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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

SIERRA CLUB, INC. and SIERRA) 2:04-cv-2114-GEB-DAD
NEVADA FOREST PROTECTION CAMPAIGN,)
)
Plaintiffs,) ORDER
)
v.)
)
DALE BOSWORTH, in his official)
capacity as Chief of the U.S.)
Forest Service; JOHN BERRY, in his)
official capacity as Forest)
Supervisor of the Eldorado)
National Forest; LAURIE TIPPIN, in)
her official capacity as Forest)
Supervisor of the Lassen National)
Forest; UNITED STATES FOREST)
SERVICE, an agency of the U.S.)
Department of Agriculture; ANN)
VENEMAN, in her official capacity)
as Secretary of the U.S. Dept. of)
Agriculture; and UNITED STATES)
DEPARTMENT OF AGRICULTURE,)
)
Defendants.)
_____)

Pending are cross-motions for summary judgment and
Plaintiffs' motion to supplement the Administrative Record ("AR").
Plaintiffs contend the categorical exclusion ("CE") established by the
United States Forest Service ("USFS") for fuel reduction projects
("Fuels CE") violates the National Environmental Policy Act ("NEPA");
and that the application of the Fuels CE to the timber project in the

1 Eldorado National Forest also violates NEPA.¹ Defendants counter that
2 the Fuels CE, and its application to the Eldorado National Forest
3 projects do not violate NEPA and must be upheld.

4 I. BACKGROUND

5 A. Overview of NEPA

6 NEPA, which is prescribed in pertinent part at 42 U.S.C.
7 §§ 4321-4347, is the "basic national charter for protection of the
8 environment." 40 C.F.R. § 1500.1. NEPA's purpose is to "encourage
9 productive and enjoyable harmony between man and his environment; to
10 promote efforts which will prevent or eliminate damage to the
11 environment and biosphere and stimulate the health and welfare of man;
12 [and] to enrich the understanding of the ecological systems and
13 natural resources important to the Nation" 42 U.S.C. § 4321.
14 "NEPA is a procedural statute that does not 'mandate particular
15 results, but simply provides the necessary process to ensure that
16 federal agencies take a hard look at the environmental consequences of
17 their actions.'" High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630,
18 639 (9th Cir. 2004) (quoting Cuddy Mountain v. Alexander, 303 F.3d
19 1059, 1070 (9th Cir. 2004)).

20 NEPA requires "all agencies of the Federal Government" to
21 include an environmental review document "in every recommendation or
22 report on proposals for legislation and other major Federal actions
23 significantly affecting the quality of the human environment." 42
24 U.S.C. § 4332(2)(C). "In determining whether to prepare an

25
26 ¹ Plaintiffs' motion also addresses the application of the
27 Fuels CE to a project in the Lassen National Forest; however, at the
28 hearing on the motions held on July 18, 2005, Plaintiffs withdrew
their challenge against the project in the Lassen National Forest
since the USFS has decided not to proceed with that project.

1 environmental impact statement the Federal agency shall . . .
2 [d]etermine . . . whether the proposal is one which: (1) Normally
3 requires an environmental impact statement, or (2) Normally does not
4 require either an environmental impact statement or an environmental
5 assessment (categorical exclusion)." 40 C.F.R. § 1501.4.

6 A categorical exclusion is "a category of actions which do
7 not individually or cumulatively have a significant effect on the
8 human environment . . . and for which, therefore, neither an
9 environmental assessment ["EA"] nor an environmental impact
10 statement ["EIS"] is required." Id. § 1508.4. "In determining
11 whether an action will 'significantly' effect the environment, the CEQ
12 regulations provide certain factors that should be considered
13 [including], among others, (1) the degree to which the proposed action
14 affects public health or safety, (2) the degree to which the effects
15 will be highly controversial, (3) whether the action establishes a
16 precedent for further action with significant effects, and (4) whether
17 the action is related to other action which has individually
18 insignificant, but cumulatively significant impacts." Alaska Ctr. for
19 the Env't v. U.S. Forest Serv., 189 F.3d 851, 859 (9th Cir. 1999)
20 (citing 40 C.F.R. § 1508.27(b)).

21 When an agency determines that a category of actions should
22 be categorically excluded from NEPA review, the agency must include in
23 its regulations "specific criteria for and identification of" actions
24 that qualify for the categorical exclusion, and must also "provide for
25 extraordinary circumstances in which a normally excluded action may
26 have a significant environmental effect." Id. §§ 1507.3(b)(2)(ii),
27 1508.4. "In such extraordinary circumstances, a categorically
28 excluded action would nevertheless trigger preparation of an EIS or an

1 EA." California v. Norton, 311 F.3d 1162, 1168 (9th Cir. 2002).
2 Furthermore, the agency must publish the proposed CE in the Federal
3 Register, provide an opportunity for public comment, and submit the CE
4 to the Council on Environmental Quality ("CEQ") for review and
5 approval. 40 C.F.R. § 1507.3(a); 48 Fed. Reg. 34,263, 34,265
6 (July 28, 1983).

7 At issue is whether the USFS's Fuels CE and/or the
8 application of it to the Eldorado National Forest projects should be
9 set aside. A court should "set aside [an agency's] actions, findings,
10 or conclusions if they are 'arbitrary, capricious, an abuse of
11 discretion, or otherwise not in accordance with the law.'" Ocean
12 Advocates v. U.S. Army Corps of Eng'rs, 361 F.3d 1108, 1118 (9th Cir.
13 2004) (quoting the Administrative Procedure Act ("APA") at 5 U.S.C.
14 § 706(2)(A)). "Courts apply a 'rule of reason' standard in reviewing
15 the adequacy of a NEPA document." Klamath-Siskiyou Wildlands Ctr. v.
16 U.S. Bureau of Land Mgmt., 387 F.3d 989, 992 (9th Cir. 2004) (citing
17 Churchill County v. Norton, 276 F.3d 1060, 1071 (9th Cir. 2001)).
18 "Under this standard, we ask 'whether an [environmental review]
19 contains a reasonably thorough discussion of the significant aspects
20 of the probable environment consequences.'" Churchill County, 276
21 F.3d at 1071 (citation omitted).

22 "The court must defer to an agency conclusion that is 'fully
23 informed and well-considered,' but need not rubber stamp a 'clear
24 error of judgment.'" Anderson v. Evans, 371 F.3d 475, 486 (9th Cir.
25 2004) (quoting Blue Mountains Biodiversity Project v. Blackwood, 161
26 F.3d 1208, 1211 (9th Cir. 1998)). "If the adverse environmental
27 effects of the proposed action are adequately identified and
28 evaluated, the agency is not constrained by NEPA from deciding that

1 other values outweigh the environmental costs. Thus the pertinent
2 question for the Court is not whether [it] would have arrived at the
3 same decision as that of the agency but merely whether the agency's
4 decision was an informed one." Australians for Animals v. Evans, 301
5 F. Supp. 2d 1114, 1120 (N.D. Cal. 2004).

6 "District courts are not empowered to substitute their own
7 judgment for that of the government agency." Id. at 1122 (quoting
8 Wetlands Action Network v. U.S. Army Corps of Eng'rs, 222 F.3d 1105,
9 1114 (9th Cir. 2000)). The Court's "task in reviewing NEPA claims is
10 simply to ensure that the procedure followed by the agency resulted in
11 a reasoned analysis of the evidence before it, and that the agency
12 made the evidence available to all concerned." Cold Mountain v.
13 Garber, 375 F.3d 884, 893 (9th Cir. 2004) (quoting Friends of
14 Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 986 (9th Cir.
15 1985)).

16 Further, when considering "an agency's actions under NEPA
17 . . . courts must also be mindful to defer to agency expertise,
18 particularly with respect to scientific matters within the purview of
19 the agency." Klamath-Siskiyou Wildlands Ctr., 387 F.3d at 993. "When
20 specialists express conflicting views, an agency must have discretion
21 to rely on the reasonable opinions of its own qualified experts even
22 if, as an original matter, a court might find contrary views more
23 persuasive." Marsh v. Or. Natural Resources Council, 490 U.S. 360,
24 378 (1989).

25 B. Factual and Procedural Background

26 In response to concerns about the fire risk created by the
27 accumulation of hazardous fuels in many national forests, in August
28 2002, President Bush "established the Healthy Forests Initiative,

1 directing the Departments of Agriculture and Interior and the Council
2 on Environmental Quality to improve regulatory processes to ensure
3 more timely decisions, greater efficiency, and better results in
4 reducing the risk of catastrophic wildfires by restoring forest help.”
5 67 Fed. Reg. 77,038, 77,039 (Dec. 16, 2002). “[T]he Departments of
6 Agriculture and the Interior” responded to the Healthy Forests
7 Initiative by “consider[ing] whether new categorical exclusions could
8 be created for some of the fire management activities already
9 undertaken by those Departments.” (Defs.’ Mem. in Opp’n to Pls.’
10 Summ. J. Mot. & Supp. Defs.’ Summ. J. Mot. (“Defs.’ Mot.”) at 4-5.)
11 “The Departments conducted an extensive review of over 2,500 past
12 hazardous fuel reduction and rehabilitation projects in order to
13 determine whether certain types of projects did not individually or
14 cumulatively have significant environmental effects and could
15 therefore form the basis for new categorical exclusions.” (Id. at 5;
16 see 68 Fed. Reg. 33,814 (June 5, 2003).) “The agencies also
17 considered peer[-]reviewed scientific literature concerning the
18 effects of hazardous fuel reduction activities.” (Defs.’ Mot. at 5.)
19 “Based on this project review, the Departments identified a set of
20 limited hazardous fuel reduction and rehabilitation projects that
21 would not normally have significant effects on the environment. The
22 Departments proposed these limited categories of projects as a new
23 categorical exclusion in a Federal Register notice, and sought public
24 comment and review and approval by CEQ.” (Id.; see 67 Fed. Reg.
25 77,038 (Dec. 16, 2002).)

26 After revising the categories in response to public and
27 agency comments, on June 5, 2003, the USFS published the final Fuels
28 CE in the Federal Register. 68 Fed. Reg. 33,814 (June 5, 2003). The

1 Fuels CE delineates what actions are categorically excluded as
2 follows:

3 • Hazardous fuels reduction activities using
4 prescribed fire not to exceed 4,500 acres, and
5 mechanical methods for crushing, piling, thinning,
6 pruning, cutting, chipping, mulching, and mowing,
7 not to exceed 1,000 acres. Such activities:

8 • Shall be limited to areas (1) in wildland-urban
9 interface and (2) Condition Classes 2 or 3 in Fire
10 Regime Groups I, II, or III, outside the
11 wildland-urban interface;

12 • Shall be identified through a collaborative
13 framework as described in "A Collaborative
14 Approach for Reducing Wildland Fire Risks to
15 Communities and the Environment 10-Year
16 Comprehensive Strategy Implementation Plan;"

17 • Shall be conducted consistent with agency and
18 Departmental procedures and applicable land and
19 resource management plans;

20 • Shall not be conducted in wilderness areas or
21 impair the suitability of wilderness study areas
22 for preservation as wilderness;

23 • Shall not include the use of herbicides or
24 pesticides or the construction of new permanent
25 roads or other new permanent infrastructure; and
26 may include the sale of vegetative material if the
27 primary purpose of the activity is hazardous fuels
28 reduction.

• Post-fire rehabilitation activities not to
exceed 4,200 acres (such as tree planting, fence
replacement, habitat restoration, heritage site
restoration, repair of roads and trails, and
repair of damage to minor facilities such as
campgrounds) to repair or improve lands unlikely
to recover to a management approved condition from
wildland fire damage, or to repair or replace
minor facilities damaged by fire. Such activities:

• Shall be conducted consistent with agency and
Departmental procedures and applicable land and
resource management plans;

• Shall not include the use of herbicides or
pesticides or the construction of new permanent
roads or other new permanent infrastructure; and

1 action." (Id.)

2 Since "Defendants do not oppose supplementation of the
3 record with the '10-Year Comprehensive Strategy Implementation Plan,'
4 . . . the Forest Service Handbook, . . . the Scoping Notices and
5 Schedule of Proposed Actions in the Eldorado and Lassen National
6 Forests . . . or the Healthy Forest Report[, and since the] series of
7 memoranda from the Forest Service Office of General Counsel . . . were
8 submitted to the Forest Service in public comments on the Forest
9 Service's decision to revise its extraordinary circumstances
10 provisions, and are appropriately part of the administrative record,"
11 those documents will supplement the record. (Defs.' Opp'n to Mot. to
12 Supplement AR at 1-2.)

13 "Thus, the sole dispute [is] whether it is appropriate to
14 supplement the record with the declarations of [Craig] Thomas, [Dr.
15 Denis] Odion and [Monica] Bond." (Id. at 2.) "Generally, judicial
16 review of agency action is limited to review of the administrative
17 record." Animal Def. Council v. Hodel, 840 F.2d 1432, 1436 (9th Cir.
18 1988). "The task of the reviewing court is to apply the appropriate
19 APA standard of review, 5 U.S.C. § 706, to the agency decision based
20 on the record the agency presents to the reviewing court." Fl. Power
21 & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985). However,
22 supplementation is permitted: "(1) if necessary to determine whether
23 the agency has considered all relevant factors and has explained its
24 decision, (2) when the agency has relied on documents not in the
25 record, . . . (3) when [it] is necessary [for] expla[nation of]
26 technical terms or complex subject matter[, or (4)] when plaintiffs
27 [need it to] make a showing of agency bad faith." Inland Empire Pub.
28 Lands Council v. Glickman, 88 F.3d 697, 703-04 (9th Cir. 1996)

1 (quoting Friends of the Payette v. Horseshoe Bend Hydroelectric Co.,
2 988 F.2d 989, 997 (9th Cir. 1993) & Nat'l Audubon Soc'y v. U.S. Forest
3 Serv., 46 F.3d 1437, 1447 n.9 (9th Cir. 1993)) (internal quotation
4 marks omitted).

5 Plaintiffs argue the declarations of Odion, Bond, and Thomas
6 "will assist the Court in determining whether the Forest Service has
7 considered all relevant factors." (Pls.' Mot. to Supplement AR at
8 10.) Plaintiffs contend the declarations

9 highlight the breadth of information the Forest
10 Service was not privy to because the agency did
11 not do an environmental assessment or
12 environmental impact statement before promulgating
13 the Fuels CE or approving the challenged projects.
14 Second, they explain . . . how the Forest
15 Service's own administrative record demonstrates
16 that the . . . [p]rojects will significantly
17 impact a number of sensitive species. Third, due
18 to the incomplete information in the
19 Administrative Record regarding individual and
20 cumulative impacts, two of the declarants
21 conducted a field visit to various units in the
22 Project Areas and reviewed past, present and
23 reasonably foreseeable projects, so that
24 [Plaintiffs] could explain to this Court the true
25 cumulative impacts of three of the challenged
26 projects. Finally, the Declarations provide
27 background information that is needed to
28 effectively review the Fuels CE and its
application to the challenged projects.

(Id. at 10-11.)

21 Further, Plaintiffs contend that "[t]he effectiveness of
22 fuel reduction activities on the spread of wildfire has been the
23 'subject of on-going scientific study by teams of researchers,
24 analyzing technical and complex environmental and biological
25 information' and Dr. Odion's declaration will be helpful to this court
26 by 'highlighting . . . deficiencies in the [Forest Service's]
27 environmental review process.'" (Id. at 11 (quoting Env't Now! v.
28 Espy, 877 F. Supp. 1397, 1404 (E.D. Cal. 1994)).) Plaintiffs argue

1 "Dr. Odion's entire declaration demonstrates that the environmental
2 review performed by the Forest Service in promulgating the Fuels CE
3 and approving the . . . challenged projects was deficient because it
4 did not consider a wealth of scientific information[; and therefore,]
5 Dr. Odion's declaration will help this court determine whether the
6 Forest Service has considered all relevant factors in promulgating the
7 Fuels CE." (Pls.' Mot. to Supplement AR at 11.)

8 Plaintiffs contend Monica Bond's declaration would "help
9 explain why the Forest Service's decision making process was
10 insufficient with regard to the agency's analysis of individual and
11 cumulative environmental impacts for the challenged Eldorado
12 Projects." (Id.) Plaintiffs contend "[t]he Declaration highlights
13 that the Administrative Record is devoid of any information to support
14 the Forest Service's allegation that the Fuels CE and the projects
15 approved under it will have no significant impacts [and] demonstrates
16 that the projects will have both individual and significant impacts on
17 the California spotted owl." (Id. at 11-12.)

18 Plaintiffs argue that "Craig Thomas' [s] Declaration provides
19 background information that will assist this Court in determining
20 whether the Forest Service has considered all relevant information[;
21 and] provides background information on past, present, and future
22 logging projects on both the Eldorado and Lassen National Forests."
23 (Id. at 12.) Furthermore, Plaintiffs contend these declarations will
24 "explain and illuminate the complex scientific issues of fire and
25 wildlife ecology." (Id.)

26 Defendants argue the record should not be supplemented with
27 Dr. Odion's testimony because that "testimony is in large part
28 non-responsive to the actual projects being challenged, is mere expert

1 disagreement with the agency, and should have been submitted to the
2 agency during the public comment periods.” (Defs.’ Opp’n to Mot. to
3 Supplement AR at 6.)

4 Defendants object to Ms. Bond’s declaration, arguing that it
5 “constitutes little more than an articulation of her disagreement with
6 the scientific conclusions reached by . . . the Forest Service’s own
7 wildlife experts,” which should not be adjudicated. (Id. at 9.)
8 Further, Defendants argue “Ms. Bond’s testimony does not fall into any
9 of the exceptions under which this Court may consider extra-record
10 evidence, but instead disputes the agency’s conclusions regarding the
11 projects’ impacts on the California spotted owl.” (Id.)

12 Defendants also object to Mr. Thomas’s declaration, arguing
13 that it “provides no competent evidence that the Forest Service failed
14 to consider all relevant factors, and indeed does not identify any
15 ‘past present and future logging projects’ the agency failed to
16 consider. Instead Mr. Thomas offers legal and scientific argument
17 that he is not qualified to give.” (Id. at 4.)

18 Finally, Defendants contend that if Plaintiffs’
19 supplementation motion is granted, the record should also be
20 supplemented with the following rebuttal declarations: “the
21 declaration of Jeffrey Barnhart, responding to the allegations made in
22 the declaration of Dr. Odion[;] the declaration of Charis Parker,
23 responding to the allegations made in the declaration of Ms. Bond with
24 regard to the Grey Eagle and Rockeye Projects[; and] the declaration
25 of Jennifer Ebert responding to the allegations made in the
26 declaration of Ms. Bond with regard to the Forest Guard Project.”
27 (Id. at 10.)

28

1 Since the declarations of Bond and Odion are offered to
2 assist the Court in determining whether the USFS considered all
3 relevant factors and to assist in explaining complex scientific
4 issues, Plaintiffs' motion to supplement the administrative record
5 with these declarations is granted. Portions of the Thomas
6 declaration are also admitted for this purpose; but Thomas's legal
7 arguments and emotional distress arguments are excluded because they
8 are inappropriate expert opinions. See Pac. Gas & Elec. Co. v. Lynch,
9 216 F. Supp. 2d 1016, 1027 (N.D. Cal. 2002) (granting motion to strike
10 a declaration "because th[e] declaration primarily contain[ed] legal
11 argument rather than evidentiary matter"); Metro. Edison Co. v. People
12 Against Nuclear Energy, 460 U.S. 766, 773-776 (1983) (stating that
13 "psychological health damage [is not] cognizable under NEPA").
14 Furthermore, Defendants' request that the Court consider its rebuttal
15 declarations is also granted. See Tri-Valley Cares v. U.S. Dep't of
16 Energy, 2004 WL 2043034, at *3 (N.D. Cal. 2004) (granting "Defendants
17 leave to file rebuttal declarations because they had not had an
18 opportunity to respond to the extra record materials [and] Defendants'
19 response was essential to [its] review of the underlying motions.").

20 B. Cross-Motions for Summary Judgment

21 Plaintiffs move for summary judgment, arguing that
22 the Forest Service's promulgation of the Fuels CE
23 was arbitrary and capricious . . . because: 1) the
24 terms of the Fuels CE are contrary to 40 C.F.R.
25 §§ 1508.4 and 1507.3, in that they do not specify
26 and identify adequately the actions to be covered,
27 create an unlawful 'case-by-case' categorical
28 exclusion, and fail to establish properly
 'extraordinary circumstances'; and 2) the actions
 to be covered are not appropriate for categorical
 exclusion under 40 C.F.R. § 1508.4 because they
 have individual and/or cumulative significant

1 effects; and the [USFS]'s findings of non-
2 significance were arbitrary and capricious and
contrary to the evidence before the agency.

3 (Pls.' Mot. at 1.) Plaintiffs also contend that "the Fuels CE was not
4 in accordance with NEPA . . . because the [USFS] failed to prepare an
5 environmental assessment or environmental impact statement for the
6 Fuels CE prior to approving it" and "the Fuels CE cannot be applied to
7 the challenged timber projects in the . . . Eldorado National Forest
8 in California because they . . . involve individual and/or cumulative
9 significant effects." (Id.)

10 Defendants counter that "[t]he Fuels CE was promulgated in
11 compliance with all law and regulations on the basis of an exhaustive
12 record, and the [USFS] properly determined that the . . . specific
13 projects challenged by Plaintiffs are covered by the Fuels CE."

14 (Defs.' Mot. at 41.)

15 1. Was the promulgation of the Fuels CE in violation of NEPA?

16 a. Does the Fuels CE violate the CEQ regulations?

17 Plaintiffs contend "the terms of the Fuels CE are contrary
18 to 40 C.F.R. §§ 1508.4 and 1507.3, in that they do not specify and
19 identify adequately the actions to be covered, create an unlawful
20 'case-by-case' categorical exclusion, and fail to establish properly
21 'extraordinary circumstances.'" (Pls.' Mot. at 1.) Defendants rejoin
22 that "the Departments have complied with all regulatory requirements
23 in promulgating the Fuels CE[: t]he CE identifies a specific class of
24 actions, and the Forest Service has appropriately defined the
25 extraordinary circumstances that would preclude authorizing a project
26 under the CE." (Defs.' Mot. at 15.)

27 Plaintiffs contend "[t]he Fuels CE is contrary to
28 [1507.3(b)(2)(ii)] because the actions to be covered are not specified

1 or identified [and i]nstead, identification of the actions is left to
2 future, *ad hoc* determination.” (Pls.’ Mot. at 8.) The CEQ
3 regulations require agencies promulgating a CE to include “[s]pecific
4 criteria for and identification of those typical classes of action”
5 which are covered by the CE. 40 C.F.R. § 1507.3(b)(2)(ii).
6 Plaintiffs argue there is noncompliance with this regulation because
7 “the Fuels CE states that the projects to be covered by it: ‘[s]hall
8 be identified through a collaborative framework as described in [the]
9 10-Year Comprehensive Strategy Implementation Plan[, which] does not,
10 however, “identify” the “category of actions” to be covered by a
11 categorical exclusion.’” (Pls.’ Mot. at 8-9.) Plaintiffs also argue
12 that “[t]he Fuels CE . . . does not define key terms used in the
13 categorical exclusion” (Id. at 9.)

14 Defendants counter that “the Fuels CE sets forth in explicit
15 detail specific criteria for identifying the ‘classes of action’ to
16 which it applies.” (Def.’ Mot. at 8.) Defendants assert the Fuels
17 CE “is limited to projects designed to meet a specific purpose, the
18 reduction of hazardous fuels[; it is] limited to specific types of
19 treatments on specific acreages[;] projects may not use herbicides,
20 pesticides or involve construction of new roads or other permanent
21 infrastructure[; it] is limited geographically to the wildland-urban
22 interface or areas in fire condition classes 2 or 3 in Fire Regime
23 Groups I, II or III[; and it] cannot be applied to projects . . .
24 unless the project is identified through the collaborative process set
25 forth in the 10-Year Comprehensive Strategy Implementation Plan.”
26 (Id. at 8-9 (citing 68 Fed. Reg. at 33,824).) Defendants argue the
27 requirement that all projects under the Fuels CE be identified through
28 the 10-Year Comprehensive Strategy Implementation Plan’s collaborative

1 framework "does not mean . . . that the CE can be broadened to include
2 projects outside the 'typical classes of action' identified in the CE;
3 it simply means that when determining where to implement a project and
4 what type of treatment methods to use - within the types already
5 authorized by the CE - the Forest Service will collaborate with state,
6 local and tribal governments." (Defs.' Mot. at 9.)

7 Plaintiffs further contend that the Fuels CE creates a case-
8 by-case categorical exclusion, which is prohibited by 40 C.F.R.
9 §§ 1507.3(b)(2)(ii) and 1508.4, since "by leaving determination of
10 whether a project is covered by the Fuels CE to the process of the
11 '10-Year Comprehensive Strategy Implementation Plan,' the Fuels CE
12 refers to another, future decision-making process, which is itself
13 without specificity." (Pls.' Mot. at 9.) Plaintiffs support this
14 contention by citing to memoranda from the Department of Agriculture
15 Office of General Counsel ("OGC") for the proposition that case-by-
16 case categorical exclusions violate the CEQ regulations. (*Id.* at 10.)
17 Defendants rejoin that Plaintiffs' argument fails because "[u]nlike
18 the CEs addressed in the OGC memoranda, the Fuels CE identifies a very
19 discrete and precise category of actions that may be included, and
20 unlike the true 'case-by-case' CEs criticized by the OGC, the Fuels CE
21 does not allow the Forest Service to categorically exclude, based on a
22 case-by-case determination of significance, other activities not
23 included in the CE." (Defs.' Mot. at 13.)

24 Finally, Plaintiffs argue that the Fuels CE violates 40
25 C.F.R. § 1508.4, which requires categorical exclusions to "provide for
26 extraordinary circumstances in which a normally excluded action may
27 have a significant environmental effect." 40 C.F.R. § 1508.4. The
28 USFS Handbook directs land managers to consider certain "resource

1 conditions" when determining whether the proposed action involves
2 extraordinary circumstances that warrant further environmental review.
3 67 Fed. Reg. 54,622, 54,627 (Aug. 23, 2002). The "resource
4 conditions" include: threatened and endangered species or their
5 designated critical habitat, or USFS sensitive species; flood plains,
6 wetland, or municipal watersheds; wilderness areas; inventoried
7 roadless areas; research natural areas; Native American religious or
8 cultural sites; and archaeological or historical sites. Id.

9 Plaintiffs contend the "provision for 'extraordinary circumstances in
10 the [USFS] Handbook . . . does not meet the requirements of 40 C.F.R.
11 § 1508.4 because the [USFS] did not specify or identify the
12 extraordinary circumstances [but rather] qualified the definition and
13 application of the 'extraordinary circumstances exception based on the
14 'degree of potential effect' of an action on the 'resource
15 conditions.'" (Pls.' Mot. at 11 (citing Exh. H at § 30.3(2)(a)).)
16 Plaintiffs argue "[o]nce a 'case-by-case' determination of
17 significance or degree of impact must be done . . . , the action
18 cannot be excluded from review with a categorical exclusion [and] must
19 be analyzed under an EA and FONSI or EIS." (Pls.' Mot. at 11.)

20 Defendants rejoin that the USFS properly designated
21 extraordinary circumstances. Defendants contend that in determining
22 whether the proposed action involves extraordinary circumstances
23 warranting further analysis in an EA or EIS, land managers are
24 required to consider the resource conditions and "[i]f the responsible
25 official determines, based on the public scoping process, that it is
26 uncertain whether the project may have a significant effect, the
27 agency must prepare an EA, and if [the official] determines, . . .
28 based on public scoping, that it may have a significant effect the

1 agency must prepare an EIS.” (Defs.’ Mot. at 13-14.) Defendants
2 argue “it is difficult to envision how any agency could comply with
3 the CE’s requirement that the agency ‘provide for extraordinary
4 circumstances in which a normally excluded action *may have a*
5 significant environmental effect,’ 40 C.F.R. § 1508.4 (emphasis
6 added), without empowering decisionmakers to decide on a case-by-case
7 basis whether the circumstances present in each case actually involve
8 a potential significant effect.’” (Defs.’ Mot. at 14.) Defendants
9 also argue “the fact that other Federal agencies take the same
10 approach” and the fact that the approach was “reviewed by the CEQ
11 itself,” indicates that the USFS’s approach is “reasonable and
12 appropriate.” (Id. at 15.) Defendants also point to the CEQ’s
13 notation “that the Forest Service efforts ‘to clarify the effect of
14 the existence of extraordinary circumstances on the ability to
15 categorically exclude designated actions . . . is to be commended.’”
16 (Id. (citing AR 23).)

17 Plaintiffs disagree with Defendants’ position, contending
18 that the Fuels CE violates the CEQ regulations, regardless of the CEQ
19 determination that the Fuels CE is “in conformance with NEPA and the
20 CEQ regulations.” (AR 78.) Specifically, Plaintiffs argue the Fuels
21 CE fails to properly identify the projects covered by the Fuels CE,
22 but the USFS identified specific criteria governing which actions fall
23 within the Fuels CE. The CEQ “encourages the agencies to consider
24 broadly defined criteria which characterize types of actions that,
25 based on the agency’s experience, do not cause significant
26 environmental effects.” 48 Fed. Reg. 34,263, 34,265 (July 28, 1983).
27 Further, the fact that the particular projects will be identified by
28 the 10-Year Collaborative Implementation Strategy Plan does not

1 broaden the Fuels CE, it merely requires collaboration with state,
2 local, and tribal governments. Additionally, although Plaintiffs
3 contend the Fuels CE is an invalid case-by-case categorical exclusion,
4 it is permissible for an agency to determine, case by case, whether a
5 particular action fits within a CE; NEPA only prohibits an agency from
6 creating a new CE on a case-by-case basis.

7 Plaintiffs also challenge the Fuels CE's extraordinary
8 circumstances provision; however, the USFS adequately defined
9 extraordinary circumstances when it established the list of resource
10 conditions. Further, the CEQ specifically found that the USFS's
11 extraordinary circumstances provisions "conform[] to [NEPA] and the
12 CEQ regulations for implementing the procedural provisions of [NEPA]."
13 (AR 46.) "The CEQ's interpretation of NEPA is entitled to substantial
14 deference" because CEQ is charged by Congress with the obligation of
15 overseeing how federal agencies implement NEPA. Trustees for Alaska
16 v. Hodel, 806 F.2d 1378, 1382 (9th Cir. 1986) (citing Andrus v. Sierra
17 Club, 442 U.S. 347, 358 (1979)).

18 For the stated reasons, Defendants prevail on their position
19 and their motion for summary judgment is granted, and Plaintiffs'
20 motion for summary judgment is denied.

21 b. Will the projects covered by the Fuels CE have
22 cumulatively and/or individually significant effects on the
23 environment?

24 Plaintiffs also challenge the Fuels CE, arguing the Fuels CE
25 is improper since the projects covered by it will have cumulatively
26 significant effects on the environment. (Pls.' Mot. at 12.) By
27 definition, a categorical exclusion is "a category of actions which do
28 not individually or cumulatively have a significant effect on the

1 human environment." 40 C.F.R. § 1508.4. Plaintiffs, relying on
2 Klamath-Siskiyou Wildlands Center, 387 F.3d at 993-94, for the
3 proposition that the total number of acres affected by a project "may
4 demonstrate by itself that the environmental impact will be
5 significant," argue "[t]he projects covered by the Fuels CE certainly
6 meet the Klamath-Siskiyou standard" (Pls.' Mot. at 13.)
7 Plaintiffs contend, since "[t]here is no limitation on the number of
8 the times the Fuels CE can be invoked nationwide, in any particular
9 National Forest, or in any particular watershed . . . , many
10 individually insignificant (small) projects could be right next to
11 each other, or close enough to one another to have a combined or
12 cumulative effect on soils, water, fish and wildlife, without their
13 total cumulative effect being taken into account." (Id. at 13-14.)
14 Plaintiffs contend the projects in the Eldorado National Forest are an
15 example of this problem. (Id. at 14.)

16 Plaintiffs contend "the term 'significantly,' for purposes
17 of NEPA, requires the consideration of both context and intensity [and
18 that i]n evaluating intensity, the agency must consider the degree to
19 which effects are likely to be 'highly controversial.'" (Id.)
20 Plaintiffs argue since "[a]pproximately 39,000 comments were submitted
21 regarding the Fuels CE, including thousands of comments relating to
22 the environmental impacts of the Fuels CE," the Fuels CE "is by
23 definition significant, and not an allowable CE under 40 C.F.R.
24 § 1508.4." (Id. at 15.) Finally, Plaintiffs argue that comparison of
25 the Fuels CE with other "longstanding categorical exclusions of the
26 agency" makes evident that the Fuels CE "is not a proper categorical
27 exclusion." (Id.)

1 Defendants counter that the projects covered by the Fuels CE
2 will not have significant cumulative effects. Defendants argue "the
3 Departments evaluated approximately 2,500 hazardous fuel reduction
4 projects nationwide before determining that the category of actions
5 described in the CE will not have significant cumulative effects on
6 the human environment." (Defs.' Mot. at 15.) Defendants argue
7 "[n]othing in Klamath-Siskiyou . . . stands for the proposition that
8 impacts on a large number of acres constitutes a per se significant
9 cumulative impact" (Id. at 16.)

10 Defendants assert that Plaintiffs' concern about two
11 projects being "right next to each other" without their total
12 cumulative effects being taken into account, "is unfounded [since] CEQ
13 regulations prohibit an agency from the segmentation of projects into
14 pieces that, due to their small size, fall below the NEPA radar."
15 (Id. at 16-17.) Furthermore, Defendants note that "[t]he Fuels CE is
16 not some sort of national program of hazardous fuels reduction
17 projects which would itself be subject to a NEPA analysis[; it] is
18 only a procedural device under NEPA which allows an agency to identify
19 existing categories of projects that from the agency's experience do
20 not normally have a significant impact [and its] only 'purpose' . . .
21 is to allow the agency to authorize low-impact projects which would
22 otherwise have had to have been evaluated under an EA." (Id. at 17-
23 18.)

24 Defendants counter Plaintiffs' argument that the Fuels CE is
25 impermissible because it is highly controversial, stating "[t]he
26 appropriate inquiry . . . is not whether . . . the CE is
27 controversial, but whether there is sufficient controversy over the
28 degree of impacts of hazardous fuels reduction projects to suggest

1 they will have significant impacts and preclude their authorization
2 through the CE[; and, i]n this case there is not." (Id. at 18.)
3 Furthermore, Defendants contend "[t]he receipt of a large number of
4 comments opposing a proposal does not render that proposal
5 controversial under NEPA." (Id.)

6 Plaintiffs also contend the Fuels CE is "improper because
7 the class of actions includes individually significant projects."
8 (Pls.' Mot. at 16.) Plaintiffs note that "[o]f the NEPA projects
9 contained in [the] data call, 28 individual projects had environmental
10 impact statements prepared for them, which meant the implementing
11 agency considered the projects' impacts significant." (Id.) Further,
12 Plaintiffs contend "[t]imber projects like those authorized under the
13 Fuels CE often have significant impacts, which is why EISs are
14 required for them." (Id.) Plaintiffs assert "[t]he record includes
15 numerous examples of fuel reduction projects that have significant
16 impacts," contending that "the fuel reduction projects named in the
17 Complaint serve as examples of projects with significant individual
18 effects that the Forest Service considers covered by the Fuels CE."
19 (Id. at 16-17.)

20 Defendants rejoin that "[t]he record . . . belies
21 [Plaintiffs'] claim." (Defs.' Mot. at 19.) Defendants contend that
22 although "of the 2,500 projects reviewed by the Departments, twelve
23 were found to have significant impacts[, t]his fact does not mean that
24 the Fuels CE includes projects with significant effects," because the
25 Departments found those twelve projects would not be covered by the
26 Fuels CE since they "involved extraordinary circumstances." (Id.)

27 Defendants also argue that although "Plaintiffs list a
28 series of ecological impacts they assert are associated with fuel

1 reduction projects . . . , Plaintiffs fail to link any of these
2 alleged impacts to any of the 2,500 projects in the data set reviewed
3 by the Departments, and fail to point to anything arbitrary or
4 capricious in the Departments' conclusion that . . . 'none of the[]
5 environmental effects was individually or cumulatively significant
6 because the effects were localized, temporary, and of minor
7 magnitude.'" (Id. at 20 (citing AR 155 at 8).)

8 Plaintiffs contend the public comments by state and federal
9 agencies demonstrate the individual and cumulative significance of the
10 projects covered by the Fuels CE. (Pls.' Mot. at 17.) Specifically,
11 Plaintiffs assert that "[i]n their public comments to the Forest
12 Service, several States opposed the Fuels CE because of the direct and
13 cumulative environmental impacts." (Id. at 17-18.) Plaintiffs argue
14 "the Forest Service chose to approve the Fuels CE over the objections
15 of these state and federal agencies, and disregarded the evidence of
16 individual and cumulative harm they provided." (Id. at 20.)

17 Defendants counter that "[t]he fact that other agencies
18 expressed concern, or even opposition to the proposal, does not carry
19 Plaintiffs' burden of proving the agency's action was arbitrary or
20 capricious." (Defs.' Mot. at 20.) Defendants note that "[t]he record
21 before the Court demonstrates that the Departments carefully evaluated
22 and responded to all public comments." (Id. at 21.)

23 Plaintiffs disagree, contending the USFS's conclusion that
24 the impacts of the projects to be covered by the Fuels CE were not
25 individually or cumulatively significant was arbitrary and capricious.
26 (Pls.' Mot. at 21.) Plaintiffs argue that the USFS's finding of no
27 significance "was based primarily on: 1) a review of scientific
28 literature on fuel reduction and forest fires; and 2) a "data call"

1 that consisted of a database of approximately 2,500 projects involving
2 fuel reduction" (Id.) Plaintiffs contend those sources "do
3 not support the Forest Service's finding of no significant cumulative
4 effect, and the Forest Service's reliance on them was arbitrary and
5 capricious" (Id.) Plaintiffs argue "[t]here was little or no
6 analysis of the cumulative effects of fuel reduction projects -
7 especially on the scale contemplated here - on fish, wildlife, water
8 or soils [and t]he Forest Service did not review the scientific
9 literature regarding the actual effects of fuels reduction activities
10 on fish, wildlife, water or soils" (Id.)

11 Plaintiffs also contend the data does not support the USFS's
12 finding of no cumulative significant impacts. (Id. at 22-29.)

13 Plaintiffs argue that

14 there is a cumulative effects column in the
15 Spreadsheet Compiling Data Call Records. . . .
16 However, the spreadsheet does not state what other
17 projects were considered in conjunction with any
18 particular project - if any. There is no telling
19 whether the projects were considered to be
20 cumulative with other projects in the same
21 watershed or in the same National Forest, much
22 less cumulatively with all other projects in the
23 "data call." Nowhere in the data call is there a
24 "quantified assessment" of the combined
25 environmental impacts from these projects.

26 Further, . . . the Forest Service did not
27 determine how many projects it expects the Fuels
28 CE to cover; the total acres it expects will be
impacted; or the total amount of board feet of
timber it expects to remove. The Forest Service
provides no quantitative measure of cumulative
"significance" in the promulgation of the Fuels
CE; and no qualitative measure of cumulative
"significance" in the promulgation of the Fuels
CE. . . .

29 [T]he Forest Service . . . us[ed] the "data
30 call" as a *post-hoc* rationale for an already made
31 decision. The Forest Service's . . . analysis was
32 not done objectively in good faith because the
33 agency had already decided to issue a categorical
34 exclusion. . . .

1 The data call . . . is insufficient . . .
2 because the determination of whether individual
3 projects had "significant effects" is based on the
4 "personal observation" of individual Forest
5 Service employees[;] a majority of the projects
6 that were reviewed were actually themselves analyzed in an EA or
7 EIS[;] the 1,000 and 4,500 acre figures the Fuels CE ultimately
8 established were arbitrary levels and not determinative of whether
9 there is significant individual or cumulative harm above that
10 threshold[;] the data call does not provide adequate information to
11 assess the impacts of these projects[; and because] many of the data
12 call projects were not hazardous fuel treatment reduction projects at
13 all. . . . In sum, the data call does not support the conclusion that
14 the projects to be covered by the Fuels CE have no individual or
15 cumulative significant environmental effects.

16 (Id. at 23-29.)

17 Defendants rejoin the record supports the USFS's conclusion
18 that the Fuels CE will not have significant individual or cumulative
19 impacts. Defendants assert that each of Plaintiffs' criticisms of the
20 USFS's methodology fails because "NEPA does not obligate an agency to
21 prepare an EIS or EA before promulgation of a CE, and the Plaintiffs
22 cannot seek [to] impose such a requirement through the backdoor by
23 asserting that the agency's evaluation of cumulative impacts must be
24 equivalent to that conducted in an EA or EIS." (Defs.' Mot. at 21.)
25 Further, Defendants argue "the agencies complied with the CEQ's
26 directions [in 40 C.F.R. § 1507.3(b)(2), by] evaluating over 2,500
27 past hazardous fuel reduction projects to determine whether certain
28 types of projects did not individually or cumulatively have
29 significant environmental effects" (Id. at 22.) Defendants
30 contend they were therefore in the position to conclude "that the
31 class of projects included in the CE will not normally have
32 significant cumulative impacts." (Id.) Defendants contend "[t]here
33 is no evidence that the Departments did not act in good faith in
34 collecting and evaluating past hazardous fuel projects to develop the
35 fuels CE [and that t]he relevant legal inquiry is not whether the

1 Forest Service collected the data for a specific purpose, but whether
2 the agency examined the data objectively and in good faith. . . .”
3 (Id. at 22-23.)

4 Further, Defendants argue “the Forest Service was not
5 required by either NEPA or the CEQ regulations to conduct any
6 post-implementation monitoring before promulgating a CE [and] there is
7 nothing inappropriate about the Forest Service’s choice to utilize the
8 observations of its trained and professional personnel as part of its
9 methodology for reviewing the over the past fuel reduction projects.”
10 (Id. at 23-24.) Defendants argue “the agency provides a rational
11 explanation for its reliance on the observations of field personal:
12 ‘resource specialists and stakeholders involved in the design and
13 analysis of each specific on-the-ground project were best qualified to
14 identify resulting environmental effects or whether extraordinary
15 circumstances were present.’” (Id. at 24 (citing AR 139 (68 Fed. Reg
16 at 33,817)).)

17 Defendants also contend Plaintiffs “misunderstand . . . how
18 the Departments reviewed the 2,500 projects in the study[; b]ecause
19 the Departments reviewed the projects as they were finally
20 implemented, those projects included whatever modifications or
21 mitigation might have been made during the NEPA procedures.” (Defs.’
22 Mot. at 25.)

23 Defendants contend, although Plaintiffs assert the acreage
24 limitations adopted in the CE are arbitrary, “the Departments made a
25 reasonable finding based on the extensive record of past projects, and
26 that finding must be upheld.” (Id.) Defendants note that the “USDA
27 and DOI reviewed 2,500 hazardous fuels reduction projects for which
28 the initial NEPA reviews predicted the environmental effects would not

1 be significant, and for which that prediction had been validated by
2 post-implementation review[, and that a]fter reviewing th[e] data, and
3 in response to public comment, the agencies determined [the acreage
4 limitations for] the categorical exclusion.” (Id.) Defendants
5 contend the acreage limitations “are well within the range of acreages
6 analyzed in the data” and “Plaintiffs point to nothing arbitrary or
7 capricious in this approach. . . .” (Id.)

8 Finally, Defendants contend “the data collection form used
9 by the Departments allowed personnel to describe significant impacts,
10 and they were not limited to a ‘binary’ choice[;] the data used by the
11 Agencies includes fuel reduction projects from a five year period,
12 from 1998 through 2002[; and t]he inclusion of fuel reduction projects
13 from grasslands is appropriate and should be upheld.” (Id. at 25-26.)

14 Although Plaintiffs challenge the methodology used by the
15 agencies, since Plaintiffs fail to demonstrate that the methodology
16 used was “irrational,” the methodology will be upheld. Marsh v. Or.
17 Natural Resources Council, 490 U.S. at 378. Plaintiffs’ contention
18 that it was inappropriate for the USFS to use personal observations of
19 agency experts in conducting its data call is unsupported; the USFS
20 has not been shown unreasonable in relying on these expert opinions.
21 Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1150 (9th Cir. 1998)
22 (stating that an agency is entitled to rely on its own expert
23 opinions). Plaintiffs’ contention that it was inappropriate for the
24 USFS to use the data call “as a post-hoc rationale for an already made
25 decision” is also unavailing. (Pls.’ Mot. at 24) “[A]n agency can
26 formulate a proposal or even identify a preferred course of action
27 before completing an EIS.” Metcalfe v. Daley, 214 F.3d 1135, 1145 (9th
28 Cir. 2000). Furthermore, the past projects were reviewed as

1 implemented, not as proposed; the acreage limits in the Fuels CE are
2 supported by the record and the choice of acreage is within the
3 agencies' expertise; the USFS's evaluation contained sufficient
4 information about the appropriateness of the Fuels CE; and the
5 projects included in the evaluation were sufficient.

6 The agencies reviewed over 2,500 hazardous fuels reduction
7 projects and rehabilitation projects and considered peer-reviewed
8 scientific literature concerning the effects of hazardous fuel
9 reduction activities before identifying the category of actions that
10 would not normally have significant effects on the environment. 68
11 Fed. Reg. 33,814 (June 5, 2003); AR 139. The USFS proposed the
12 category of actions to be covered by the categorical exclusion in a
13 Federal Register notice, and sought public comment and review and
14 approval by CEQ. 67 Fed. Reg. 77,038 (Dec. 16, 2002); AR 135. Before
15 the Fuels CE was adopted, the USFS considered and responded to
16 numerous comments from the public. 68 Fed. Reg. at 33,815-33,823; 67
17 Fed. Reg. at 54,623-54,627. The USFS provided reasoned explanations
18 for their conclusions that the category of actions covered by the
19 Fuels CE would not normally have a significant impact on the
20 environment. The USFS's determination that the projects covered by
21 the Fuels CE would not have cumulative or individually significant
22 impacts on the environment was not arbitrary and capricious.
23 Therefore, Defendants' motion for summary judgment on this issue is
24 granted and Plaintiffs' motion for summary judgment is denied.

25
26
27 c. Did the USFS violate NEPA by failing to prepare an EA or
28 an EIS for the Fuels CE?

1 Plaintiffs argue "NEPA and its implementing regulations
2 require an EIS or at least an EA for the Fuels CE [since] the Fuels CE
3 is a 'major federal action[] significantly affecting the quality of
4 the human environment.'" (Pls.' Mot. at 30.) "[A]n EIS *must* be
5 prepared if 'substantial questions are raised as to whether a project
6 . . . may cause significant degradation of some human environmental
7 factor.'" Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1149 (9th
8 Cir. 1998) (quoting Greenpeace Action v. Franklin, 14 F.3d 1324, 1332
9 (9th Cir. 1992)). Plaintiffs contend "[t]he Fuels CE . . .
10 constitutes a 'rulemaking' and NEPA analysis was required for it."
11 (Pls.' Mot. at 31.) Defendants counter "[n]either NEPA nor the CEQ's
12 regulations require preparation of an EIS when an agency develops a
13 categorical exclusion[, and] the caselaw squarely rejects
14 [Plaintiffs'] claim." (Defs.' Mot. at 27.)

15 Plaintiffs cite Kootenai Tribe of Idaho v. Veneman, 313 F.3d
16 1094 (9th Cir. 2002), and Citizens for a Better Forestry v. U.S. Dep't
17 of Agric., 341 F.3d 961, 969-70 (9th Cir. 2003), in support of their
18 argument that the USFS was required to prepare an EIS for the Fuels
19 CE. In Kootenai Tribe of Idaho, the Court held that the USFS was
20 required to prepare an EIS in promulgating the roadless area
21 conservation rule for national forests, since the rule immediately
22 altered substantive management of almost 60 million acres of land
23 without the need for any future decisions. In Citizens for Better
24 Forestry, the Court stated in dicta, that the agency erred in not
25 circulating for public comment the EA it prepared for its Forest
26 Planning Regulation, but the decision does not address the issue
27 whether an agency is required to prepare an EA or EIS when
28 promulgating a CE. 341 F.3d at 970.

1 Plaintiffs assert "NEPA and its implementing regulations
2 require an EIS or at least an EA for the Fuels CE" because "the Fuels
3 CE is a 'major federal action[] significantly affecting the quality of
4 the human environment.'" (Pls.' Mot. at 30.) Plaintiffs further
5 argue the Fuels CE should be characterized as "adoption of new agency
6 programs or regulations" and therefore "require[s] the preparation of
7 an EIS outright." (Id. at 31 (citing 40 C.F.R. § 1508.18(b)(1), where
8 it is stated "Federal Actions requiring NEPA review include
9 '[a]doption of official policy, such as rules, regulations, and
10 interpretations adopted pursuant to the Administrative Procedure Act,
11 5 U.S.C. 551 et seq.'").)

12 However, neither NEPA nor the CEQ regulations require
13 preparation of an EIS when an agency develops a categorical exclusion.
14 As the Seventh Circuit stated in Heartwood, Inc. v. United States
15 Forest Service, 230 F.3d 947, 954 (7th Cir. 2000): "CEs are not
16 proposed actions, they are categories of actions for which an EA or
17 EIS has been deemed unnecessary For these procedures, the CEQ
18 does not mandate that agencies conduct an EA before classifying an
19 action as a CE and we must give great deference to the CEQ's
20 interpretation of its own regulations." See also Trustees for Alaska,
21 806 F.2d at 1382 (stating "[t]he CEQ's interpretation of NEPA is
22 entitled to substantial deference."). The CEQ's interpretation of its
23 own implementing regulations is "controlling" unless it is "plainly
24 erroneous or inconsistent with the regulation." Robertson v. Methow
25 Valley Citizens Council, 490 U.S. 332, 359 (1989) (internal quotations
26 omitted). The CEQ regulations specifically provide the procedures for
27 how agencies are to develop categorical exclusions: agencies must
28 publish all procedures for implementing NEPA in the Federal Register

1 and "the procedures shall be adopted only after an opportunity for
2 public review and after review by the [CEQ] for conformity with [NEPA]
3 and the[] regulations." 40 C.F.R. § 1507.3(a). Here, the Final
4 Federal Register Notices for the Fuels CE explain that "establishing
5 categorical exclusions does not require preparation of a NEPA analysis
6 or document." 68 Fed. Reg. at 33,823. Therefore, Plaintiffs' motion
7 for summary judgment on this issue is denied, and Defendants' motion
8 is granted.

9 2. Does the application of the Fuels CE to the Eldorado National
10 Forest projects violate NEPA?

11 Plaintiffs also seek summary judgment on the issue that the
12 USFS unlawfully applied the Fuels CE to the projects in the Eldorado
13 National Forest. (Pls.' Mot. at 31.) Defendants counter that "[e]ach
14 of the challenged projects meets the specifications for inclusion in
15 the Fuels CE [and that f]or each project, the Forest Service undertook
16 public scoping to help identify potentially significant issues[;]
17 undertook studies of the proposed actions to determine whether
18 extraordinary circumstances were present that might preclude the use
19 of the Fuels CE[; and] provided a reasoned explanation for its
20 application of the Fuels CE to these projects and its determination
21 that no extraordinary circumstances were present." (Defs.' Mot. at
22 30-31.)

23 "If a proposed action fits within a categorical exclusion,
24 NEPA review is not required unless there are 'extraordinary
25 circumstances' related to the proposed action." Alaska Ctr. for the
26 Env't v. U.S. Forest Serv., 189 F.3d 851, 858 (9th Cir. 1999) (quoting
27 40 C.F.R. § 1508.4); California v. Norton, 311 F.3d at 1176 (noting
28 that "[i]n many instances, a brief statement that a categorical

1 exclusion is being invoked will suffice"). When determining whether a
2 proposed action fits within a categorical exclusion, a "scoping
3 process is used to 'determine the scope of the issues to be addressed
4 and for identifying the significant issues related to a proposed
5 action.'" Alaska Ctr. for the Env't, 189 F.3d at 858 (citing 40
6 C.F.R. § 1501.7). The arbitrary and capricious standard is applied
7 "to an agency's determination that a particular action falls within
8 [a] categorical exclusion[]." Bicycle Trails Council of Marin v.
9 Babbitt, 82 F.3d 1445, 1456 (9th Cir. 1996). "When an agency decides
10 to proceed with an action in the absence of an EA or EIS, the agency
11 must adequately explain its decision. . . . To determine whether
12 agency action is arbitrary or capricious, a court must consider
13 'whether the decision was based on a consideration of the relevant
14 factors and whether there has been clear error of judgment.'" Alaska
15 Ctr. for the Env't, 189 F.3d at 859 (internal citations omitted).

16 Defendants argue the USFS reasonably determined there are no
17 extraordinary circumstances related to any of the named projects.
18 Defendants contend "[f]or each of the projects challenged by
19 Plaintiffs, the Forest Service determined and documented that no
20 extraordinary circumstances exist that would preclude the use of the
21 Fuels CE." (Defs.' Mot. at 32 (citing AR 1917, 2371, 2759).)

22 Plaintiffs argue this finding was arbitrary and capricious
23 because it "overlooked several important impacts of the projects
24 and/or reached conclusions that were contrary to the evidence before
25 the agency." (Pls.' Mot. at 37.) Plaintiffs contend this conclusion
26 was reached "without considering the effect of other projects." (Id.
27 at 38.) Plaintiffs also argue that "[a]lthough the three projects on
28 the Eldorado National Forest were approved within months of each

1 other, none of the Decision Memos mention either of the other projects
2 as either past, present or reasonably foreseeable projects.” (Id. at
3 38.) Plaintiffs contend “[n]umerous ‘resource conditions’ that could
4 constitute ‘extraordinary circumstances’ are present within each
5 project area.” (Id. at 39.)

6 Further, Plaintiffs argue “[t]he Forest Service concluded
7 that these projects would not significantly affect the resource
8 conditions without considering the ten factors that define
9 significance under the NEPA regulations.” (Id. at 40 (citing 40
10 C.F.R. § 1508.27).) Plaintiffs argue “[i]nstead, the Forest Service
11 makes conclusory statements that the projects will have no significant
12 impacts.” (Id.)

13 Specifically, Plaintiffs argue the Eldorado projects will
14 have significant cumulative impacts on wildlife, water quality, and
15 will not reduce fire risk. Plaintiffs argue “[t]he Eldorado projects
16 will degrade habitat for several sensitive species by simplifying
17 mature forest stand structures, logging and removing trees up to 30”
18 in diameter, and reducing the density of downed logs and snags [and]
19 will adversely affect these species’ ability to breed, feed, and
20 shelter. . . .” (Id. at 32.) Plaintiffs contend the USFS has not
21 provided a convincing statement of reasons why potential effects on
22 the California spotted owl are insignificant. (Id.; Bond Decl. ¶¶ 36-
23 43.) Furthermore, Plaintiffs argue “[t]he Eldorado projects include
24 activities that will directly contribute to an increase in sediment in
25 the watersheds, which adversely affects water quality and fisheries
26 habitat.” (Pls.’ Mot. at 34.) Plaintiffs also note that “the Forest
27 Service’s assertion that these projects will reduce wildfire potential
28 is not supported in the record. In fact, projects such as this may

1 increase fire risk.” (Id. at 35; Odion Decl.) Plaintiffs also
2 contend the projects in the Eldorado National Forest will have
3 significant individual impacts on various species, including the
4 California spotted owl, and therefore use of the Fuels CE is
5 prohibited. (Pls.’ Mot. at 36; Bond Decl.)

6 Defendants rejoin: “Plaintiffs . . . err in suggesting that
7 the mere presence of a resource condition is sufficient to preclude
8 the use of a categorical exclusion.” (Defs.’ Mot. at 32.) Defendants
9 note that “Forest Service implementing procedures for categorical
10 exclusions state that “[t]he mere presence of one or more of these
11 resource conditions does not preclude use of a categorical exclusion[;
12 i]t is the degree of the potential effect of a proposed action on
13 these resource conditions that determines whether extraordinary
14 circumstances exist.” (Id. (citing 67 Fed. Reg. 54,622, 54,627 (Aug.
15 23, 2002)).) Defendants argue “the Forest Service appropriately
16 considered both the presence of threatened or sensitive species and
17 cultural or archaeological sites and determined neither constitute
18 extraordinary circumstances precluding the use of the Fuels CE for any
19 of the challenged projects.” (Defs.’ Mot. at 32.) Defendants assert
20 “[a] Biological Evaluation and Assessment (BEA) was prepared for each
21 project” which “examine[d] the direct, indirect, and cumulative
22 effects of the proposed action on sensitive and threatened wildlife
23 species and habitat if present in the project area.” (Id. at 33.)
24 Defendants assert “[t]he Forest Service provided reasoned explanations
25 for its conclusions [and] each project will require limited operating
26 periods to protect known spotted owl and goshawk nest sites and
27 includes protection measures designed to minimize any potential
28 project effects.” (Id. at 33-34.) Defendants contend “[c]ontrary to

1 Ms. Bond's assertions, the Forest Service addressed cumulative effects
2 to sensitive species and threatened species in its BEAs." (Id. at 34-
3 35.)

4 Defendants also contend "[t]he Forest Service surveyed each
5 project area for the presence of archaeological, historic, and
6 cultural resource sites, and analyzed potential project effects to
7 these sites for each. The Forest Service set out specific protection
8 measures that will be applied to these resources, including flagging
9 and avoiding identified sites." (Id. at 36.)

10 Finally, Defendants contend that although Plaintiffs assert
11 the projects on the Eldorado National Forest will have significant
12 cumulative impacts on water quality, and will not meet the USFS's goal
13 of reducing the risk of fire, "these allegations should have been
14 [made against] the promulgation of the Fuels CE as a whole, rather
15 than [against] the specific named projects." (Id. at 37.) Defendants
16 also assert "even if Plaintiffs' allegations were properly raised
17 against the specific projects, they are without merit." (Id.)

18 The issue is whether the USFS "provided a reasoned decision
19 . . . specifically indicat[ing] that during the scoping process there
20 were no extraordinary circumstances found that would warrant the
21 preparation of an EA or EIS" for any of the Eldorado National Forest
22 projects. Alaska Ctr. for the Env't, 189 F.3d at 859.

23 For each of the projects Plaintiffs challenge, the USFS
24 adequately determined and documented that no extraordinary
25 circumstances exist which would require the preparation of an EA or an
26 EIS. (AR 1916, 2371, 2759.) The USFS prepared a BEA for each project
27 which evaluated the direct, indirect, and cumulative effects of the
28 proposed action on sensitive and threatened wildlife species, and

1 habitat if present in the project area. (AR 1946-60, 2381-2412, 2459-
2 61, 2792-2817.) The USFS specifically considered the effects on the
3 California spotted owl. (AR 1956, 2406, 2803.) The USFS then
4 determined there would be no long-lasting effects, and any effects
5 would be minimized by using limited operating periods, and prepared
6 reasoned explanations for these conclusions. (AR 1167, 1912, 1917,
7 2366, 2754-55, 2759.)

8 In its BEAs, the USFS also surveyed each project area for
9 the presence of archaeological, historical, and cultural resource
10 sites; analyzed potential effects at these sites; set out specific
11 protection measures to be applied at the sites; and then reasonably
12 concluded the proposed projects will not have a significant effect on
13 those sites. (AR 1162-63, 1166-67, 1912-13, 2014, 2367, 2754-55,
14 2764.) The USFS also conducted a Riparian Conservation Objectives
15 Analysis for each project and adequately explained its conclusion that
16 the projects would not have a significant effect on water quality or
17 aquatic habitat. (AR 1968, 2460.) Finally, although Plaintiffs
18 contend the projects could increase fire risk (see Sierra Club v.
19 Eubanks, 335 F. Supp. 2d 1070 (E.D. Cal. 2004), and Odion Decl.), the
20 USFS adequately explained that the Eldorado National Forest projects
21 involve understory thinning designed to reduce the intensity and
22 severity of fire once it starts. (AR 1908, 2361, 2751.)

23 "Employing the deferential standard of review, which . . .
24 must [be used] when reviewing factual conclusions within the agency's
25 expertise, [I] conclude that the Forest Service considered the
26 relevant factors and determined that no extraordinary circumstances
27 were present. Accordingly, the Forest Service did not violate NEPA."
28 Alaska Ctr. for the Env't, 189 F.3d at 859.

1 III. CONCLUSION

2 For the foregoing reasons, Plaintiffs' motion for summary
3 judgment is denied and Defendants' motion for summary judgment is
4 granted. The Clerk of the Court shall enter judgment in favor of
5 Defendants and against Plaintiffs.

6 IT IS SO ORDERED.

7 DATED: September 16, 2005

8 /s/ Garland E. Burrell, Jr.
9 GARLAND E. BURRELL, JR.
United States District Judge

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