UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

TONGASS CONSERVATION SOCIETY; SIERRA CLUB; NATURAL RESOURCES DEFENSE COUNCIL; GREENPEACE, INC., CENTER FOR BIOLOGICAL DIVERSITY; and CASCADIA WILDLANDS PROJECT,	)	
Plaintiffs,	)	
vs.	)	**1:09-cv-00003 JWS**
FORREST COLE, in his official capacity as Forest Supervisor, Tongass National Forest; UNITED STATES FOREST SERVICE; and UNITED STATES DEPARTMENT OF AGRICULTURE,	)	**ORDER AND OPINION**
Defendants.	)	**[Re: Motion at Docket 33]**

I. MOTION PRESENTED

At docket 33, plaintiffs Tongass Conservation Society, *et al.* ("plaintiffs") move for summary judgment on their claims for declaratory and injunctive relief pursuant to Federal Rule of Civil Procedure 56. At docket 39, defendants Forrest Cole, Forest Supervisor, Tongass National Forest, *et al.*, ("defendants") oppose the motion. Plaintiffs reply at docket 42. Oral argument was not requested, and it would not assist the court.

II. BACKGROUND

The subject of this action is the Orion North timber sale, which is part of the Sea Level timber sale, in the Tongass National Forest. In May 1999, the Forest Service issued a Final Environmental Impact Statement ("EIS") for the Sea Level timber sale. The "Purpose and Need" section of the EIS stated that the Sea Level timber sale was intended to meet objectives set forth in the Tongass Land Management Plan as revised in 1997 ("TLMP"), including:

- improve timber growth and productivity on suitable timber lands made available for timber harvest, and manage these lands for long-term sustained yield of timber,
- contribute to a timber supply to meet market demand, and
- provide opportunities for local employment in the wood-products industry, which in turn contribute to the local and regional economies of Southeast Alaska.[1]

On May 3, 1999, the Forest Service signed a Record of Decision ("ROD") authorizing the Sea Level timber sale and construction of necessary roads. The Sea Level timber sale, which is comprised of numerous timber sales, including the Orion North timber sale, is projected to harvest about 1,828 acres of commercial forest land, provide approximately 51 million board feet ("MMBF") of timber, and involve construction of 29 miles of new road and reconstruction of 14 miles of existing road.[2]

The Orion North timber sale was initially awarded in 2003 and then canceled in 2007.[3] In 2007, a settlement agreement in several related cases[4] prohibited logging in inventoried roadless areas in the Tongass National Forest, including Orion North, until after the Forest Service completed an amendment to the TLMP. The settlement agreement specifically provided that the Forest Service would not offer Orion North for sale until 30 days after the TLMP Amendment was completed. In January 2008, the

---

[1]Doc. 10, exh. 1 at p. 4.

[2]Doc. 10, exh. 2 at p. 5.

[3]Doc. 4, exh. 37 at p. 3.

[4]Case Nos. 1:03-cv-0029 (JKS), 1:04-cv-0010 (JKS), 1:04-cv-0029 (JKS), and 1:06-cv-0005 (JKS).

Forest Service issued the EIS and signed the ROD for the TLMP Amendment, with an effective date of March 17, 2008.

On May 14, 2008, the District Ranger for the Ketchikan/Misty Fjords Ranger District completed a Change Analysis advising the Forest Supervisor that the District was preparing to reoffer the Orion North timber sale authorized in the Sea Level timber sale ROD.[5] The Change Analysis concluded that since the December 2, 1999 analysis, "[n]o additional modifications have occurred that would result in additional environmental effects"[6] and recommended that the Forest Supervisor find that the Orion North "Reoffer" timber sale was consistent with the Amended TLMP.

By letter dated September 9, 2008, plaintiffs requested the Forest Service to delay offering the Orion North Reoffer timber sale and road construction contract until after the Forest Service prepared a supplement to the Sea Level EIS.[7] Plaintiffs argued that "revisions to the deer habitat capability model and developments related to wolf viability, invasive species, yellow cedar decline and climate change, changes in timber economics and market demand, endemism, and intact habitat present significant new information that should be analyzed in a supplemental environmental impact statement."[8]

On September 19, 2008, the Forest Supervisor signed a Supplemental Information Report ("SIR") for the Orion North Reoffer timber sale, concluding that there was no significant new information that required preparation of a supplemental environmental impact statement ("SEIS").[9] On the same day, the Forest Service awarded a public-works roads contract "for the reconstruction and construction of

---

[5]Doc. 4, exh. 30 at p. 1.

[6]*Id.*

[7]Doc. 4, exh. 34 at p. 1.

[8]*Id.*

[9]Doc. 4, exh. 37 at p. 8.

specified roads necessary to access the timber required to be removed on the Orion North timber sale."[10]

On March 3, 2009, plaintiffs filed this action seeking declaratory and injunctive relief pursuant to 5 U.S.C. §§ 702, 706(2)(A) and 42 U.S.C. § 4332.[11] Plaintiffs ask the court to "[e]nter a declaratory judgment that Defendants' decision to proceed with the Sea Level Roads contract and the Orion North Reoffer timber sale without preparing a supplement to the Sea Level [EIS] was arbitrary, unreasonable and contrary to NEPA."[12] Plaintiffs also request "permanent injunctive relief to prevent implementation of the Sea Level roads and the Orion North Reoffer timber sale."[13]

Plaintiffs filed a motion for preliminary injunction on March 3, 2009.[14] By order dated April 30, 2009, the court denied plaintiffs' motion for a preliminary injunction on the grounds that plaintiffs failed to show that they were likely to succeed on the merits of any of their proffered arguments.[15] Plaintiffs appealed. The Ninth Circuit Court of Appeals affirmed this court's order in a decision dated August 31, 2009, concluding that the district court did not abuse its discretion in denying preliminary injunctive relief and expressing no view on the merits of the complaint.[16]

The Orion North Reoffer timber sale contract was awarded to Pacific Log & Lumber on July 13, 2009.[17] The timber sale is projected to initially harvest approximately 4.36 MMBF of timber from 204.9 acres.[18] The Orion North Reoffer timber

---

[10]Doc. 10, exh. 3 at p. 6.

[11]Doc. 1.

[12]Doc. 1 at p. 10.

[13]*Id*.

[14]Doc. 4.

[15]Doc. 16.

[16]Doc. 46-2.

[17]Doc. 45.

[18]Doc. 33, exh. 37 at p. 2. An additional 31.4 acres will be cleared for roads. *Id.*

sale will involve approximately 4.82 miles of new road construction, 1.91 miles of road reconstruction, and 1.03 miles of temporary road construction. Road construction is underway. As of October 2, 2009, approximately 1.3 miles of new road construction and 1.91 miles of reconstruction had been completed.[19] However, "it is unlikely harvest will commence before next spring" as the contractor has not requested the requisite pre-work conference or mobilized harvesting equipment.[20]

III. APPLICABLE LEGAL STANDARDS

This action arises under the Administrative Procedures Act ("APA"), which provides for judicial review of final agency action.[21] Under the APA, the court "will reverse the agency action only if the action is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law."[22] "An agency's action is arbitrary and capricious if the agency fails to consider an important aspect of a problem, if the agency offers an explanation for the decision that is contrary to the evidence, if the agency's decision is so implausible that it could not be ascribed to a difference in view or be the product of agency expertise, or if the agency's decision is contrary to the governing law."[23] "The determination whether the [agency] acted in an arbitrary and capricious manner rests on whether it 'articulated a rational connection between the facts found and the choice made.'"[24] The scope of review is narrow, and the court may not substitute its judgment for that of the agency.[25]

---

[19]Doc. 45.

[20]*Id.*

[21]5 U.S.C. §§ 701-706.

[22]*Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005) (citing 5 U.S.C. § 706(2)).

[23]*Id.* (internal citation omitted).

[24]*Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 793 (9th Cir. 2003) (quoting *Pub. Citizen v. DOT*, 316 F.3d 1002, 1020 (9th Cir. 2003)).

[25]*Hells Canyon Alliance v. U.S. Forest Serv.*, 227 F.3d 1170, 1177 (9th Cir. 2000)).

IV. DISCUSSION

Plaintiffs move for summary judgment on their claims for declaratory and injunctive relief. Plaintiffs specifically request a declaratory judgment that defendants' decision to proceed with the Orion North Reoffer timber sale and roads contract without preparing a supplement to the Sea Level EIS was "arbitrary, unreasonable and contrary to NEPA." Plaintiffs also request a permanent injunction to prevent implementation of the Orion North Reoffer timber sale and roads contract.[26]

A. Request for Declaratory Judgment

NEPA is the country's fundamental charter for protecting the environment.[27] "Although NEPA 'does not mandate particular results,' it does 'prescribe the necessary process.'"[28] Through these procedural requirements, "NEPA aims to make certain that 'the agency . . . will have available, and will carefully consider, detailed information concerning significant environmental impacts,' and 'that the relevant information will be made available to the larger [public] audience.'"[29] NEPA requires federal agencies to prepare an environmental impact statement ("EIS") for all "major Federal actions significantly affecting the quality of the human environment."[30] The EIS "shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment."[31]

Regulations implementing NEPA further require federal agencies to prepare a supplemental EIS ("SEIS") if "[t]here are significant new circumstances or information

---

[26]Doc. 1 at p. 10.

[27]*North Idaho Community Action Network v. U.S. Dept. of Transportation,* 545 F.3d 1147, 1153 (9th Cir. 2008).

[28]*Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1216 (9th Cir. 1998) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)).

[29]*Lands Council v. McNair*, 537 F.3d 981, 1000 (quoting *Robertson*, 490 U.S. at 349).

[30]42 U.S.C. § 4332(C).

[31]40 C.F.R. § 1502.1.

relevant to environmental concerns and bearing on the proposed action or its impacts."[32] Agencies need not prepare a SEIS every time new information emerges. "Rather, a SEIS is required only if changes, new information, or circumstances may result in significant environmental impacts 'in a manner not previously evaluated and considered.'"[33] It is well established that NEPA requires agencies to take a hard look at the new information to decide whether or not a SEIS is necessary.[34] In determining whether a SEIS is required, an agency may prepare an environmental report, such as an environmental assessment. Here, the Forest Service prepared a supplemental information report ("SIR"), which is a "formal instrument[] for documenting whether new information is sufficiently significant to trigger the need for an SEIS."[35]

"The Forest Service's decision to forego an SEIS should not be set aside unless it was arbitrary or capricious."[36] In reviewing a decision not to supplement an EIS, the court should carefully review the record and satisfy itself that the agency has made "a reasoned decision based on its evaluation of the significance -or lack of significance- of the new information."[37]

Plaintiffs allege that the increased costs and decreased revenue from the Orion North Reoffer timber sale, changes to the deer habitat model, and new scientific information regarding endemic and invasive species and yellow cedar "are significant new circumstances and information that require a supplemental EIS for the Sea Level [EIS]."[38] The court considers each category of new information below.

---

[32]40 C.F.R. § 1502.9 (c)(1)(ii).

[33]*North Idaho Community Action Network*, 545 F.3d at 1157 (quoting *Westlands Water Dist. v. Dept. of Interior,* 376 F.3d 853, 873 (9th Cir. 2004)).

[34]*E.g., Headwaters, Inc. v. Bureau of Land Managemen*t, 914 F.2d 1174, 1177 (9th Cir. 1990).

[35]*Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 555 (9th Cir. 2000).

[36]*Id.* at 556.

[37]*Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989).

[38]Doc. 1 at p. 10.

Plaintiffs first argue that "significant changes in timber economics require supplemental analysis to disclose the true costs of the Project" and that "[t]hese changed economic circumstances are highly relevant to weighing the environmental costs and benefits of the project."[39] In support of their argument, plaintiffs state and the court agrees that the record establishes the following:

> The Sea Level EIS reported that, in 1994, timber sale receipts from the Tongass were nearly $34 million. By last year, revenues were only $211,000. The EIS also reported an estimated net stumpage value for Sea Level projects - the revenue the government could expect to get for selling the timber in Sea Level timber sales at $91 per thousand board-feet (mbf). But, when the Forest Service advertised the Orion North Reoffer this March, the appraised value of the timber was about $32/mbf, significantly worse than anything anticipated in the Sea Level EIS.
>
> ... The Sea Level EIS estimated that timber sales on the Tongass came close to breaking even, with revenues from Tongass timber sales averaging $123[/mbf] and expenses about $124/mbf.... In 2008, taxpayer losses averaged $2,214/mbf for Tongass timber sales.[40]

In addition, plaintiffs point out that the Sea Level EIS anticipated that the timber purchasers, not the taxpayers, would pay for the costs of road construction. Plaintiffs correctly explain that new information shows that the timber purchaser will pay $140,635 for the timber, while taxpayers will spend $1,579,880 for road construction for the Orion North Reoffer timber sale - approximately eleven times the purchase price for the timber.[41] Plaintiffs further argue that the economic losses incurred in the timber sale will be even higher when the costs of planning, offering, and administering the timber sale are included. Thus, "contrary to the information in the Sea Level EIS, the Orion North Reoffer will not come close to breaking even."[42] Defendants have disputed neither the costs of the road construction, nor the amount to be paid for the timber.

---

[39]Doc. 33 at p. 6.

[40]Doc. 33 at pp. 7-8 (internal citations to record omitted).

[41]Doc. 42 at p. 3.

[42]Doc. 33 at p. 8.

Rather, defendants assert that the changes in economic circumstances do not require a SEIS.[43]

Plaintiffs further argue that information contained in the Sea Level EIS concerning employment benefits to the local and regional economies of Southeast Alaska is also inaccurate. One of the objectives set forth in the Sea Level FEIS was to "provide opportunities for local employment in the wood-products industry."[44] The EIS estimated that the Orion North Reoffer timber sale would provide as many as 6.71 jobs per MMBF harvested which could increase if the harvest developed utility log opportunities,[45] but Forrest Cole, Tongass National Forest Supervisor, now estimates that the Orion North Reoffer timber sale will provide only 2.31 to 3.31 jobs per MMBF of the sawlog volume sold.[46]

Plaintiffs argue persuasively that continued reliance on outdated and inaccurate economic information regarding the Orion North timber sale in the Sea Level EIS "skews the balance of the environmental and economic costs and benefits of the project" and "presents misleading information to the public and the decisionmaker by significantly understating the costs of the project in comparison to its benefits, frustrating the purposes of NEPA."[47] Plaintiffs conclude that the Forest Service's failure to take a hard look of the significant changes in public costs and revenues for the Orion North Reoffer timber sale and its failure to issue a SEIS disclosing this information to the public and decisionmakers is arbitrary.

In support, plaintiffs cite *Natural Resources Defense Council*, where the Ninth Circuit held that the Forest Service's inflated assessment of market demand for Tongass timber in its EIS "was sufficiently significant that it subverted NEPA's purpose

---

[43]Doc. 39 at pp. 21-24.

[44]Doc. 10, exh. 1 at p. 4.

[45]Doc. 42, exh. 44 at p. 3.

[46]Doc. 33, exh. 40 at pp. 6-7.

[47]Doc. 33 at p. 8.

of providing decision makers and the public with an accurate assessment of the information relevant to evaluate the Tongass Plan."[48] The Ninth Circuit stated, "Inaccurate economic information may defeat the purpose of an EIS by 'impairing the agency's consideration of the adverse environmental effects' and by 'skewing the public's evaluation' of the proposed agency action."[49] The court reasoned that the "Forest Service's error in assessing market demand fatally infected its balance of economic and environmental considerations, rendering the Plan for the Tongass arbitrary and capricious in violation of the APA."[50]

Defendants argue that "NEPA does not require supplemental analysis for changed economic circumstances,"[51] but rather "only if changes, new information, or circumstances may result in significant environmental impacts 'in a manner not previously evaluated and considered.'"[52] Defendants argue that, because the new economic information is not relevant to environmental impacts, no supplemental analysis is required under NEPA. That argument was persuasive when advanced in opposition to the motion for a preliminary injunction. However, in their brief on appeal before the Ninth Circuit, defendants acknowledged the following:

> Under this Court's case law, however, when an agency voluntarily undertakes an economic review in an EIS, significant inaccuracies in the economic information which affect the agency's and the public's consideration of alternatives can require revision of the EIS. *Natural Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797 (9th Cir. 2005). Thus, new economic information can require a supplemental EIS only if it is significant, it is directly relevant to the economic analysis in the original EIS and would change that analysis, and it bears on the proposed action. *See* 40 C.F.R. § 1502.9(c)(1).[53]

---

[48]*Natural Resources Defense Council*, 421 F.3d at 812.

[49]*Id.* at 811 (quoting *Hughes River Watershed Conservancy Council v. Glickman*, 81 F.3d 437, 446 (4th Cir. 1996)).

[50]*Id.* at 816.

[51]Doc. 39 at p. 21.

[52]*Id*. (quoting *North Idaho Comm. Action,* 545 F.3d at 1157).

[53]Doc. 42, exh. 49 at pp. 2-3.

Here, it is undisputed that the Forest Service voluntarily undertook an economic analysis in the Sea Level timber sale EIS. Moreover, the plain language in the EIS and ROD indicates that the Forest Service's assessment of timber economics was a significant factor in its selection of Alternative 7, which included the Orion North timber sale. Chapter 1 of the FEIS sets forth the significant issues that are the focus of the EIS, and compares the alternatives in light of each issue. Issue 1 is "Timber Harvest Economics and Supply."[54] In its summary of Alternative 7, the FEIS states,

> The objective of this alternative is to emphasize timber economics by harvesting stands with the greatest potential for economic return, while addressing wildlife-habitat connectivity concerns. The location of harvest units, and selection of silvicultural prescriptions, logging systems, and transportation network are aimed to maximize the appraised timber value. This approach emphasizes a positive net economic return for the project by seeking to minimize logging and road construction costs...[55]

Significantly, the Sea Level timber sale ROD advances Alternative 7's anticipated economic return as one of the reasons for selecting Alternative 7:

> The Selected Alternative will provide the highest economic return to the Federal Government while meeting the previously mentioned resource objectives. The Selected Alternative provides a net return of $91 per thousand board feet (MBF) as indicated by the midmarket analysis. The midmarket analysis is within the normal range of high and low markets for the past few years . . . .[56]

In this case, as in *Natural Resources Defense Council*, "[c]ommon sense, as well as the record,"[57] reveals that the Forest Service's assessment of economic return from the Sea Level timber sale was significant to its selection of Alternative 7, as well as to its decision to offer the Orion North timber sale. In his declaration dated March 17, 2009, Forrest Cole, Forest Supervisor for the Tongass National Forest, states,

> Increases in fuel costs and manufacturing costs, along with decreases in values of the end products, have rendered uneconomical in today's market the Upper

---

[54]Sea Level Timber Sale FEIS at p. 2-10.

[55]*Id.* at p. 2-6.

[56]Doc. 33, exh. 7 at p. 9.

[57]*Natural Resources Defense Council*, 421 F.3d at 808.

> Carroll II sale, the Buckdance Madder sale, and the Licking Creek sale. The Orion North sale appraises positive. Moreover, if the purchaser of the above-mentioned sales also purchases the Orion North sale, he may combine the economical timber from this sale with the uneconomical timber from other sales and recoup some of the loss that may be experienced in this market.[58]
>
> ....I am aware that the timber industry considers the Orion North timber sale to be a "good" sale in that it is better than average in terms of economics and timber quality. The sale is appraised positively, and the price for stumpage that a purchaser would pay for the sale will be higher as a result of the construction of the public-works road described in paragraph 9 [sic] below.[59]

The new information proffered by plaintiffs shows that the costs to the public of the Orion North Reoffer timber sale are significantly higher and the returns to the federal government are very significantly lower than anticipated in the Sea Level EIS. The opportunities for local employment are also significantly lower.

Timber economics, and specifically "provid[ing] the highest economic return to the Federal Government" while meeting resource objectives, was a significant factor in comparing alternatives and one of the main reasons for selecting Alternative 7.[60] The new economic information regarding the costs and benefits of the Orion North Reoffer timber sale is directly relevant to the economic analysis in the original EIS, would change that analysis, and bears on the proposed action.[61] Consequently, the court concludes that the changes in timber economics information are "sufficiently significant" that defendants' failure to prepare a SEIS including the updated economic information subverts "NEPA's purpose of providing decision makers and the public with an accurate assessment of the information relevant to evaluate the [Orion North Reoffer timber sale.]"[62]

---

[58]Doc. 10, exh. 3 at ¶ 5.

[59]*Id.* at ¶ 7.

[60]Doc. 33, exh. 7 at p. 9.

[61]*See* 40 C.F.R. § 1502.9(c)(1).

[62]*Natural Resources Defense Council*, 421 F.3d at 812.

Alternatively, defendants argue that even assuming NEPA requires evaluation of new economic information, the Forest Service met its burden. Defendants contend that "[a]s stated in the SIR, the Orion North sale appraises 'net positive.'"[63] However, as plaintiffs point out, the SIR did not mention, much less consider, the road construction and other costs of the Orion North Reoffer timber sale, its anticipated revenue, or the losses to taxpayers. Rather, the SIR summarily states, "Current appraisal for Orion North Reoffer is net positive."[64] Here, defendants' argument and the SIR's conclusion that the Orion North Reoffer timber sale appraises "net positive" is contrary to the evidence of the actual costs and anticipated revenues from the timber sale. Because the Forest Service failed to take the requisite hard look at the new economic information and its explanation of its decision not to complete a SEIS runs counter to the evidence before the agency, the court concludes that defendants' decision to not complete a SEIS addressing the above changes in timber economics was arbitrary and capricious.

The court now turns to the other arguments raised by plaintiffs. Because all of them involve some degree of scientific and technical expertise, the court is mindful of the special deference owed to the agency's judgment.[65] Plaintiffs argue that "changes in the deer model demonstrate significant new information about the environmental effects of the project" which necessitate supplemental analysis.[66] Plaintiffs contend that in the 2008 TLMP, "the Forest Service corrected the model it uses to assess deer habitat suitability and to assess whether the habitat provides sufficient carrying capacity to support the needs of wolves (a predator of deer) and deer hunters."[67] Plaintiffs further argue that even though the Forest Service considered this new information on a forest-wide basis, "the changes to the deer model demonstrate significant adverse

---

[63]Doc. 39 at p. 22.

[64]Doc. 33, exh. 34 at p. 8.

[65]*Natural Resources Defense Council*, 421 F.3d at 803 n.13.

[66]Doc. 33 at p. 9.

[67]*Id.*

effects at the project level that must be considered in a supplemental site specific EIS."[68]

Defendants contend that supplemental analysis is not required because 1) a change in the method of analysis is not "significant new information" as contemplated by NEPA; 2) some of the allegedly new information was considered in the 1998 draft Sea Level EIS; and, 3) "the allegedly new information does not create a substantially different picture of the environmental impacts."[69] Significantly, and more specifically, defendants explain that "even if the Forest Service were to re-analyze the impacts of the project using the revised model, the outcome would show that wildlife analysis area 405, where the project is located, will still maintain habitat capability of 17.9 per square mile, which Plaintiffs concede meets what they call the Plan threshold."[70]

The SIR recognized that changes in the deer model used for the TLMP Amendment "resulted in a more conservative estimate of deer habitat capability than was estimated in the 1997 Forest Plan."[71] However, the SIR concluded that "[e]ven with these lower estimates of deer habitat capability, the [Amended TLMP] was determined to have a high likelihood of maintaining viable wolf populations on the Tongass."[72] Based on its review of the record and according the agency appropriate deference, the court concludes that defendants adequately considered the changes in the deer model before concluding that preparation of a SEIS was not necessary.

As discussed above, "a SEIS is required only if changes, new information, or circumstances may result in significant environmental impacts 'in a manner not previously evaluated and considered.'"[73] Here, defendants considered and evaluated

---

[68]Doc. 33 at p. 10.

[69]Doc. 39 at p. 11.

[70]*Id.* at p. 12.

[71]Doc. 33, exh. 34 at p. 5.

[72]*Id.*

[73]*North Idaho Community Action Network*, 545 F.3d at 1157 (quoting Westlands Water Dist., 376 F.3d at 873 (citation omitted)).

the changes in the deer models in the 2008 TLMP Amendment EIS and in the SIR, and reasonably concluded that the Orion North sale would not significantly affect the environment in a manner not previously analyzed. Accordingly, the court cannot conclude that defendants' decision that a SEIS was not required was arbitrary or capricious with respect to this topic.

Plaintiffs also argue that "significant new information about yellow cedar decline should be analyzed in a supplemental EIS."[74] Plaintiffs specifically argue that the Forest Service failed to address new studies linking the decline of yellow cedar to climate change and to incorporate new management measures to address such decline. Plaintiffs point to the 2008 EIS for the Iyouktug Timber Sale, which allegedly incorporated recommendations for planting yellow cedar based on "the most recent scientific information . . . ."[75]

Defendants respond that there is no significant new information about yellow cedar decline. Rather, defendants contend that the Sea Level EIS, like the Iyouktug EIS, addressed yellow cedar decline, and that the 2008 TLMP Amendment EIS specifically discussed the possible effects of climate change on yellow cedar on a forest-wide basis. In addition, the SIR noted that the Sea Level FEIS recognized yellow cedar as a minor forest component inside the project area. The SIR also indicated that the 2008 TLMP Amendment FEIS addressed yellow cedar decline and climate change, recognizing that "cedar decline is likely to continue to spread if climate were to continue to warm."[76] The SIR further indicated that climate change is difficult to assess at the project level, and management of the Tongass for resiliency of yellow cedar in the face of anticipated climate change "will be done through maintaining mostly intact ecosystems."[77] The SIR also cited the Forest Plan ROD, which requires replanting

---

[74]Doc. 33 at p. 16.

[75]*Id*. at p. 17 (quoting from doc. 33, exh. 26 at p. 14.)

[76]Doc. 33, exh. 34 at p. 7.

[77]*Id.*

yellow cedar in several units of the Sea Level project similar to the requirement for replanting in the Iyouktug Timber Sales EIS.[78]

Based on its review of the record and with appropriate deference to the agency's scientific and technical expertise, the court is satisfied that defendants conducted a reasoned evaluation of the relevant information concerning climate change and yellow cedar decline and determined that it was not of such significance that preparation of a site-specific SEIS was required for the Orion North Reoffer timber sale. Defendants' determination was not arbitrary or capricious.

Finally, plaintiffs argue that invasive species, an issue which has become a Forest Service priority in the last few years, should be analyzed in a SEIS for the Orion North Reoffer timber sale. In support, plaintiffs note that while the Sea Level EIS did not include the term "invasive plants," the Forest Service completed an invasive species risk assessment for the Orion North timber sale and concluded that even if mitigation measures are implemented, the proposed action "is likely to result in moderate risk of spread of existing populations of invasive species along road corridors . . . ."[79] Plaintiffs argue that the Forest Service's conclusion is "effectively an admission that the new information is 'significant,' yet the Forest Service refused to complete a supplemental EIS."[80]

In response, defendants assert that there is no significant new information about invasive species requiring a SEIS. In fact, the evidence shows that the Forest Service did complete a 2008 Risk Assessment for Invasive Species specifically for the Orion North Reoffer timber sale.[81] The risk assessment identified one plant, reed canary grass, as an invasive species, but concluded that reed canary grass is "not a high priority for control" because it is well established and widespread throughout the

---

[78]*Id.*

[79]Doc. 33 at p. 19 (quoting doc. 33, exh. 33 at p. 9).

[80]*Id.*

[81]A copy of the Assessment is found at doc. 4, exh. 35.

Tongass National Forest and "eradication would be impossible to achieve."[82] In order not to facilitate its spread, however, the risk assessment indicated that contract provisions should include management and mitigation provisions, such as requiring off-road equipment to be cleaned of contaminated soil prior to transport and using rock from non-contaminated sites away from the existing road.[83]

The SIR specifically considered the information about invasive species provided in the risk assessment. The SIR concluded that while the proposed action is likely to result in moderate risk of the spread of existing populations of invasive species along road corridors and low risk of spread into habitats not disturbed by human activity, "[a]ppropriate mitigation measures are included in the Orion North Reoffer Timber Sale Contract under current contract clauses."[84] Based on the analysis conducted in the risk assessment and the SIR and given the deference owed to the Forest Service on such a scientific and technical issue, it is clear that defendants adequately considered the new information regarding invasive species and reasonably concluded that it was unnecessary to prepare a SEIS addressing this topic.

For the above reasons, the court concludes that defendants violated NEPA by failing to prepare a SEIS which addressed the significant changes in timber economics, including the significant increases in costs and decreases in revenues associated with the Orion North Reoffer timber sale, but that defendants' decision not to prepare a SEIS addressing new information concerning the deer model, climate change and yellow cedar, and invasive species was not arbitrary or capricious. Accordingly, the court will grant in part plaintiffs' motion for a declaratory judgment.

---

[82]Doc. 39 at p. 19.

[83]Doc. 4, exh. 35 at p. 8.

[84]Doc. 33, exh. 34 at p. 7.

B. Request for Injunctive Relief

In addition to declaratory relief, plaintiffs request a permanent injunction "to prevent implementation of the Sea Level roads and the Orion North Reoffer timber sale."[85] To secure injunctive relief, a plaintiff must show "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction."[86] In determining whether injunctive relief is appropriate, a court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief."[87] "In determining the scope of an injunction, a district court has broad latitude, and it must balance the equities between the parties and give due regard to the public interest."[88]

Defendants argue that plaintiffs are not entitled to a permanent injunction "because they cannot achieve 'actual success' on the merits of their claims."[89] Defendants do not address the other three factors in the four-factor test for injunctive relief. Defendants' argument fails because the court has concluded that plaintiffs do succeed on the merits of their claim that defendants' failure to prepare a SEIS addressing the significant changes in the timber economics of the Orion North Reoffer timber sale violated NEPA. However, despite the fact that injunctive relief is "typically appropriate in environmental cases . . . . injunctive relief is not automatic, and there is

---

[85]Doc. 1 at p. 10.

[86]*eBay v. MercExchange, LLC*, 547 U.S. 388, 391 (2006)).

[87]*Amoco Production Co. v. Village of Gambell,* 480 U.S. 531, 542 (1987).

[88]*Geertson Seed Farms v. Johanns*, 570 F.3d 1130, 1136-1137 (internal quotations and citations omitted).

[89]Doc. 39 at pp. 24-25.

no rule requiring automatic issuance of a blanket injunction when a [NEPA] violation is found."[90]

To obtain injunctive relief, plaintiffs must also demonstrate that they are likely to suffer irreparable injury in the absence of an injunction, and that the equities and the public interest weigh in their favor.[91] The Supreme Court has explained that "'[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.'"[92] Plaintiffs argue that "[c]learcut logging and the construction of a new road in the Orion North Reoffer will cause substantial irreparable harm."[93] In support, plaintiffs cite portions of the Sea Level EIS which acknowledge the irreparable effects of clearcut logging in old growth habitat and road construction in an area that is currently roadless. In light of the above undisputed evidence and the fact that defendants do not address this factor, plaintiffs have demonstrated a likelihood of irreparable injury in the absence of an injunction.[94]

As for the balance of harms, plaintiffs argue that while they and members of the public who use and enjoy the roadless Sea Level watershed "will suffer permanent, irreparable harm if the logging is allowed to proceed in violation of NEPA, any harm to the Forest Service or third parties from entering an injunction is purely financial."[95] Defendants did not address this factor. In *Idaho Sporting Congress Inc. v. Alexander*, the Ninth Circuit found that "financial hardship is outweighed by the fact the old growth forests plaintiffs seek to protect would, if cut, take hundreds of years to reproduce."[96]

---

[90]*Northern Cheyenne Tribe v. Norton*, 503 F.3d 836, 843 (9th Cir. 2007).

[91]*Klein v. City of San Clemente*, 584 F.3d 1196, 1207 (9th Cir. 2009).

[92]*Amoco Prod. Co.*, 480 U.S. at 545.

[93]Doc. 33 at p. 23.

[94]*Klein*, 584 F.3d at 1207.

[95]Doc. 33 at p. 24.

[96]222 F.3d 562, 569 (9th Cir. 2000) (internal quotation and citations omitted).

Idaho Sporting Goods provides guidance which, when applied to the facts in this case, persuades the court that plaintiffs have demonstrated that the balance of harms weighs in favor of injunctive relief.

The Ninth Circuit has explained that "the public's interest in preserving precious, unreplenishable resources must be taken into account in balancing the hardships."[97] On the other side of the scale, the significance of any hardship to the public in the form of lost jobs or revenues is substantially diminished in light of the new economic information which must be considered. In these circumstances, the court finds that the public's interest in the preservation of the forest lands and resources also weighs in favor of injunctive relief.

Defendants argue that if the court were to determine that the Forest Service violated NEPA, "it should hold a hearing or order additional briefing on the scope of injunctive relief."[98] Defendants are correct that generally speaking, "a district court must hold an evidentiary hearing before issuing a permanent injunction unless the adverse party has waived its right to a hearing or the facts are undisputed."[99] However, the purpose of any evidentiary hearing is perforce to ascertain from disputed evidence what the facts actually are. Here, defendants have not established any material issues of fact concerning the changes in timber economics as applied to the Orion North Reoffer timber sale. To the contrary, defendants did not dispute plaintiffs' evidence concerning the significantly increased costs and decreased revenues for the timber sale. Moreover, the changes in timber economics are precisely the sort of consideration more properly addressed by the Forest Service in the process required for preparation of a SEIS.

Importantly, the injunction at issue here, as in *Geertson Seed Farms*, is not a typical permanent injunction, which is of indefinite duration. "A permanent injunction to ensure compliance with NEPA has a more limited purpose and duration."[100] Here, the

---

[97] *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1125 (9th Cir. 2002).

[98] Doc. 39 at p. 25 n.12.

[99] *Geertson Seed Farms*, 570 F.3d at 1139.

[100] *Id.*

permanent injunction will be in place until a SEIS is completed and a determination is made as to whether to continue with the Orion North Reoffer timber sale project, and if so, on what terms and conditions. Consequently, an evidentiary hearing is not required before issuing an injunction.[101]

Plaintiffs have established all the criteria needed to support issuance of an injunction. The injunction will protect public resources just long enough to allow time for the preparation of a SEIS. Accordingly, the court will enter an order enjoining defendants from taking or allowing any further actions to implement the Orion North Reoffer timber sale and roads contract until the Forest Service has completed a SEIS as required by NEPA.

V. CONCLUSION

For the reasons set out above, plaintiffs' motion for summary judgment at docket 33 is **GRANTED IN PART** as follows. Plaintiffs' motion is **GRANTED** to the extent it requests the court to enter a declaratory judgment that defendants' decision to proceed with the Orion North Reoffer timber sale and roads construction without preparing a SEIS addressing the changes in timber economics discussed in the body of this order was arbitrary and capricious and violated NEPA; and

IT IS ORDERED that defendants are enjoined from taking or allowing any further actions implementing the Orion North Reoffer timber sale and roads construction contract until the required SEIS has been completed and a decision has been made whether to proceed with the Orion North Reoffer timber sale and road construction project, **PROVIDED** that this injunction does not apply to any actions reasonably necessary to secure work sites from damage, and to remove or de-mobilize personnel, material, and equipment in the field; and

[101] *Id.* at 1140.

IT IS FURTHER ORDERED that plaintiffs shall file a proposed form of judgment for the court's consideration within fourteen (14) days from the filing of this order.

DATED at Anchorage, Alaska, this 7th day of December 2009.

/s/ JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE