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10 UNITED STATES DISTRICT COURT
11 EASTERN DISTRICT OF CALIFORNIA
12 SACRAMENTO DIVISION

13 SIERRA CLUB, INC. and SIERRA NEVADA
FOREST PROTECTION CAMPAIGN,

14 Plaintiffs,

15 v.

16 DALE BOSWORTH, in his official capacity as
17 Chief of the U.S. Forest Service; JOHN BERRY, in
18 his official capacity as Forest Supervisor of the
19 Eldorado National Forest; LAURIE TIPPIN, in her
20 official capacity as Forest Supervisor of the Lassen
21 National Forest; UNITED STATES FOREST
22 SERVICE, an agency of the U.S. Department of
Agriculture; ANN VENEMAN, in her official
23 capacity as Secretary of the U.S. Dept. of
Agriculture; and UNITED STATES
DEPARTMENT OF AGRICULTURE,

24 Defendants.

Case No. Civ. S-04-2114 GEB DAD

**PLAINTIFFS' MEMORANDUM
OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

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1 **INTRODUCTION AND SUMMARY**

2 Plaintiffs Sierra Club and Sierra Nevada Forest Protection Campaign bring this lawsuit to
3 vacate the categorical exclusion from National Environmental Policy Act documentation that the
4 Defendant United States Forest Service has established for “fuel reduction” projects on all units
5 of the National Forest system. (Hereafter this categorical exclusion is referred to as the “Fuels
6 CE.”) Under the Fuels CE, all thinning or logging projects that are classified “fuel reduction” on
7 up to 1,000 acres, and prescribed burns on up to 4,500 acres, are exempted from the NEPA
8 requirements of an environmental assessment or environmental impact statement in advance of
9 the project.

10 As set forth in Count I of the Complaint, the Forest Service’s promulgation of the Fuels
11 CE was arbitrary and capricious, an abuse of discretion or otherwise not in accordance with law,
12 contrary to the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et. seq.* That is because:

13 1) the terms of the Fuels CE are contrary to 40 C.F.R. §§ 1508.4 and 1507.3, in that they do not
14 specify and identify adequately the actions to be covered, create an unlawful “case-by-case”
15 categorical exclusion, and fail to establish properly “extraordinary circumstances”; and 2) the
16 actions to be covered are not appropriate for categorical exclusion under 40 C.F.R. § 1508.4
17 because they have individual and/or cumulative significant effects; and the Forest Service’s
18 findings of non-significance were arbitrary and capricious and contrary to the evidence before
19 the agency.

20 As set forth in Count II, the Fuels CE was not in accordance with NEPA and must be
21 vacated and remanded because the Forest Service failed to prepare an environmental assessment
22 or environmental impact statement for the Fuels CE prior to approving it.

23 As set forth in Count III, the Fuels CE cannot be applied to the challenged timber projects
24 in the Lassen National Forest and the Eldorado National Forest in California because they
25 involve individual and/or cumulative significant effects. Application of the Fuels CE to these

1 projects is also unlawful because these projects involve significant impacts on “resource
2 conditions” that constitute an “extraordinary circumstance” that prohibits use of a categorical
3 exclusion under the 40 C.F.R. § 1508.4 and the Forest Service’s Handbook 1909.15 ch. 30.3.
4 These include adverse effects on Forest Service designated sensitive species. At a minimum, the
5 Forest Service’s finding of no significant effect on these resource conditions was arbitrary and
6 capricious and not supported by the record. Under NEPA, an environmental assessment or
7 environmental impact statement should have been prepared for these projects before they were
8 approved, but this was not done.

9 STATEMENT OF THE CASE

10 I. LEGAL BACKGROUND ON NEPA AND CATEGORICAL EXCLUSIONS

11 NEPA, 42 U.S.C. §§ 4321-4347, is the “basic national charter for protection of the
12 environment.” 40 C.F.R. § 1500.1. It is designed to “insure that environmental information is
13 available to public officials and citizens before decisions are made and before actions are taken.”
14 *Id.* at § 1500.1(b)-(c). NEPA’s purpose is to promote efforts “which will prevent or eliminate
15 damage to the environment.” 42 U.S.C. § 4321. To accomplish these purposes, NEPA requires
16 that all federal agencies prepare a detailed statement, known as an environmental impact
17 statement (“EIS”), regarding all “major federal actions significantly affecting the quality of the
18 human environment” 42 U.S.C. § 4332(C). NEPA’s guiding principle is that agencies must
19 evaluate the environmental implications of their actions *prior* to making a decision. *See, e.g.,*
20 *Andrus v. Sierra Club*, 442 U.S. 347, 350-51 (1979) (emphasis added); *Oregon Env’tl. Council v.*
21 *Kunzman*, 817 F.2d 484, 492 (9th Cir. 1987).

22 Under NEPA’s implementing regulations, federal agencies may prepare an environmental
23 assessment (“EA”) to determine whether a proposed action may have a “significant” effect on
24 the environment. 40 C.F.R. § 1501.4. If the agency determines that the project will have no
25 significant environmental effects, the agency may then issue a finding of no significant impact

1 (“FONSI”), rather than prepare an EIS for the project. 40 C.F.R. §§ 1508.9(a)(1); 1508.13.

2 The regulations also provide that in some situations, neither an EA nor an EIS is required,
3 and federal agencies may instead invoke a categorical exclusion from NEPA analysis. 40 C.F.R.
4 § 1508.4. The regulations define a categorical exclusion as follows:

5 “Categorical exclusion” means a category of actions *which do not individually or*
6 *cumulatively have a significant effect on the human environment and which have*
7 *been found to have no such effect* in procedures adopted by a Federal agency in
8 implementation of these regulations (§ 1507.3) and for which, therefore, neither
9 an environmental assessment nor an environmental impact statement is
required....Any procedures under this section shall provide for extraordinary
circumstances in which a normally excluded action may have a significant
environmental effect.

10 40 C.F.R. § 1508.4 (emphasis added). The regulations further require that agencies adopt
11 procedures to implement NEPA, including “specific criteria for and identification of” actions
12 that qualify for categorical exclusions. 40 C.F.R. § 1507.3(b)(2)(ii). If an action falls within an
13 adopted categorical exclusion an agency is not required to prepare an EIS or an EA, unless
14 “extraordinary circumstances” related to the proposed action exist. 40 C.F.R. §§ 1507.3, 1508.4.
15 Extraordinary circumstances are those “in which a normally excluded action may have a
16 significant environmental effect.” *Id.*

17 **II. STATEMENT OF FACTS**

18 **A. FOREST SERVICE PREPARATION OF THE FUELS CE**

19 On September 11, 2002, the Deputy Chief of National Forest System, Tom L. Thompson,
20 requested data regarding fuels treatment projects from all Regional Foresters. He informed them
21 that the Forest Service intended to propose a categorical exclusion for fuels treatment and
22 restoration activities. He asked the Regional Foresters to provide information to complete a
23 database on fuel hazard reduction projects and fire rehabilitation projects in support of the
24 categorical exclusion. Administrative Record (AR) CD 2, Doc. 86; Plaintiffs’ Excerpts of
25

1 Administrative Record (Pl. Exh.) A at 1.¹

2 The Forest Service database that was subsequently developed included over 2,500
3 hazardous fuel reduction and rehabilitation/stabilization projects. AR-CD 2, Doc. 133 (Pl. Exh.
4 B at 3)(hereafter referred to as “Final Report on Data Call”). Among other data entries, the
5 database included a field indicating whether the project had been analyzed under an EA, EIS or
6 CE, and a field for an opinion on whether the individual project had individual or cumulative
7 significant effects. *Id.* Over half of these projects were documented with an EA, less than 50
8 were documented with an EIS, and the remaining ones were categorically excluded under
9 existing categories. *Id.* Twelve projects, all fuels reduction projects, contained predictions of
10 significant environmental effects. 67 Fed. Reg. 77,038, 77,041.

11 To support the Fuels CE, the Forest Service also “conducted a review of peer-reviewed
12 scientific literature identifying the effects of hazardous fuels reduction activities.” 68 Fed. Reg.
13 33,814, 33,814. The purpose of this was to review the literature on the effect of hazardous fuels
14 reduction activities on the frequency and intensity of forest fires. *Id.*

15 On December 16, 2002, the Forest Service gave public notice of, and requested comment
16 on, its proposal to establish the Fuels CE. 67 Fed. Reg. 77,038, 77,038. Almost 39,000 comments
17 were submitted. 68 Fed. Reg. 33,814, 33,815. Among the comments, the Council on
18 Environmental Quality (“CEQ”) and the U.S. Fish & Wildlife Service expressed concerns about
19 the Forest Service’s data review and methodology in determining a lack of individual and
20 cumulative significant effects. *See*, AR-CD 2, Doc. 161 (Pl. Exh. H) and AR-CD1, HF1147 (Pl.
21 Exh. L). Several state agencies also expressed concern regarding the data review and
22 methodology, including the Arizona Game & Fish Department, the State of California Resources
23

24 ¹ The Fuels CE Administrative Record has been filed by the Forest Service on two CD/ROM.
25 For the court’s convenience, Plaintiffs have filed with this motion excerpts from that record that
are principally relied upon. The reference to Exhibit numbers are to the numbers in Plaintiffs’
Administrative Record Excerpts.

1 Agency, and the Wyoming Game & Fish Department. *See*, AR-CD 1, HF799 (Pl. Exh. M); AR-
2 CD 1, HF1705 (Pl. Exh. R); and AR-CD 1, HF802 (Pl. Exh. S). The Plaintiffs in this case and
3 numerous other environmental organizations also submitted detailed comments in opposition to
4 the Fuels CE. *See*, AR-CD 1, HF1186 (Pl. Exh. P).

5 **B. TERMS OF THE FUELS CE**

6 On June 5, 2003, the Forest Service published the final Fuels CE. 68 Fed. Reg. 33,814.
7 The final Fuels CE was rule was also published as a revision to the Forest Service Handbook
8 1909.15, Chapter 30, Section 31.2. AR-CD 2, Doc. 156 (Pl. Exh. C). Among its provisions, the
9 Fuels CE authorizes thinning (i.e. logging) projects up to 1,000 acres and prescribed burning up
10 to 4,500 acres without an EA or EIS. There is no limit on the size, number, or location of trees
11 that may be cut under the Fuels CE. Nor is there any limit on the number of times the Fuels CE
12 may be used in any particular watershed, in any one National Forest, or in the system regionally
13 or nationwide.

14 The text of the Fuels CE is as follows:

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

- 17 a. Shall be limited to areas:
- 18 (1) In the wildland-urban interface; or
19 (2) Condition Classes 2 or 3 in Fire Regime Groups I, II, or III, outside the
20 wildland-urban interface;
- 21 b. Shall be identified through a collaborative framework as described in “A
22 Collaborative Approach for Reducing Wildland Fire Risks to Communities and
23 Environment 10-Year Comprehensive Strategy Implementation Plan”;
- 24 c. Shall be conducted consistent with agency and Departmental procedures and
25 applicable land and resource management plans;
- d. Shall not be conducted in wilderness areas or impair the suitability of wilderness
study areas for preservation as wilderness; and

1 e. Shall not include the use of herbicides or pesticides or the construction of new
2 permanent roads or other new permanent infrastructure; and may include the sale
3 of vegetative material if the primary purpose of the activity is hazardous fuels
4 reduction.

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

10 a. Shall be conducted consistent with agency and Departmental procedures and
11 applicable land and resource management plans;

12 b. Shall not include the use of herbicides or pesticides or the construction of new
13 permanent roads or other new permanent infrastructure; and

14 c. Shall be completed within three years following a wildland fire.

15 AR-CD 2, Doc. 156 (Pl. Exh. C)(Forest Service Handbook 1909.15, Chapter 30, Section 31.2).

16 The Fuels CE is applicable to all units of the National Forest System, which includes 192
17 million acres of land in 42 states, the Virgin Islands, and Puerto Rico. The System includes 155
18 National Forests and 20 national grasslands. 65 Fed. Reg. 67,514, 67,514.

19 **C. APPLICATION OF THE FUELS CE IN THE ELDORADO AND LASSEN 20 NATIONAL FORESTS**

21 In 2004, the Forest Service applied the Fuels CE to at least three projects in the Eldorado
22 National Forest. These projects are: Grey Eagle Fuels Reduction (logging 984 acres and
23 prescribed burning 4,149 acres); Forest Guard Fuels Reduction (logging and prescribed burning
24 412 acres); and Rockeye Fuels Reduction Project (logging and prescribed burning 513 acres).

25 *See*, AR-Vol. 6, p. 2360 (Pl. Exh. D); AR-Vol. 7, p. 2750 (Pl. Exh. E); AR-Vol. 5, p. 1907 (Pl.
Exh. F) (Decision Memos on the respective projects).² In 2004, the Forest Service also applied

² The Forest Service has several more Fuels CE projects planned for the Eldorado National Forest in 2005. These include Smarty Jones Fuel Reduction Project, Jane Doe Fuel Reduction Project, O'Leary's Cow Fuel Reduction Project, and Four Corners Fuel Reduction Project. *See*,

1 the Fuels CE in the Lassen National Forest. It approved the Adams Windthrow Fuels Reduction
2 Project, which involves the removal of wind thrown trees up to 30” in diameter from 760 acres.
3 *See* Decision Memo at AR-Vol. 3, p. 1160 (Pl. Exh. G).³

4 **III. STANDARD OF REVIEW**

5 The standard of review of the Forest Service’s actions is provided by the Administrative
6 Procedure Act (APA), 5 U.S.C § 706, et seq. The APA requires the reviewing court to determine
7 whether the Forest Service’s actions were “arbitrary and capricious, an abuse of discretion, or
8 otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); *Idaho Sporting Congress v.*
9 *Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1988); *Greenpeace Action v. Franklin*, 14 F.3d 1324,
10 1331 (9th Cir. 1992). Under this standard, the court must ensure that the Forest Service has
11 taken a hard look at the environmental consequences of proceeding with the proposed project, by
12 carefully reviewing the record and satisfying itself that the Forest Service made a reasoned
13 decision based on an evaluation of the relevant factors. *Id.* at 1332; *Marsh v. Oregon Natural*
14 *Resources Council*, 490 U.S. 360, 373-374 (1989); *see Idaho Sporting Congress*, 137 F.3d at
15 1149 (“we consider whether the decision was based on a consideration of the relevant factors and
16 whether there has been a clear error of judgment”).

17 Although an agency’s decision is entitled to a presumption of regularity, “that
18 presumption is not to shield [the agency’s] action from a thorough, probing, in-depth review.”
19 *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971); *Tribal Village of Akutan*

21 Plaintiffs’ Supplemental Administrative Record filed herewith at Exhibit D for the Scoping
22 Notices on these projects and Schedule of Proposed Actions.

23 ³ The Forest Service has several more Fuels CE projects planned for the Lassen National Forest
24 in 2005. These include Hogback Plum Creek Fuels Reduction Project and Panther Springs Fuel
25 Reduction Project. *See*, Pls. Supplemental Administrative Record Exh. E (Schedule of Proposed
Actions on Lassen National Forest). Another project named in the Complaint, Battle DFPZ, was
originally scoped by the Forest Service as a fuel reduction project but ultimately was approved
under a different categorical exclusion than the Fuel CE. Plaintiffs therefore withdraw their
claims against the Battle DFPZ project.

1 *v. Hodel*, 869 F.2d 1185 (9th Cir. 1988). The court’s inquiry must “be searching and careful.”
2 *Volpe*, 401 U.S. at 416. The court must ascertain whether the agency examined the relevant data
3 and articulated a rational connection between the facts found and the decision made. *Motor*
4 *Vehicle Mfrs. Ass’n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983). Agency action must be
5 set aside “if the agency relied on factors which Congress has not intended for it to consider,
6 entirely failed to consider an important aspect of the problem, offered an explanation for its
7 decision that runs counter to the evidence before the agency, or is so implausible that it could not
8 be ascribed to a difference in view or the product of agency expertise.” *Id.*

9 **ARGUMENT**

10 **I. THE FOREST SERVICE’S ESTABLISHMENT OF THE FUELS CE WAS**
11 **ARBITRARY AND CAPRICIOUS AND NOT IN ACCORDANCE WITH NEPA**
AND ITS IMPLEMENTING REGULATIONS.

12 **A. THE TERMS OF THE FUELS CE DO NOT MEET REGULATORY**
13 **REQUIREMENTS AND CREATE AN UNLAWFUL CASE BY CASE**
14 **CATEGORICAL EXCLUSION.**

15 **1. The Fuels CE does not meet the Regulatory Requirements for**
16 **Specificity and Identification of Projects.**

17 The regulations direct agencies to adopt “specific criteria for and identification of those
18 typical classes of action:....(ii) Which normally do not require either an environmental impact
19 statement or an environmental assessment (categorical exclusions (§ 1508.4)).” 40 C.F.R. §
20 1507.3(b)(2)(ii) (emphasis added). The Fuels CE is contrary to this regulation because the
21 actions to be covered are not specified or identified. Instead, identification of the actions is left to
22 future, *ad hoc* determination.

23 The Fuels CE states that the projects to be covered by it: “Shall be identified through a
24 collaborative framework as described in ‘A Collaborative Approach for Reducing Wildland Fire
25 Risks to Communities and Environment 10-Year Comprehensive Strategy Implementation
Plan.’” (*See*, Fuels CE, at AR-CD 2, Doc. 156 (Pl. Exh. C)(emphasis added).) (The 10-year

1 Implementation Plan is at Plaintiffs' Supplemental Administrative Record ("Pl. SAR") Exh. J.)
2 That plan does not, however, "identify" the "category of actions" to be covered by a categorical
3 exclusion. Rather it describes a "strategy" or "framework" for "priority setting" of projects,
4 institutes a process for collaboration among stakeholders, and calls for future establishment of
5 performance measures and monitoring. *Id.* at 5. It has no specification or identification of actions
6 as required by 40 C.F.R. § 1507.3(b)(2)(ii).

7 The Fuels CE also does not define key terms used in the categorical exclusion, such as
8 "hazardous," as in "hazardous fuel reduction activities." The type and extent of road
9 construction that would be permissible is not defined in the Fuels CE. The Fuels CE also does
10 not contain an indication of how much fuel "reduction" would be allowed.⁴ The only limit on
11 these factors is consistency with the 10-Year Implementation Plan, but that document does not
12 provide this information either. *See*, Pl. SAR Exh. J.

13 **2. The Fuels CE Creates an Unlawful Case-by-Case Categorical** 14 **Exclusion.**

15 The purpose of 40 C.F.R. § 1508.4 is to identify "categories of actions" that have no
16 individual or cumulative significant impacts. Since the categories of actions have no significant
17 impacts, a case-by-case analysis of significance is unnecessary and an agency may dispense with
18 the environmental analysis usually required by NEPA. However, by leaving determination of
19 whether a project is covered by the Fuels CE to the process of the "10-Year Comprehensive
20 Strategy Implementation Plan," the Fuels CE refers to another, future decision-making process,
21 which is itself without specificity. The Fuels CE has created a "case-by-case" or *ad hoc*
22 categorical exclusion. That is not allowed under 40 C.F.R. §§ 1507.3(b)(2)(ii) and 1508.4.

23 The Forest Service's own counsel have previously informed it that case-by-case

24
25 ⁴ The fact that the terms of the Fuels CE are vague and unlawful in this respect was set out in
Complaint paragraphs 67-72. These paragraphs were not denied by the Forest Service in its
Answer.

1 categorical exclusions are not allowed, but that advice was apparently ignored in preparing the
2 Fuels CE. The Department of Agriculture Office of General Counsel once cautioned regarding a
3 similar categorical exclusion: “[C]ategorical exclusions as defined by CEQ NEPA Regulations
4 40 C.F.R. 1508.4, cannot be established on a case-by-case basis by review of the context and
5 intensity of the proposal....[I]f judgment is exercised on a case-by-case basis considering the
6 question of context and intensity, which is the CEQ regulation breakdown of significantly, then
7 an [EA] and [FONSI] must accompany the Decision Notice.” Pl. SAR Exh. G-1 at 1-2. Later
8 the Counsel issued an opinion warning: “The Forest Service has defined some categories in [its
9 categorical exclusion] tied to 40 CFR 1508.27 which of course is the same consideration for
10 when to do an EIS....It seems the Forest Service is proposing a non-documentary solution to a
11 documentation problem.” Pl. SAR Exh. G-2 at 2-3. Finally, the Counsel issued an opinion
12 concluding: “We have advised for some time that the Forest Service case-by-case determination
13 of categorical exclusions violated the CEQ Regulations, NEPA case law, and introduced
14 significant legal risk to the Forest Service NEPA compliance....We know of no other federal
15 agency which has successfully litigated the case-by-case approach.” Pl. SAR Exh. G-3.

16 **3. The Forest Service Failed to Properly Designate “Extraordinary**
17 **Circumstances” and through its “Extraordinary Circumstances”**
18 **Provision Created an Unlawful “Case-by-Case” Categorical**
19 **Exclusion.**

19 CEQ regulations require categorical exclusions to provide for “extraordinary
20 circumstances,” which preclude use of the categorical exclusion. 40 C.F.R. § 1508.4. Pursuant to
21 these regulations, the Forest Service has listed several “resource conditions” that comprise the
22 “extraordinary circumstances” for the Fuels CE. These are threatened and endangered species or
23 their designated critical habitat; wilderness areas; inventoried roadless areas; wetlands; impaired
24 waters; and archaeological, cultural or historic sites. 68 Fed. Reg. 33,814. The Forest Service has
25 also included “sensitive species” as one of these “resource conditions.” *See*, 67 Fed. Reg. 54,622,
54,623; and Pl. SAR Exh. H (Forest Service Handbook at § 30.3(2)(a) listing the resource

1 conditions).

2 The Forest Service’s provision for “extraordinary circumstances” in the Forest Service
3 Handbook 1909.15 ch. 30.3 does not meet the requirements of 40 C.F.R. § 1508.4 because the
4 Forest Service did not specify or identify the extraordinary circumstances. To the contrary, it
5 qualified the definition and application of the “extraordinary circumstances” exception based on
6 the “degree of potential effect” of an action on the “resource conditions.” Pl. SAR Ex. H
7 (Forest Service Handbook at § 30.3(2)(a)). The operable language is: “The mere presence of one
8 or more of these resource conditions does not preclude use of a categorical exclusion. It is the
9 degree of the potential effect of a proposed action on these resource conditions that determines
10 whether extraordinary circumstances exist.” *Id.* The Forest Service has stated that the “degree of
11 potential effect” test is whether “the proposed action would not have a significant effect on the
12 listed resource condition.” 67 Fed. Reg. 54,623.⁵

13 In establishing this “extraordinary circumstance” provision, the Forest Service stated that
14 “extraordinary circumstances” could only preclude use of the categorical exclusion “if the
15 official determines on a case-by-case basis that the proposed action would not have a significant
16 effect on the listed resource conditions.” *Id.* (emphasis added). As set forth above, a “case-by-
17 case” categorical exclusion is not permitted. Once a “case-by-case” determination of significance
18 or degree of impact must be done (as the Forest Service did for each project named in the
19 Complaint, for example), the action cannot be excluded from review with a categorical exclusion
20 but rather must be analyzed under an EA and FONSI or EIS. 40 C.F.R. §§ 1508.9, 1508.13; *see,*
21 *e.g., Rhodes*, 153 F.3d. at 790 (if there are potential significant environmental effects, an internal

23 ⁵ By qualifying the extraordinary circumstances exception in this way the Forest Service was
24 attempting to change the outcome of *Rhodes v. Johnson*, 153 F.3d 785 (7th Cir., 1998), which
25 held that based on the Forest Service Handbook the mere presence of an extraordinary
circumstance precludes the use of a categorical exclusion. The Forest Service’s change was not
complete, however, and two of three portions relied on in *Rhodes* are still in effect. *See* Pl. SAR I
(FSH 1909.15 zero code (June, 29, 2004)) and *compare to* 153 F.3d 785.

1 review to determine whether there will be significant impacts on the environment is not enough;
2 the agency must prepare an EA).

3 Allowing an agency to perform this “case-by-case” determination essentially creates an
4 undocumented Environmental Assessment and Finding of No Significant Impact (FONSI)
5 process, which is in direct violation of NEPA and the CEQ regulations. *Id.*; 40 C.F.R. § 1501.1;
6 *and, see, Idaho Sporting Congress Inc. v. Alexander*, 222 F.3d 562, 567 (9th Cir. 2000)(holding
7 that the Forest Service is not allowed to substitute a “non-NEPA procedure” for an EA or EIS).
8 In sum, If the Forest Service wishes to perform an analysis to determine the “degree” of impact
9 of the project, the proper method to do this is under an EA and FONSI as allowed under CEQ
10 regulations. 40 C.F.R. §§ 1501.3, 1501.4 and 1507.3. It is not to develop a non-NEPA case-by-
11 case determination of the impact.

12 **B. PROJECTS COVERED BY THE FUELS CE WILL HAVE**
13 **CUMULATIVELY SIGNIFICANT EFFECTS ON THE ENVIRONMENT.**

14 The CEQ regulations define a CE as “a category of actions *which do not*
15 *individually or cumulatively have a significant effect on the human environment* and
16 *which have been found to have no such effect* in procedures adopted by a Federal agency
17 in implementation of these regulations (§ 1507.3).” 40 C.F.R. § 1508.4 (emphasis added).
18 Thus, if a category of actions has cumulatively significant effects, it cannot be the subject
19 of a categorical exclusion under 40 C.F.R. § 1508.4.

20 The Ninth Circuit recently stated the standard for determining cumulative
21 significant effects, as follows:

22 A cumulative impact is defined in NEPA’s implementing regulations as “the
23 impact on the environment which results from the incremental impact of the
24 action when added to other past, present, and reasonably foreseeable future
25 actions....Cumulative impacts can result from individually minor but collectively
significant actions taking place over a period of time.” 40 C.F.R. § 1508.7....The
most obvious way is that the greater total magnitude of the environmental
effects—**such as the total number of acres affected** or the total amount of
sediment to be added to streams within a watershed—may demonstrate by itself

1 that the environmental impact will be significant. Sometimes the total impact
2 from a set of actions may be greater than the sum of the parts.

3 *Klamath-Siskiyou Wildlands Ctr. v. U.S. Bureau of Land Mgmt.*, 387 F.3d 989, 993-994
4 (9th Cir. 2004) (emphasis added).

5 The projects covered by the Fuels CE certainly meet the *Klamath-Siskiyou* standard for
6 cumulatively significant effect based on “total number of acres affected.” The Forest Service
7 surveyed 2,559 projects over two years to support its decision to issue the Fuels CE. *See*, AR-CD
8 2, Doc. 133 (Pl. Exh. B at 3).⁶ Those projects involved treatment of **2,542,328 acres** by
9 mechanical methods and/or prescribed burns. AR-CD 2, Doc. 132 (Pl. Exh. N at columns G &
10 H). The Forest Service has stated that those surveyed projects would have been covered under
11 the Fuels CE, and therefore the acreage surveyed represents a reasonable projection of its future
12 use. 68 Fed. Reg. 33,814, 33,823 (“[T]he profile of the past hazardous fuels reduction and fire
13 rehabilitation activities . . . is indicative of the agencies’ future activities.”).⁷

14 In fact, the numbers could be even higher, considering that virtually all of the surveyed
15 projects underwent EAs or EISs and bypassing that review would expedite projects and allow the
16 completion of more projects in a shorter amount of time. Increasing the number of projects is
17 one of the primary purposes of the Fuels CE. 68 Fed. Reg. 33,814, 33,815 (purpose of the Fuels
18 CE is to “ensure more timely decisions [and] greater efficiency”). There is no limitation on the
19 number of times the Fuels CE can be invoked nationwide, in any particular National Forest, or in
20 any particular watershed. Without this limitation, many individually insignificant (small) projects

21
22 ⁶ Of the 2,559 projects considered: (1) 336 projects were located in California; (2) 1,518 projects
23 involved treatments in the Wildland Urban Interface and the remaining 1,041 were outside of the
24 interface. *See*, AR-CD 2, Doc. 133 (Pl. Exh. B at 4, 6).

25 ⁷ The amount of fuel reduction on federal lands is staggering. According to a November 1, 2004
Forest Service report: “Since 2001, Federal land management agencies have treated 11 million
acres of hazardous fuels on public lands. In 2004, . . . [t]he Forest Service and Department of
Interior land management agencies far exceeded [their] goal by treating nearly 4.2 million acres,
or 113% of the 2004 goal.” Pl. SAR Exh. F.

1 could be right next to each other, or close enough to one another to have a combined or
2 cumulative effect on soils, water, fish and wildlife, without their total cumulative effect being
3 taken into account. An example of this is provided by the projects in the Eldorado National
4 Forest named in this case. *See*, Thomas Decl., Pl. SAR Exh. C at ¶ 20 (two of the challenged
5 projects are in the same watershed and are within three miles of each other).

6 Not only is the cumulative acreage of the Fuels CE significant throughout all National
7 Forests, it is significant in the Eldorado National Forest by itself. Plaintiff Sierra Nevada Forest
8 Protection Campaign calculated in its public comments that in one ranger district on the
9 Eldorado National Forest, from 1994 to 2000, 55.25 million board feet of timber were logged
10 under 32 fuel reduction projects, 23 of which were categorically excluded under then existing
11 categories. AR-CD 1, HF1765 (Pl. Exh. O at 2-3). A logging truck holds approximately 5,000
12 board feet, so this represents the removal of 11,050 truckloads of timber. Pl. SAR Exh. C at ¶
13 17. The cumulative impacts on the Eldorado National Forest from the majority of this massive
14 logging program, such as the fragmentation of California spotted owl and northern goshawk
15 habitat, were never analyzed under any NEPA document. AR-CD 1, HF1765 (Pl. Exh. O at 2-3).
16 They were also not analyzed in preparation of the Fuels CE.

17 Given the avowed purpose of the Fuels CE, the Forest Service claim that the activities to
18 be covered by this CE will not be significant is somewhat disingenuous. The purpose of the CE
19 is to have a significant impact on the human environment, by culling untold thousands of acres
20 of national forests, to supposedly protect communities at risk. *See* 67 Fed. Reg. 77,039, 77,039-
21 40. The fact that the agency believes the Fuels CE will result in a net benefit for communities
22 does not change the fact that it significantly impacts the forests. To the contrary, the CEQ
23 regulations state that, “[a] significant effect may exist *even if the Federal agency believes that on*
24 *balance the effect will be beneficial.*” 40 C.F.R. § 1508.27(b)(1) (emphasis added). Thus, the
25

1 Forest Service’s claim that the project will *benefit* public health or safety, even if true, does not
2 allow it to conclude that the impact is “insignificant” for purposes of NEPA. *See, Natural*
3 *Resources Defense Council v. Duvall*, 777 F.Supp. 1533, 1542 (E.D. Cal. 1991). Put another
4 way, the whole purpose of the Fuels CE is to significantly change the forest; therefore, finding
5 that it is not significant is contradictory to the evidence before the agency. *See, Motor Vehicle*
6 *Mfrs. Ass’n.*, 463 U.S. at 43 (agency action is arbitrary and capricious if contrary to the evidence
7 before the agency).⁸

8 In addition, the term “significantly,” for purposes of NEPA, requires the consideration of
9 both context and intensity. 40 C.F.R. § 1508.27. In evaluating intensity, the agency must
10 consider the degree to which effects are likely to be “highly controversial.” The Fuels CE is
11 beyond a doubt highly controversial. Approximately 39,000 comments were submitted regarding
12 the Fuels CE, including thousands of comments relating to the environmental impacts of the
13 Fuels CE. 68 Fed. Reg. 33,814, 33,815. Therefore, it is by definition significant, and not an
14 allowable CE under 40 C.F.R. § 1508.4. *Jones v. Gordon*, 792 F.2d 821 (9th Cir. 1986);
15 *California v. Norton*, 311 F.3d 1162, 1177 (9th Cir. 2002); *Blue Mountains Biodiversity. Project*
16 *v. Blackwood*, 161 F.3d 1208, 1212-13 (9th Cir. 1998), *cert. denied*, 527 U.S. 1003 (1999).

17 In the end, the fact that the Fuels CE is not a proper categorical exclusion is shown by
18 comparing it to the other, longstanding categorical exclusions of the agency, which are not
19 controversial and would have little or no effect on their face. For example, the existing Forest
20 Service CEs include: repair and maintenance of administrative sites, for example mowing lawns
21 at a district office; replacing a roof or storage shed; painting a building; and applying registered
22

23 ⁸ Nothing in 40 C.F.R. § 1508.4 would permit the Forest Service to offset the cumulative harm of
24 these projects to wildlife, watersheds or soils by placing a greater value on fuel reduction, but,
25 even if it did, the Fuels CE does not serve that purpose. As set forth in Sierra Club’s comments,
“thinning” as a fuel reduction activity is often counter-productive and increases fire risk. AR-CD
1, HF1186 (Pl. Exh. P at 15-18). The fact that these projects can cause increased risk is
discussed further below, in the section on the effects of the projects named in the Complaint.

1 pesticides for rodent or vegetation control. *See*, Pl. SAR Exh. H at § 31.1(b)(3) (Forest Service
2 Handbook). Also, the existing U.S. Department of Agriculture CE categories cover
3 administrative activities, not on-the-ground projects. 7 C.F.R. § 1b.3(a).

4 **C. PROJECTS COVERED BY THE FUELS CE WILL HAVE**
5 **INDIVIDUALLY SIGNIFICANT EFFECTS ON THE ENVIRONMENT.**

6 The Fuels CE is also improper because the class of actions includes individually
7 significant projects. Of the NEPA projects contained in data call, 28 individual projects had
8 environmental impact statements prepared for them, which meant the implementing agency
9 considered the projects' impacts significant. AR-CD 2, Doc. 133 (Pl. Exh. B at 3, Table 1); AR-
10 CD 2, Doc. 132 (Pl. Exh. N); *see also, Idaho Sporting Congress*, 137 F.3d at 1149 (“an EIS must
11 be prepared if ‘substantial questions are raised as to whether a project...may cause significant
12 degradation of some human environmental factor’”) (citation omitted).

13 Timber projects like those authorized under the Fuels CE often have significant impacts,
14 which is why EISs are required for them. The examples are countless, but *see, e.g., Native*
15 *Ecosystems Council v. Dombeck*, 304 F.3d 886, 896 (9th Cir. 2002) (EA inadequate for failure to
16 consider cumulative impacts of road densities); *Land Council v. Vaught*, 16 Fed. Appx. 768,
17 769-70 (9th Cir. 2001) (logging would increase the risk of catastrophic fire), *Alexander*, 222 F.3d
18 at 567 (EIS required to analyze environmental harm caused by timber sales); *Neighbors of Cuddy*
19 *Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1376 (9th Cir. 1998) (Supplemental EIS required
20 to evaluate impact of three other planned sales); *Blue Mountains*, 161 F.3d at 1213-14, (EIS
21 should have been prepared prior to a post-fire salvage logging project); *Marble Mountain*
22 *Audubon Soc’y v. Rice*, 914 F.2d 179, 182 (9th Cir. 1990) (EIS required to include analysis of
23 threatened biological corridor in fire-recovery timber sale); *Sierra Club v. Eubanks*, 335
24 F.Supp.2d 1070, 1081 & 1084 (E.D. Cal. 2004) (district court issued a preliminary injunction
25 because logging could create the “specter of bonfire-like combustion across the landscape”).

The record includes numerous examples of fuel reduction projects that have significant

1 impacts. Sierra Club provided numerous examples of fuel reduction projects with significant
2 environmental effects in its public comments, backed up with Forest Service documents and
3 attached scientific reports and other information. AR-CD 1, HF1186 (Pl. Exh. P at 10-13).
4 For example, the “thinning” in fuel reduction projects often requires road building and other
5 harvest activities that have been demonstrated to have negative environmental impacts on
6 terrestrial and aquatic ecosystems. *Id.* at 9. Documented ecological impacts of thinning forests
7 include increased peakflows, snowpack loss, soil compaction and surface soil loss, leading to
8 degradation of water quality and fish habitat, as well as reduced reservoir capacity. *Id.* These
9 impacts on aquatic habitat quality in turn may result in local extinctions of aquatic species,
10 including listed salmonids. *Id.* Because fuel reduction thinning must be carried out over large
11 acreages, the negative impacts are spread out and because soil loss is permanent and
12 irreplaceable in human time, the impacts are cumulative both spatially and temporally. *Id.* The
13 Forest Service itself has stated that stream sedimentation from logging and road construction is
14 inevitable regardless of management practices. *Id.* at 10. Furthermore, evidence submitted by
15 Plaintiffs, and others, in public comments on the Fuels CE indicates that the “fuel reduction”
16 activities proposed may be counter-productive and that the “fuel reduction” activities proposed in
17 the Fuels CE may actually lead to *increased* fire risk. *Id.* at 15; and *Eubanks, supra.*

18 Finally, although they were not in existence when the Fuels CE was prepared, the fuel
19 reduction projects named in the Complaint serve as examples of projects with significant
20 individual effects that the Forest Service considers covered by the Fuels CE. These effects are
21 discussed in detail in the section on those projects, *infra*, and in the Bond Declaration, Pl. SAR
22 Exh. A; Odion Declaration, Pl. SAR Exh. B; and Thomas Declaration, Pl. SAR Exh. C.

23 **D. PUBLIC COMMENTS BY STATE AND FEDERAL AGENCIES**
24 **DEMONSTRATE INDIVIDUAL AND CUMULATIVE SIGNIFICANCE.**

25 Environmental organizations and concerned citizens are not the only ones that objected to
the Fuels CE. In their public comments to the Forest Service, several States opposed the Fuels

1 CE because of the direct and cumulative environmental impacts. One of these was California.
2 Mary D. Nichols, Secretary, California Resources Agency, told the Forest Service that her
3 agency had:

4 [S]erious concerns about the proposed categorical exclusion for fuel reduction
5 projects, on both substantive and procedural grounds....We conclude that the
6 proposal could lead to significant degradation of public forestland in the state,
especially when considered in combination with the many other federal forest
policy proposals pending on both the state and regional levels....

7 AR-CD 1, HF1705 (Pl. Exh. R at 2). Secretary Nichols continued:

8 The proposal does not make sense in California

9 ...[T]he situation in California does not conform to the rationale provided in the
10 notice for the proposal....[T]here is no indication that environmental review is
11 hampering fuel reduction work and therefore no need to relax public review by
categorically excluding this work in California.

12 *Id.* (internal citation omitted). In discussing the cumulative impacts of the Fuels CE rules,
13 Secretary Nichols stated:

14 To our knowledge, the Forest Service has not investigated the impacts of
15 understory treatments on native plants (other than conifers) and animals. Removal
16 of herbaceous and shrub layers to create open and park-like forest stands
eliminates food (plant material, seeds, pollinators, invertebrate prey, vertebrate
prey) and cover required by wildlife.

17 The long-term effects on wildlife and habitat of long term thinning are unknown,
18 but they appear to be negative for at least 10 years. For example, development of
19 a shrub layer following treatments is rare, and fuel reduction work on private
20 timberlands increases the concern about conducting impacts on public lands,
where there are multiple use mandates.

21 The brush that would be removed in California is recognized as a significant
22 component of the “fire-adapted ecosystems”. While, the purpose of the proposal
23 is to reduce hazardous fuels in timber stands, application of the appropriate
habitat models demonstrates that many more species will be harmed than
benefited by such treatments....

24 In addition to effects on wildlife and its habitat, long term thinning and fuel
25 reduction projects could easily produce cumulative impacts on water quality, air
quality, forest sustainability, and ecological integrity. Without a robust monitoring
program and a strict adaptive management process, neither of which are provided

1 in the proposal, NEPA review is even more critical to ensure protection of these
2 public lands and resources....Because fuel treatment projects may cause
3 significant cumulative environmental impacts and will be controversial with the
4 public, they should not be excluded from NEPA review.

5 *Id.* at 3-4 (internal citation omitted) (emphasis added).

6 California was not alone. For example, the Arizona Game & Fish Department stated:

7 The Department is concerned that these categorical exclusions could result in the
8 implementation of major, large-scale timber removal projects without evaluation
9 of the impacts from such removal....

10 We believe that the fuels reduction projects that have the potential to involve 190
11 million acres of Federal forest and rangelands over several years would
12 cumulatively (either in time or space) have significant impacts on the human
13 environment (as defined in 40 CFR § 1508.14). In addition, it is our position that
14 cumulatively, hazardous fuels reduction activities on such a massive scale would
15 likely satisfy at least five of the ten evaluation criteria for significance [as defined
16 in 40 C.F.R. § 1508.27]....

17 Thinning forests on a large scale and creating expansive, open, park-like forest
18 conditions may alter wildlife habitat elements dramatically. For some wildlife
19 species, such as deer and elk, there may be beneficial effects but other wildlife
20 species that are more old-growth dependent or closed canopy species, such as
21 Northern goshawk and Abert's squirrel, may experience a reduction in population
22 numbers. Other unknown consideration include exotic species invasion,
23 erosion/sedimentation, water quality, air quality, and wildlife disease
24 transmission....By categorically excluding large-scale fuels reduction projects,
25 there would be no analysis involved and thus there would be no way to identify
whether implementation of large-scale projects would have significantly adverse
or beneficial, individual or cumulative effects on the environment.

AR-CD 1, HF799 (Pl. Exh. S, Attach. A at 1-4) (emphasis added).

The Wyoming Game & Fish Department also expressed concerns about the use of timber
sales in the Fuels CE rules:

Since the categorical exclusions would apply to trees and include mechanical
removal, the possibility exists to use this process to back-door timber sales in the
name of fire prevention or to use it to add to the Allowable Sale Quantity (ASQ)
without the benefit of public comment. In order to assure the public that this is not
an intention or a feasible result of this action, we suggest including a statement
that any commercial timber harvested under a categorical exclusion would result
in an in-kind decrease in the current ASQ.

1 AR-CD 1, HF802 (Pl. Exh. S at 2) (Letter from Wyoming Game & Fish Department, to Julie
2 Kozlowski, Assistant Director, Office of Federal Land Policy (Jan. 7, 2002)).⁹

3 The U.S. Fish & Wildlife Service (“FWS”) expressed their concerns as follows:

4 The FWS is concerned with potential impacts of the revised procedures on public
5 participation in the NEPA process. During the preparation of an EA or EIS, public
6 involvement occurs at three stages: initial scoping, draft document, and final
7 document. The FWS is concerned about limitations on opportunities for the public
8 to comment on hazardous fuel reduction projects and rehabilitation and
stabilization projects if these activities are categorically excluded from preparing
an EA or EIS. Reducing public comment opportunities also reduces the potential
for modifying planned projects to minimize environmental effects....

9 We note that there is no size limit on the fuels reduction activities proposed for
10 categorical exclusion. A fuels reduction activity that encompasses 30 acres has a
very different potential for environmental effects compared to an activity that
11 encompasses 1,000 acres. This is especially true when evaluating the cumulative
or aggregated effect of fuels projects;...We believe, that at a minimum, an EA
12 may be necessary for large acreage projects in order to balance various
environmental impacts through the process of alternative development and
13 analysis, and as a means for determining whether cumulative effects will rise to
the level of significance....

14 AR-CD1, HF1147 (Pl. Exh. U at 2) (internal citations omitted). The FWS was especially
15 concerned about the impacts of road construction allowed by the Fuels CE. *Id.* at 3.

16 In sum, the Forest Service chose to approve the Fuels CE over the objections of
17 these state and federal agencies, and disregarded the evidence of individual and
18 cumulative harm they provided. The Forest Service’s approval of the Fuels CE “runs
19 counter to the evidence before the agency,” and therefore it must be vacated and
20 remanded. *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43 (applying the APA, 5 U.S.C. §
21 706(2)(A)).

22 ///

23
24
25 ⁹ A Forest Service employee also noted how the Fuels CE was ripe for abuse within the Forest
Service because “thinning is just another name for logging,” and in practice “thinning” includes
trees up to 35 inches in diameter. *See*, AR-CD 1, HF10 (Pl. Exh. J at 11-12).

1 **E. THE FOREST SERVICE’S CONCLUSION THAT THE IMPACTS OF**
2 **THE PROJECTS TO BE COVERED BY THE FUELS CE WERE NOT**
3 **INDIVIDUALLY OR CUMULATIVELY SIGNIFICANT WAS**
4 **ARBITRARY AND CAPRICIOUS.**

5 **1. The Forest Service Failed to Adequately Consider the Cumulative**
6 **Impacts of the Fuels CE.**

7 As a necessary prerequisite to the Fuels CE the Forest Service found that the projects to
8 be covered by it would have no cumulative significant effect. 68 Fed. Reg. 33,814. That finding
9 was based primarily on: 1) a review of scientific literature on fuel reduction and forest fires; and
10 2) a “data call” that consisted of a database of approximately 2,500 projects involving fuel
11 reduction. As discussed in the following, these do not support the Forest Service’s finding of no
12 significant cumulative effect, and the Forest Service’s reliance on them was arbitrary and
13 capricious contrary to the APA, 5 U.S.C. § 706(2)(A).

14 As stated in the Federal Register, the Forest Service “conducted a review of peer-
15 reviewed scientific literature identifying the effects of hazardous fuels reduction activities.” 68
16 Fed. Reg. 33,814. However, the scientific literature reviewed deals almost exclusively with the
17 effects hazardous fuels reduction activities have on the rate of spread and intensity of fires. The
18 Forest Service’s analysis was based on the effect of fuel reduction on fire management, e.g. the
19 effect of reducing the fuel load (trees, brush, etc.) on the potential for, and intensity of, forest
20 fires. There was little or no analysis of the cumulative effects of fuel reduction projects—
21 especially on the scale contemplated here—on fish, wildlife, water or soils. The Forest Service
22 did not review the scientific literature regarding the actual effects of fuels reduction activities on
23 fish, wildlife, water or soils, and, therefore, its conclusion of no significant impact on these
24 factors is not supported by the record.

25 The Council on Environmental Quality (CEQ) brought this deficiency to the Forest
Service’s attention. In comments on a draft Federal Register Notice, CEQ included the question:

1 “References to literature on env[ironmental] effects of HFR [hazardous fuel reduction] &
2 stab/rehab activities?” AR-CD 2, Doc. 161 (Pl. Exh. H at 11). The Department of Interior
3 (which promulgated its own Fuels CE along with the Forest Service’s) responded by admitting
4 this deficiency existed:

5 As I understand it, the lit[erature] search addresses the efficacy of hfr and
6 rehab/stab projects with respect to the probability of and further effects of wildfire
7 not the environmental effects of the activities or the type of NEPA compliance
8 required. I do not think we have a lit search on the environmental effects of thfr
9 [sic] and rehab/stab.

10 AR-CD 2, Doc. 166 (Pl. Exh. I at 14). The Department of Interior further noted: “A
11 literature search of this nature is possible but would likely [sic] require commissioning a
12 couple of scientists to conduct a review. Can this be done as we’re soliciting public
13 comment?” *Id.* at 15. However, no literature search of this nature was pursued.¹⁰

14 **2. The Forest Service’s Data Call Does Not Support the Finding of No**
15 **Significant Cumulative Effect.**

16 The Forest Service’s analysis of the effects of the Fuels CE is analogous to, but
17 even worse than, the Environmental Assessments (EAs) that were found legally deficient
18 in *Klamath-Siskiyou*. There, the court stated:

19 A proper consideration of the cumulative impacts of a project requires “some
20 quantified or detailed information;...[g]eneral statements about possible effects
21 and some risk do not constitute a hard look absent a justification regarding why
22 more definitive information could not be provided.” *Ocean Advocates*, 361 F.3d
23 at 1128 (quoting *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d
24 1372, 1379-80 (9th Cir.1998)). The analysis “must be more than perfunctory; it
25 must provide a useful analysis of the cumulative impacts of past, present, and
future projects.” *Id.* (internal quotations and citations omitted).

¹⁰ One Forest Service employee with more than 29 years experience pointed out the absence of analysis of the cumulative environmental effect from the projects, and that the analysis was focused instead on the effects on fire management. He listed 46 scientific citations on the issue of whether the Fuels CE projects would in fact have significant cumulative effects, but these were apparently disregarded by the Forest Service. *See*, AR-CD 1, HF10 (Pl. Exh. J at 7-11).

1 *Klamath-Siskiyou*, 387 F.3d at 994-95.

2 The court further stated: “Although each of the EAs contains a section of more than a
3 dozen pages under the heading ‘Cumulative Effects,’ a close read reveals that those sections do
4 not adequately discuss the subject. A considerable portion of each section discusses only the
5 direct effects of the project at issue on its own minor watershed. In the parts of the section where
6 the other projects are contemplated, there is no quantified assessment of their combined
7 environmental impacts.” *Id.*

8 Similarly, in the instant case, there is a cumulative effects column in the Spreadsheet
9 Compiling Data Call Records. *See* Column X in AR-CD 2, Doc. 132 (Forest Service Spreadsheet
10 Compiling Data Call Records); and *see* Pl. Exh. N (exemplar excerpts of the Spreadsheet).
11 However, the spreadsheet does not state what other projects were considered in conjunction with
12 any particular project – if any. There is no telling whether the projects were considered to be
13 cumulative with other projects in the same watershed or in the same National Forest, much less
14 cumulatively with all other projects in the “data call.” Nowhere in the data call is there a
15 “quantified assessment” of the combined environmental impacts from these projects. That is
16 especially egregious considering these projects covered millions of acres of National Forests.
17 The Forest Service seems to have presumed no significant effect on that scale, without any
18 explanation in the record.

19 Further, the term “significantly” requires the consideration of whether the action is
20 related to other actions with cumulatively significant impacts. 40 C.F.R. § 1508.27(b). In this
21 case that is completely missing. For instance, the Forest Service did not determine how many
22 projects it expects the Fuels CE to cover; the total acres it expects will be impacted; or the total
23 amount of board feet of timber it expects to remove. The Forest Service provides no quantitative
24 measure of cumulative “significance” in the promulgation of the Fuels CE; and no qualitative
25 measure of cumulative “significance” in the promulgation of the Fuels CE. *Klamath-Siskiyou*,

1 387 F.3d at 995.

2 **3. The Forest Service’s Data Call Does Not Support the CE.**

3 **a. The Outcome of the Data Call was Pre-Decided.**

4 NEPA requires a federal agency to evaluate the “environmental risks and remedies
5 associated with [a] pending project...*before* a project is approved.” *LaFlamme v. Federal Energy*
6 *Regulatory Comm’n.*, 852 F.2d 389, 398 (9th Cir. 1988) (emphasis in original). “Proper timing is
7 one of NEPA’s central themes.” *Save the Yaak Committee v. Block*, 840 F.2d 714, 718 (9th Cir.
8 1988). The agency’s hard look “must be timely, and it must be taken objectively in good faith,
9 not as an exercise in form over substance, and not as a subterfuge designed to rationalize a
10 decision already made.” *Metcalf v. Daley*, 214 F.3d 1135, 1142-43 (9th Cir. 2000). The purpose
11 of these requirements is to ensure that agencies do not use the NEPA process to “rationalize or
12 justify decisions already made.” 40 C.F.R. §§ 1502.5; 1506.1(a); *see also, Save the Yaak*
13 *Committee*, 840 F.2d at 718.

14 In this action, the Forest Service flagrantly violated these requirements by using the “data
15 call” as a *post-hoc* rationale for an already made decision. The Forest Service’s rationale for
16 promulgating the Fuels CE rules—as indicated in its response to numerous comments on the
17 direct and cumulative impacts—is that they reviewed over 2,500 projects. *See, e.g.*, 68 Fed. Reg.
18 33,814. However, this analysis was not done objectively in good faith because the agency had
19 already decided to issue a categorical exclusion.

20 The Forest Service admitted that it had already made its decision before the data call was
21 completed. David E. Sire, the Forest Service employee responsible for record management
22 concerning the Fuels CE told the Regional NEPA Coordinators when announcing the close of the
23 data call: “We intend to put this information to good use supporting a categorical exclusion for
24 fuels treatment, rehab and salvage.” AR-CD 2, Doc. 42 (Pl. Exh. K at 1). Likewise, on
25 September 11, 2002, Deputy Chief Thompson issued a memo to all Regional Foresters providing

1 them with the blank database and asking them to fill it out because the “Forest Service will soon
2 jointly propose a categorical exclusion for fuels treatment and restoration activities.” AR-CD 2,
3 Doc. 86 (Pl. Exh. A).

4 By deciding to establish a categorical exclusion, and then gathering data to allegedly
5 support the decision, the Forest Service eliminated the opportunity to choose among alternatives
6 and “seriously impeded the degree to which their planning and decisions could reflect
7 environmental values.” *Save the Yaak*, 840 F.2d at 718-719; *see also Norton*, 311 F.3d at 1,175;
8 *Natural Resources Defense Council v. Houston*, 146 F.3d 1,118 (9th Cir. 1998); *Sierra Club v.*
9 *Lujan*, 716 F.Supp. 1289, 1293 (D.Ariz. 1989)(remanding EA because “post hoc compliance
10 with NEPA is unlawful”).

11 **b. The Data Call Does Not Provide Scientific or Statistical**
12 **Support for the Fuels CE.**

13 The data call upon which the Fuels CE was allegedly based is insufficient for five
14 reasons, any of which alone is enough to invalidate the CE, and, taken together, they demonstrate
15 conclusively that the Forest Service’s decision was arbitrary and capricious.

16 First, the data review is arbitrary because the determination of whether individual
17 projects had “significant effects” is based on the “personal observation” of individual Forest
18 Service employees. *See*, AR-CD 2, Doc. 133 (Pl. Exh. B at 7-8). That involved no objective
19 criteria or verifiable monitoring. *Id.* at *see, e.g.* Table 7, Information Source, Personal
20 Observation Column on the Forest Service’s database for countless examples of personal
21 observation listed as the basis for the conclusion.¹¹

22
23 ¹¹ *See, also*, the questionnaire that was sent to the Forest Service employees to complete, the
24 information from which was compiled in the database. AR-Vol 1, Doc. 1 (Pl. Exh. T). It simply
25 had a checklist for the employee to describe “significant” or “non-significant” impacts, without
providing criteria for that description. In the field asking “how do you know about these actual
effects,” the choices that can be checked are “observation,” “formal monitoring” and “Forest
Plan monitoring.” *Id.*

1 The Ninth Circuit has held that personal observation or subjective valuation of
2 significance will not support a finding of no significant impact. In *Klamath-Siskiyou*:

3 But the problem with the entire table is that it does not provide any objective
4 quantification of the impacts. Instead, the reader is informed only that a particular
5 environmental factor will be “unchanged,” “improved,” or “degraded” and
6 whether that change will be “minor” or “major.” The reader is not told what data
7 the conclusion was based on, or why objective data cannot be provided. Such an
8 analysis does not satisfy the admonition in *Neighbors of Cuddy Mountain* that
9 “[g]eneral statements about possible effects and some risk do not constitute a hard
10 look absent a justification regarding why more definitive information could not be
11 provided.”

12 137 F.3d at 994 (emphasis supplied).

13 And, as the Ninth Circuit held in *Idaho Sporting Congress*:

14 [A]llowing the Forest Service to rely on expert opinion without hard data either
15 vitiates a plaintiff’s ability to challenge an agency action or results in the courts
16 second guessing an agency’s scientific conclusions. As both of these results are
17 unacceptable, we conclude that NEPA requires that the public receive the
18 underlying environmental data from which a Forest Service expert derived her
19 opinion. In so finding, we note that NEPA’s implementing regulations require
20 agencies to “identify any methodologies used and [] make explicit reference by
21 footnote to the scientific and other sources relied upon for conclusions” used in
22 any EIS statement. 40 C.F.R. § 1502.24.

23 137 F.3d at 1150.

24 *See also, Northwest Motorcycle Ass’n v. U.S. Dept. of Agric.*, 18 F.3d 1468, 1475 (9th
25 Cir. 1994) (“If this court were only to consider the experiences of the Forest Service personnel,
the court would have a difficult time upholding the Defendants’ decision to” prohibit ORV use in
a sensitive area).¹²

¹² Even the “formal monitoring,” which occurred on 21% of the evaluated projects, (*see, AR-CD 2, Doc. 133 (Pl. Exh. B at Table 7)*) does not corroborate the agency’s findings because there is no information about what was actually monitored. For instance, “formal monitoring” may have only assessed impacts to ground cover and snags (dead trees), and neglected to assess impacts to water quality or wildlife. Since the Forest Service never established a “monitoring” benchmark or gathered information about what was actually monitored, the data call provides zero analytical value regarding whether the surveyed projects had significant impact.

1 Plaintiff Sierra Club raised the issue of the impropriety of basing the Fuels CE on the
2 subjective opinions of Forest Service personnel. AR-CD 1, HF1186 (Pl. Exh. P at 12). Sierra
3 Club also pointed out that this practice was contrary to the information quality guidelines of the
4 federal Office of Management and Budget. *Id.* at 12. The Forest Service did not, however,
5 correct its database before finalizing the Fuels CE or respond on this point in the Federal
6 Register.

7 Second, a majority of the projects that were reviewed were actually themselves analyzed
8 in an EA or EIS. Accordingly, more than half of these projects were implemented only after the
9 implementing agency analyzed a range of alternatives. That allowed the Forest Service personnel
10 at the project level to select the alternative for each project that had the least environmental
11 impacts and to determine, in the context of thorough NEPA analysis, the mitigation measures
12 required to offset any negative impacts. *See*, 40 C.F.R. § 1502.13(f) (an EIS or EA must consider
13 alternatives and “[i]nclude appropriate mitigation measures not already included in the proposed
14 action or alternatives”). This development of alternatives and mitigation is not, however,
15 required for categorically excluded actions.

16 The FWS brought this flaw to the Forest Service’s attention in comments on the Fuels
17 CE, to no avail:

18 We wonder if the analysis considered that if EAs were not completed, action
19 alternatives that minimize environmental impacts may not have been developed
20 and more projects may have predicted significant environmental effects. The
21 FWS believes that development and evaluation of alternatives in an EA/EIS
22 results in projects with fewer environmental impacts.

23 AR-CD 1, HF1147 (Pl. Exh. L at 2).

24 The Arizona Game & Fish Department also identified this defect in the Forest Service’s
25 analysis in its comments on the Fuels CE, also to no avail:

[A]pproximately 52 percent of the reviewed projects were documented with an
environmental assessment (EA) or an environmental impacts statement (EIS)...
[O]f these projects, most found the impacts to be as expected from the NEPA
process. However, in developing these EAs and EISs as required by NEPA, the

1 agencies analyzed and evaluated a reasonable range of alternatives, including the
2 No Action alternative, for each project. The agencies were able to compare
3 alternatives relative to identified project objectives and anticipated impacts and
4 select an alternative that best met the project objectives while minimizing or
5 avoiding negative effects. Categorical exclusions do not require an evaluation of
6 management alternatives or a determination of effects in order to predict the
7 outcome of a selected alternative.

8 AR-CD 1, HF799 (Pl. Exh. M, Attach. A at 1).

9 Simply put, what the Forest Service overlooked in its analysis is that if the projects in the
10 data call were categorically excluded they would have been different projects. They would have
11 had less analysis and, consequently, more significant environmental effects. It is inherently
12 invalid to assume that projects analyzed in an EA or EIS would have had the same impacts had
13 they been categorically excluded and had undergone no NEPA review. However, this is exactly
14 what the Forest Service assumed in developing the Fuels CE rules.¹³

15 Third, the 1,000 and 4,500 acre figures the Fuels CE ultimately established were arbitrary
16 levels and not determinative of whether there is significant individual or cumulative harm above
17 that threshold. *See, e.g., Heartwood, Inc. v. U.S. Forest Serv.*, 73 F.Supp. 2d 962 (S.D. Ill. 1999)
18 ((finding categorical exclusion of timber projects below a certain board feet was arbitrary and
19 capricious); *San Luis & Delta-Mendota Water Auth. v. Badgley*, 136 F.Supp.2d 1136, 1150 (E.D.
20 Cal. 2000) (agency’s determination to list a species was arbitrary and capricious because its
21 conclusion was only sustainable by data manipulation).¹⁴

22 Fourth, the data call does not provide adequate information to assess the impacts of these
23 projects. The data call classifies significance in a binary fashion—yes or no. However, impacts
24

25 ¹³ This deficiency was also raised in the Forest Service employee comments at AR-CD 1, HF10
(Pl. Exh. J), where he accurately likened the Forest Service’s approach to “comparing apples and
oranges.”

¹⁴ The three Eldorado National Forest projects named in this suit are not typical of those in the
data call. Their average size is 636 acres, 2 ½ times the data call average. Their mean size is 513
acres, over 6 ½ times the data call mean.

1 are never simply binary. For instance, impacts that are individually insignificant can become
2 significant when viewed cumulatively with other projects. In addition, impacts were monitored
3 within two years of project completion. This presents a temporal problem because it is
4 impossible to determine within such a relatively short period of time if some impacts are
5 “significant.” For instance, many aquatic resource impacts only become apparent several years
6 after project completion. In fact, the data call is devoid of information regarding impacts on
7 aquatic systems; for instance it contains no information on road construction, landing
8 construction, watersheds impacted, the presence of steep slopes or hazard soils. Since the Forest
9 Service never gathered this information, it is impossible for the agency to accurately determine
10 the cumulative impacts of these projects on aquatic resources.

11 Fifth, and finally, many of the data call projects were not hazardous fuel treatment
12 reduction projects at all. For instance approximately 18% of the analyzed projects (465 of the
13 2,559) were located in grasslands. AR-CD 2, Doc. 133 (Pl. Exh. B at 7, Table 6). Grasslands do
14 not pose a colorable hazardous fuel threat, so this information is irrelevant to the data call
15 purpose. Notably, the data call had more projects in grasslands than in any other vegetation type.
16 *Id.*

17 In sum, the data call does not support the conclusion that the projects to be covered by the
18 Fuels CE have no individual or cumulative significant environmental effects. In Administrative
19 Procedures Act terms, the Forest Service’s reliance on the data call was “arbitrary and
20 capricious” and must be “set aside,” inasmuch as the Forest Service “entirely failed to consider
21 an important aspect of the problem [and] offered an explanation for its decision that runs counter
22 to the evidence before the agency.” *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43 (applying the
23 APA, 5 U.S.C. § 706(2)(A)).

24 ///

25 ///

1 **II. THE FOREST SERVICE’S FAILURE TO PREPARE AN EIS FOR THE FUELS**
2 **CE VIOLATES NEPA AND NINTH CIRCUIT PRECEDENT.**

3 The Forest Service has prepared Environmental Impact Statements for rulemaking that is
4 analogous to the Fuels CE, namely the federal “roadless rule” and the forest planning rules. It did
5 not, however, prepare an EIS (or even an EA) for the Fuels CE. It is undisputed that the Forest
6 Service did not perform that analysis for the Fuels CE. 68 Fed. Reg. 33,814, 33,823.

7 In *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094 (9th Cir. 2002), the court held that
8 in promulgating the roadless area conservation rule for national forests, the Forest Service was
9 required to prepare an EIS. That is because the rule would have a demonstrable impact on the
10 physical environment by altering how Forest Service would manage inventoried roadless areas.
11 *Id.* at 1114. Likewise, the Fuels CE changes how the Forest Service manages the forests, and
12 thus an EIS is required. *Id. See, also, e.g., Citizens for a Better Forestry v. U.S. Dept. of Agric.*,
13 341 F.3d 961, 969-70 (9th Cir. 2003) (Forest Service land management planning regulations can
14 be construed as major federal actions that may significantly effect the quality of the human
15 environment; and Forest Service performed NEPA analysis for its 1979, 1982 and 2000 forest
16 plan rules).¹⁵

17 NEPA and its implementing regulations require an EIS or at least an EA for the Fuels
18 CE. That is because the Fuels CE is a “major federal action[] significantly affecting the quality
19 of the human environment.” 42 U.S.C. § 4332. Federal agencies must ordinarily prepare at least
20 an EA to determine whether a major federal action may have a “significant” effect on the
21 environment. 40 C.F.R. § 1501.4. Some broad federal actions, like the Fuels CE, require the
22 preparation of an EIS outright—adoption of new agency programs or regulations. 40 C.F.R. §

23
24 ¹⁵ In *Heartwood v. U.S. Forest Serv.*, 230 F.3d 947 (7th Cir. 2000) it was held that the Forest
25 Service did not have to prepare an EA or EIS for a categorical exclusion (one for small timber
harvest under certain board feet). But that is distinguishable and inconsistent with *Kootenai Tribe*
and *Citizens for a Better Forestry*.

1 1502.4.

2 Federal actions requiring NEPA review include “[a]doption of official policy, such as
3 rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act 5
4 U.S.C. 551 et seq.” 40 C.F.R. § 1508.18(b)(1). The APA defines “rulemaking” as an “agency
5 process for formulating, amending, or repealing a rule,” 5 U.S.C. 551(5), and further defines
6 “rule” as:

7 [T]he whole or a part of an agency statement of general or particular applicability
8 and future effect designed to implement, interpret, or prescribe law or policy or
describing the organization, procedure, or practice requirements of an agency....

9 5 U.S.C. § 551(4).

10 The Fuels CE, therefore, constitutes a “rulemaking” and NEPA analysis was required for
11 it. This interpretation of rulemaking has been specifically applied to the Forest Service’s
12 Handbook, in which the Fuels CE was published, and therefore it applies here. *See, Rhodes*, 153
13 F.3d at 788. Therefore, under the plain language of the NEPA regulations and the APA,
14 adoption of the CE rules constitutes a “federal action” subject to NEPA. 40 C.F.R. § 1508.18(b).
15 The court should remand the Fuels CE to the agency to prepare an EIS or at least an EA.

16 **III. THE FOREST SERVICE UNLAWFULLY APPLIED THE FUELS CE TO THE**
17 **NAMED TIMBER PROJECTS IN THE ELDORADO AND LASSEN NATIONAL**
18 **FORESTS.**

19 Categorical exclusions may not be applied to actions which have individual or
20 cumulatively significant effects. 40 C.F.R. § 1508.4; *see, e.g., Heartwood*, 73 F.Supp. 2d 962
21 (timber harvests wrongfully categorically excluded), *aff’d* on other grounds, 230 F.3d 947 (7th
22 Cir. 2000); *Mississippi ex rel. Moore v. Marsh*, 710 F.Supp. 1488, 1507 (S.D. Miss. 1989)
23 (Army Corps of Engineers CE could not be applied to significant project). In this case, the use
24 of the Fuels CE for the named projects in the Eldorado and Lassen National Forest was not
25 lawful because these projects have individual and/or cumulatively significant effects.

1 **A. THE PROJECTS WILL HAVE SIGNIFICANT CUMULATIVE IMPACTS.**

2 **1. Significant Cumulative Effects on Wildlife**

3 The Complaint names three projects in the Eldorado National Forest: Rockeye, Grey
4 Eagle and Forest Guard. (Hereafter these are referred to as the “Eldorado projects.”) The
5 Eldorado projects will degrade habitat for several sensitive species by simplifying mature forest
6 stand structures, logging and removing trees up to 30” in diameter, and reducing the density of
7 downed logs and snags. Although these projects will adversely affect these species’ ability to
8 breed, feed, and shelter, the Forest Service claims—without any reasoned explanation—that
9 these projects will have no significant effects. *See, e.g.*, AR-Vol.7, p.2406-07; AR-Vol. 8, p.
10 2805-07; AR-Vol. 5, p. 1957-58; and AR-Vol. 4, p. 1209-10.

11 When an agency invokes a categorical exclusion it “must supply a convincing statement
12 of reasons why potential effects are insignificant.” *Alaska Center for the Env’t v. U.S. Forest*
13 *Serv.*, 189 F.3d 851, 859 (9th Cir. 1999). For the Eldorado projects, however, the Forest Service
14 has not supplied that “convincing statement,” particularly regarding the California spotted owl.
15 Because the Forest Service analysis is so slight, Plaintiffs submit the declaration of an expert
16 wildlife biologist, Monica Bond (at Pl. SAR Exh. A). Based on her visit to the project areas, the
17 Forest Service’s project records, and the Forest Service records of the volume of timber
18 harvested and acreage to be logged attached to her declaration, Ms. Bond explains that the Forest
19 Service’s analysis does not meet accepted scientific standards and does not support a conclusion
20 of insignificant harm. *See*, Pl. SAR Exh. A at ¶¶ 36-43. ¹⁶

21 _____
22 ¹⁶ Although not part of the Administrative Record, the Bond Declaration should be considered
23 as it assists the court, *see Inland Empire Pub. Lands Council v. U.S. Forest Service*, 88 F3d. 754
24 (9th Cir. 1996). Plaintiffs also offer it since the Administrative Record is inadequate and
25 incomplete to explain the Forest Service’s actions, primarily because no EA or EIS was done. In
such case, supplementation of the administrative record by plaintiffs is appropriate. *See, Oregon*
Natural Resources v. Lowe, 109 F.3d 521, 526-27 (9th Cir. 1997). This is the basis of Plaintiffs’
Motion to Supplement the Administrative Record in this case. In addition, because a categorical
exclusion was used, the project documentation was not noticed or made available for comment

1 The projects cumulatively involve nine owl sites directly impacted, 722 acres of habitat
2 thinned, 1.7-23.7% of Home Range Core Areas (“HRCAs”) thinned, and three Protected Activity
3 Centers within one-quarter mile of the project area. *See*, Bond Declaration, Pl. SAR Exh. A at p.
4 16. The California spotted owl is a sensitive species that is seriously threatened by ongoing
5 habitat loss and reduction throughout its range. *Id.* at ¶ 41. Significantly reducing hundreds of
6 acres of foraging habitat within HRCAs and in the matrix throughout the project and analysis
7 areas for each of these three projects is likely to result in adverse impacts to California spotted
8 owls by reducing foraging success, reproductive success, and the ability of the species to recover
9 from population declines. *Id.*

10 Ms. Bond further explains that the effects of these projects are exacerbated because the
11 habitat in the project area is already fragmented. A large portion of each project area has already
12 been logged or is privately owned—interspersed in a checkerboard fashion throughout the Forest
13 Service lands; yet the Forest Service provides no analysis of the impacts of these projects in
14 conjunction with this already fragmented habitat. Pl. SAR Exh. A at ¶ 40.

15 At the very least, the Bond Declaration raises substantial questions about whether the
16 Eldorado projects may cumulatively result in a significant impact, so the Forest Service is
17 required to prepare a comprehensive EIS for these projects. *Blue Mountains*, 161 F.3d. at 1215;
18 *see also Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1195 (9th Cir. 1988).¹⁷

21 beforehand, hence Plaintiffs were not able to submit Ms. Bond’s opinion on them for inclusion in
22 the Administrative Record.

23 ¹⁷ Like the Eldorado projects, the Adams Windthrow Project in the Lassen National Forest
24 presents significant impacts and a failure of analysis. For example, the project will affect the
25 habitat of the pileated woodpecker by decreasing stand densities, which is a preferred habitat
attribute. *See*, AR-Vol.4, p. 1239. And it will “add to an overall lower habitat quality at the
landscape level meeting only moderate habitat capability” for the American marten. *See*, AR-
Vol. 4, p. 1215.

1 **2. Significant Cumulative Impacts on Water Quality**

2 The Eldorado projects include activities that will directly contribute to an increase in
3 sediment in the watersheds, which adversely affects water quality and fisheries habitat. For
4 instance, each project allows for road reconstruction and maintenance, which significantly
5 elevates erosion and sediment deliveries to streams. The projects allow trees to be removed with
6 ground-based equipment, machine piling and landing construction; and they allow this within
7 close proximity to streams, especially non-perennial, seasonally-flowing streams. For example,
8 tree removal is allowed within 150 feet, skidding is allowed within 50 feet, and feller bunchers
9 are allowed to operate within 50 feet of these streams. All of the projects employ machine piling
10 and burning, which has negative impacts on soils, erosion and runoff. *See*, AR-Vol. 5, p. 1907
11 (Pl. Exh. F at 2, 5-7, 9); AR-Vol. 6, p. 2360 (Pl. Exh. D at 2, 6, 8, 10, 13); and AR-Vol. 7, p.
12 2750 (Pl. Exh. E at 2, 4-7).

13 The Forest Service nevertheless makes vague, conclusory statements about how there
14 would be no adverse cumulative watershed effects from these projects—with no supporting data
15 or analysis. For example, the Forest Service claims that highly erosive soils are not present in the
16 project areas; however, the agency never did a soil survey to reach this conclusion. Also, for
17 example, the Forest Service states that the Rockeye Project does not “pose much concern” for
18 cumulative watershed effects. AR-Vol. 5, p. 1907 (Pl. Exh. F at 1). But this conclusion is directly
19 contrary to the agency’s acknowledgement that six sub-watersheds in the project area are
20 considered at a “high risk for adverse cumulative watershed effects.” *Id.* at 1, 9. This falls far
21 short of the “convincing statement of reasons why potential effects are insignificant” that is
22 required by *Alaska Center for the Env’t.*, 189 F.3d at 859, if the Forest Service wishes to use a
23 categorical exclusion.

24 ///

25 ///

1 **3. The Projects will not Reduce Fire Risk.**

2 The Forest Service’s primary reason for concluding that there will be no cumulative
3 impacts from the Eldorado projects is based on the theory that the projects’ impacts to wildlife
4 and aquatic resources will be off-set by the reduced threat of forest fire. *See, e.g.*, AR-Vol.7, pp.
5 2407, 2409-10 and AR-Vol. 5, pp. 1955, 1957-60. However, the Forest Service’s assertion that
6 these projects will reduce wildfire potential is not supported in the record. In fact, projects such
7 as this may *increase* fire risk. *See, Eubanks, supra* (noting the fuel reduction projects caused
8 “specter of bonfire-like combustion across the landscape,” and holding that “[d]efendants have
9 failed to take the ‘hard look’ required by NEPA at scientific studies which suggest that the
10 timber removal proposed actually increases, not reduces, fire risk”). Judge England based his
11 holding in the *Eubanks* decision on the expert testimony of fire ecologist Dennis C. Odion. *Id.* at
12 1077-78. In the instant case, Plaintiffs submit a declaration from Dr. Odion as well, again
13 demonstrating that these projects are not legitimate “fuel reduction” projects. *See*, Pl. SAR Exh.
14 B at ¶¶ 9 - 12.¹⁸

15 As Dr. Odion discusses, the Eldorado projects involve “thinning,” which includes the
16 considerable reduction of the overstory or canopy, which causes environmental harm without
17 any fuel reduction benefit. By opening up the forest floor to sun, this practice makes the forest
18 more fire prone, not less. *Id.* at ¶¶ 9 - 11. Other impacts of these projects are described in his
19 declaration, such as fuel accumulation, soil compaction and displacement, increased runoff and
20 soil erosion, off-site impacts to aquatic systems, damage to understory plants, and effects of
21 building, reopening and maintaining roads. *Id.* at ¶ 17. These projects would open the forest to
22 invasive species, which is especially problematic. *Id.* at ¶¶ 19-20. The Decision Memos’

23
24
25 ¹⁸ Although not part of the administrative record, Dr. Odion’s declaration should be considered
by the court. *See*, note 18, *supra*, and Plaintiffs’ Motion to Supplement the Administrative
Record.

1 analyses of these effects and others are wholly lacking. *Id.* at ¶ 22.

2 **B. THE PROJECTS WILL HAVE SIGNIFICANT INDIVIDUAL IMPACTS.**

3 Even considered in isolation, these projects will have significant impacts on the
4 California spotted owl, northern goshawk and American peregrine falcon. They will also
5 adversely affect the American marten and Pacific fisher. Each project will degrade suitable
6 habitat for these species because they will simplify mature forest stand structure, log large
7 diameter trees, and reduce canopy closure and density of downed logs and snags. *See, e.g.*, AR-
8 Vol. 7, pp. 2406-10; AR-Vol. 8, pp. 2805-06, 2811, 2813; AR-Vol. 5, p. 1946; and AR-Vol. 4, p.
9 1215. This simplification of old forest structure will interfere with these species' ability to
10 shelter. *Id.*

11 Opening the forest canopy will impede the owls' ability to forage, in particular. *See*, AR-
12 Vol. 4, p. 1214. The impact of the individual projects on the California spotted owl, and the
13 inadequate analysis by the Forest Service, is described at length in the Bond Declaration. Pl.
14 SAR Exh. A at ¶ 28-30, 34-35, 40-4.

15 The projects may burn nests occupied by owls and northern goshawks, cause
16 reproductive failure and generally disturb these and other birds, and cause them to abandon their
17 nesting sites. Thus these projects will interfere with these birds' ability to breed, shelter, and
18 forage—essential life functions. *See, e.g.*, AR-Vol. 7, pp. 2406, 2408; AR-Vol. 5, p. 1946; and
19 AR-Vol. 8, p. 2805, 2811. These projects will also crush and displace Northern pond turtles and
20 yellow-legged frogs. *See, e.g.*, AR-Vol. 7, pp. 2411-12; AR-Vol. 5, pp. 1959-60. These projects
21 may also adversely affect pallid, Townsend's big-eared and western red bats. Smoke from
22 prescribed burns and other authorized activities may disturb or displace bats that are roosting in
23 hardwoods, snags, or abandoned mines within or adjacent to harvest units. AR-Vol. 7, p. 2410;
24 AR-Vol. 8, p. 2814; AR-Vol. 5, p. 1958. These displacements could increase risk of mortality
25 due to predation and exposure. *Id.* These projects will also degrade suitable habitat by reducing

1 the density of snags and downed logs. *Id.*

2 **C. THE FOREST SERVICE’S CONCLUSION OF NO SIGNIFICANT**
3 **IMPACT TO “RESOURCE CONDITIONS” IN THE PROJECT AREAS**
4 **WAS ARBITRARY AND CAPRICIOUS.**

5 CEQ regulations require categorical exclusions to provide for “extraordinary
6 circumstances,” which preclude use of the categorical exclusion. 40 C.F.R. § 1508.4. The Forest
7 Service has established that “categorical exclusions will not apply where there are extraordinary
8 circumstances, such as adverse effects on the following: threatened and endangered species or
9 their designated critical habitat; wilderness areas; inventoried roadless areas; wetlands; impaired
10 waters; and archaeological, cultural or historic sites.” 68 Fed. Reg. 33,814, 33,814. The Forest
11 Service has also included “sensitive species” in this list. *See*, Pl. SAR Exh. H at § 30.3(2).
12 Elsewhere the Forest Service defines the above listed factors as “resource conditions,” and states
13 that whether they constitute an “extraordinary circumstance” that would preclude use of a
14 categorical exclusion depends upon the “degree of effect” on those “resource conditions” or
15 whether there is a “significant effect.” *Id.*; *see also*, 67 Fed. Reg. 54623. ¹⁹

16 For each project in this case, the Forest Service made the determination that there were
17 no “extraordinary circumstances” because the projects would allegedly not have a significant
18 effect on any resource condition, including sensitive species. *See*, AR-Vol. 7, p. 2759 (Pl. Exh. E
19 at 10); AR-Vol. 5, p. 1917 (Pl. Exh. F at 11); AR-Vol. 6, p. 2371 (Pl. Exh. D at 12); AR-Vol. 3,
20 p. 1161 (Pl. Exh. G at 2). As set forth below, however, the Forest Service’s analysis was
21 arbitrary and capricious, overlooked several important impacts of the projects and/or reached
22 conclusions that were contrary to the evidence before the agency. Therefore, these projects must
23 be set aside and remanded to the agency. *Motor Vehicle Mfrs. Ass’n., supra.*

24 ¹⁹ The Forest Service’s “extraordinary circumstance” standard is unlawful, as discussed in detail
25 in Section I of this brief *supra*, and note 6, and therefore all of these projects applying that
standard must be vacated. In this section, Plaintiffs show that even if that standard is applied the
Forest Service did not follow it, and for that additional reason they must be vacated.

1 **1. The Forest Service Failed to Analyze Other Related Projects.**

2 When determining “significance,” the Forest Service is required to consider the
3 cumulative effect of past, present and future related projects. 40 C.F.R. §§ 1508.7 and
4 1508.27(7). In this case, however, the Forest Service concluded there would be no significant
5 impact on any resource condition from these projects, without considering the effect of other
6 projects. Although the three projects on the Eldorado National Forest were approved within
7 months of each other, none of the Decision Memos mention either of the other projects as either
8 past, present or reasonably foreseeable projects. AR-Vol. 6, p. 2360 (Pl. Exh. D at 13); AR-Vol.
9 7, p. 2750 (Pl. Exh. E at 10); and AR-Vol. 5, p. 1907 (Pl. Exh. F at 1). In addition to ignoring one
10 another, the Decision Memos do not provide a comprehensive list of past timber harvests in the
11 National Forest or in the watershed. *See* Pl. SAR Exh. C at ¶ 13. The Decision Memos for the
12 Forest Guard and Rockeye Projects do not name any past, present, or foreseeable projects; rather,
13 they only make general references to “projects” that were reviewed prior to making a
14 determination. *See*, AR-Vol. 7, p. 2750 (Pl. Exh. E at 10); and AR-Vol. 5, p. 1907 (Pl. Exh. F at
15 11). The Adams Windthrow Project does not mention reviewing other projects at all. *See, e.g.*,
16 AR-Vol. 3, p. 1160 (Pl. Exh. G) (lacks discussion of other projects).

17 *See, also*, the Bond Declaration at paragraphs 37-38, describing how each of the Eldorado
18 projects’ Biological Evaluations do not refer to the other two projects and fail to mention 32
19 other projects from 1994-2000. Pl. SAR Exh. A.

20 In *Klamath-Siskiyou*, 387 F.3d at 995, the court considered an environmental assessment
21 that concluded no significant harm, which is directly analogous to the finding of no significant
22 impact on “resource conditions” that the Forest Service performed here. The court held that the
23 agency’s EA did not adequately analyze cumulative impacts because it just listed other
24 upcoming projects’ environmental concerns. *Id.* The court held that the EA was inadequate
25 because it did not have an actual description of the cumulative environmental effects and did not

1 discuss to what degree each environmental concern would be impacted. *Id.*

2 Like *Klamath-Siskiyou*, the Decision Memos here do not mention *any* details about other
3 projects, including no mention of the cumulative acres logged, miles of road constructed, or
4 environmental concerns implicated. AR-Vol. 6, p. 2360 (Pl. Exh. D at 13); AR-Vol. 7, p. 2750
5 (Pl. Exh. E at 10); AR-Vol. 5, p. 1907 (Pl. Exh. F at 11). “This conclusory presentation does not
6 offer any more than the kind of ‘general statements about possible effects and some risk’ which
7 we have held to be insufficient to constitute a ‘hard look.’” *Klamath-Siskiyou*, 387 F.3d at 995
8 (citing *Ocean Advocates*, 361 F.3d at 1128); *see also, Wilderness Watch v. Mainella*, 375 F.3d
9 1085, 1094-95 (11th Cir. 2004) (decision invoking categorical exclusion without adequate
10 documentation of decision will be vacated); and *Lands Council v. Powell*, 379 F.3d 738, 745 (9th
11 Cir. 2004) (to adequately evaluate cumulative effects, an agency should examine data on the
12 time, type, place, and scale of the other projects and how they affect the environment).

13 **2. The Record Indicates Significant Impact on Resource Conditions and**
14 **Therefore Use of the Fuels CE was Not Allowed.**

15 Numerous “resource conditions” that could constitute “extraordinary circumstances” are
16 present within each project area. For instance: (1) two federally listed threatened species, eight
17 sensitive species and fourteen archaeological sites are within or adjacent to the Grey Eagle
18 Project Area, AR-Vol. 6, p. 2360 (Pl. Exh. D at 7-8); (2) five sensitive species and fifteen
19 cultural resource sites are within or adjacent to the Forest Guard Project Area, AR-Vol. 7, pp.
20 2750, 2792 (Pl. Exh. E at 6); (3) eight sensitive species and a number of cultural resource sites
21 are within or adjacent to the Rockeye Project Area AR-Vol. 5, pp. 1907, 1946 (Pl. Exh. F at 6).
22 The Adams Windthrow Project also has significant individual impacts. It has one federally listed
23 threatened species and five sensitive species, for instance. *See*, AR-Vol. 3, p. 1160 (Pl. Exh. G at
24 3). There are also a number of archaeological and historic resources within or adjacent to the
25

1 project area. *Id.* at 4.²⁰

2 The Forest Service concluded that these projects would not significantly affect the
3 resource conditions without considering the ten factors that define significance under the NEPA
4 regulations. 40 C.F.R. § 1508.27. Instead, the Forest Service makes conclusory statements that
5 the projects will have no significant impacts. AR-Vol. 7, p. 2750 (Pl. Exh. E at 10); AR-Vol. 3,
6 p. 1160 (Pl. Exh. G at 2). Such speculative and conclusory statements do not satisfy NEPA or the
7 APA. *See, The Steamboaters v. Federal Energy Regulatory Comm’n*, 759 F.2d 1382, 1393 (9th
8 Cir. 1985) (“An agency cannot avoid its statutory responsibilities under NEPA merely by
9 asserting that an activity it wishes to pursue will have an insignificant effect on the
10 environment”).

11 *Riverhawks v. Zapeda*, 228 F.Supp.2d 1173 (D.Ore. 2002) is on point. There, the court
12 held that the agency’s decision that a proposed action qualified for a categorical exclusion was
13 arbitrary and capricious and not in accordance with NEPA because it did not provide a “reasoned
14 basis” for its decision. *Id.* at 1189-91. The court also held that although the biological evaluation
15 concluded that these impacts would be “insignificant,” that conclusion was arbitrary and
16 capricious because it gave no reasoned explanation for that conclusion. *Id.* at 1190-91. Likewise,
17 in the instant case, the Forest Service concluded there would be no significant impact on
18 sensitive species in the project areas, without an adequate explanation of its conclusion.

19 Contrary to the Forest Service’s conclusory assertions of no significant impact, the
20 administrative record is replete with evidence of significant impacts. This evidence is set forth in
21 the sections above on cumulative and individual impacts from the projects. Under the Forest

22
23 ²⁰ The Rockeye and Adams Windthrow “Decision Notices” note that cultural, archeological
24 and/or historic resources are present in the project areas. However the notice never discloses how
25 many sites are present or discusses the impact to these resources. The dismissive manner in
which these resources are addressed in the Decision Notices is indicative that the agency only
did a superficial review.

1 Service's own Forest Service Handbook, it can only apply a categorical exclusion when the
2 proposed action will have no significant impact on any listed resource condition. Pl. SAR Exh. H
3 at § 30.3(2)(a). Thus, in this case the Forest Service's action is contrary to its own procedures
4 and therefore it cannot invoke the Fuels CE for these projects.

5 **CONCLUSION**

6 For the foregoing reasons, Plaintiffs respectfully request that summary judgment be
7 entered for Plaintiffs and against Defendants, on all counts.

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Respectfully submitted,

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