Case No. 05-16989

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SIERRA CLUB, SIERRA NEVADA FOREST PROTECTION CAMPAIGN

Plaintiffs-Appellants,

v.

DALE BOSWORTH, in his official capacity as Chief of the United States Forest Service; *et al*.,

Defendants-Appellees.

On Appeal From An Order of the United States District Court
For the Eastern District of California, Hon. Garland E. Burrell
(E.D. Cal. No. CIV S-04-2114 GEB DAD)

REPLY BRIEF OF APPELLANTS SIERRA CLUB AND SIERRA NEVADA FOREST PROTECTION CAMPAIGN

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SUMMARY OF REPLY

The Forest Service was required to prepare an environmental impact statement ("EIS") or environmental assessment ("EA") for the Fuels categorical exclusion ("Fuels CE") under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(C), because the Fuels CE is a "major federal action," which is defined as a "rule, regulation, plan, policy or procedure" under 40 C.F.R. § 1508.18(a). The Fuels CE is an action "significantly affecting the quality of the human environment" because its purpose is to increase the number and pace of logging and burning projects in our national forests, while eliminating the mitigation measures and consideration of alternatives that have been performed for such projects for decades.

The Fuels CE will apply to projects on more than 1.25 million acres per year, which is a cumulatively significant effect, and therefore categorical exclusion of these project is not allowed under 40 C.F.R. § 1508.4. The Forest Service's conclusion to the contrary was arbitrary and capricious because the Forest Service: a) did not analyze or address the cumulative effect of all of the projects to be covered; b) based the Fuels CE on an acreage limit despite its finding that there is no correlation between acreage and significant impacts; and c) based its review of impacts of nearly 80% of the projects in the data call solely on the subjective "personal observation" of its employees.

The Fuels CE is also invalid because it does not fully identify what actions it authorizes and, through its provision for a subsequent collaborative process and "extraordinary circumstances" review, it establishes a "case-by-case" categorical exclusion.

The named projects in the Eldorado and Lassen National Forests exemplify these flaws in the Fuels CE and their individual analysis was also deficient under the Administrative Procedure Act ("APA"). These projects *may* have cumulative and/or individual significant effects and hence under Ninth Circuit law and the Forest Service's own procedures they were not appropriate for categorical exclusion.

REPLY ON STANDARD OF REVIEW

The Forest Service characterizes Sierra Club's claims as falling into two categories: "facial" and "as applied" and based on that misconception it urges an erroneous standard of review. Forest Service Brief ("FS Br.") at 3, 11-13.

Sierra Club's claims actually involve three distinct sets of challenges. The first is that the Forest Service failed to comply with the procedures required by NEPA, its regulations and the APA when it promulgated the Fuels CE. This includes *inter alia* Sierra Club's claims that an EIS or EA was required for the Fuels CE, the Forest Service failed to consider the cumulative effects of the whole Fuels CE, and that the data call does not support the agency decision. Such claims

are not "facial" challenges. Rather they are reviewed under the APA, 5 U.S.C. § 706(2)(A), to determine if the agency action was "arbitrary and capricious, an abuse of discretion or otherwise not in accordance with law."[1] The "no circumstances test" the Forest Service applies to these claims has never been applied to a procedural challenge to a regulation. *See, e.g.* Stuart Buck, *Salerno v. Chevron: What to Do About Statutory Challenges*, 55 ADMIN. L. REV. 427, 463-64 (2003).

The second set of claims comprises a "facial challenge," inasmuch as they challenge the terms of the Fuels CE. These claims are that the Fuels CE does not properly identify covered actions and creates an unlawful "case-by-case" categorical exclusion. The APA standard of review also applies to these claims because the "no circumstances" test is rarely if ever used in cases such as this, where a rule is challenged as being inconsistent with statute and regulation, rather than on constitutional grounds.

The Supreme Court established the "no set of circumstances" test for facial challenges to statutes for inconsistency with the Constitution in *United States v.*

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[1] Agency action is arbitrary and capricious "if the agency . . . entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency, . . ." *Pacific Coast Fed'n of Fishermen's Ass'n v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1090 (9th Cir. 2005) (*quoting* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983)).

Salerno, 481 U.S. 739, 745 (1987). In *Reno v. Flores*, 507 U.S. 292 (1993), the *Salerno* standard was extended to facial challenges to a regulation for inconsistency with its authorizing statute. *Id*. at 301. However, since then the Supreme Court has consistently declined to apply that standard to facial challenges. *See, e.g. Troxel v. Granville*, 530 U.S. 57, 85 n.6 (2000) (plurality opinion); *and, especially, City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) (plurality opinion) ("To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court."). *See also Compassion in Dying v. Washington*, 79 F.3d 790, 798 (9th Cir. 1996)("the Court does not generally apply the *Salerno* test"). Thus, the "no circumstances" test is a test in name only, not in application.

The Forest Service relies on *Akhtar v. Burznski*, 384 F.3d 1193, 1198 (9th Cir. 2004), which stated that, based on *Reno*, to facially challenge a regulation a plaintiff "must establish that no set of circumstances exists under which the regulation would be valid." *Id*. However, the court's opinion does not apply that test. Instead, the court proceeded with the conventional *Chevron* APA analysis and invalidated the regulation for being inconsistent with congressional intent. In fact, the majority of cases involving facial challenges of regulations simply apply the *Chevron* APA test with no mention of the "no circumstances" test. *See, e.g.,*

Envtl. Defense Ctr., Inc., v. U.S. Envtl. Protection Agency, 344 F.3d 832, 854-55 (9th Cir. 2005); *Natural Res. Defense Council v. Nat'l Marine Fisheries Serv.*, 421 F.3d 872, 877 (9th Cir. 2005); *Cal. ex rel. Lockyer v. Fed. Energy Regulatory Comm'n*, 383 F.3d 1006, 1016 (9th Cir. 2004); *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 703 (1995).

The D.C. Circuit examined the issue of what standard of review applies to facial challenges to regulations in *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998). It reasoned that it would be irrational to uphold a regulation against a facial attack only because one application existed in which the regulation was consistent with the statute. *Id*. at 1407-08. It stated: "We have on several occasions invalidated agency regulations challenged as facially inconsistent with governing statutes despite the presence of easily imaginable valid applications." *Id*.; *see also*, *American Lands Alliance v. Norton,* 242 F.Supp.2d 1, 19 (D.D.C. 2003); *Mineral Policy Center v. Norton,* 292 F.Supp.2d 30, 39-40 (D.D.C. 2003).

The third and final set of claims in this case is the "as applied" claims to particular timber sales in the Eldorado and Lassen National Forests. The parties agree that the standard of review for these claims is the APA arbitrary and capricious standard. FS Br. at 12.

ARGUMENT

I. THE FOREST SERVICE'S FAILURE TO PREPARE AN EIS OR EA FOR THE FUELS CE WAS CONTRARY TO NEPA AND NINTH CIRCUIT PRECEDENT

A. The Forest Service was Required to Prepare an EIS or EA for the Fuels CE.

The Forest Service argues that no EIS or EA was required before promulgating the Fuels CE because it merely established a "procedure" and, therefore, it will not substantively impact the environment. FS Br. at 15. But this "procedure" eliminated the EIS and EA/finding of no significant impact ("FONSI") process which ensures that environmental impacts are taken into account in decision making and eliminated the mitigation measures and alternatives analysis that previously applied to these projects. Such "procedures" have environmental effects. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1115 (9th Cir. 2002) (EIS required for the Roadless Rule because it would alter management practices and thus impact the environment); *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 974-975 (9th Cir. 2003) (programmatic rules impact the environment through the projects they authorize.) For the Forest Service to be correct in this case would mean that EISs and EAs have no environmental effect, which is contrary to the legislative history and case law on the subject. *See* Sierra Club's Opening Brief ("SC Br.") at 4-7.

The Forest Service relies on the statement in *Heartwood, Inc. v. U.S. Forest*

Service, 230 F.3d 947, 954 (7th Cir. 2000), that "CEs are not proposed actions, they are categories of actions." FS Br. at 17. In doing so the Forest Service failed to rebut Sierra Club's arguments that the small timber CE in *Heartwood* differed substantially in its environmental effects from the Fuels CE. *See* SC Br. at 28-29. Thus, while the categorical exclusion in *Heartwood* may have had no environmental effect, this one does.

If *Heartwood* stands for the proposition that an EIS or EA is never required for a categorical exclusion, it is simply wrong. NEPA states that an EIS must be prepared if: (1) there is a major federal action that would (2) significantly affect the environment. 42 U.S.C. § 4332. NEPA's implementing regulations explicitly define a "major federal action" to include "new or revised agency rules, regulations, plans, policies or procedures." 40 C.F.R. § 1508.18(a) (emphasis added). Throughout its brief the Forest Service acknowledges that the Fuels CE is a "procedure" e.g., FS Br. at 14-16, and that alone qualifies it as a major federal action. 40 C.F.R. § 1508.18(a).

Even if the Fuels CE was not a rule, regulation, or procedure, it falls under the "major federal action" definition of a "program"— "Adoption of programs, such as a group of concerted actions to implement a specific policy…[or] to implement a specific statutory program or executive directive." 40 C.F.R. § 1508.18(b)(3). Since the Fuels CE is implementing the executive branch's Healthy

Forest Initiative, FS Br. at 7, it is carrying out that policy and for this additional reason it is an "action."

Finally, the Forest Service attempts to circumvent its procedural violation by dubbing *post-hoc* its Federal Register notice a FONSI that would excuse the absence of the EIS. FS Br. at 17. A FONSI, however, is a formal document provided for by regulation that must be accompanied by an EA. 40 C.F.R. § 1508.13. The Forest Service never prepared an EA for the Fuels CE. It cannot avoid its obligation to prepare an EA or EIS by claiming after the fact that its notice is somehow a FONSI.

B. Ninth Circuit Precedent Provides Persuasive Authority that an EIS is Required.

The Forest Service claims that *Citizens for Better Forestry* "provides no support for Sierra Club's position" because it "merely acknowledged that the Forest Service had prepared an EA for its issuance of broad regulations governing nation-wide forest planning" but did not require the agency to prepare such a document. FS Br. at 19.

The Forest Service's description of this case misses the mark completely. In *Citizens for Better Forestry*, the Forest Service claimed that the environmental group would not suffer an "injury" because the agency had merely adopted regulations, and it was the actions authorized by the regulations that would actually impact the environment and injure the group, not the regulations. 341 F.3d at 973-

74. This Court held that the plaintiffs would be adversely impacted—even though the rule would not result "in any direct environmental effects"—because these "higher-level, programmatic rules [] impose *or remove requirements on site-specific plans*" and "it is through these [site-specific plans] that [the regulation] poses an actual, physical effect on the environment." *Id*. at 973, 975 (emphasis added). Thus, *Citizens for Better Forestry* shows that removing the requirements for environmental analysis does have consequences for the environment, through the site-specific plans in that case or the projects authorized under the Fuels CE in this one.

The Forest Service also contends that *Kootenai Tribe* is inapposite. FS Br. at 19. The agency claims that *Kootenai* dealt with the Roadless Rule, which altered the management of 60 million acres of public lands, whereas, the Fuels CE "simply establishes a procedure for governing the NEPA documentation for a small subset" of projects. *Id*. The Fuels CE, however, is similar to the Roadless Rule because the Forest Service has altered how it manages activities on the national forests. As a direct result of the Fuels CE logging and burning in the national forests will increase. Applying *Kootenai Tribe*, an EIS is required for this action.

C. The CEQ Chairman's Opinion does not Relieve the Forest Service of the EIS Requirement.

The Forest Service also contends it is relieved of its obligation to prepare an EA or EIS because CEQ allegedly did not require it. To support this claim, the Forest Service cites its own Federal Register Notice. FS Br. at 16. However, the Forest Service's opinion is not due any deference because it does not administer NEPA. *See*, *e.g.*, *Air North America v. Dep't of Transp.*, 937 F.2d 1427, 1436–37 (9th Cir. 1991) (No deference for the department's interpretation of the APA, "[s]ince Congress has not directed the Department to implement the APA.")

The Forest Service's use of the letter from the Chairman of CEQ to support its position is also misplaced because the Chairman's letter is totally conclusory. It does not state that the Forest Service was not required to prepare an EIS or EA, and does not indicate that the Chairman considered that issue. The Chairman does not provide any analysis that would enable this court to review his opinion or conclusion. ER 548-49. Such statements do not support agency action under the APA. *See, e.g., Chemical Mfrs. Ass'n v. EPA*, 28 F.3d 1259, 1265-66 (D.C. Cir. 1994) (conclusory statements are not due deference and do not satisfy APA standards); *Dickson v. Secretary of Defense*, 68 F.3d 1396, 1407 (D.C. Cir. 1995) (conclusory statements do not satisfy APA); *Wilderness Watch v. Mainella*, 375 F.3d 1085, 1096 (11th Cir. 2004) (rejecting conclusory statements for agency action).

Second, the CEQ letter contradicts the plain language of NEPA's regulations, 40 C.F.R. §§ 1502.4, 1508.18, which require the preparation of an EIS or EA before promulgating new agency regulations or procedures which will significantly impact the environment. *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (opinions that are "plainly erroneous or inconsistent with the regulation" are not due deference); *Sierra Club v. Martin*, 168 F.3d 1, 4 (11th Cir. 1999) (*citing* Thomas Jefferson University v. Shalala, 512 U.S. 504, 512 (1994)) (no deference due to agency interpretation that contradicts the regulation's plain language).

Third, the binding Ninth Circuit precedent is that the CEQ chairman's interpretation of NEPA is not due any deference. *Trustees for Alaska v. Hodel*, 806 F.2d 1378, 1384 n.10 (9th Cir 1986). That is because the statute that created the chairman's position makes no reference to his duties and the Executive Order that authorized the CEQ to promulgate NEPA regulations does not grant the CEQ chairman any special powers to interpret or administer the regulations. *Id*., *see also* 42 U.S.C. § 4342; Exec. Order No. 11991; 42 Fed. Reg. 26,967, 26, 968 (May 24, 1977); *cf.*, *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (executive order gave Secretary of Interior specified powers).

Fourth, this letter is not due any deference because it represents an unexplained reversal in agency policy. *See Louisiana Pub. Serv. Comm'n v. Fed.*

Energy Regulatory Comm'n, 184 F.3d 892, 897 (D.C.Cir.1999) ("For the agency to reverse its position in the face of a precedent it has not persuasively distinguished is quintessentially arbitrary and capricious."). For more than 20 years EISs have been required for rules and regulations. *See* 46 Fed. Reg. 18,033 (March 23, 1981). In fact, the CEQ prepared an EA before it issued its NEPA procedures applicable to all agencies, 40 C.F.R. § 1500 *et seq*. 43 Fed. Reg. 25,230, 25,232 (June 9, 1978) ("The Council has prepared a special environmental assessment of these regulations to illustrate the analysis that is appropriate under NEPA.").

II. THE TERMS OF THE FUELS CE DO NOT MEET REGULATORY REQUIREMENTS AND CREATE AN UNLAWFUL CASE-BY-CASE CATEGORICAL EXCLUSION.

A. The Fuels CE Does Not Sufficiently Identify the Actions to be Covered.

As a threshold matter, the Court should note that the text of the Fuels CE is actually only comprised of the last two pages of the Forest Service's Federal Register notice. Preambles to rules are not the rules themselves. *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 570 (D.C. Cir. 2002). To review the terms of the Fuels CE, therefore, see the Addendum to Sierra Club's Opening Brief at 132-133.

The Fuels CE leaves many key terms undefined and places no limit on the use of the Fuels CE. To fill in these gaps, the Fuels CE states that projects will be identified in the future under the 10-Year Plan. 68 Fed. Reg. 33,814, 33,814 (May 29, 2003) (emphasis added); *see also* ER 121-147. This subsequent identification

process is unlawful because a prerequisite for a categorical exclusion is that projects covered are identified in advance. 40 C.F.R. § 1508.4. And, by definition, the projects must be specifically and precisely defined. 40 C.F.R. § 1507.3(b)(2)(ii). However, on the face of the Fuels CE one cannot discern if any particular project will be included, since it may be proscribed or excluded by the future collaborative process.

B. The Fuels CE Creates an Unlawful Case-by-Case Categorical Exclusion.

The Forest Service contends that consideration of the case-by-case issue is barred since Sierra Club did not raise it before the agency. FS Br. at 23. However, the Administrative Record shows that many comments raised this exact same argument. ER 554-558, 578, 580, 587, 590, 662. The agency had full opportunity to consider the issue and did consider it. *See* ER 580. It is well established that as long as some commenter raised it and the agency considered it, the claim is not barred. *See, e.g., Waterkeeper Alliance v. U.S. Envtl. Protection Agency*, 399 F.3d 486, 518 n.30 (2d Cir. 2005); *Natural Res. Def. Council v. U.S. Envtl. Protection Agency*, 824 F.2d 1146, 1151 (D.C. Cir. 1987); *DIRECTV, Inc. v. Fed. Communication Comm'n.*, 110 F.3d 816, 825 (D.C. Cir. 1997); *Engine Mfrs. Ass'n v. U.S. Envtl. Protection Agency*, 88 F.3d 1075, 1097 (D.C. Cir. 1996).

When it established its "extraordinary circumstances" provision the Forest Service stated that its categorical exclusions would apply only after an "official

determines on a case-by-case basis that the proposed action would not have a significant effect on the listed resource conditions." 67 Fed. Reg. 54,622, 54,623 (Aug. 23, 2002) (emphasis added). Thus there is no genuine issue that a case-by-case exclusion exists—the only issue is whether this is allowed.

As explained at Sierra Club's Opening Brief 34-38, case-by-case categorical exclusions are not allowed under NEPA or its regulations. By definition, a project covered by a categorical exclusion need not undergo any future case-by-case review of its impacts to determine whether it has a significant effect. 40 C.F.R. § 1508.4. If a future determination of significance is necessary to determine if an action qualifies for a categorical exclusion, then the prerequisites of 40 C.F.R. § 1508.4 have not been satisfied.

The Forest Service argues nonetheless that this is not a case-by-case categorical exclusion because the extraordinary circumstances provision does not address the significance of the category, merely the significance of individual actions. FS Br. at 26. That misses the mark because 40 C.F.R. § 1508.4 prohibits categorical exclusion of individually significant projects, but the significance determination for individual projects under the Fuels CE is not made until the case-by-case, second-step analysis. In that regard, *Southwest Center for Biological Diversity v. U.S. Forest Service,* 100 F.3d 1443, 1450 (9th Cir. 1996) is inapposite. Although the court allowed the Forest Service to invoke a categorical exclusion

despite the possible presence of threatened or endangered species, the plaintiffs in that case had not challenged the categorical exclusion or extraordinary provision as unlawful, under NEPA; thus the court did not address the issue before this court.[2] *Id*.

Finally, the Forest Service attempts to justify its action by citing the categorical exclusions of other federal agencies. These provisions do not support the Forest Service because most of them do not require the agency to assess, on an *ad hoc* basis, whether there is a significant impact. For instance, the Federal Energy Regulatory Commission's provision does not require a "significance" determination. 18 C.F.R. § 380.4; *see also* FS SER 126 (Department of Interior provision requires only the possibility of an adverse effect, with no measure of degree); SER 124 (EPA provision requires only "indirect[] affect" on listed resource conditions). In fact, extraordinary circumstances provisions typically do not require an evaluation of significance before prohibiting use of a categorical exclusion. *See, e.g*., 7 C.F.R. § 1940.317(b), 38 C.F.R. § 26.6(b) (both only

[2] *Southwest Center for Biological Diversity* is further distinguishable from the instant case because it dealt with the application of a smaller categorical exclusion that did not involve the same on-the-ground actions or sheer acreage presented by the Fuels CE. In *Southwest Center*, under a different categorical exclusion, the Forest Service approved a project, which would salvage log 69 acres of dead trees without the construction of any new roads and would not impact the Mexican spotted owl because burned forest does not provide suitable habitat for the owl. 100 F.3d at 1446.

require the mere presence of resource conditions). In any event, the lawfulness of these categorical exclusions is not the issue before the court. It is no legal defense that other agencies may have violated NEPA in the same fashion as the Forest Service.

III. ACTIONS AUTHORIZED BY THE FUELS CE WILL HAVE CUMULATIVELY SIGNIFICANT EFFECTS

NEPA regulations provide that categorical exclusions can be established only for "a category of actions *which do not individually or cumulatively have a significant effect on the human environment* and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3)." 40 C.F.R. § 1508.4 (emphasis added). Therefore, if a category of actions has significant cumulative effects on the environment, such a category is inappropriate for a categorical exclusion.

The Forest Service claims that "[t]he fact that insignificant projects may occur on a large number of acres spread throughout the [national forests] does not indicate that the Fuels CE will have a cumulatively significant impacts." FS Br. at 28. According to the agency, a project becomes "no more or less significant" because other projects are subsequently implemented. *Id*. Since the "activities themselves do not have a significant impact," the impact of all these insignificant projects could never be significant. *Id*.

The Forest Service completely misapprehends the concept of cumulative

impacts. Cumulative impacts cannot be assessed by examining individual projects in a vacuum and then concluding that since the individual projects will not have significant impacts there is no collective impact. Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions. 40 C.F.R. § 1508.7; *see also* 40 C.F.R. § 1508.27(b)(7) (significance determinations require consideration of cumulative effects). Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. *Id*.

As was discussed at length in the Sierra Club's Opening Brief at 38-43, the total number of acres that the Fuels CE will affect demonstrates that it will have a significant cumulative effect. The Forest Service's projected use of the Fuels CE is annually logging and burning 1,271,164 acres of national forests. SC Br. at 15-16, 25-26. Continuous use of Fuels CE, over a decade, would treat 12,711,640 acres.

Under Ninth Circuit precedent, the total acreage that the Fuels CE will affect may by itself be enough to indicate that there will be significant cumulative environmental effects. *Klamath-Siskiyou Wildlands Ctr. v. U.S. Bureau of Land Mgmt.*, 387 F.3d 989, 994 (9th Cir. 2004) ("the total number of acres affected…may demonstrate by itself that the environmental impact will be

significant"). Therefore, the Forest Service is wrong; "insignificant projects occur[ing] on a large number of acres" does indicate that the Fuels CE will have cumulatively significant impacts.

The Forest Service's example of a prescribed burn in Florida having no cumulative effect with one in Washington (FS Br. at 28) demonstrates the fallacy of its argument. While those hypothetical projects might have no cumulative effect, the fact remains that the Forest Service did no analysis of cumulative effects of the thousands of projects to be covered, including the countless projects that will be approved each year that have some connection with other projects, such as being in the same watershed, the same national forest or the same larger ecosystem region, such as the Sierra Nevada. Perhaps after the Forest Service performs the analysis of all projects it will conclude that there is no cumulative effect, but the *post hoc* speculation on the results of that analysis does not relieve it from its obligation to perform the analysis in the first place.

Finally, the Forest Service claims that the only purpose of the Fuels CE is to create a "procedural device" to allow projects to go forward without further NEPA review. FS Br. at 29. However, the Forest Service cannot defend its inherently contradictory position that projects under the Fuels CE will significantly reduce the fuel load throughout the United States, but nonetheless are insignificant because they are merely procedural. *Cf., West v. Secretary of the Dept. of Transp.,* 206

F.3d 920, 929 (9th Cir. 2000) (a "fully-directional interchange cannot simultaneously relieve traffic congestion and yet have no significant impact on travel patterns").

IV. THE FOREST SERVICE'S FINDING OF NO CUMULATIVELY SIGNIFICANT EFFECT WAS ARBITRARY AND CAPRICIOUS.

The issue is not just whether the Fuels CE will cause a significant environmental impact, but whether the path taken to reach that conclusion was the right one in light of NEPA's procedural requirements. *See Robertson*, 490 U.S. at 350 ("NEPA itself does not mandate particular results, but simply prescribes the necessary process.").

In determining that the Fuels CE would have no significant impacts, the Forest Service did not follow NEPA's procedures because it did not analyze the cumulative effects of all 2,500 projects in its data call nor analyze the cumulative effects of all projects to be covered in the future. Nor did it analyze the cumulative effects of all projects to be authorized on an annual basis or even the cumulative effect of all projects to be covered in any particular national forest. Instead of considering the total effects of the *category of actions* covered by the Fuels CE, the Forest Service considered whether each individual project had cumulative effects. *See, e.g.*, 68 Fed. Reg. at 33,815-16; ER 740-1027; ER 271.

The Forest Service attempts to avoid this issue by arguing that this issue is indistinguishable from whether it was required to prepare an EA or EIS for the

Fuels CE. FS Br. at 30. But independent of whether an EA or EIS was required, the categorical exclusion regulation itself requires the Forest Service to make the finding of no cumulative significant effect. It can only issue a categorical exclusion for actions "which have been found to have no such effect." 40 C.F.R. § 1508.4. To put it in terms of the APA, ignoring the cumulative effect of the projects "overlook[s] an important aspect of the problem," which makes the decision arbitrary and capricious. *Pacific Coast Fed'n of Fishermen's Ass'n*, 426 F.3d at 1090.

Furthermore, 40 C.F.R. § 1508.27 defines the term "significantly" "as used in NEPA," and § 1508.27(b)(7) expressly includes cumulative effect in that definition. Also, 40 C.F.R. § 1508.7 defines "cumulative impact" to include "past, present and reasonably foreseeable future actions . . . [and] collectively significant actions taking place over a period of time." Those regulations do not merely apply to preparation of EAs or EISs, but to categorical exclusions as well. *See, e.g. Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995) ("we adopt the premise that the term should be construed, if possible, to give it a consistent meaning throughout the Act"); *American Tunaboat Ass'n v. Brown*, 67 F.3d 1404, 1408 (9th Cir. 1995) ("[w]e must 'interpret language in one section of a statute consistently with language of other sections'"). Utilizing NEPA's only test for significance, the Forest Service's analysis was inadequate because it did not analyze the cumulative

impacts of all of the projects to be covered. *See, e.g.*, *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214-15 (9th Cir. 1998) (holding that a single EIS was required to address the cumulative effects of five projects that were part of coordinated strategy); *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 896 (9th Cir. 2002) (scope held inadequate because agency failed to consider reasonably foreseeable road density amendments for timber sales); *and, especially, Resources Limited, Inc. v. Robertson*, 35 F.3d 1300, 1306 (9th Cir. 1994) (for programmatic action "must analyze [] impacts, including possible synergistic effects from implementation of the Plan as a whole").

V. THE FOREST SERVICE'S DATA CALL WAS ARBITRARY AND CAPRICIOUS AND DOES NOT SUPPORT THE FUELS CE.

A. The Projects Reviewed in the Data Call were Not Comparable to the Projects Authorized by the Fuels CE.

The U.S. Fish & Wildlife Service and the Arizona Game & Fish Department objected to the Fuels CE because the projects reviewed in the data call are not comparable to the projects authorized by the Fuels CE. ER 199, ER 205. That is because 57% of the projects in the data call had EAs or EISs, which considered alternatives and modified proposed projects to mitigate impacts. Under the Fuels CE, by contrast, projects are just proposed and approved, without modification. As a result the data call does not support the categorical exclusion. *See* SC Br. at 47-48.

The Forest Service's response confirms this inadequacy. The agency states that it "analyzed the impacts of the projects as they were finally implemented thus accounting for whatever modifications or mitigations might have been included." FS Br. at 32. But the initial projects are the ones that will be included under the Fuels CE, not the modified project after mitigation, since they will no longer have the mitigation measures of an EA or EIS. The Fish & Wildlife Service and Arizona agency are correct: the Forest Service *is* comparing apples to oranges.

The Forest Service excuses its action because it "may" develop mitigation measures for projects under the Fuels CE, and uses the Eldorado projects named in this suit as examples. FS Br. at 32. But these isolated examples do not change the fact that the Fuels CE covers projects that otherwise would have received an alternatives analysis and mitigation measures. An informal, voluntary and uncertain allowance for mitigation measures in select projects is not the equivalent of the EIS or EA/FONSI process. Put another way, regardless of whether it applied mitigation measures for these projects, that does not cure the defect of having analyzed one type of project (ones developed under the EIS or EA/FONSI regimen) and categorically excluded another type of project (ones that will not have had the project modification inherent in that review).

B. The Outcome of the Data Call was Pre-Determined.

As discussed in Sierra Club's Opening Brief at 48, the Forest Service

violated NEPA by using the "data call" as a *post hoc* rationale for an already made decision. The Forest Service's defense is that it should be given a presumption that it acted properly and in good faith. FS Br. at 33. But the Forest Service is not due that presumption. *See, e.g.,* the Ninth Circuit's recent decision in *Earth Island Institute v. U.S. Forest Serv.*, --- F.3d ---, 2006 WL 767012 (Mar. 24, 2006), in which this Court stated that the Forest Service "appears to have been more interested in harvesting timber than in complying with our environmental laws." *Id*. at *27. Ultimately, this is not a case where the Forest Service stated it was considering an action and took comment on it. Rather, this is a case where the agency decided to establish a categorical exclusion and then proceeded to gather and manipulate data to allegedly support that already made decision.

C. The Impacts Analysis was Wrongly Based on Personal Observation.

The Forest Service claims it is allowed to rely on its employees' personal observation in making a significance determination, and relies on a Tenth Circuit decision issued after Sierra Club's Opening Brief was filed: *Colorado Wild v. U.S. Forest Service,* 435 F.3d 1204, 1211 (10th Cir. 2006). FS Br. at 33-34. However, under Ninth Circuit law, reliance on agency expert opinion without supporting data is unlawful. *Idaho Sporting Congress v. Thomas,* 137 F.3d 1146, 1150 (9th Cir. 1998) ("[A]llowing the Forest Service to rely on expert opinion without hard data either vitiates a plaintiff's ability to challenge an agency action or results in the

courts second guessing an agency's scientific conclusions."); *Klamath,* 387 F.3d at 994*; Northwest Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1475 (9th Cir. 1994).

The Tenth Circuit actually misread *Northwest Motorcycle* by stating that: "the Ninth Circuit was not concerned with the agency's reliance on the 'personal observation'…, but rather was troubled by the lack of [statements regarding] the personal experiences of the agency employees." *Colorado Wild*, 435 F.3d at 1217. In *Northwest Motorcycle*, however, this court stated that "[i]f this court were only to consider the experiences of the Forest Service personnel, the court would have a difficult time upholding the Defendants' decision…; however, this was not the only basis for the Defendants' decision." 18 F.3d at 1475. A careful reading of *Northwest Motorcycle,* therefore, shows that, in the Ninth Circuit, personal observation alone does not support a finding of no significant impact, the underlying data or other verifiable information must also be provided. *Id.*; *see also Thomas,* 137 F.3d at 1150; *Klamath,* 387 F.3d at 994.

The Forest Service states that Forest Service personnel evaluated 30 data items for the Fuels CE (FS Br. at 34), but that is incorrect and not supported by their citation to 68 Fed. Reg. at 33,817. There is no indication that those data items were considered in the "personal observation." The questionnaire the Forest Service sent its employees did not direct them to gather or evaluate any data items.

See ER 243-245. Their field service reports back did not indicate that these data points were considered. *See* ER 740-1027. In contrast to the personal observation, 21% of the projects had actual field monitoring. *See* ER 271. The reference to 30 data items refers to the actual monitoring that was conducted, not the personal observation. If those 30 data points were considered in the personal observation, it is not reported in the Administrative Record, it is not available for the court to consider and is not, therefore, an objective or verifiable process. By contrast, the "resulting data" was in the record in *Colorado Wild*, *see,* 435 F.3d at 1217, and thus, unlike this court the Tenth Circuit could uphold the reliance on the personal observation.

The Forest Service finally claims that even if its practice was insufficient, it should be excused since the agency "was not required to undertake [such analysis] in the first place." FS Br. at 33. This is simply wrong. An agency's decision regarding the significance of a project's impacts must be supported by data. *Klamath,* 387 F.3d at 994 (Without the "data the conclusion was based on,…[s]uch an analysis does…not constitute a hard look…."). Under 40 C.F.R. § 1508.4 the agency had an obligation to perform an analysis of environmental effects and under the APA its actions must not be arbitrary and capricious. 5 U.S.C. § 706(2)(A). The Ninth Circuit authority demonstrates that such subjective and conclusory opinions do not meet APA strictures.

D. The Data Call does not Support the Acreage Limits of the Fuels CE.

The Fuels CE establishes acreage limits of 1,000 and 4,500 acres. The Forest Service concedes that the data found projects ranging from 5 to 2,900 acres *had* significant impacts and the "*data did not support a correlation between acreage limits of projects and their impacts.*" FS Br. at 28, 35 (emphasis added); *see also* 68 Fed. Reg. at 33,818; ER 693a-c. Nonetheless, the Forest Service based the Fuels CE on acreage limits. The categorization of actions is therefore based on something other than their significance, which is inconsistent with, and not allowed under 40 C.F.R. § 1508.4. This is the definition of arbitrary; establishing an acreage threshold for a categorical exclusion—a category of actions that supposedly has no significant impacts—that is in no way correlated to significant impacts.

The Forest Service relies on *Colorado Wild* to support its argument. FS Br. at 31, 35. But *Colorado Wild* actually supports Sierra Club's position. The salvage CE there was upheld by the court there precisely because the Forest Service had made a correlation between acreage and environmental impacts. *Colorado Wild*, 435 F.3d at 1220. For the salvage CE, the Forest Service stated that "potential environmental impacts are better predicted using acres." *Id.* In the Fuels CE, by contrast, the Forest Service found the opposite—that there was no correlation between impact and acres—hence it lacked the justification for basing

the CE on acreage limits.[3]

Colorado Wild does not support the Forest Service in this case for the additional reason that there the Forest Service set the acreage limit for the salvage CE slightly *below* the mean acreage of the projects reviewed. 435 F.3d at 1214. The plaintiffs claimed it was arbitrary and capricious to use the mean average instead of the median average, but the court upheld that practice because of the over representation of small projects in the data call.[4] *Id* at 1216. In the Fuels CE, on the other hand, the Forest Service set the acreage limit approximately 4 times the mean average for logging projects and 3.5 times the average for prescribed burns.[5] Thus the rationale of *Colorado Wild* is not applicable to this case.

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[3] The salvage CE allowed the logging of dead and/or dying trees up to 250 acres and the construction of .5 miles of temporary roads. The Fuels CE on the other hand allows the logging and prescribed burning of 1,000 and 4,500 acres, respectively, of live green forests and limitless construction of temporary roads. Each categorical exclusion was supported by a different data call.

[4] The mean is calculated by summing the values and dividing by the number of values. The median is the middle value of the set when they are ordered by rank. http://dictionary.reference.com/help/faq/language/a/avg-mean.html.

[5] The mean average of the projects reviewed for the Fuels CE is 253 acres for logging and 1,277 acres for prescribed burns. ER 740-1027 (mean averages of columns G and H). The median average is 75 and 192 acres for logging and prescribed burns respectively. ER 740-1027 (median averages of columns G and H).

VI. APPLICATION OF THE FUELS CE TO THE ELDORADO AND LASSEN PROJECTS WAS ARBITRARY AND CAPRICIOUS AND NOT IN ACCORDANCE WITH LAW.

The Forest Service did not respond to Sierra Club's central point on the projects, which is that, since there is no genuine issue that these projects "may" have significant effects, the use of a categorical exclusion for them is prohibited. *See California v. Norton*, 311 F.3d 1162, 1177 (9th Cir. 2002).[6]

Instead the Forest Service argues it need not conduct the same cumulative effects analysis it would utilize in preparing an EA or an EIS for these projects. FS Br. at 37. The Forest Service misapprehends the Sierra Club's argument. Although in order to apply a CE an agency need not conduct an evaluation of significant effects, if the extraordinary circumstances provision of the CE requires analysis of "significant effects" on certain resource conditions, then the agency must evaluate those significant impacts. That analysis was required for these challenged projects because resource conditions that are listed under the Fuels CE extraordinary circumstances provision and the Forest Service Handbook are

[6] Although the Forest Service withdrew the Adams Windthrow Project, the agency still intends to use the Fuels CE on the Lassen National Forest. *See*, *e.g.*, ER 487-499; Addendum to SC Br. at 160-173. Therefore, this claim is not moot because it is "capable of repetition, yet evading review." *See Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166, 1173 (9th Cir. 2002).

present in the project areas. *See* SC Br. at 51. That determination of "significance" is subject to the definition of that term in 40 C.F.R. § 1508.27, to the definition of "cumulative impact" in 40 C.F.R. § 1508.7, and to APA standards, just like EAs and EISs.

It is obvious that the Forest Service did not adequately analyze the cumulative effects of these projects because the decision memos for these projects do not take one another into account—even though two of the projects are within three miles of each other—much less provide a full analysis of their cumulative effect. SC Br. at 52-54. The expert declarations of Dr. Dennis Odion and Monica Bond demonstrate, at a minimum, that the agency overlooked important aspects of the problem and acted contrary to the evidence before the agency, which renders the Forest Service's "extraordinary circumstances" analysis arbitrary and capricious under the APA. *Motor Vehicle Mfrs.*, 463 U.S. at 43.

CONCLUSION

For the reasons set forth above and in Sierra Club's Opening Brief, the district court's order should be reversed and summary judgment should be entered for Appellants. The Forest Service's Fuels CE should be vacated and remanded to the agency, and further use of it enjoined nationwide until the Forest Service complies fully with NEPA and the APA. Finally, the challenged projects on the Eldorado and Lassen National Forests should be vacated.

DATED: April 18, 2006

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to F.R.A.P. 32(a)(7) and Ninth Circuit Rule 32-1, the attached reply brief is proportionately spaced, has a typeface of 14 points, and contains 6,985 words.

Dated this 18th day of April, 2006.

Respectfully submitted,

_____

Kristin Henry

CERTIFICATE OF SERVICE

I, Elly Benson, certify and declare as follows:

I am over the age of 18 years, and not a party to this action. My business address is 85 Second Street, 2nd Floor, San Francisco, CA 94105-3441 which is located in the county where the mailing described below took place.

On April 18, 2006, I sent the REPLY BRIEF OF APPELLANTS SIERRA CLUB AND SIERRA NEVADA FOREST PROTECTION CAMPAIGN to the recipients listed below via Federal Express:

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These documents and required copies were filed with the Court of Appeals for the Ninth Circuit via messenger on April 18, 2006.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on the 18th day of April, 2006.

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