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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CONSERVATION CONGRESS,
Plaintiff,
v.
UNITED STATES FOREST SERVICE,
and UNITED STATES FISH AND
WILDLIFE SERVICE,
Defendants,
and
TRINITY RIVER LUMBER COMPANY,
Defendant
Intervenor.

No. 2:13-cv-01977-JAM-DB

FINAL JUDGMENT

On February 17, 2017, the Court entered its Order on the Motions for Summary Judgment ("Merits Order"). ECF No. 121. The Court granted Federal Defendants' and Intervenor's Motions with respect to the Second, Third, Fifth, Sixth, Seventh, Eighth, and Ninth Claims for Relief and the Supplemental Complaint and denied Plaintiff's Motion with respect to those claims. The Court granted Plaintiff's Motion with respect to the First and Fourth Claims for Relief. The Court then ordered supplemental briefing

1 on the appropriate remedy in this case and held a hearing on this
2 issue on May 16, 2017. The Court has reviewed the parties'
3 briefs for the original and supplemental motions, the evidence
4 submitted therewith, as well as the proposed orders, and is fully
5 advised. This Judgment Order incorporates the facts, reasoning,
6 and conclusions contained in the Merits Order.

7 **I. Remand**

8 The Court's Merits Order found the Forest Service violated
9 the National Environmental Policy Act (NEPA), for which the
10 presumptive remedy is a remand to the agency for additional
11 explanation or investigation. Fla. Power & Light Co. v. Lorion,
12 470 U.S. 729, 744 (1985). The parties do not dispute, and the
13 Court agrees, that a remand to the agency is appropriate. ECF
14 No. 125 at 1; ECF No. 129 at 2-3; ECF No. 130 at 23.
15 Instructions on remand are included under "Final Judgment,"
16 *infra*.

17 **II. Vacatur**

18 Whether to vacate an agency action "depends on how serious
19 the agency's errors are 'and the disruptive consequences of an
20 interim change that may itself be changed.'" Cal. Cmty. Against
21 Toxics v. U.S. E.P.A., 688 F.3d 989, 992 (9th Cir. 2012) (quoting
22 Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d
23 146, 150-51 (D.C. Cir. 1993)).

24 The Court finds that vacatur of the Smokey Project Decision
25 Notice/Finding of No Significant Impact (DN/FONSI) is not
26 warranted. On the whole, the Court found that USFS complied with
27 its NEPA obligations; Plaintiff lost its Motion for Summary
28 Judgment on the majority of its claims. Two of the deficiencies

1 the Court found—the unclear LOPs and failure to address past
2 monitoring efforts—were not, in these circumstances, serious
3 errors. The flaws will be cured on remand and Plaintiff will
4 have an opportunity to respond to the supplemental documents.
5 See Cal. Cmty. Against Toxics, 688 F.3d at 993 (“[A]ny
6 disadvantage petitioners suffered can be corrected on remand when
7 they will have an opportunity to comment meaningfully on the
8 documents.”). The changes are unlikely to affect the project
9 design or decision. See Pollinator Stewardship Council v. U.S.
10 E.P.A., 806 F.3d 520, 532 (9th Cir. 2015) (“We have also looked
11 at whether the agency would likely be able to offer better
12 reasoning or whether by complying with procedural rules, it could
13 adopt the same rule on remand, or whether such fundamental flaws
14 in the agency’s decision make it unlikely that the same rule
15 would be adopted on remand.”).

16 The Court does view the failure to consider a large diameter
17 cap as a serious error. However, vacatur is subject to equitable
18 considerations and the Court does not find it just to vacate the
19 entire decision—which was largely supported by the administrative
20 record—on this basis. See Pollinator Stewardship Council, 806
21 F.3d at 532 (quoted above); Sierra Forest Legacy v. Sherman, 951
22 F. Supp. 2d 1100, 1106 (E.D. Cal. 2013) (“[T]he determination of
23 when to remand without vacatur should not be limited to
24 situations where it is necessary to avoid environmental harm, but
25 should instead be based on a broader examination of the
26 equities.”); Cal. Cmty. Against Toxics, 688 F.3d at 993 (“A
27 flawed rule need not be vacated. Indeed, when equity demands,
28 the regulation can be left in place while the agency follows the

1 necessary procedures to correct its action.") (citations
2 omitted). The broad consequences of vacatur are unwarranted. A
3 remedy tailored to the facts of this case and the Court's Merits
4 Order is the more equitable and just result.

5 **III. Injunctive Relief**

6 A plaintiff seeking injunctive relief to remedy a NEPA
7 violation must demonstrate: (1) that it has suffered an
8 irreparable injury; (2) that remedies available at law, such as
9 monetary damages, are inadequate to compensate for that injury;
10 (3) that, considering the balance of hardships between the
11 plaintiff and defendant, a remedy in equity is warranted; and
12 (4) that the public interest would not be disserved by a
13 permanent injunction. Monsanto Co. v. Geertson Seed Farms, 561
14 U.S. 139, 156-57 (2010).

15 Although an injunction is a drastic remedy and generally
16 disfavored where vacatur is sufficient to redress a plaintiff's
17 injury, see Monsanto Co., 561 U.S. at 165-66, a tailored
18 injunction is the appropriate remedy in these circumstances. As
19 noted above, the failure to address or consider a large diameter
20 cap was a serious error. See 40 C.F.R. § 1502.14 (Alternatives
21 analysis "is the heart of the environmental impact statement.");
22 Merits Order at 31-37. An injunction that prevents the removal
23 of large diameter trees while the agency corrects the NEPA
24 analysis will address this deficiency and ensure that the Project
25 does not proceed in a manner that precludes the possibility of
26 the agency adopting a diameter cap. This outcome accounts for
27 the agency's error while also permitting some progress on the
28 Project in the interim.

1 The Court finds that absent a narrow injunction Plaintiff
2 will suffer an irreparable injury not compensable by monetary
3 damages. “[E]nvironmental injury, by its nature, can seldom be
4 adequately remedied by money damages and is often permanent or at
5 least of long duration, i.e., irreparable.” League of Wilderness
6 Def. v. Connaughton, 752 F.3d 755, 764-65 (9th Cir. 2014). The
7 felling of the large diameter trees cannot be remedied easily if
8 at all. See id. (“The logging of mature trees, if indeed
9 incorrect in law, cannot be remedied easily if at all.”). The
10 Court acknowledges that, as Defendants and Intervenor argue,
11 Plaintiffs have not established that cutting those trees will
12 result in irreparable harm to the northern spotted owl. A
13 contrary finding could not flow from the Court’s conclusion that
14 the decision not to prepare an EIS was not arbitrary or
15 capricious. Merits Order at 24-28. Instead, the Court is
16 satisfied that the irreparable harm prong is met by the
17 procedural harm Plaintiff suffered coupled with the permanent
18 removal of trees that may be unnecessary to achieve the Project’s
19 purpose and need. See Today’s IV, Inc. v. Fed. Transit Admin.,
20 2014 WL 5313943, at *20-22 (C.D. Cal. Sep. 12, 2014)
21 (“[P]rocedural harm is insufficient by itself to warrant an
22 injunction.”) (finding irreparable harm where agency failed to
23 adequately address alternative constructive methods; construction
24 would preclude later use of the plaintiffs’ preferred
25 alternative, construction would be disruptive, and plaintiffs
26 would be denied an opportunity to participate in a meaningful
27 NEPA process). Between the evidence submitted on the summary
28 judgment motions and that submitted with the supplemental briefs,

1 the irreparable harm prong is met. See ECF No. 103-1, 2, & 3
2 (Declarations of Conservation Congress members); ECF No. 125-1,
3 2, 4, & 5 (Supplemental Declarations).

4 The balance of the hardships and public interest support a
5 narrow injunction. The injunction will address Plaintiff's
6 interests in seeing the agency consider (briefly or in detail) a
7 large diameter cap and receiving an opportunity to participate in
8 that analysis. The Defendants' and Intervenor's interests in
9 seeing the Project move forward are accounted for in the narrow
10 scope of the injunction. The parties may apply to dissolve the
11 injunction once USFS satisfies its NEPA obligations. A narrow
12 injunction also accounts for the public's interest. The Court
13 makes no finding with respect to the competing accounts of
14 whether the removal of large trees will abate fire risk.
15 However, in the absence of an imminent threat and because the
16 Project may proceed in limited form, the public's interest in
17 requiring agencies to follow NEPA procedures and make well-
18 informed decisions in managing the nation's forests favors
19 injunctive relief.

20 There is a concern, however, that an injunction imposing an
21 18 inch dbh diameter cap will hurt the Project's economic
22 viability and effectively halt all operations this year. See
23 Taylor Decl., ECF No. 131; Williams Decl., ECF No. 129-1.
24 Defendants submitted evidence that USFS is presently considering
25 diameter caps of 18, 20, and 24 inches and—based on preliminary
26 analysis and assuming the Project's other parameters stay the
27 same—has found that an 18 inch cap would drastically reduce the
28 timber volume. Williams Decl. at ¶¶ 28-31. Increasing the

1 diameter cap by 2 inches is expected to increase the number of
2 acres treated from 18 acres to 246 acres and the timber produced
3 from 3,189 CCF to 4,368 CCF. Williams Decl. at ¶¶ 28-31.
4 Although the Court cannot determine that this difference is
5 sufficient to ameliorate the economic harm Intervenor is
6 concerned with, a 20 inch dbh diameter cap should at least afford
7 Defendants and Intervenor more leeway in finding ways to move
8 forward with the Project while USFS completes the NEPA analysis.
9 At the May 16, 2017 hearing, Defendants and Intervenor also
10 indicated that if the Court were to grant limited injunctive
11 relief, they preferred a 20 inch dbh cap over an 18 inch dbh cap.

12 **IV. Final Judgment**

13 Based on the foregoing, the Court remands the Project to
14 USFS. ECF No. 121. Although courts typically refrain from
15 issuing instructions on remand, the parties each proposed
16 instructions which were discussed in detail at the hearing.
17 Based on those recommendations the Court instructs as follows:

18 1. USFS shall prepare supplemental NEPA analysis that
19 cures the NEPA violations identified in the Court's Merits Order
20 and complies with the applicable statutes;

21 2. Should USFS conclude that no EIS is required, USFS
22 shall circulate the analysis and draft revised DN/FONSI to the
23 public;

24 3. USFS shall accept objections for a 20-day period from
25 any party eligible to object under 36 C.F.R. § 218.5 (USFS is not
26 required to accept public comment during remand other than during
27 the objection period specified herein); and


28 4. USFS shall complete its supplemental NEPA documentation

1 and public involvement process no later than December 1, 2017.

2 The Court further orders that Defendants and Intervenor are
3 enjoined from removing any trees with 20 inches dbh or greater in
4 implementing the Project. The Court will retain jurisdiction to
5 dissolve this limited injunction upon a showing that USFS has
6 complied with this Court's Order and satisfied its obligations
7 under NEPA. The Court declines to vacate the DN/FONSI or require
8 USFS to cancel its contract with Intervenor.

9 IT IS SO ORDERED.

10 Dated: May 26, 2017

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12 JOHN A. MENDEZ,
13 UNITED STATES DISTRICT JUDGE
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