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

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

15 Plaintiffs,

16 v.

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

23 Defendants.

Case No. Civ.

24 **COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

1 **NATURE OF THE CASE**

2 1. This is an action for declaratory judgment and injunctive relief challenging
3 Defendant United States Forest Service’s Categorical Exclusion (“CE”) from National
4 Environmental Policy Act (“NEPA”) documentation of: (1) hazardous fuels reduction activities;
5 and (2) rehabilitation activities for lands and infrastructure impacted by fires or fires suppression,
6 published at 68 Fed. Reg. 33,814 (2003) (hereinafter the “Fuels CE”). Under the Fuels CE,
7 hazardous fuel reduction activities on up to 1,000 acres and prescribed burns on up to 4,500 acres
8 are exempted from the NEPA requirements of an environmental assessment (“EA”) or
9 environmental impact statement (“EIS”), on all National Forest land.

10 2. Contrary to the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et. seq.*,
11 the Forest Service’s promulgation of the Fuels CE was arbitrary and capricious, an abuse of
12 discretion or otherwise not in accordance with law because: 1) the activities covered by the Fuels
13 CE are not appropriate for a CE under 40 C.F.R. § 1508.4 because they have individual and/or
14 cumulative significant effects on the human environment; 2) the Fuels CE was based on
15 inadequate and biased data and was predetermined; 3) the Fuels CE is vague, overbroad and
16 internally inconsistent; 4) it does not establish extraordinary circumstances as exceptions to the
17 CE as required by 40 C.F.R. § 1508.4; and 5) the Forest Service failed to prepare an
18 environmental assessment or environmental impact statement for the Fuels CE.

19 3. This is also a challenge to the Fuels CE as applied to particular timber projects in
20 the Lassen National Forest and the Eldorado National Forest in California. A categorical
21 exclusion cannot be applied to these projects because they involve individual and/or cumulative
22 significant effects on the human environment. Application of the exclusion is also inappropriate
23 because these projects involve exceptions to the Fuels CE since they will have a significant
24 effect on certain species designated by the Forest Service as sensitive species, or it is uncertain if
25 these projects will have such an effect, and/or the Forest Service’s finding of no significant effect

1 was arbitrary and capricious. Thus, an environmental assessment or environmental impact
2 statement should have been prepared for these projects before they were approved by the Forest
3 Service, but neither was done.

4 4. A preliminary injunction on the use of the Fuels CE and the implementation of
5 these particular projects is necessary to preserve the status quo pending a determination of the
6 action on the merits. A preliminary injunction should issue because Plaintiffs have either a
7 combination of probable success on the merits and the possibility of irreparable injury or serious
8 questions are raised and the balance of hardships tips in Plaintiffs' favor.

9 **JURISDICTION AND VENUE**

10 5. Jurisdiction over this action is conferred by 28 U.S.C. § 1331 (federal question);
11 28 U.S.C. § 1361 (mandamus); 28 U.S.C. §§ 2201-02 (declaratory judgment and further relief);
12 and the APA, 5 U.S.C. §§ 701-06.

13 6. Venue is appropriate in this judicial district and in this Court under 28 U.S.C. §
14 1391(e) because Defendants are a federal agency and officers thereof; Defendants Forest
15 Supervisors reside in this judicial district; and a substantial part of the events or omissions giving
16 rise to the claims herein occurred in this district.

17 **PARTIES**

18 **Plaintiffs**

19 7. The Sierra Club was founded in 1892 and is the nation's oldest grass-roots
20 environmental organization. The Sierra Club is incorporated in California, and has its
21 headquarters in San Francisco, California. It has more than 700,000 members nationwide,
22 including thousands of members in California. The Sierra Club is dedicated to the protection and
23 preservation of the natural and human environment, including the National Forests. The Sierra
24 Club's purpose is to explore, enjoy and protect the wild places of the earth; to practice and
25 promote the responsible use of the earth's ecosystems and resources; and to educate and enlist

1 humanity to protect and restore the quality of the natural and human environments. The Sierra
2 Club has members in California whose recreational, aesthetic, business and/or environmental
3 interests have been, are being and will be adversely affected by the Defendants actions as set
4 forth herein. Members of the Sierra Club use and enjoy the Lassen and Eldorado National
5 Forests, including the areas covered by the Fuels CE and the named projects, for outdoor
6 recreation and scientific study of various kinds, including nature study, photography, bird-
7 watching, fishing, canoeing, hunting, backpacking, camping, solitude, and a variety of other
8 activities. The Sierra Club brings this action on behalf of itself and its members.

9 8. The Sierra Nevada Forest Protection Campaign (“Campaign”) is a group coalition
10 formed in 1996 to protect old growth forests, at-risk wildlife, and rivers and streams in the Sierra
11 Nevada. The Campaign and its member groups advocate the protection and conservation of
12 Sierra Nevada National Forest lands. The Campaign has members in California whose
13 recreational, aesthetic, business and/or environmental interests have been, are being and will be
14 adversely affected by the Defendants’ actions as set forth herein. Members of the Campaign use
15 and enjoy the Lassen and Eldorado National Forests including the areas covered by the Fuels CE
16 and the named projects, for outdoor recreation and scientific study of various kinds, including
17 nature study, photography, bird-watching, fishing, canoeing, hunting, backpacking, camping,
18 solitude, and a variety of other activities. The Campaign brings this action on behalf of itself and
19 its member groups.

20 9. Plaintiffs and their members have aesthetic, scientific, and recreational interests in
21 the National Forests, including specifically the Eldorado and Lassen National Forests, in regards
22 to clean water, healthy ecosystems and threatened, endangered and sensitive wildlife. The
23 Defendants’ actions at issue in this case, e.g. their failure to adequately analyze the actions to be
24 covered by the Fuels CE and the particular projects at issue, pose a risk of harm to Plaintiffs’
25 interests.

1 10. Plaintiffs and their members monitor the use of public lands and compliance with
2 the law respecting these lands, educate their members and the public concerning the management
3 of these lands, and advocate policies and practices that protect the natural value of these lands.
4 Plaintiffs and their members comment on environmental assessments and environmental impact
5 statements, and rely upon them for information on the effects of projects and alternatives to those
6 projects. Plaintiffs rely on information and data in environmental assessments and environmental
7 impact statements to plan their activities, to prepare and inform their public participation
8 concerning agency actions on the forests, and to disseminate to their members and the general
9 public for their information and use. These activities are impaired without adequate disclosure
10 and analysis of information and impacts in environmental assessments and environmental impact
11 statements, as occurs if a project is approved under the Fuels CE. The interests and
12 organizational purposes of the Plaintiffs and their members are and will be directly and
13 irretrievably injured by the Defendants' failure to comply with the statutes and regulations cited
14 in this Complaint.

15 11. Plaintiffs and their members are and will be injured in that environmental
16 consequences of the Defendants' actions described herein, including the timber sales and
17 projects complained of herein, are overlooked as a result of the Defendants' inadequate
18 environmental analyses; and the related failure to prepare appropriate environmental assessments
19 or environmental impact statements concerning these timber sales and projects.

20 12. Plaintiffs submitted written comments to the Forest Service in opposition to the
21 Fuels CE. Plaintiffs also commented on one or more of the projects named in this suit. Plaintiffs
22 have exhausted their administrative remedies or have no administrative remedies for the matters
23 raised herein. The actions challenged in this complaint are final actions for purposes of review,
24 and an actual, justiciable controversy exists between Plaintiffs and Defendants. Plaintiffs have
25 standing for the claims made herein; and Plaintiffs have no adequate remedy at law.

Defendants

1
2 13. Defendant United States Forest Service is an agency of the United States
3 government within the United States Department of Agriculture. The Defendant Forest Service
4 maintains its headquarters at 12th and Independence S.W., P.O. Box 96090, Washington, D.C.,
5 20090-6090. The Defendant Forest Service has been delegated authority to administer the
6 National Forest System of the United States. In that capacity, the Defendant Forest Service must
7 comply with NEPA and the APA in planning and implementing projects which may have a
8 significant effect on the environment.

9 14. Defendant Dale Bosworth, in his official capacity as an officer of the Defendant
10 Forest Service, is the Chief of the Forest Service. The Chief is the highest ranking officer in the
11 Forest Service, and maintains his office at the headquarters as identified above. The Chief is
12 responsible for approving and signing final NEPA rules adopted by the agency. In that capacity
13 he has the responsibility to ensure that the Forest Service acts in accordance with applicable laws
14 and regulations.

15 15. Defendant John Berry is the Forest Supervisor for the Eldorado National Forest.
16 In his capacity as Forest Supervisor, he has the responsibility to ensure that the Forest Service
17 acts in accordance with applicable laws and regulations. He maintains his office at the Eldorado
18 National Forest headquarters, 100 Forni Road, Placerville, CA 95667.

19 16. Defendant Laurie Tippin is the Forest Supervisor for the Lassen National Forest.
20 In her capacity as Forest Supervisor, she has the responsibility to ensure that the Forest Service
21 acts in accordance with applicable laws and regulations. She maintains her office at the Lassen
22 National Forest headquarters, 2550 Riverside Drive, Susanville, CA 96130.

23 17. Defendant United States Department of Agriculture administers the National
24 Forest system. In that capacity, the Department must comply with NEPA and the APA in
25

1 planning and implementing projects which may have a significant effect on the environment. It
2 maintains its headquarters at 1400 Independence Ave. S.W., Washington, D.C. 20250.

3 18. Defendant Ann Veneman is the Secretary of the U.S. Department of Agriculture,
4 and in that capacity she has the responsibility to ensure that the Department acts in accordance
5 with applicable laws and regulations. She maintains her office at the U.S. Department of
6 Agriculture address identified above.

7 **LEGAL BACKGROUND**

8 19. NEPA requires that all agencies make a report on the “environmental impact of
9 the proposed action” whenever the agency proposes action “significantly affecting the quality of
10 the human environment.” 42 U.S.C. § 4332(2)(C).

11 20. The Council on Environmental Quality’s (“CEQ”) regulations implementing
12 NEPA refer to this report as an “environmental impact statement,” 40 C.F.R. § 1508.11, and
13 direct agencies to establish implementing procedures to determine which actions “normally
14 require[] an environmental impact statement.” 40 C.F.R. § 1501.4(a)(1). Environmental impact
15 statements are detailed reports completed after a thorough analysis and study.

16 21. The CEQ regulations also direct agencies to adopt implementing procedures to
17 determine which actions normally do not have any significant impact on the environment and so
18 need not be the subject of any study or report; these actions are referred to as “categorical
19 exclusions.” 40 C.F.R. § 1501.4(a)(2).

20 22. If a proposed action is neither one normally requiring an environmental impact
21 statement nor one normally a categorical exclusion, the agency must prepare an “environmental
22 assessment.” 40 C.F.R. § 1501.4(b). An environmental assessment leads either to a “finding of
23 no significant impact,” in which case no environmental impact statement need be prepared, or
24 to a finding that the project will have a significant impact, in which case an environmental
25 impact statement is required. 40 C.F.R. §§ 1501.4(c) & (e).

1 28. To support the Fuels CE, the Forest Service also “conducted a review of peer-
2 reviewed scientific literature identifying the effects of hazardous fuels reduction activities.” 68
3 Fed. Reg. at 33,814 (2003). The purpose of this was to review the literature on the effect of
4 hazardous fuels reduction activities on the frequency and intensity of forest fires.

5 29. On December 16, 2003, the Department of Agriculture and the Forest Service
6 gave public notice of, and requested comment on, their proposal to establish two categorical
7 exclusions to the agencies’ NEPA procedures: “(1) Hazardous fuels reduction activities (such as
8 thinning overstocked stands and brush); and (2) activities for rehabilitating and stabilizing lands
9 and infrastructure (such as reseeding) impacted by wildland fires or fire suppression.”
10 (Collectively these are referred to herein as the “Fuels CE”). 67 Fed. Reg. 77,038 (2002).

11 30. Almost 39,000 comments were submitted. Among the comments, the CEQ and
12 the U.S. Fish and Wildlife Service expressed concerns about the Forest Service’s data review and
13 methodology in determining a lack of individual and cumulative significant effects. Several state
14 agencies also expressed concern regarding the data review and methodology, including for
15 example the Arizona Game and Fish Department, the State of California Resources Agency, and
16 the Wyoming Game and Fish Department.

17 31. On June 5, 2003, the Department of Agriculture and Forest Service gave notice of
18 their final action establishing the Fuels CE. The action established implementing procedures for
19 National Environmental Policy Act Documentation Needed for Fire Management Activities;
20 Categorical Exclusions, at 68 Fed. Reg. 33,814-24 (2003). The final procedure was issued in
21 Forest Service Handbook 1909.15, Chapter 30, Section 31.2, which purports to describe
22 categorical exclusions, i.e., categories of actions, which do not individually or cumulatively have
23 a significant effect on the human environment and therefore normally do not require further
24 analysis in either an environmental assessment or an environmental impact statement. Following
25 is the text of the two categorical exclusions:

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

- 3 a. Shall be limited to areas:
 - 4 (1) In the wildland-urban interface; or
 - 5 (2) Condition Classes 2 or 3 in Fire Regime Groups I, II, or III, outside the
6 wildland-urban interface;
- 7 b. Shall be identified through a collaborative framework as described in “A
8 Collaborative Approach for Reducing Wildland Fire Risks to Communities and
Environment 10-Year Comprehensive Strategy Implementation Plan”;
- 9 c. Shall be conducted consistent with agency and Departmental procedures and
10 applicable land and resource management plans;
- 11 d. Shall not be conducted in wilderness areas or impair the suitability of wilderness
study areas for preservation as wilderness; and
- 12 e. Shall not include the use of herbicides or pesticides or the construction of new
13 permanent roads or other new permanent infrastructure; and may include the sale
14 of vegetative material if the primary purpose of the activity is hazardous fuels
reduction.

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

- 18 a. Shall be conducted consistent with agency and Departmental procedures and
19 applicable land and resource management plans;
- 20 b. Shall not include the use of herbicides or pesticides or the construction of new
21 permanent roads or other new permanent infrastructure; and
- 22 c. Shall be completed within three years following a wildland fire.

23 32. Thus, among its other provisions, the Fuels CE authorizes thinning (i.e. logging)
24 projects up to 1,000 acres and prescribed burning up to 4,500 acres without environmental
25 assessments or environmental impact statements.

1 37. A meaningful analysis of cumulative impacts must identify: (1) the area in which
2 effects of the proposed project will be felt; (2) the impacts that are expected in that area from the
3 proposed project; (3) other actions – past, proposed, and reasonably foreseeable – that have had
4 or are expected to have impact in the same area; (4) the impacts or expected impacts from these
5 other actions; and (5) the overall impact that can be expected if the individual impacts are
6 allowed to accumulate.

7 38. The Forest Service’s analysis of an alleged lack of cumulative impacts from the
8 actions to be covered by the Fuels CE did not include one or more of the elements set forth
9 above.

10 39. The Forest Service did not determine how many projects the Fuels CE is expected
11 to cover.

12 40. The Forest Service did not determine how many total acres will be involved in the
13 projects the Fuels CE is expected to cover.

14 41. The Forest Service did not determine how many board feet of timber it expects to
15 remove from our National Forests under the Fuels CE.

16 42. The Forest Service did not make a quantitative measure of cumulative
17 “significance” in the promulgation of the Fuels CE.

18 43. The Forest Service did not make a qualitative measure of cumulative
19 “significance” in the promulgation of the Fuels CE.

20 44. Further, the term “significantly,” for purposes of NEPA, requires the
21 consideration of both context and intensity. 40 C.F.R. § 1508.27. In evaluating intensity, the
22 agency must consider impacts that may be both beneficial and adverse, unique characteristics of
23 the geographic area, the degree to which effects are likely to be highly controversial, the degree
24 to which effects are highly uncertain, the degree to which the action may establish a precedent
25 for future actions with significant effects, whether the action is related to other actions with

1 cumulatively significant impacts, the degree to which the action may adversely affect threatened
2 or endangered species or its habitat, and whether the action threatens a violation of federal, state,
3 or local environmental laws. *Id.*

4 45. The Forest Service determined that the category of actions covered by the Fuels
5 CE would not individually or cumulatively have a significant effect on the human environment
6 without considering one or more of the factors for determining significance under 40 C.F.R. §
7 1508.27.

8 46. The Forest Service had no basis for determining that the cumulative effect of all
9 projects for hazardous fuel reduction activities on up to 4,500 acres or post-fire rehabilitation
10 activities on up to 4,200 acres of National Forest System land is not significant.

11 47. The administrative record contains virtually no scientific documents that
12 demonstrate that the “effects” of fuels reduction and rehabilitation activities are not significant.

13 48. In fact, the actions enumerated in the Fuels CE cumulatively will have a
14 significant effect on the environment. The total of the fuel treatment activities surveyed for 2
15 years was 3,300,594 acres alone. That represents a cumulatively significant amount of acreage.

16 49. There is no limitation on how often the individual CEs could be used, so that
17 many individually insignificant (small) projects could be right next to each other, or near enough
18 to one another to have a combined or cumulative effect on water, soils or fish and wildlife,
19 without their total effect being taken into account.

20 50. There are numerous examples of hazardous fuel reduction and rehabilitation
21 projects that have significant impacts as well as cumulative impacts. Forest thinning often
22 requires road building. Other harvest activities have been demonstrated to have negative
23 environmental impacts on terrestrial and aquatic ecosystems. Some of the documented
24 ecological impacts of thinning forests include increased peakflows, snowpack loss, soil
25 compaction and surface soil loss, leading to degradation of water quality and fish habitat, as well

1 as reduced reservoir capacity. These impacts on aquatic habitat quality in turn may result in local
2 extinctions of aquatic species, including listed salmonids. Because fuel reduction thinning must
3 be carried out over large acreages, the negative impacts are spread out and because soil loss is
4 permanent and irreplaceable in human time, the impacts are cumulative in space and time. The
5 Forest Service itself has stated that stream sedimentation from logging and roading is inevitable
6 regardless of management practices.

7 51. The claim that the activities to be covered by this CE will not be significant is also
8 contradicted by the avowed purpose of the CE. The purpose of the CE is to have a significant
9 impact on the human environment, by culling untold thousands of acres of national forests, to
10 *inter alia* protect communities at risk. That the agency considers this a net beneficial effect does
11 not alter the fact that it involves significant effects on the forests. 40 C.F.R. § 1508.27(b)(1).

12 52. Evidence submitted by Plaintiffs and others in public comments on the Fuels CE
13 also indicated that the “fuel reduction” activities proposed may be counter-productive.

14 53. The “fuel reduction” activities proposed in the Fuels CE may actually lead to
15 increased fire risk.

16 54. The category of actions covered by the Fuels CE also has a “significant” effect on
17 the human environment inasmuch as the actions are highly controversial.

18 **b) The Fuels CE was based on inadequate and biased data and was**
19 **predetermined.**

20 55. The “data call” underlying the Fuels CE did not meet the Office of Management
21 and Budget guidelines for information quality.

22 56. The determination in the database of the significance of individual or cumulative
23 effects or lack thereof in the database was in many cases based on “personal observation.” The
24 Data Call Analysis Summary Document provided on the Forest Service’s website in association
25 with the Fuels CE states that 48% of the information on actual impacts of the reviewed projects

1 came from “personal observation,” and that 20.9% of the information came from “unknown
2 sources.”

3 57. “Personal observations” are subjective. They can vary and can be subject to bias.
4 This is particularly so when the person reporting the information is themselves responsible for
5 the effects of an implemented project.

6 58. The “personal observation” standard used for significance in the “data call” does
7 not satisfy the OMB objectivity standard.

8 59. The Forest Service did not review the actual environmental assessments,
9 environmental impact statements or categorical exclusion documentation for the projects
10 included in the database.

11 60. The Forest Service based its determination of no significant individual or
12 cumulative harm on the database, although there was no analysis of the cumulative effect of all
13 projects combined in the database.

14 61. The Forest Service used the relatively low number of projects with predictions of
15 significant environmental impacts as the basis for finding that these types of activities, on the
16 whole, do not result in significant impacts on the environment and therefore do not require an
17 environmental assessment or environmental impact statement. The Forest Service analysis did
18 not consider that that development and evaluation of alternatives in an environmental
19 assessment/environmental impact statement results in projects with fewer environmental
20 impacts. If environmental assessments were not completed, action alternatives that minimize
21 environmental impacts may not have been developed and more projects may have predicted
22 significant environmental effects. The Forest Service, however, assumed that the projects that
23 were analyzed in an environmental assessment or environmental impact statement would have
24 had the same impacts if they were categorically excluded.

25

1 62. Some of the projects in the data call were also individually significant. For
2 example, 26 of the projects were analyzed under environmental impact statements. That indicates
3 that they were determined to have significant effects, which is why the environmental impact
4 statement was done for them.

5 63. The Defendants data call constitutes a “case-by-case” analysis in support of the
6 categorical exclusion, without analysis of the cumulative effects of all the cases included. The
7 Defendants utilized this procedure, which is not consistent with the CEQ NEPA regulations, to
8 attempt to determine that an individual action (as opposed to a category of actions) does not to
9 have any significant effects, and to avoid their requirements under NEPA to give the cumulative
10 effect of the entire category of actions the requisite hard look.

11 64. Regarding the review of “peer-reviewed scientific literature,” 68 Fed. Reg. at
12 33,814 (2003), the scientific literature reviewed dealt almost exclusively with the effects
13 hazardous fuels reduction activities have on the rate of spread and intensity of fires, not the
14 environmental effects of the activities or the type of NEPA compliance required.

15 65. The Forest Service did not conduct a review of peer-reviewed scientific literature
16 on the environmental effects of thinning or temporary roads in regards to their effect on
17 watersheds, fish, wildlife, aesthetics and recreation.

18 66. The decision to establish a CE for fuel reduction and rehabilitation was also pre-
19 decided, in advance of the data call. For example, David E. Sire, the Forest Service employee
20 responsible for the record management responsibilities concerning the Fuels CE rules, told the
21 Regional NEPA Coordinators when announcing the close of the data call for inputting projects
22 into the Fire CE database: “We intend to put this information to good use supporting a
23 categorical exclusion for fuels treatment, rehab and salvage.” Thus, the decision to use a CE was
24 made in advance of the data review.

25 /////

1 **c) The Fuels CE is vague, overbroad and inconsistent.**

2 67. The Fuels CE is impermissibly vague and ambiguous in all of its applications. It
3 does not give fair warning of what is covered by the CE and is fatally overbroad. Contrary to 40
4 C.F.R. § 1508.4 it does not adequately identify the categories of actions to be covered by the CE.

5 68. The Fuels CE does not define “hazardous,” as in “hazardous fuel reduction
6 activities.” The type and extent of road construction that would be permissible is not defined in
7 the Fuels CE.

8 69. The Fuels CE does not contain an indication of how much fuel “reduction” would
9 be allowed. The only limit on the use of the Fuels CE is that the fuel reduction project should be
10 consistent with “A Collaborative Approach for Reducing Wildfire Risks to Communities and the
11 Environment 10-year Comprehensive Strategy Implementation Plan” (hereafter referred to as the
12 “10 –Year Comprehensive Strategy Implementation Plan”). But that document does not provide
13 this information either.

14 70. The Fuels CE leaves it up for future actions, namely the collaborative process in
15 the “10-year Comprehensive Strategy Implementation Plan,” to determine when and where the
16 CE will be applied. But that document does not define when the Fuels CE should apply.

17 71. The Fuels CE is inconsistent with the “10 –Year Comprehensive Strategy
18 Implementation Plan.” For instance, the Plan was established based on the then existing
19 environmental review requirements that required environmental assessments or environmental
20 impact statements for the projects. Under the Fuels CE, environmental assessments or
21 environmental impact statements will no longer be done for the covered projects.

22 72. The Fuels CE notice of proposed action stated that instructions for applying the
23 CE would not be issued until after this rule is finally established. Thus neither the Forest Service
24 nor the public knew how, where, when and how often this CE would be utilized.

25

1 **d) The Forest Service did not establish extraordinary circumstances as**
2 **exceptions to the CE as required.**

3 73. Under 40 C.F.R. § 1508.4, the Forest Service was required to provide for
4 extraordinary circumstances in which a normally excluded action may have a significant
5 environmental effect.

6 74. On August 23, 2002, the Forest Service gave notice of revision to the Forest
7 Service Handbook for its list of extraordinary circumstances, at 67 Fed. Reg. 54,622 (2002).

8 75. The notice of final action for the Fuels CE, 68 Fed. Reg. at 33,814 (2003), states
9 that “[t]hese categorical exclusions will not apply where there are extraordinary circumstances,”
10 and lists the extraordinary circumstances.

11 76. The August 23, 2002 action and the Forest Service Handbook list of extraordinary
12 circumstances utilized in the Fuels CE is in conflict with the notice at 68 Fed. Reg. at 33,814
13 (2003), and does not meet the requirements of 40 C.F.R. § 1508.4, because they do not identify
14 the “extraordinary circumstances.” They merely list “resource conditions that should be
15 considered in determining whether extraordinary circumstances warrant further analysis and
16 documentation in an EA or EIS.” But it does not identify the extraordinary circumstances
17 themselves.

18 77. That section also states that “the mere presence of one or more of these resource
19 conditions does not preclude use of the categorical exclusion.” Forest Service Handbook
20 1909.15, Chapter 30.3(2). Thus the “extraordinary conditions” are so vague, ambiguous and
21 discretionary as to not constitute any conditions at all.

22 78. The list of extraordinary circumstances is also internally inconsistent since it
23 states that projects will not be allowed to proceed under the Fuels CE if one of the extraordinary
24 circumstances is present, but elsewhere indicates that will be up to the deciding officer’s
25 determination of significance. That determination, if at all, should be in an environmental
assessment, not the CE.

1 whether to prepare an environmental impact statement” or a finding of no significant impact
2 (“FONSI”). *Id.*

3 85. Federal actions requiring NEPA review include “[a]doption of official policy,
4 such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure
5 Act 5 U.S.C. 551 et seq.” 40 C.F.R. § 1508.18(b)(1).

6 86. An EIS must be prepared if an agency proposes to implement a specific policy, to
7 adopt a plan for a group of related actions, or to implement a specific statutory program or
8 executive directive. 40 C.F.R. § 1508.18. In addition, the adoption of official policy in the form
9 of rules, regulations and interpretations pursuant to the APA, treaties, conventions, or other
10 formal documents establishing governmental or agency policy which will substantially alter
11 agency programs, could require an environmental impact statement. “Forty Most Asked
12 Questions Concerning CEQ’s National Environmental Policy Act Regulations,” 46 Fed. Reg.
13 18,033 (1981) (Answer to Question 24a).

14 87. The Fuels CE is an adoption of official policy, rules, regulations or interpretation
15 adopted pursuant to the APA.

16 88. The NEPA regulations also identify “rulemaking” as “federal action” for which
17 compliance with NEPA is required. 40 C.F.R. § 1508.18(b). The APA defines “rulemaking” as
18 an “agency process for formulating, amending, or repealing a rule,” 5 U.S.C. 551(5), and further
19 defines “rule” as: “the whole or a part of an agency statement of general or particular
20 applicability and future effect designed to implement, interpret, or prescribe law or policy or
21 describing the organization, procedure, or practice requirements of an agency” 5 U.S.C. §
22 551(4).

23 89. The above definition of rulemaking applies to the Forest Service’s Environmental
24 Handbook.

1 90. The Fuels CE is “the whole or a part of an agency statement of general or
2 particular applicability and future effect designed to implement, interpret, or prescribe law or
3 policy or describing the organization, procedure, or practice requirements of an agency.” *Id.*
4 Therefore, the Fuels CE constitutes a rulemaking.

5 91. The CEQ’s NEPA regulations require that an agency which establishes categories
6 eligible for categorical exclusion from the documentation requirements of NEPA must find that
7 the category does not “individually or cumulatively have a significant effect on the human
8 environment.” 40 C.F.R. § 1508.4. The CEQ NEPA regulations require that this finding be done
9 in procedures consistent with the CEQ NEPA regulations. 40 C.F.R. § 1507.3(b). The
10 Department of Agriculture regulations also contain this requirement. 7 C.F.R. pt. 1B.

11 92. The Fuels CE is “significant” as that term is defined in 40 C.F.R. § 1508.27.
12 Almost 39,000 public comments were submitted to the agency on the proposed Fuels CE. That
13 indicates the Fuels CE was highly controversial. A “highly controversial” matter is “significant”
14 by definition under 40 C.F.R. § 1508.27. Therefore, the finding that the Fuels CE was not
15 significant and the lack of an environmental assessment or environmental impact statement on
16 the Fuels CE were contrary to the NEPA regulations and were arbitrary and capricious, an abuse
17 of discretion and not in accordance with law, contrary to the APA, 5 U.S.C. § 706(2)(A).

18 93. In the case of the Fuels CE, the Forest Service did not perform an environmental
19 impact statement, an environmental assessment or issue a FONSI. That is contrary to NEPA, 42
20 U.S.C. § 4332(2)(C), and its implementing regulations including but not limited to 40 C.F.R. §§
21 1501.3, 1501.4, 1502.4, 1508.9, 1508.11, 1508.18 and 1508.27.

22 94. For the reasons set forth above, the Forest Service’s promulgation of the Fuels CE
23 was inconsistent with NEPA, CEQ and Department of Agriculture regulations. It was arbitrary
24 and capricious, an abuse of discretion, or otherwise not in accordance with law, contrary to the
25 APA, and must be set aside. 5 U.S.C. § 706(2)(A).

1 **COUNT III**

2 **(The Fuels CE is Unlawful as Applied to Projects**
3 **in the Eldorado and Lassen National Forests)**

4 95. Plaintiffs reallege, as if fully set forth herein, each and every allegation contained
5 in the preceding paragraphs.

6 96. The Fuels CE is unlawful as applied to projects in the Eldorado and Lassen
7 National Forests, contrary to the NEPA and the APA.

8 **a) Lassen National Forest Projects**

9 97. Defendants are utilizing the Fuels CE for the following projects on the Lassen
10 National Forest: Adams Windthrow Reduction (760 acres logging; cuts up to 30” dbh; Decision
11 Memo February 2, 2004); and Battle DFPZ (920 acres logging; Decision Memo September 7,
12 2004). Implementation could begin on one or both of these projects immediately.

13 98. The Adams Windthrow Reduction and Battle DFPZ projects have individual
14 and/or cumulatively significant effects making the use of the Fuels CE for them contrary to 40
15 C.F.R. §§ 1501.4, 1508.4, 1508.9 and 1508.27; and Defendants’ finding that they were not
16 significant and the application of the Fuels CE to these projects were arbitrary and capricious, an
17 abuse of discretion or not in accordance with law, contrary to the APA, 5 U.S.C. § 706(2)(A).

18 99. In addition, the Adams Windthrow Reduction and Battle DFPZ projects involve
19 extraordinary circumstances, in that species designated by the Forest Service as sensitive species
20 and/or sensitive species’ habitat are present. Therefore a CE cannot be used for them. The use of
21 the CE is further inappropriate because these projects will have a significant effect on one or
22 more of these species and/or their habitat, or it is it is uncertain if these projects will have such an
23 effect, and/or the Forest Service’s finding of no significant effect on them was arbitrary and
24 capricious.

25 100. The Forest Service has several more Fuels CE projects planned for the Lassen
National Forest. These include but are not limited to: Fox Farm DFPZ Project (decision expected

1 December 2004); Fuels Reduction in Wind Damaged Stands (decision expected October 2004);
2 Hogback Plum Creek Fuels Reduction Project (decision expected December 2004); and Panther
3 Springs Fuel Reduction Project (decision expected May 2005).

4 **b) Eldorado National Forest Projects**

5 101. Defendants are also utilizing the Fuels CE for the following projects on the
6 Eldorado National Forest: Grey Eagle Fuels Reduction (984 acres logging; Decision Memo
7 February 29, 2004); Forest Guard Fuels Reduction (412 acres logging; Decision Memo April 19,
8 2004); and Rockeye Fuel Reduction Project (513 acres logging; Decision Memo September 21,
9 2004). Implementation could begin on one or more of these projects immediately.

10 102. The Grey Eagle Fuels Reduction, Forest Guard Fuels Reduction and Rockeye
11 Fuels Reduction projects have individual and/or cumulatively significant effects making the use
12 of the Fuels CE for them contrary to 40 C.F.R. §§ 1501.4, 1508.4, 1508.9 and 1508.27; and
13 Defendants' finding that they were not significant and the application of the Fuels CE to these
14 projects arbitrary and capricious, an abuse of discretion or not in accordance with law, contrary
15 to the APA, 5 U.S.C. § 706(2)(A).

16 103. In addition, the Grey Eagle Fuels Reduction, Forest Guard Fuels Reduction and
17 Rockeye Fuel Reduction projects involve extraordinary circumstances, in that species designated
18 by the Forest Service as sensitive species and/or sensitive species' habitat are present. Therefore
19 a CE cannot be used for them. The use of the CE is further inappropriate because these projects
20 will have a significant effect on one or more of these species and/or their habitat, or it is
21 uncertain if these projects will have such an effect, and/or the Forest Service's finding of no
22 significant effect on them was arbitrary and capricious.

23 104. The Forest Service has several more Fuels CE projects planned for the Lassen
24 National Forest. These include but are not limited to: Smarty Jones Fuel Reduction project
25

1 (decision expected January, 2005) and O’Leary’s Cow Fuel Reduction project (decision expected
2 spring of 2005).

3 105. The Forest Service conducted a case-by-case analysis of whether the above
4 named Lassen and Eldorado National Forest projects were significant to determine if
5 extraordinary circumstances applied. The Forest Service’s conclusions that extraordinary
6 circumstances did not apply to the above named Lassen and Eldorado National Forest projects
7 were an impermissible ad hoc use of a categorical exclusion contrary to 40 C.F.R. § 1508.4, and
8 was arbitrary and capricious, an abuse of discretion and otherwise not in accordance with law
9 contrary to the APA, 5 U.S.C. § 706(2)(A).

10 106. The above named Lassen and Eldorado National Forest projects were also
11 significant, or extraordinary circumstances applied, in that they were the subject of public
12 controversy, and as a result the Fuels CE should not have been applied to them.

13 107. For the above named Lassen and Eldorado National Forest Projects the Forest
14 Service did not perform the “hard look” required by NEPA, and did not perform an
15 environmental impact statement, an environmental assessment or issue a FONSI. That is
16 contrary to NEPA, 42 U.S.C. § 4332(2)(C), and its implementing regulations including but not
17 limited to 40 C.F.R. §§ 1501.3, 1501.4, 1502.4, 1508.9, 1508.11, 1508.18 and 1508.27. Its
18 actions were arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with
19 law, contrary to the APA, and must be set aside. 5 U.S.C. § 706(2)(A).

20 **PRAYER FOR RELIEF**

21 WHEREFORE, Plaintiffs request this Court to find for Plaintiffs and to enter a judgment
22 order:

- 23 a) Declaring the Forest Service’s adoption of the Fuels CE is null and void and in
24 violation of the Administrative Procedure Act and the National Environmental
25 Policy Act;

- 1 b) Declaring all Forest Service projects approved (nationwide) pursuant to the Fuels
2 CE and not yet completely implemented are null and void and in violation of the
3 Administrative Procedure Act and the National Environmental Policy Act;
4 c) Issuing a nationwide injunction enjoining the Forest Service from undertaking or
5 allowing any of the activities pursuant to the Fuels CE;
6 d) Declaring that the specific projects named in this suit are null and void and in
7 violation of the Administrative Procedure Act and the National Environmental
8 Policy Act; and issuing preliminary and permanent injunctive relief on said
9 projects;
10 e) Awarding Plaintiffs their costs, expenses and attorneys' fees under the Equal
11 Access to Justice Act, 28 U.S.C. § 2412, and other applicable law; and
12 f) Providing for such other relief as the Court deems just and appropriate.

13 DATED: October ____, 2004

Respectfully submitted,

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