to portions of four

[12] Id. ¶¶ 16–18, 23, 27.
[13] Id. ¶ 4.
[14] Id. ¶¶ 2, 5, 7.
[15] Id. ¶ 5.
[16] Id. ¶ 7.
[17] Id. ¶ 32–33.
[18] Id. ¶¶ 33–36, 45–51.
[19] See id. ¶¶ 1, 2, 7–10.
[20] Id. ¶¶ 2, 9.
[21] Id. ¶ 39 (quoting FEMA's Record of Decision).

high fire risk treatment areas that are in close proximity to structures: Strawberry Canyon (UCB), Claremont Canyon (UCB), North Hills-Skyline (Oakland), and Caldecott Tunnel (Oakland)."[22]

"Despite the vagueness of the 'unified methodology,' [FEMA's] Record of Decision conclude[d] that it [was] not . . . [a] significant enough [change] to warrant supplementing the [Impact Statement] descriptions and analysis."[23] According to FEMA, the unified methodology did not substantially change the proposed action and did not create new significant circumstances warranting NEPA-review supplementation.[24] But SPRAWLDEF and Sierra Club disagree, and so they sued.

The plaintiffs allege that the unified methodology "was not analyzed in the draft [Impact Statement] and therefore fails the primary public disclosure purpose of the [Impact Statement]" under NEPA.[25] They assert that the methodology fails "to describe and weigh 'thinning' the eucalyptus versus long-term restoration of native East Bay Hills shrubs and plant communities with more manageable fire behavior characteristics."[26] They accordingly claim the defendants violated NEPA, 42 U.S.C. § 4321 et seq., "by failing to properly describe and evaluate alternatives associated with the invasive, non-native overstory species and the creation of long-term, stable native plant communities."[27] SPRAWLDEF and Sierra Club allege three broad categories of NEPA deficiencies: (1) "The vague and arbitrary 'unified methodology' fails to describe and analyze alternatives"; (2) "Failure to consider the full period and area affected by the project"; and (3) "Failure to identify inconsistencies with the Executive Order on Invasive Species."[28]

The parties in this case — and in the related Hills Conservation Network case — filed fully briefed summary-judgment motions. But before the court ruled on those motions, FEMA settled

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[22] Id. (quoting FEMA's Record of Decision).

[23] Id. ¶ 43.

[24] Id. ¶ 44.

[25] Id. ¶ 2.

[26] Id.

[27] Id. ¶ 54.

[28] Id. ¶¶ 57–82 (quoting the headings).

with the Hills plaintiff.[29] Under that agreement, FEMA withdrew the portion of the Record of Decision authorizing the unified methodology and terminated the grants to the University and Oakland implementing it.[30] FEMA and the Park District, reading SPRAWLDEF and Sierra Club's complaint as attacking only the unified methodology, now move to dismiss this case.[31] They argue that the case is moot because the unified methodology has been withdrawn and will not be implemented.[32] Oakland does not oppose the motion; the University filed its own motion to dismiss or intervene.[33]

GOVERNING LAW

A complaint must contain a short and plain statement of the ground for the court's jurisdiction (unless the court already has jurisdiction and the claim needs no new jurisdictional support). Fed. R. Civ. P. 8(a)(1). The plaintiff has the burden of establishing jurisdiction. See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994); Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co., 907 F.2d 911, 912 (9th Cir. 1990). A defendant's Rule 12(b)(1) jurisdictional attack can be either facial or factual. White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000). "A 'facial' attack asserts that a complaint's allegations are themselves insufficient to invoke jurisdiction, while a 'factual' attack asserts that the complaint's allegations, though adequate on their face to invoke jurisdiction, are untrue." Courthouse News Serv. v. Planet, 750 F.3d 776, 780 n.3 (9th Cir. 2014). Under a facial attack, the court "accept[s] all allegations of fact in the complaint as true and construe[s] them in the light most favorable to the plaintiffs." Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003). In a factual attack, the court "need not presume the truthfulness of the plaintiff's allegations" and "may review evidence

[29] Joint Motion to Vacate Hearing Date — ECF No. 85; Order — ECF No. 90; Notice of Settlement, Case No. 3:15-cv-01057 — ECF No. 107.

[30] Settlement Agreement ¶¶ 1–2; Amended Record of Decision at 4; Notices of Termination.

[31] See generally Motion to Dismiss.

[32] Id.

[33] Oakland Statement of Non-Opposition — ECF No. 100; Park District Motion to Dismiss or Intervene — ECF No. 97.

beyond the complaint without converting the motion to dismiss into a motion for summary judgment." Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004).

If a court dismisses a complaint, it should give leave to amend unless the "the pleading could not possibly be cured by the allegation of other facts." Cook, Perkiss and Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 247 (9th Cir. 1990).

ANALYSIS

1. The Plaintiffs' Challenges to the Unified Methodology Are Moot

The first issue is whether FEMA's withdrawal of the unified methodology moots any (if not all) of the plaintiffs' claims. Because FEMA withdrew that portion of the Record of Decision authorizing the methodology, terminated the grants to the University and Oakland that would have implemented it, and must go through new NEPA processes before any subsequent grants are authorized, the plaintiffs' unified methodology-based claims are dismissed as moot.

1.1 The Unified-Methodology Claims Are Moot

"[F]ederal courts have no jurisdiction to hear a case that is moot, that is, where no actual or live controversy exists." Cook Inlet Treaty Tribes v. Shalala, 166 F.3d 986, 989 (9th Cir. 1999). "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Cnty. of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) (quoting Powell v. McCormack, 395 U.S. 486, 496 (1969)). "[T]he question is not whether the precise relief sought at the time the application for an injunction was filed is still available. The question is whether there can be any effective relief." West v. Sec'y of Dept. of Transp., 206 F.3d 920, 925 (9th Cir.2000) (quoting Nw. Envtl. Defense Ctr. v. Gordon, 849 F.2d 1241, 1244–45 (9th Cir. 1988)).

The defendant's "burden of demonstrating mootness 'is a heavy one.'" Davis, 440 U.S. at 631 (quoting United States v. W.T. Grant Co., 345 U.S. 629, 632–33 (1953)). And "[m]ere voluntary cessation of allegedly illegal conduct does not moot a case; it if did, the courts would be compelled to leave [t]he defendant . . . free to return to his old ways." United States v.

Co*ncentrated Phosphate Export Ass'*n, 393 U.S. 199, 203 (1968) (quoting W.T. Grant Co., 345 U.S. at 632); see also Adarand Constructors, Inc. v. Slater, 528 U.S. 216, 222 (2000). Voluntary cessation of illegal conduct does not render a challenge to that conduct moot unless the defendant can show "(1) there is no reasonable expectation that the wrong will be repeated, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." Barnes v. Healy, 980 F.2d 572, 580 (9th Cir. 1992); see also Lindquist v. Idaho State Bd. of Corrections, 776 F.2d 851, 854 (9th Cir. 1985) (quoting Davis, 440 U.S. at 631); Adarand, 528 U.S. at 222 ("Voluntary cessation of challenged conduct moots a case . . . only if it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.").

Courts have considered at least three factors to determine whether there is a reasonable expectation that the wrong will be repeated. See Envtl. Prot. Info. Ctr. v. U.S. Forest Serv., No. C-02-2708 JCS, 2006 WL 2130905, at *5 (N.D. Cal. July 28, 2006). First, "whether the defendant has shown that a change was the result of serious deliberation and was made for convincing reasons (other than the desire to avoid litigation)." Id.; see also Armster v. United States Dist. Court for the Cent. Dist. of Cal., 806 F.2d 1347, 1359 (9th Cir. 1986) (finding defendant's concession that conduct was illegal more likely to establish mootness). Second, "the extent to which the defendant has committed not to engage in the challenged practice in the future and the degree to which any promises made are likely to be binding." Envtl. Prot. Info. Ctr., 2006 WL 2130905 at *5; see also Quincy Oil, Inc. *v. Dep't of Energy*, 620 F.2d 890, 895 (Temp. Emer. Ct. App. 1980) (concluding possibility of recurrence speculative where defendant promised to "vigorously defend" the new policy); Wilcher v. City of Wilmington, 139 F.3d 366, 370 n.2 (3d Cir. 1998) (finding defendant's reservation of its right to resume the challenged procedure did not make the case moot). And third, "whether the cessation is based on external circumstances that have made a recurrence of the challenged conduct impossible or impractical." Envtl. Prot. Info. Ctr., 2006 WL 2130905 at *5; see also Forest Serv. Employees for Envtl. Ethics v. United States Forest Serv., 408 F. Supp. 2d 916, 918–19 (N.D. Cal. 2006) (reasoning that the economic circumstances made the challenged conduct unlikely to recur).

Under those factors, in Envtl. Prot. Info. Ctr. v. U.S. Forest Serv., there was a reasonable expectation that the wrong would recur. 2006 WL 2130905 at *10. There, the plaintiff challenged a fire-management plan that the Forest Service issued without preparing an Environmental Evaluation or Environmental Impact Statement. Id. at *1. The court held that the Forest Service's plan violated NEPA and the Service subsequently withdrew it. Id. at *1–*2. The withdrawal of the plan did not, however, demonstrate that the wrongs were unlikely to be repeated. Id. at *8–10. "First, there [was] no evidence that the withdrawal of the 2005 Fire Management Plan represent[ed] a 'genuine' change in policy rather than merely a strategic move in response to the litigation." Id. at *9. The Service did not demonstrate a shift in thinking, but instead maintained that the plan complied with NEPA requirements. Id. Second, the Forest Service did not offer the "sort of assurance that might make 'absolutely clear' that there [was] no reasonable possibility of recurrence." Id. The Service's promise to conduct the appropriate NEPA process for future fire-management decisions was insufficient, "especially in light of the fact that the Forest Service failed to achieve this objective despite [previous] 'exhaustive' efforts." Id. And third, there were no relevant changes in external circumstances — "there [was] no evidence that [the subject area] no longer need[ed] a fire plan or that issuance of a fire plan [was] no longer possible." Id. at *10.

The Forest Service therefore failed to meet its burden, but the court nonetheless dismissed the case as moot because it could not grant effective relief. Id. at *12. The court reasoned that, "there [was], at most, a possibility that the Forest Service [would] issue another fire plan" requiring a NEPA-compliant evaluation. Id. If that were to happen, "it [would] be the product of a new administrative process and likely [would] raise new issues that [were] not addressed in [that] lawsuit." Id. "Such a remote and undefined future set of events is not an appropriate subject for an injunction" — any proposed relief would essentially require the Forest Service to comply with the law. Id. The court, in its discretion and because effective relief could not be granted, dismissed the case as moot. Id.

Other courts have similarly dismissed plaintiffs' NEPA claims as moot where (1) the government withdrew the challenged decision and (2) any future decision would necessarily go through NEPA's evaluation process. For example, in Wildwest Inst. v. Seesholtz, the plaintiff

challenged the Forest Service's logging projects for "fail[ing] to adequately protect the viability of wildlife species, and provide for their habitat, thereby violating NFMA and NEPA." No. CV-07-199-S-BLW, 2008 WL 3289486, at *1 (D. Idaho Aug. 8, 2008). But "the Forest Service's irrevocable withdrawal of both projects, the pending completion of a Revised Forest Plan, and the need to re-initiate the NEPA process if either project is reinitiated" mooted the plaintiff's claims and satisfied the Service's burden under the voluntary-cessation doctrine. Id. at *3. Similarly, in City of Berkeley v. United States Postal Service, the plaintiffs challenged the USPS's contract to sell a post office building, alleging "that the USPS violated NEPA by declaring a categorical exclusion in secret, and in an arbitrary and capricious manner." Nos. C 14-04916 WHA, C 14-05179 WHA, 2015 WL 1737523, at *1 (N.D. Cal. April 14, 2015). The claims became moot, however, when "(1) [the buyer] terminated the sales agreement and (2) the USPS . . . rescinded the 2013 final determination, such that if the USPS later decide[d] to relocate, it [would] go through the process all over again under 39 C.F.R. 241.4." Id. at *2. Cf. Forrestkeeper v. Benson, No. 1:14-cv-00341-LJO-SKO, 2014 WL 4193840, at *6 (E.D. Cal. Aug. 22, 2014) (concluding that plaintiff's claims were not moot where "the Forest Service may have the regulatory authority to reinstate the timber sale without engaging in a public participation process" and while "the NEPA framework for the[] [withdrawn] actions [remained] intact").

Here, like the cases above, and to the extent the complaint is based on the unified methodology, the plaintiffs' claims are moot. Under the settlement agreement in Hills Conservation Network, FEMA terminated the University and Oakland funding grants for projects utilizing the unified methodology.[34] FEMA also withdrew the portion of Record of Decision authorizing those projects and the unified methodology.[35] And the Hills settlement agreement and Amended Record of Decision require that future grants to the University and Oakland go through the NEPA evaluation process:

> FEMA agrees that any grant application for East Bay Hills fuel risk vegetation management by UCB or Oakland will be subject to additional NEPA procedures

[34] Settlement Agreement — ECF No. 96-1; Notices of Termination — ECF No. 96-2.

[35] Amended Record of Decision — ECF No. 96-3.

> including the preparation of an appropriate environmental review document, public notice, and an opportunity for public comment.[36]
>
> FEMA has determined that before it will authorize funding for East Bay Hills fuel risk vegetation management by UCB or the City of Oakland, including work within the scope of the terminated grants[,] that it will undertake additional NEPA procedures.[37]

These facts demonstrate that there is no reasonable expectation that the wrong — i.e. the implementation of the unified methodology without proper public disclosure and discussion — will be repeated. Like the cases above, FEMA has (1) withdrawn the applicable decision (or portion thereof) and the grants adopting and applying the methodology, and (2) obligated itself to undertake additional NEPA procedures before any new grants to the University or Oakland. In contrast to Envtl. Prot. Info. Ctr. and Forrestkeeper — where the district courts were not convinced by the government's promises to undertake future NEPA review procedures — FEMA's assurances here (written into two legally binding documents) provide the type of assurance making it "'absolutely clear' that there is no reasonable possibility of recurrence." Envtl. Prot. Info. Ctr., 2006 WL 2130905 at *9; Forrestkeeper, 2014 WL 4193840 at *6.

And, because FEMA withdrew the relevant part of the Record of Decision and terminated the grants, the court cannot provide effective relief. It would serve no purpose to require FEMA to go back and analyze site-by-site overstory thinning versus removal (instead of the unified methodology) at sites for which it has revoked the funding. And it is premature to order FEMA do so in any future grant — such an order could have no effect other than requiring FEMA to comply with NEPA, and such potential harm (i.e. caused by FEMA's failure to do so) is too remote. The court therefore could not grant effective relief based on SPRAWLDEF and Sierra Club's unified methodology attacks.

The court notes that the other factors often considered in these cases are not met here. For example, as in Envtl. Prot. Info. Ctr., there is no evidence that FEMA's change in course represents a "genuine" change in policy, rather than a strategic response to litigation. The change is in fact a direct response to the Hills litigation and settlement, and FEMA actually denies any

[36] Settlement Agreement ¶ 5.

[37] Amended Record of Decision at 4.

NEPA violation.[38] And like Envtl. Prot. Info. Ctr., there has been no change in circumstances making the challenged conduct impossible or unnecessary. But on this record, for the reasons above, the plaintiffs' unified methodology-based challenges are moot.

The plaintiffs argue that the cases discussed above are inapplicable because they involved projects that were terminated completely, rather than partially, and relatedly emphasize that the Park District's funding grant remains in place.[39] But mootness is analyzed claim by claim: if the plaintiffs can no longer obtain relief on a claim, that claim must be dismissed for lack of jurisdiction. See Foster v. Carson, 347 F.3d 742, 745 (9th Cir. 2003). So even if there were claims related to the Park District project (which does not apply the unified methodology), those would be analyzed separately from the claims challenging the unified methodology. Thus, the Park District's continuing project is irrelevant to the extent that the plaintiff's claims challenge the unified methodology.

1.2 The Capable-of-Repetition Exception Does Not Apply

Certain "extraordinary" cases are excepted from the mootness doctrine where the challenged conduct "is capable of repetition but evades review." Alaska Ctr. For Env't v United States Forest Serv., 189 F.3d 851, 854 (9th Cir. 1999) (citing Weinstein v. Bradford, 423 U.S. 147, 148–49 (1975)). The exception is limited to cases where "(1) the duration of the challenged action is too short to allow full litigation before it ceases, and (2) there is a reasonable expectation that the plaintiffs will be subjected to it again." Id. (quoting Greenpeace Action v. Franklin, 14 F.3d 1324, 1329 (9th Cir.1992)).

In Klamath Siskiyou Wildlands Center v. United States Bureau of Land Management, the BLM's alleged NEPA violations — subsequently withdrawn — were not the type of conduct capable of repetition but evading review. No. 05-3094-CO, 2007 U.S. Dist. LEXIS 20714, at *18–*19 (D. Or. Aug. 6, 2007). There, the challenged action was not too short to allow full litigation:

[38] Settlement Agreement, Recitals ("[D]efendants deny the allegations in the complaint and deny that any violations of NEPA or any other law occurred.")

[39] Opposition at 6, 8.

the "case was fully briefed on the merits and a Findings and Recommendation was issued before the mootness became an issue." Id. at *19. And there was no reasonable expectation that the plaintiffs would again be subject to the action: "it would be premature and unreasonable to assume that the BLM would repeat the alleged defects in the development of a new project," and the BLM could not apply the challenged decisions to any new projects because the Ninth Circuit had found them invalid. Id. The exception therefore did not apply. Id.

Here, like Klamath Siskiyou, FEMA's alleged misconduct is not capable of repetition but evading review. First, FEMA's conduct is not too short to allow litigation on the merits: the case was fully briefed for summary judgment before the mootness became an issue. Second, there is no reasonable expectation that the plaintiffs will be subject to the same alleged misconduct: FEMA has obligated itself to undergo NEPA processes for future grants and it would be premature to assume that it will engage in the same alleged misconduct in doing so. The exception therefore does not apply.

1.3 The Impact Statement's Discussion of the Unified Methodology

SPRAWLDEF and Sierra Club argue that their claim is not moot because the final Impact Statement references the unified methodology.[40] The issue is whether the Impact Statement's discussion of the methodology — despite the amendment to the Record of Decision and the termination of the relevant grants — saves the plaintiffs' claims.

The plaintiffs brought this case under the Administrative Procedure Act, which authorizes courts to "set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under the Act, courts may review a "final agency action for which there is no other adequate remedy in a court." Id. § 704. "An agency action is 'final' when (1) the agency reaches the 'consummation' of its decisionmaking process and (2) the action determines the 'rights and obligations' of the parties or is one from which 'legal consequences will flow.'" Rattlesnake Coal. v. United States Envtl.

[40] Opposition at 4, 7. The plaintiffs reiterated this argument at the October 27 hearing.

Prot. Agency, 509 F.3d 1095, 1103 (9th Cir. 2007) (quoting Bennett v. Spear, 520 U.S. 154, 177–78 (1997)). In NEPA actions, "the [government] does not take a final agency action until it completes its review of the grant application and decides to disburse the appropriated funds." Rattlesnake Coal., 509 F.3d at 1104. And "[a]bsent final agency action, there [is] no jurisdiction in the district court to review [a] NEPA claim." Id.

Here, on this record, the appropriate measure of the "consummation" of FEMA's decision-making process is the Amended Record of Decision, not the final Impact Statement. The Impact Statement discussed the unified methodology in the context of its application to the University and Oakland grants.[41] But the withdrawal of those grants renders the Impact Statement's discussion of the methodology an "action" that (1) does not affect the parties' rights and (2) from which legal consequences will not flow. FEMA's final determination — reflected in the Amended Record of Decision and surviving portions of the Impact Statement — does not fund the methodology. And FEMA cannot simply rely on the Impact Statement to implement the methodology in the future: both the Hills settlement agreement and the amended Record of Decision obligate FEMA to undertake appropriate NEPA review before awarding future grants.[42]

It is thus too late to challenge the previously contemplated use of the methodology — FEMA's final decision terminated the relevant grants. It is also too early to challenge any future use — FEMA must review and take (new) final action regarding future applications before they can be contested. The final Impact Statement's discussion of the unified methodology accordingly has no effect on the plaintiffs' claims; that agency action is not "final" and not reviewable under the Administrative Procedure Act.

* * *

In sum, to the extent that the plaintiffs' claims challenge the unified methodology, they are moot. The court next considers which of the plaintiffs' claims attack the methodology.

[41] FAC ¶ 39.

[42] Settlement Agreement ¶ 5; Amended Record of Decision at 4.

2. All of the Plaintiffs' Claims Are Moot

The plaintiffs make two general arguments: (1) the complaint does not simply challenge the unified methodology, but more broadly insufficient comparison between "thinning and overstory removal" alternatives in FEMA's Impact Statement; and (2) with the termination of the University and Oakland grants, the Impact Statement is now more deficient than before.[43] These arguments raise two legal issues: first, whether the FAC includes claims distinct from the challenges to the unified methodology; and second, whether the plaintiffs should be allowed to amend or supplement their FAC.

2.1 The Plaintiffs' Claims Attack Only the Unified Methodology

In the FAC, the plaintiffs allege that FEMA violated NEPA "by failing to properly describe and evaluate alternatives associated with the invasive, non-native overstory species and the creation of long-term, stable native plant communities."[44] By failing to do so, they allege, FEMA "failed to provide a 'full and fair discussion' of the environmental implications of its federal grant funding."[45] The alleged failures fall into three broad groups of allegations.

In the first group, the plaintiffs allege that the "vague and arbitrary 'unified methodology' fails to describe and analyze alternatives."[46] They assert that "[b]ecause of the [final Impact Statement's] sudden adoption of the vague 'unified methodology,' i[t] fails to directly evaluate — head-to-head — the alternative benefits and consequences between merely thinning eucalyptus versus complete removal followed by long-term re-establishment of native plant communities with less extreme fire behavior."[47] The plaintiffs also allege that the final Impact Statement failed to take into account Fish & Wildlife's Biological Opinion.[48] According to them, FEMA should have

[43] Opposition at 4, 6, 7, 10.
[44] FAC ¶ 54.
[45] Id. ¶ 56.
[46] Id. at 10 (heading).
[47] Id. ¶ 57.
[48] Id. ¶¶ 58–64.

supplemented the final Impact Statement to incorporate the Biological Opinion's findings, but that it failed to do so when it did not "discuss the differences between overstory 'thinning' versus complete removal and native restoration and the clearly different and significant potential impacts of these alternatives, which the Biological Opinion identified."[49] The final Impact Statement "lack[ed] description of the 'unified methodology,' [and] omit[ted] analysis of [the] vaguely-described thinning alternative."[50] Read as a whole, these allegations challenge only the analysis and application of the unified methodology and are moot.

In the second group of allegations, the plaintiffs assert that FEMA failed "to consider the full period and area affected by the project."[51] These allegations attack the FEMA grants' time and acreage limits (i.e. the project duration and the covered land areas), and how these measurements differ from Fish & Wildlife's and the Park District's 2010 Plan.[52] The plaintiffs explain the importance of the time and acreage limits:

> 69. Time and acreage limits resulted in an incomplete analysis for fire hazard reduction, long-term vegetation management to create habitat for three federally protected species, and for undeveloped lands that are dedicated in perpetuity as parkland. While called a "unified" approach, it is not. Whatever it might be called, the final EIS is a significant, unanalyzed departure from the project analyzed by the Park District in its 2010 EIR for its activities, and from the earlier draft EIS.
>
> 70. Failure to consider the project impacts beyond the 10-year funded window ignored reasonably likely natural evolution after the 10 years, during which time native communities will again by subject to the invasive overstory. Fire risk is certain to be altered for better or worse depending upon which never-presented alternatives are chosen for maintaining or not maintaining the project area.[53]

Like the first group, these assertions challenge the unified methodology: the final EIS's unified methodology did not address Fish & Wildlife's or the Park District's considered time and acreage limits. In doing so, the unified methodology departed from the Park District's 2010 Plan — the basis for the methodology[54] — and the draft Impact Statement. To the extent that these alleged

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[49] Id. ¶ 63–64.

[50] Id. ¶ 62.

[51] Id. at 11 (heading).

[52] Id. ¶¶ 66–70.

[53] Id. ¶¶ 69–70.

[54] Id. ¶ 58.

deficiencies are about the unified methodology, the claim is moot because the methodology is no longer being applied.

In the third group, the plaintiffs assert that FEMA failed "to identify inconsistencies with the Executive Order on Invasive Species."[55] The FAC generally describes the Executive Order and regulations,[56] and alleges that FEMA did not comply because it did not "analyze the project implications to the invasive eucalyptus overstory."[57] The FAC goes on to specify what is wrong with FEMA's final analysis:

> 80. The "unified methodology" considered in the [final] EIS, promotes the spread of eucalyptus because it allows its re-growth throughout "unified" project areas after the 10-year FEMA period. Along with future native habitat degradation, the dangerous fire conditions arising from eucalyptus will return.
>
> 81. A proper area-by-area comparison between thinning versus restoration of the native understory is necessary to comply with the Executive Order, including in the fuel break areas where nonnative grasses would proliferate.[58]

Again, as above, these allegations challenge the unified methodology. The assertions do not, for example, address any supposed deficiencies in the Park District's project, or the remaining portion of the Oakland project.[59] In their opposition brief, the plaintiffs contest FEMA's argument that the FAC's allegations all relate to the unified methodology, and point to paragraph 71, "which says nothing of the unified methodology."[60] Although true — paragraph 71 merely introduces the Executive Order — the remainder of the allegations (specifically, the factual ones[61]) make clear that the challenge is to the unified methodology's alleged deficiencies. These allegations, then, are also moot.

There are, however, two potential claims that fall outside of these three broad categories. The first relates to the final Impact Statement's discussion of "fuel break" areas.[62] SPRAWLDEF and

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[55] Id. at 12 (heading).

[56] Id. ¶¶ 71–74, 76–78.

[57] Id. ¶ 75.

[58] Id. ¶¶ 80–81.

[59] See Amended Record of Decision at 4 (identifying the remaining grants).

[60] Opposition at 6 n.1.

[61] FAC ¶¶ 75, 80–81.

[62] Id. ¶¶ 8, 65, 68.

Sierra Club allege that the Impact Statement "consider[ed] residential-edge fuel breaks of sufficient width in combination with homeowner defensible space to provide safe access for firefighters defending ember[-]resistant homes."[63] The fuel break areas included more than 1,500 acres and "would be converted to a mosaic of native shrubs and grass along the residential interface."[64] But the final Impact Statement allegedly "failed to analyze alternatives in light of the Biological Opinion where it vaguely sets out 'fuel break' areas."[65] And, the Park District's 2010 Plan — on which the unified methodology was based — did not discuss "the vital question of 'fuel breaks,'" but such fuel breaks were included in the final Impact Statement.[66] These assertions, read in conjunction with the rest of the complaint, also relate to the unified methodology and the now-terminated University and Oakland grants.

The second relates to the final Impact Statement's failure "to evaluate omitting the Frowning Ridge area."[67] FEMA allegedly arbitrarily removed the University's "grant funding for work at Frowning Ridge."[68] SPRAWLDEF and Sierra Club assert that a lack of fuel management at the Ridge will increase overall fire risk to residential areas and reduce habitat restoration potential.[69] And, they say, the final Impact Statement did not evaluate the effects on the overall project of removing fuel management funding at the Ridge.[70] But when the court asked the parties about the analysis of Frowning Ridge during the October 27 hearing, the plaintiffs did not identify these allegations as separate from those concerning the unified methodology. The plaintiffs instead maintained that their challenge is to the Impact Statement's adoption of the methodology and its failure to analyze thinning versus restoration. The court therefore construes the Frowning-Ridge allegations as a part of that challenge, and these assertions are accordingly moot.

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[63] Id. ¶ 25.
[64] Id. ¶ 26.
[65] Id. ¶ 65.
[66] Id. ¶ 68.
[67] Id. ¶ 67.
[68] Id. ¶ 10.
[69] Id.
[70] Id.

2.2 Leave to Amend or Supplement the FAC Is Denied

The FAC attacked only the disclosure and discussion of overstory removal versus thinning embodied in the unified methodology (see above). But the plaintiffs' opposition indicates an intent to assert and prosecute new claims that do not find support in the FAC. For example, they appear to challenge the evaluation of the Park District's project: they assert that because the Park District's project is moving forward unchanged, so too should their case.[71] And they allege that FEMA's withdrawal of the unified methodology renders the projects "now even more confused" and requires "an EIS re-do."[72] The court construes these arguments as a plea to amend or supplement the FAC.

Under Federal Rule of Civil Procedure 15(a), leave to amend should be given freely "when justice so requires." Fed. R. Civ. P. 15(a); *see Sonoma Cnty. Ass'n of Retired Employees v.* Sonoma Cnty., 708 F.3d 1109, 1118 (9th Cir. 2013). Because "Rule 15 favors a liberal policy towards amendment, the nonmoving party bears the burden of demonstrating why leave to amend should not be granted." Genentech, Inc. v. Abbott Labs., 127 F.R.D. 529, 530–31 (N.D. Cal. 1989). Courts generally consider five factors when assessing the propriety of a motion for leave to amend: undue delay, bad faith, futility of amendment, prejudice to the opposing party, and whether the party has previously amended the pleadings. Ahlmeyer v. Nev. Sys. of Higher Educ., 555 F.3d 1051, 1055 n.3 (9th Cir. 2009).

Undue delay by itself is generally an insufficient justification to deny leave to amend. Bowles v. Reade, 198 F.3d 752, 758 (9th Cir. 1999). Thus, even when there is delay, there must also be a showing of "prejudice to the opposing party, bad faith by the moving party, or futility of amendment." Id. The plaintiff's knowledge of — but failure to assert — the relevant facts and claims at the time of earlier pleadings may also weigh in favor of denying leave to amend. See Kaplan v. Rose, 49 F.3d 1363, 1370 (9th Cir. 1994). But "[p]rejudice to the opposing party is the most important factor." Jackson v. Bank of Hawaii, 902 F.2d 1385, 1387 (9th Cir. 1990).

[71] See, e.g., Opposition at 6, 8, 11.

[72] Id. at 10; see also id. at 8.

Supplemental pleadings are governed by Rule 15(d). Under that rule, and with the court's permission, a party may supplement pleadings to add "[n]ew claims, new parties, and [new] allegations regarding events that occurred after the original complaint was filed." Lyon v. United States Immigration & Customs Enforcement, 308 F.R.D. 203, 214 (N.D. Cal. 2015). "The legal standard for granting or denying a motion to supplement under Rule 15(d) is the same as for amending one under 15(a)." Id. (quoting Paralyzed Veterans of America v. McPherson, No. C 06-4670 SBA, 2008 WL 4183981, at *26 (N.D. Cal. Sept. 9, 2008)).

Here, the court denies leave to amend the FAC to add new charges against the Park District's project. The plaintiffs unduly delayed asserting these claims: despite their awareness of FEMA's Park District-project analysis when they filed their complaint over one-and-a-half years ago, SPRAWLDEF and Sierra Club waited until now (post-summary judgment) to challenge the Park District's project. They could have prosecuted any challenge to the project. They instead previously focused their arguments on the disclosure and analysis of the unified methodology. To allow the plaintiffs to add new challenges — at this stage in the litigation — would prejudice the defendants by shifting the focus of the case and forcing them to undertake a new course of defense.

The court also denies leave to supplement the FAC. The plaintiffs' argue that the withdrawal of the unified methodology has rendered the Impact Statement "even more confused on the necessary habitat creation."[73] But, as described above, the plaintiffs' claims have focused on attacking the unified methodology — including its alleged failure to consider Fish & Wildlife's Biological Opinion. The court cannot see how withdrawal of the methodology and those grants renders the Impact Statement "more confused" than before. The court therefore denies the plaintiffs leave to assert that "FEMA's disowning of its own 'unified methodology' requires an EIS re-do."[74]

[73] Id. at 10.

[74] Id.

CONCLUSION

The court grants the defendants' motion to dismiss and dismisses the plaintiffs' complaint with prejudice.

Because the court dismisses the allegations against FEMA, the court also dismisses the claims asserted against the Park District, Oakland, and the University. The court denies the University's motion to intervene as moot.

This disposes of ECF Nos. 96 and 97.

IT IS SO ORDERED.

Dated: November 15, 2016

LAUREL BEELER
United States Magistrate Judge

United States District Court
Northern District of California