Jesse A. Buss, OSB # 122919
411 Fifth Street
Oregon City OR 97045-2224
Tel: 503-656-4884
Fax: 503-608-4100
Email: jessebuss@gmail.com

Tom Buchele, OSB # 081560
Earthrise Law Center
Lewis & Clark Law School
10015 SW Terwilliger Blvd.
Portland OR 97219-7799
Tel: 503-768-6643
Fax: 503-768-6642
Email: tbuchele@lclark.edu

Attorneys for Plaintiff League of Wilderness Defenders/Blue Mountains Biodiversity Project

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PENDLETON DIVISION

LEAGUE OF WILDERNESS DEFENDERS/BLUE MOUNTAINS BIODIVERSITY PROJECT, an Oregon non-profit corporation, Plaintiff, v. **SLATER R. TURNER**, District Ranger, Crooked River National Grassland and Lookout Mountain, Ochoco National Forest, in his official capacity; and **UNITED STATES FOREST SERVICE**, an agency of the United States Department of Agriculture, Defendants	Case No. 2:16-CV-01648-MO MOTION FOR PRELIMINARY INJUNCTION OR IN THE ALTERNATIVE FOR A TEMPORARY RESTRAINING ORDER AND SUPPORTING MEMORANDUM EXPEDITED HEARING REQUESTED ORAL ARGUMENT REQUESTED

MOTION

Plaintiff League of Wilderness Defenders/Blue Mountains Biodiversity Project ("Defenders" or "plaintiff") hereby moves this Court for an order pursuant to Federal Rule of Civil Procedure (FRCP) 65 preliminarily enjoining defendants U.S. Forest Service and District Ranger Slater Turner (Turner) (collectively "defendants" or "Forest Service") from allowing or implementing any of the commercial sanitation logging or commercial thinning authorized in Units 1-5 by the December 15, 2015 Decision Memo ("DM") (AR 6349-91). As required by LR 7-1, counsel for plaintiff has conferred with counsel for defendants regarding this motion and they were unable to resolve the issues raised by this motion. During that conferral, counsel for defendants informed plaintiffs that defendants intend to begin the commercial logging and/or commercial thinning on October 17, 2016. This motion will be fully briefed on or before October 4, 2017. Plaintiff's counsel contacted the Court's courtroom deputy before filing this motion and established a tentative date for argument regarding this motion, October 6, 2016 at 11am. All counsel are available on that date, and if that date is still available on the Court's calendar, plaintiff also requests that the Court set argument on this motion for October 6, 2016 at 11am. If the Court is unable to set this motion for argument before October 17, 2016, or is for any other reason unable to fully consider the parties' briefs and arguments before that date, plaintiff requests that its motion be treated as a motion for a temporary restraining order pursuant to FRCP 65. Plaintiff also submits the following Memorandum and declarations from Karen Coulter, Marilyn Miller, Jesse Buss and Kitty Benzar in support of this motion.

Wherefore, plaintiff respectfully requests that the Court enter an order preliminarily enjoining, or temporarily restraining, the defendants from allowing or implementing any of the commercial logging and/or commercial thinning authorized by their challenged DM.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Codes and Regulations

Other

TABLE OF ACRONYMS

CE	Categorical Exclusion
DBH	Diameter at Breast Height (also: "dbh")
DM	Decision Memo
EA	Environmental Assessment
EIS	Environmental Impact Statement
FOIA	Freedom of Information Act
FRCP	Federal Rules of Civil Procedure
FSH	Forest Service Handbook
FSM	Forest Service Manual
LOWD/BMBP	League of Wilderness Defenders/Blue Mountains Biodiversity Project
LR	Local Rule
LRMP	Land and Resource Management Plan
NEPA	National Environmental Policy Act
NFMA	National Forest Management Act
USFS	United States Forest Service

MEMORANDUM IN SUPPORT OF MOTION

INTRODUCTION

The challenged logging would occur in a 176 acre area (the "project area") around Walton Lake, the most popular recreation site in the Ochoco National Forest. The Treatments map attached to the DM indicates the commercial logging and commercial thinning that Defenders seeks to enjoin would occur in Units 1-5. AR6390. Only non-commercial thinning would occur in the remaining units, 6-8. *Id*. (collectively "Walton Lake Project" or "the Project") Although that thinning also was approved illegally, Defenders does not seek an injunction against it now because it would not irreparably harm Defenders. Indeed, Defenders might have supported this noncommercial thinning if the Forest Service had approved it legally. Defenders has no objection to Forest Service efforts to remove real hazard trees (*see* note 8 below) immediately adjacent to roads and campgrounds while any preliminary injunction is in force.

As Defenders establishes in the following supporting Memorandum, the authorized commercial logging and thinning would immediately irreparably harm plaintiff and its supporters by cutting down hundreds of large fir trees, including numerous old growth fir trees, in areas where plaintiffs' supporters regularly recreate. That logging also violates the National Forest Management Act's ("NFMA"), 16 U.S.C. §§ 1600-1614, specifically mandatory restrictions in the Ochoco National Forest's Amended Land and Resource Management Plan ("LRMP" or "Forest Plan") that prohibit most logging of trees over 21 inches in diameter at breast height ("dbh"). These well-known restrictions are usually referred to as the Eastside Screens, or simply the Screens. Although defendants invoke two of the Screens' limited exceptions, those exceptions cover only large tree removal for "health and safety (roadside or campground hazard trees)" and in "special use recreation areas." Moreover, defendants'

proposed logging of hundreds of large firs targets far more than "hazard trees," and they do not intend to cut any large trees within the 68.8 acre special use recreation area that is a part of the 176 acre project area. Defendants' decision also violates the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370(h), because defendants illegally attempt to rely upon a Categorical Exclusion ("CE") that only, at best, covers 25% of the Project. Additionally, defendants' required public scoping for the Project failed to inform the public that the Forest Service was invoking those supposedly applicable exceptions to the Eastside Screens. Defendants' public outreach also did not disclose the true nature and scope of the proposed logging: passing it off as "thinning" while acknowledging in their internal analysis that it would resemble clear cutting in the areas where they intend to remove all fir trees.[1] The balancing of harms from a short-term injunction (against the logging of large and old growth trees that would not regrow within the lifetime of any of Defenders' supporters) tips sharply in favor of plaintiff. The public interest is served by and consistent with maintaining the status quo and preserving these trees while the Court fully resolves Defenders' legal claims.

PROJECT HISTORY

Walton Lake, located in the Lookout Mountain Ranger District of the Ochoco National Forest, is the most heavily-used recreation area in the Ochoco National Forest. AR5868-69. There is a forested campground and day use area which, as the Forest Service acknowledges, are "well-loved." AR5862. Its "significant number of visitors" value the lake for its fishing opportunities, and the surrounding area for its beauty. *See* AR6349. In particular, visitors cherish

[1] Defendants produced the Administrative Record (cited as "AR____") underlying their decision on September 9th, less than three business days before plaintiff filed their motion. Plaintiff has not had an opportunity to fully review that record and to raise issues regarding its completeness. Plaintiff also will wait to brief several of its claims until after it has had the opportunity to fully review the record. *See* Complaint, Dkt. # 1, Claim 1, Counts 2 and 4, Claim 2, Count 3.

the massive trees at Walton Lake. *See* AR6000 (comment implying that, if the Forest Service logs the area, its recreational value would drop); AR5968 (scoping comment stating that "[p]art of the draw of camping at Walton Lake is the lovely old growth forest that surrounds the lake").

The project area is also subject to a forest plan amendment which expressly prohibits logging late and old seral and/or structural trees greater than 21" diameter in breast height (dbh).[2] AR2317, 2455. Adopted in the early 1990s, the Eastside Screens provide riparian, ecosystem, and wildlife standards for the nine national forests east of the Cascades, including the Ochoco; the Screens act to curb and remedy the over-logging that had left a dearth of old growth trees, large trees and snags (which create vital habitat for cavity-nesting wildlife). *See* AR2263. The Screens' restrictions are well-known to the public, and the Forest Service should know that any proposal that seeks to log in excess of those restrictions will be controversial and possibly litigated. *See, e.g., LOWD v. Connaughton*, 2014 WL 6977611 (D. Or. 2014).

Nevertheless, the Walton Lake project authorizes 176 acres of timber harvest, precommercial thinning, hardwood enhancement treatments, and reforestation activities within the campground and in forested areas encircling the Lake, including logging hundreds of large fir trees and numerous old growth firs. AR6349. In addition to circumventing the Eastside Screens, the project threatens many of the very trees that make the area so popular and scenic.

Additionally, the Forest Service approved the project using a NEPA process, a CE, that allowed for very little public input and in fact misled the public regarding the actual scale and impact of the project on the forest surrounding Lake Walton. Specifically, while the scoping notice described the Forest Service's intent to remove laminated root rot hosts in part of the

[2] The Screens protect both "late and old seral" trees, more commonly referred to as "old growth trees," and structural trees over 21"dbh, AR 2455, which plaintiff refers to herein as "large trees." Generally the Forest Service considers trees over 150 years old or that have "old growth characteristics" as "old growth trees." *See generally* AR6361.

project area (in an area termed, at that time, "Block 1"), it stated that "[r]etention of the natural feel and visual quality of the area around Walton Lake" was "a key objective" of the project. AR5863. It also stressed LRMP requirements that "timber activities may be used for safety and visual enhancement, so long as the natural appearance of the area is maintained." AR5862. Similarly, other descriptions of the project stressed that the Walton Lake project involved "thinning" of the trees. *See, e.g.,* AR5878 (press release indicating the Forest Service was "seeking feedback on a proposal to selectively thin and replant" around Walton Lake); *see also* AR5891, AR5887-88 (echoing language). Elsewhere in the project area, the scoping notice stated the objective was to reduce risk of bark beetle infestation and stress on legacy ponderosa pine by commercial (proposed in "Block 3") and noncommercial thinning (proposed in what was termed, at that time, "Blocks 2, 3, and 4"). AR5863. That is, it only identified disease as present in Block 1. *See id*; *see also* AR 6409 (quoting Patrick Lair, public affairs specialist with Ochoco National Forest, acknowledging that "disease is only about 25 percent of the project").

As a result, interested members of the public such as Defenders were not given an estimate of how many trees would be cut, let alone how many of those are large trees. Internal documents, however, show that most of the fir trees, especially in "Block 1," will be cut. *See* AR6122 (map indicating thick dispersal of fir trees greater than 21" in a part of "Block 1," now units 2-4, with relatively few protected pine and larch). While the scoping notice identified the CE which the Forest Service intended to apply to the project under NEPA, AR5863, it made no mention of the Eastside Screens, nor did it identify which exceptions it intended to apply to the project. It only stated that the Forest Service intended to cut "fir of all sizes" in some areas. *Id.*

The scoping notice indicated that comments should be submitted by July 6, 2015. AR5863. Acting on the limited information it had, Defenders submitted comments dated July 3,

2015. *See generally* AR5970-81. Among other points, it called attention to the fact that a timber sale of live trees greater than 21" dbh violated the Eastside Screens. AR5970. It noted the Walton Lake area contains "magnificent old growth forest[,]" with ponderosa pines up to 61" dbh, Douglas firs up to 60" dbh and grand fir up to 57" dbh. *Id.* Plaintiff was even able to survey the Project area before it submitted its scoping comments and therefore included notes and pictures of some of these large and old growth fir trees, in areas where the scoping notice indicated that "firs of all sizes" would be logged. *Id*., AR5982-99. Other comments also questioned the need to cut large trees and expressed resistance to the idea.[3]

On August 11, after scoping concluded, the Forest Service conducted a "Walton Lake Field Trip," a visit to the site with interested parties to answer questions. Only three attendees were able to go. AR6084, AR6110. Notes from the trip indicated that "[c]larification was provided to the group regarding the removal of trees [21" dbh] and larger" and that the project did include removing such trees. *Id.* During a subsequent meeting with a public collaboration group, the Forest Service acknowledged, in response to questions, that the logging extended beyond the campground and would log trees that were not "technically hazard trees." AR6110.

Over the following months, the Forest Service finalized a series of specialist reports documenting analysis regarding aquatic species, botany, forest health, geology, recreation, soil, transportation, and wildlife.[4] *See* AR6255, 6245, 6314, 6237, 6340, 6304, 6152, 6156, respectively. The public did not see any of these reports until after the Forest Service issued its DM and had no ability to review their content before submitting comments on the proposal.

---

[3] *See* AR5968, AR5969, and AR6000. Additionally, Chad Hanson specifically wrote that "areas that may pose a risk to public safety should be highly localized . . . The project, as proposed in the [scoping notice], amounts to a large over-reaction that would likely result in mostly live, healthy firs . . . being needlessly removed." AR5906.

[4] The Wildlife Evaluation was partially incomplete in that it lacked the referenced Wildlife Maps; the Forest Service added the maps at the end of June 2016 at plaintiff's request. AR6613.

Unlike the scoping notice, several of these reports refer to treatment units, not blocks, which was a change made as the project developed. AR6357. Block 1 became Units 2, 3, 4, 5, and 8; Block 2 became Unit 6; Block 3 became Unit 1, and Block 4 became Unit 7. AR6358; *see also* AR6128 (Sept. email describing change). This was an innocuous departure from the scoping notice, but there were others: the Recreation Resource Report in particular indicated: "[t]he immediate impacts to visual resources would be extremely noticeable as a majority of fir species would be removed from the site" and that, while visitors were accustomed to "a dense, mixed-conifer forest environment[,]" after removing the firs as outlined by the project, "the site would immediately have an open, parklike dry pine forest environment . . . The landscape will need some time to recover[.]" AR6342. Meeting notes also contrasted sharply from the minimalizing language in the public notices. *See, e.g.,* AR6119 ("These areas will resemble a regeneration harvest with retention trees[,]"); AR6277 (describing it as a "[c]learcut with reserve trees[.]")

The Forest Service issued the Decision Memo ("DM") on December 15, 2015. AR6360. It indicated that the project would proceed, encompassing commercial sanitation logging in Units 2, 3, and 4 (removing all grand fir and Douglas-fir, including all large and old growth fir, with a few small leave areas carved out of the units); non-commercial thinning in units 6, 7, and 8 (removing only small trees with no commercial value); and commercial and non-commercial thinning in units 1 and 5. AR6350, AR6390. Although no old growth fir would be cut in units 1 and 5, large fir (i.e., greater than 21" dbh) near old ponderosa pine would be removed. AR6361. Thus, the Forest Service intended to log all fir trees that were protected by the Eastside Screens in Units 2-4 and at least some protected large firs in Units 1 and 5.

Paula Hood submitted a FOIA request on behalf of Defenders on January 13, 2016, asking for the Walton Lake project file, all correspondence related to the project, and any and all

information related to the Eastside Screens for the project, including the Forest Service's interpretation of the Screens. *See* AR6411 (response summarizing the request). She also emailed separately with specific questions for the agency, including an inquiry about the project timeline. AR6643. On February 23, 2016, Defenders received 239 pages of pertinent materials.[5] On March 17, the Forest Service responded to Ms. Hood's separate email. AR6642. Ms. Hood continued to contact the Forest Service in April, in part for details about the logging timeline. *See* AR6657-62.

This was needed as the logging timeline had changed quite a bit since Defenders submitted its comments. Though forester Renee Roufs completed a proposal on October 14, 2014, AR5835, the Forest Service did not issue its scoping notice until June 4, 2015, which in turn projected that the project would begin in fall 2015. AR5868 (attached flyer with timeline details). In early meetings, it appears that the Forest Service was debating logging after Labor Day. AR5813. It decided to aim for fall/winter 2015. AR5833; *see also* AR6118. However, the Forest Service did not meet that deadline. AR6409. It then hoped to implement at least some of the project in early spring 2016, telling Defenders that implementation could begin within a month. AR6642. It changed its tune a month later, telling Defenders that logging would not occur until after the campground closed in fall 2016. AR6657.

PRELIMINARY INJUNCTION STANDARDS

Under FRCP 65, the Court may issue a preliminary injunction pending final resolution of plaintiffs' claims. Typically, a plaintiff must demonstrate "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that

[5] AR6411. These 239 pages stand in contrast to the 6600+ pages which the Forest Service submitted as the administrative record, including several documents which clearly should have been included in the FOIA response. *See, e.g.,* AR6110 (ORFC meeting notes including Walton Lake project discussion); AR6274-75, AR6276-78 (relevant silvicultural prescriptions for the project); AR6120-22 (relevant email chain and map of trees greater than 21" dbh).

the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1289 (9th Cir. 2013) (citing *Winter v. NRDC*, 555 U.S. 7, 20 (2008)). However, a plaintiff need "only show that there are 'serious questions going to the merits'… if the 'balance of hardships tips *sharply* in the plaintiff's favor,' and the other two *Winter* factors are satisfied." *Shell Offshore*, 709 F.3d at 1291 (quoting *Alliance for the Wild Rockies ("AWR") v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)). As the concurring opinion in *AWR* explained, 632 F.3d at 1139 (Mosman, J., concurring): a "district court at the preliminary injunction stage is in a much better position to predict the likelihood of harm than the likelihood of success." *Id.* Thus, "in many, perhaps most, cases the *better* question to ask is whether there are serious questions going to the merits." *Id.* at 1140. Although injunctive relief is an extraordinary remedy and requires a clear showing that plaintiffs are entitled to such relief, *Winter,* 555 U.S. at 22, Defenders can make such a showing here.

ARGUMENT

I. The Project Will Result in Immediate and Irreparable Harm to Plaintiff.

In order to obtain a preliminary injunction, plaintiffs must show that they are likely to suffer irreparable harm in the absence of the injunction. *Winter*, 555 U.S. at 20. The Ninth Circuit has concluded that plaintiffs satisfy the likelihood of irreparable harm requirement when a project will harm a plaintiff's members' ability to "view, experience, and utilize the areas in their undisturbed state," and will "prevent [their] use and enjoyment … of the forest." *AWR*, 632 F.3d at 1135 (concluding that logging, even in only a portion of a burned area, establishes a likelihood of irreparable harm). Here, Defenders has established such harm.

The Forest Service's Walton Lake Project (the "Project") will log hundreds of large fir trees including all the firs from a dense, mixed-conifer forest, which includes large old growth

Douglas firs up to 60" dbh and grand firs up to 57" dbh. AR 5970. Defenders' supporters, officers, and staff hike, camp, bird watch, view wildlife, photograph scenery and wildlife, and engage in other vocational, educational, scientific observation, and recreational activities within the Ochocos, including the Project area and adjacent lands. Coulter Decl. ¶ 6.

The approved logging would negatively affect the bird-watching and wildlife viewing opportunities in the area, will harm Defenders' supporters' ability to view and utilize the area in its undisturbed state and will impede their spiritual, aesthetic, professional and recreational use and enjoyment of the area. *See* Miller Decl. ¶¶ 4, 5, 8-10. Specifically, Defenders' supporters believe that the proposed logging will negatively impact the visual and aesthetic qualities of the places they use and intend to use again. *E.g.,* Miller Decl. ¶ 10. If the Project moves forward, Defenders supporter Marilyn Miller, who frequently uses the Project area for bird watching, hiking, camping, wildlife observation, and nature photography, will avoid using the Walton Lake area because of the harm that the logging will inflict on wildlife, the visual and aesthetic quality of the area, and her sense of spiritual peace with the forest. Miller Decl. ¶¶ 6, 10.[6]

The Forest Service will commercially log large fir trees in several different parts of the Project. In units 1 and 5 that logging would remove large fir that "compete" with old growth ponderosa pine. AR6341. In units 2-4 the Forest Service intends to remove all fir trees from what is currently a dense mixed-conifer forest. *Id.* This logging would have "extremely noticeable" effects and would convert much of the forest around Walton Lake into "an open, park like dry pine forest environment." AR 6342. The Forest Service hopes that visitors will learn to like the "new visual landscape with open sight lines and attractive shrub species." *Id*. However,

[6] The facts in the Coulter and Miller declarations also establish plaintiff's standing to bring this action. *See generally Friends of the Earth v. Laidlaw*, 528 U.S. 167, 180–81 (2000); *Citizens for Better Forestry v. USDA*, 341 F.3d 961, 971–72 (9th Cir. 2003).

according to at least one Defenders supporter, a type-conversion of the mixed-conifer forest would retain neither the natural feel nor the visual quality of the project area. Miller Decl. ¶ 14.[7] Declarant Miller uses both the old growth forest where "competing" large fir would be logged and the mixed-conifer forest where logging would remove all fir trees. The removal of these large fir trees would significantly harm her aesthetic and recreational use of these forests, and she would cease using these areas if the planned commercial logging occurs. Miller Decl. ¶¶7-19.

The Ninth Circuit has recently held that the logging of mature trees, if indeed incorrect in law, cannot be remedied easily if at all. *LOWD v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014) (concluding that proposed logging of mature trees, "as with many instances of this type of harm," established irreparable harm for the purposes of the preliminary injunction analysis). "Neither the planting of new seedlings nor the paying of money damages can normally remedy such damage." *Id*. Moreover, the Ninth Circuit has upheld or granted injunctions in cases involving only smaller trees and in areas that have previously been burned. *See AWR,* 632 F.3d at 1129, 1135. Here, the Forest Service's Project will involve logging many large trees, including Douglas firs up to 60" dbh and Grand firs up to 57" dbh. AR5970. Even if the Project involved replanting logged areas with the same tree types, most Defenders supporters would not live to see the trees reach the maturity of those currently standing in the Project area. Thus, Defenders' supporters will be irreparably harmed if Defendants move forward with the project.

II. Plaintiffs are Likely to Succeed on the Merits.

Judicial review of agency actions brought under NEPA and NFMA are governed by the Administrative Procedure Act ("APA"). 5 U.S.C. §§701–706; *Idaho Sporting Congress v.*

[7] There is no substitute for the Project areas that will be logged, even in the surrounding forest. *See AWR*, 632 F.3d at 1135 (finding that the availability of surrounding areas unaffected by logging in the Project area does not weigh against establishing a likelihood of irreparable harm).

Rittenhouse, 305 F.3d 957, 964 (9th Cir. 2002). Under the APA, a court shall hold unlawful and set aside agency action, findings, and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). Under this standard:

> an "agency must examine the relevant date and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto Ins. Co.,* 463 US 29, 43,103 S.Ct. 2856, 77 L.Ed.2d 443(1983). An agency's action is arbitrary and capricious if the agency fails to consider an important aspect of a problem, if the agency offers an explanation for the decision that is contrary to the evidence, if the agency's decision is so implausible that it could not be ascribed to a difference in view or be the product of agency expertise, or if the agency's decision is contrary to the governing law. *Id.*

Gifford Pinchot Task Force v. Perez, 2014 WL 3019165, *3 (D.Or. July 3, 2014), *quoting Organized Village of Kake v. USDA,* 746 F.3d 970, 974 (9th Cir. 2014).

The arbitrary and capricious standard does not shield agency action from a "thorough, probing, in-depth review." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). Deference to agency expertise is required, but the agency must "explain the conclusions it has drawn from its chosen methodology and the reasons it considers the underlying evidence to be reliable." *Lands Council v. McNair*, 537 F.3d 981, 994 (9th Cir. 2008)(en banc). This Court may uphold the Forest Service's decision only on the basis of the reasoning found in that decision. *Anaheim Mem'l Hosp. v. Shalala*, 130 F.3d 845, 849 (9th Cir. 1997).

Consistent with these standards for review, Defenders demonstrates below that it is likely to succeed on the merits. However, because the balance of hardships tips sharply towards Defenders, all it is required to show is that it has raised "serious questions going to the merits," *AWR*, 632 F.3d at 1135, which it easily can do. The Forest Service violated two federal laws designed to protect public lands and ensure informed public participation before federal agencies make decisions impacting our national forests. First, it violated NFMA by incorrectly applying

the Screen's narrow exceptions for "health and safety" and for "special use recreation areas" to this entire project in a way that swallows the Screens' general rule protecting large trees. Second, the Forest Service violated NEPA by conducting scoping which did not give members of the public sufficient environmental information to weigh in with their views, and misled the public about the actual scope and impacts of the proposed logging. It also violated NEPA by applying a CE which, by its own terms, does not cover a project that would remove hundreds of healthy large fir trees, including from stands that are free of disease.

A. *Defendants' Proposed Logging Violates NFMA (Claim 2, Counts 1 and 2).*

NFMA is the primary statute governing the administration of national forests. It requires the Forest Service to develop and implement a forest plan (the LRMP) for each unit of the National Forest System. 16 U.S.C. § 1604. Forest Plans guide natural resource management activities forest-wide, setting standards, management area goals and objectives, and monitoring and evaluation requirements. *See id.* Under NFMA all projects in a national forest must be consistent with the applicable Forest Plan. *Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836, 850 (9th Cir. 2013); *see also Neighbors of Cuddy Mtn. v. Alexander*, 303 F.3d 1059, 1062 (9th Cir. 2002) ("[s]pecific projects ... must be analyzed by the Forest Service and the analysis must show that each project is consistent with the plan").

The Walton Lake area and Defendants' proposed logging project is subject to the 1989 Ochoco National Forest Plan (*see generally* AR1399-1888), as amended by the "Eastside Screens." *See* AR2262-2359, AR2360-70, AR2404-2548, AR2549-2558. The Eastside Screens were designed to address the Forests' deficiency of large trees resulting from decades of over-logging. *See* AR2263, AR2413. One of the primary, specific mandates of the Eastside Screens is that logging trees over 21" diameter at breast height (dbh) is prohibited. AR2317, AR2455.

The Eastside Screens contain limited exceptions including for "sales to protect health and safety" and "sales to modify vegetation within recreation special uses areas." AR2549, 2312, 2436. Defendants rely on those exceptions as justifying their proposed logging of trees over 21" dbh in the project area. AR6359. As explained below, however, the "health and safety" and "recreation special uses areas" exceptions only apply to a relatively small portion of the project area. That is, most of the project area is not subject to either exception. Accordingly, Defendants' proposed logging violates the Eastside Screens, the Forest Plan, and NFMA.

1. Alleged Exception #1: Logging "To Protect Health and Safety."

The DM cites the "protect health and safety" exception to the Eastside Screens as allowing the logging of trees over 21" dbh in the project area. AR6359. However, while that exception may apply to *portions* of the project (e.g. the campground and roadsides), the exception does not apply to *all*, or even most, of the project areas targeted for logging. One of the main purposes of the Eastside Screens is to protect *forest* health. AR2264. However, the DM conflates this forest health *purpose* of the Eastside Screens with the "health and safety" *exception* to the Eastside Screens. For example, in their DM Defendants declare that "[t]he stated purpose of the project is to improve *public* safety and *forest* health in a manner that is consistent with the desired condition for developed recreation areas, as described in the Ochoco Forest Plan." AR6371 (emphasis added). There are several other similar comments in the DM that reveal Defendants' use of the "health and safety" exception as an attempt to protect *forest* health. *See e.g.* AR6354 ("...visitor safety and *forest* health can be protected...) (emphasis added); AR6374 ("The intent of the project is to improve public safety and *forest* health...") (emphasis added); AR6375 ("Commercial thinning is proposed solely to meet the purpose of the project, which is to improve public safety and *forest* health within a developed recreation area.") (emphasis added).

However, as explained below, the purpose of the "health and safety" exception to the Eastside Screens is to protect *public* health and *public* safety, not *forest* health and public safety.

The Eastside Screens' exception for "health and safety" applies only to *public* health and safety because the exception only applies to the removal of "roadside or campground hazard trees,"[8] which would be absurd in the context of *forest* health. *See* AR2285; s*ee also* AR1614 (using "health and safety" in the context of public and human health and safety in the LRMP). Further, there is nothing in the Eastside Screens document or the Forest Plan suggesting that the "health and safety" exception was intended to apply to *forest* health. Thus, the exception to the Eastside Screens only applies to *public* health and safety, not *forest* health.

The absence in the Eastside Screens of any apparent intent to exempt logging projects for "forest health" reasons is consistent with the Eastside Screens' general purpose and its prohibition on logging large trees. Exempting logging projects on "forest health" grounds would allow the very *purpose* of the Eastside Screens' logging restrictions (i.e. forest health) to be swallowed by one of its logging *exceptions*. Under this scheme the Forest Service could justify *any* logging in eastside forests by invoking the "forest health" rationale. Such a scheme is disfavored under the law,[9] and the Eastside Screens specifically contemplate "intentionally

[8] A "hazard tree" is defined in the FSM as "[a]ny tree that is within striking distance of a permanent or transitory target of value as defined in the Field Guide for Hazard-Tree Identification and Mitigation on Developed Sites in Oregon and Washington Forests." FSM 2300, § 2332.5 (Buss Decl., Exhibit 6). The Field Guide defines "target" as a "person or object within striking distance of a tree or its part," Filip, G., et al. 2014, at 108 (Buss Decl., Ex. 10), such as "people, property, or structures." *Id.* at 12. Further, "[c]amp sites and buildings, where breakage from or failure of defective trees could result in damage to people or their property, are examples of *valuable* targets that need to be protected." *Id.* at 9 (emphasis added). Moreover, visitors who wish to recreate in forests "must accept a certain amount of hazard." *Id.* at 13.

[9] Exceptions should be interpreted so as to avoid swallowing the rule. *See e.g. Cuomo v. Clearing House Ass'n, LLC,* 557 U.S. 519, 530 (2009) (avoiding interpretation of an exception in a way that would allow it to "swallow the rule"); *United States v. Powell*, 469 U.S. 57, 68 (1984) (declining to adopt an exception where it would "swallow the rule"); *Miranda v. Castro*, 292

restrictive" standards that should be interpreted narrowly. *See* AR2263. Further, as explained below, the established and proper way for the Forest Service to authorize the logging of large trees for *forest health* purposes is to promulgate a forest plan amendment, which Defendants have not done here.

The Forest Service must attempt to promulgate a forest plan amendment if it wishes to avoid the 21" dbh limitation of the Eastside Screens for "forest health" reasons. The Forest Service is well aware of this requirement because its 2003 guidance letter specifically encourages the use of site-specific amendments for forest health-related projects that would otherwise violate the Eastside Screens. AR2846-2847. More recently, a 2015 Forest Service guidance letter cites the 2003 guidance, noting that "[f]orests have planned projects for many years involving site-specific amendments to the Eastside Screens." Buss Decl., Exhibit 1, at 1.[10] The 2015 guidance confirms the continued validity of the Screens, as well as the need to use forest plan amendments to exempt logging projects from the Screens for "forest health" reasons:

> "The Eastside Screens were intended to conserve old forest abundance and wildlife habitat in late and old structural states. I emphasize these intentions remain in place. The direction in this letter and its enclosure, which provides additional information regarding the importance of maintaining Screens and examples of when site-specific forest plan amendments may be appropriate, respond to field experience and the recent court decision, [*League of Wilderness Defenders v. Peña*, 2014 WL 6977611 (D. Or. 2014)]. This letter replaces the [2003 guidance letter]."

F.3d 1063, 1066 (9th Cir. 2002) (threshold to trigger tolling of particular statute of limitations is high " 'lest the exceptions swallow the rule.'") (internal citations omitted).

[10] Although the 2015 guidance letter is not currently in the administrative record submitted by defendants, it clearly should be. *See generally Thompson v. U.S. Dept. of Labor*, 885 F.2d 551. 555 (9th Cir. 1989*)* (record is everything considered "directly or *indirectly"* by agency). Rather than file one motion to complete the record now and another one later after plaintiff has had a chance to carefully review the entire record, plaintiff will use the 2015 Guidance Letter based on the Buss Declaration and then include it in a subsequent comprehensive motion to complete that addresses all of plaintiff's objections regarding the record.

Id. at 2. Like the 2003 guidance letter, the enclosure to 2015 letter contains a list of six examples of exclusively forest health-related projects that would be appropriately exempted from the Eastside Screens via site-specific forest plan amendments. *Id.* at 4 (examples of projects include (1) "[m]oving multiple-story ponderosa pine stands towards LOS of single story where the pines are competing with shade-tolerant species historically held in check by wildfire," (2) "maintaining shade-intolerant, desirable < 21 inch dbh when giving preference to them better meets LOS objectives," and (3) "[h]arvesting > 21 inch dbh mistletoe-infected trees when doing so best meets long-term LOS objectives and does not eliminate important wildlife habitat."). If the Eastside Screens contained a "forest health" exception, then neither the 2003 guidance nor the 2015 guidance would have been necessary.

Further, the Forest Service has undertaken "forest health"-related site-specific forest plan amendments in the recent past, which it would not have done if the "health and safety" exception covered "forest health" logging. For example, in the Final Environmental Impact Statement (FEIS) for the Snow Basin Project, the Forest Service's acknowledged purpose was "*to improve forest health*, vigor and resilience to insects, disease and fire." Buss Decl., Exhibit 2, at xi (emphasis added). Further, in its Record of Decision (ROD) for that project, the Forest Service admitted that "the Eastside Screens amendment needs to be amended to allow for the removal of uncharacteristic and unsustainable large trees (21 inches DBH and greater)." *Id.*, Exhibit 3, at 4.

As in the Snow Basin Project, in the Wolf Project (also located in the Ochoco National Forest) the Forest Service defined the purpose and need of the project largely in "forest health" terms. *See* Buss Decl., Exhibit 4, at 4. As described in the ROD: "[The chosen alternative] includes *site specific Forest Plan amendments* to address management of LOS *and manage*

forest health." Buss Decl., Exhibit 5, at 16 (emphasis added).[11] Accordingly, Defendants in this case must pursue a site-specific forest plan amendment before they can rely on "forest health" as a justification for cutting trees over 21" dbh everywhere in the project area.

Properly understood as the "*public* health and safety" exception to the Eastside Screens, the exception should be applied only to authorize the removal of "roadside or campground hazard trees." AR2285. That is, the exception is properly invoked only when there is a credible threat of diseased or "hazard" trees falling on roads (where they create hazards for moving cars) or in campsites. In light of its narrow scope, Defendants' attempt to invoke the "public health and safety" exception to the Eastside Screens to exempt the entire project represents an impermissibly overbroad application of the exception. *See, e.g.,* AR6110 (Forest Service acknowledging that not all of the trees are technically hazard trees).

Because Defendants' local interpretation of the "health and safety" exception to the Eastside Screens in this case directly conflicts with the purpose and plain language of the Eastside Screens, as well as multiple guidance documents spanning two decades, the Court should not give that interpretation any deference. *See Young v. Reno,* 114 F.3d 879, 883 (9th Cir. 1997) (ascribing considerably less deference to agency interpretation in conflict with that same agency's earlier interpretation rather than a consistently held agency view); *see also Hells Canyon Pres. Council v. Haines*, 2006 WL 2252554, at *8–9 (D. Or. 2006) ("inconsistent interpretations by an agency make the interpretation forwarded in the instant case less credible"). Deference does not apply at all if an agency's "interpretation is plainly erroneous or inconsistent

[11] Plaintiff asks the Court to take judicial notice of the Snow Basin FEIS and ROD and Wolf FEIS and ROD which are available on the Forest Service's website and are government information of public record. *See Lee v. City of L.A.*, 250 F.3d 668, 689 (9th Cir. 2001); *Ariz. Libertarian Party v. Reagan*, 798 F.3d 723, 727 n.3 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 823 (2016) ("We may take judicial notice of 'official information posted on a governmental website, the accuracy of which [is] undisputed'").

with the [standard]." *Siskiyou Regional Educ. v. U.S. Forest Service,* 565 F.3d 545, 555 (9th Cir. 2009); s*ee also Earth Island Inst. v. Forest Service,* 697 F.3d 1010, 1018 (9th Cir. 2012) (interpretations "plainly inconsistent" with the Plan do not warrant deference). Because the exceptions to the Eastside Screens are to be narrowly construed, and the local interpretation in this case is inconsistent with the Eastside Screens, the Court should reject Defendants' attempt to let the "public health and safety" exception swallow the rule.

2. *Alleged Exception #2: Logging "To Modify Vegetation Within Recreation Special Uses Areas."*

The DM also cites the logging "to modify vegetation within recreation special uses areas" exception to the Eastside Screens to allow logging trees over 21" dbh in the project area.[12] The scope and impact of this exception was intended to be similar to the other exceptions to the Eastside Screens. AR2266. As such, just as with the "public health and safety" exception, the "recreation special uses areas" exception applies only to a *portion* of the project area, not to the *entire* project area. Specifically this exception only applies to the campground area around Walton Lake, consisting of 68.8 acres (the "recreation special uses area"). Benzar Decl, Ex. 2, at 1; *see also id.,* Ex. 1, at 39.

The term "recreation special use" used in the exception to the Eastside Screens, is a Forest Service term of art defined in the Forest Service Handbook (FSH) as "[a] special use in the class of uses enumerated in FSH 2721 and designated by use codes 100 to 199." FSH

[12] The Decision Memo implicitly suggests that the term "recreation special uses areas" is synonymous with the Forest Plan's "Management Area-13, Developed Recreation" ("MA-13," which includes the entire project area). *See* AR6349, 6359. As explained below the term "recreation special uses areas" is defined by the Forest Service Handbook, not the Forest Plan, and is a completely separate term of art. *See also* AR1599 (discussing "recreation special uses" in the "Forest-Wide Standards and Guidelines" section, outside the context of the MA-13 designation). Accordingly, Walton Lake's "recreation special uses area" (i.e., the campground) is much smaller than the area designated as MA-13 in the Forest Plan (the larger project area).

2709.11, § 20.5 (Buss Decl., Exhibit 7); *see also* FSM 2700, § 2720.5 (Buss Decl., Exhibit 8) (defining "special use" classes, categories, and designations). In other words, use codes 100 to 199 are "recreation special uses." *See* FSH 2709.11, § 20.5 (Buss Decl., Exhibit 7). The various "recreation special uses" are listed by use code, including "Concession Campground" under use code 141. FSH 2709.11, § 19, Exhibit 02 (Buss Decl., Exhibit 9). The Walton Lake campground qualifies as a concession campground. *See* Benzar Decl., Exhibit 2, at 1-20; *see also id.,* Exhibit 1, at 39.[13]

Pursuant to the list of "recreation special uses" found in FSH 2709.11, §19, Exhibit 02 (Buss Decl., Exhibit 9), and pursuant to the Concessions Permit, Benzar Decl., Ex. 2, at 1, the *only* portion of the project area that qualifies as a "recreation special uses area" is the designated campground area surrounding Walton Lake. *See also* Benzar Decl. Ex. 1 at 39. None of the other listed "recreation special use" designations (use codes 100-199) apply to the project area. Accordingly, the project area outside of the designated campground area is not subject to the "recreation special uses areas" exception to the Eastside Screens.[14]

[13] Plaintiff asks the Court to take judicial notice of the provisions of the Forest Service Handbook and Manual attached as Exhibits 6-10 to the Buss Declaration. *See* note 11, above. Exhibits 1 and 2 to the Benzar Declaration are additional documents that should be in the administrative record but were not included. Plaintiff will include these documents in a subsequent, comprehensive motion to complete the record. *See* note 10, above.

[14] The Forest Plan defines the MA-13 area as including two distinct subsections: a "developed site" and a "visual influence area" surrounding the developed site. AR1507. The "developed site" and the "visual influence area" are subject to different management standards. AR1650 (the "developed site" is to be logged "only for the purpose of maintaining safe and attractive recreational sites" whereas the "visual influence area" is to be logged "to meet the visual quality objectives and maintain healthy stands."). This distinction is consistent with the campground area (the "developed site") being subject to the "public health and safety" and "recreation special uses areas" exceptions to the Eastside Screens, while the area outside the campground (the "visual influence area") is not.

B. *Defendants Violated NEPA When Approving the Project (Count 1,Claims 1 and 3).*

In its DM, the Forest Service attempts to satisfy NEPA by using a categorical exclusion ("CE"). However, it violated NEPA by failing to conduct candid scoping and by using a CE which, by its own terms, does not cover the Walton Lake Project.

NEPA allows agencies to use a CE for actions " 'which do not individually or cumulatively have a significant effect on the human environment'" and which have previously been found to have no such effect by an agency. *West v. Sec'y of Dep't of Transp.*, 206 F.3d 920, 927 (9th Cir. 2000) (citing 40 CFR § 1508.4). If an agency properly invokes a CE, further NEPA analysis is unnecessary (i.e., an environmental assessment (EA) or environmental impact statement (EIS)). *Id.* Rather, the CE satisfies the "requisite 'hard look' at the potential environmental effects of [agency] activities[.]" *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1012 (9th Cir. 2009). Determining whether an agency properly invoked a CE requires a court to consider whether the agency conducted appropriate scoping and prepared an adequate record of decision when invoking the CE; whether the CE actually applied to the agency action taken; and whether extraordinary circumstances exist that would preclude application of the CE. *Citizens for Better Forestry v. U.S. Dep't of Agric*., 481 F. Supp. 2d 1059, 1086 (N.D. Cal. 2007); *see also* 40 C.F.R. § 1508.4.

Where an agency decides to apply a CE to a proposed action, the court may set it aside only if it is arbitrary and capricious. *California v. Norton*, 311 F.3d 1162, 1176 (9th Cir. 2002). Here, the Forest Service's use of a CE is arbitrary and capricious because it has "offered an explanation for its decision that runs counter to the evidence before the agency" (*State Farm*, 463 U.S. at 43), in that the record evidence shows inadequate scoping and an inappropriate CE as the foundation for the Walton Lake DM.

1. The Forest Service Failed to Conduct Proper Scoping in Accordance With Its Own Regulations and the Requirements of NEPA.

The Forest Service failed to conduct the proper scoping before applying the CE to the Walton Lake Project because it failed to give the public sufficient information to permit them to weigh in with their views. Specifically, it failed to properly inform members of the public of the scale and impacts of the proposed logging, and in fact used misleading language to describe the project's effects. Likewise, it failed to disclose its intent to use exceptions to the Eastside Screens to log trees greater than 21" dbh. This prevented Defenders as well as other members of the public from commenting on these significant issues, diverted an unknown amount of public scrutiny and attention, and circumvented the public involvement requirements of NEPA. Critically, it also violates the Forest Service's own regulations.

A fundamental purpose of NEPA is to " 'ensure[] that federal agencies are informed of environmental consequences before making decisions and that the information is available to the public.'" *Citizens for Better Forestry v. U.S. Dept. of Agriculture*, 341 F.3d 961, 970–71 (9th Cir. 2003) (citation omitted). "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and actions are taken[,]" and, among other things, "public scrutiny [is] essential to implementing NEPA." 40 C.F.R. § 1500.1(b). Moreover, agencies should "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures" and "[s]olicit appropriate information from the public." 40 C.F.R. § 1506.6(a), (d). Scoping is a vital part of such involvement. It is used to "determine the scope of the issues to be addressed and for identifying the significant issues related to a proposed action." 40 C.F.R. § 1501.7(a)(2) (defining scoping). The Forest Service conducts scoping for "all . . . proposed actions, including those that would appear to be categorically excluded[.]" 36 C.F.R. § 220.4(e). Though the intensity of analysis depends on the

project, scoping should still engage the public on important components; as the Forest Service acknowledged for the Walton Lake project: "The scoping notice . . . can help us focus the analysis on issues that are truly significant." AR5832.

Where the Forest Service has chosen to apply a CE, scoping's importance cannot be understated since interested individuals essentially only have the scoping period to comment and involve themselves in the process. That is, there is no formal notice and comment period for categorically excluded Forest Service projects, nor is there an objection period,[15] meaning that concerned members of the public essentially get a single bite at the apple if they wish to communicate their views. *See* 36 CFR § 218.23. Consequently, ensuring meaningful public involvement during scoping for a project allegedly fitting under a CE is as vital as for those projects which require EAs. A similar framework of reasoning guided the court in *Kern v. U.S. Bureau of Land Mgmt.* to hold that that a cumulative impacts analysis was as important in an EA as for an EIS, despite not being explicitly stipulated by NEPA. *See* 284 F.3d 1062, 1075-1078 (9th Cir. 2000).[16] The court worried that, if it did not require such analysis, an agency could circumvent NEPA's requirements and subject the decision-making process to "the tyranny of small decisions." *Id.* at 1078 (citation and quotation omitted). Cursory, misleading scoping notices for CEs that prevent proper public scrutiny likewise create the risk of such tyranny.

Determining whether the public was adequately involved "is a fact-intensive inquiry made on a case-by-case basis." *Nat. Res. Def. Council, Inc. v. U.S. Forest Serv.*, 634 F. Supp. 2d

[15] The lack of an objection period appears to have been specifically highlighted as an advantage of choosing a CE for the Walton Lake project. *See* AR5813.

[16] The Forest Service likewise appeared to equate its scoping process for a CE with that for an EA when, in the Walton Lake scoping notice, it described a 30-day comment period, after which comments would be placed in the project file in accordance with 36 C.F.R. § 218.25 (which grants 30 days for comments on a proposed project to be documented in an EA, and makes no mention of CEs). AR5683.

1045, 1067 (E.D. Cal. 2007) (discussing whether scoping for EA was adequate). Generally, the rule is that "[a]n agency, when preparing an EA, must provide the public with sufficient environmental information, considered in the totality of circumstances, to permit members of the public to weigh in with their views and thus inform the agency decision-making process." *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps*, 524 F.3d 938, 953 (9th Cir. 2008) (examining sufficiency of public involvement where a draft EA was not put out for comment). Similarly, as Judge Levi wrote in *Sierra Nevada Forest Prot. Campaign v. Weingardt*:

> Depending on the circumstances, the agency could provide adequate information through public meetings or by a *reasonably thorough scoping notice*. The way in which the information is provided is less important than that a sufficient amount of environmental information—as much as practicable—be provided so that a member of the public can weigh in on the significant decisions that the agency will make in preparing the EA.

376 F. Supp. 2d 984, 991 (E.D. Cal. 2005) (emphasis added). While these last cases involve EAs and not a CE, the Forest Service conducts scoping for both; moreover, for a CE, scoping is the public's only chance to give input. Thus a member of the public has a legal right to expect a scoping notice for a CE to be "reasonably thorough." Minimally, in order to provide a sufficient amount of information, the scoping notice the Forest Service issued for the Walton Lake Project should not have omitted key details of the project or misled the public about its likely impacts.

Yet that is exactly what the scoping notice did, in two respects. First, the June scoping notice and accompanying flyer failed to disclose the number of trees being cut and that the area would be dramatically different after logging. For example, the notice stresses compliance with the Ochoco LRMP "so long as the natural appearance of the area is maintained[,]" and states that "[r]etention of the natural feel and visual quality of the area around Walton Lake is a key objective of this project; design criteria would be incorporated into the project to ensure that this objective is met." AR5862-63. In Block 1 specifically, which is a dense mixed-conifer forest

where many of the targeted large fir trees are, the scoping notice only described the Forest Service's intent to take out fir "of all sizes" for what appear to be fairly limited purposes: "to create openings within which ponderosa pine, western larch, and native shrubs would be planted[,]" around all ponderosa pine and western larch, and within striking distance of a road. AR5863. Those specific listed purposes, even in combination, simply do not inform the public that in fact *all fir trees* would be removed from this part of the forest. Similarly, other documents issued at that time, intended to attract people to the project's scoping, only described the project as involving "thinning" of trees. *See, e.g.,* AR5878 (a press release indicating that the Forest Service was "*seeking feedback on a proposal to selectively thin and replant* on nearly 200 acres of forest surrounding Walton Lake this fall") (emphasis added); AR5891 (Ochoco National Forest Facebook post echoing language); AR5887-88 (KTVZ news story echoing language).

In stark contrast, internal Forest Service language and documents indicate that the true scope and impacts of the project involved much more than just "thinning." In August, after the conclusion of scoping, Forest Service meeting notes stated that "Block 1," the dense, moist mixed conifer forest, would "resemble a regeneration harvest with retention trees." AR 6119. More bluntly, the silvicultural prescription issued for units 2-4 described the harvest as a "[c]learcut with reserve trees" which would remove "all grand fir and Douglas-fir merchantable trees (including trees over 21 inch DBH)[.]" AR6277.[17] Most bluntly of all, the Recreation Resource Report noted that "[t]he immediate impacts to visual resources would be extremely noticeable as a majority of fir species would be removed from the site," creating an "*open, parklike dry pine forest environment*." AR6342 (emphasis added). Finally, the DM itself

[17] These drastic impacts are caused by the removal of all fir trees from a currently dense forest that contains mostly fir trees. *See* AR6122 (map indicating thick dispersal of fir trees greater than 21" dbh in units 2-4, with relatively few protected pine and larch).

describes the plan for units 2, 3, and 4 as simply taking out "all fir" in those areas, which the scoping notice easily could have said.

While these internal documents post-date the issuance of the scoping notice, there is nothing in the record indicating that the Project had somehow significantly changed after the scoping notice was issued.[18] These documents simply reflect a much more candid and accurate description of the project than the public was given in the scoping notice. Indeed, the sharp contrast between the Forest Service's public and internal descriptions of the Project continued even after the DM was issued. *See* AR6398 (December press release about the "selective thinning" at Walton Lake in an effort to "maintain visual aesthetics"); AR6670 (flyer left at campground on July 15, 2016, indicating that "there will be *thinning* taking place immediately surrounding Walton Lake" that fall in order to preserve "the safety *and character of the mature forest* that visitors come to enjoy") (emphasis added).[19] In summary, members of the public who care for the Walton Lake area were told that the project consisted of "thinning" while internal Forest Service documents show that the agency planned to "clearcut" all the large and old growth fir in units 2, 3, and 4, as well as commercially "thin" large fir trees in units 1 and 5.[20] The public was therefore actively misled as to the project's true impacts and scope.

The second critical omission is that the Forest Service also failed to disclose its intention to use Eastside Screens exceptions to log trees over 21" dbh, despite the fact that the logging of such large trees was an obvious significant issue proper for airing during scoping. Indeed, unless

---

[18] If the project was changed significantly after the scoping notice went out, the Forest Service had an obligation to rescope the Project. *See* AR2499.

[19] *See also* AR6403 (Facebook post with the same language); AR6405 (webpage snapshot with the same language); AR6404 (Ochoco National Forest tweet that project would "Thin" the area).

[20] The scoping notice also did not mention that large fir trees over 21" dbh would be removed around old ponderosa pine in Block 3/unit 1. AR5863.

the project had an impact on listed species, there could be no more significant issue raised by a proposal that intends to circumvent the Screens' well-known restrictions. Defenders directed the Forest Service to the Screens' applicability in its comment, but had no opportunity to explain why the particular exceptions the Forest Service is relying upon do not apply. *See* AR5970. In contrast, the Screens EA explains that NEPA must be followed for using Screens exceptions. AR 2312, 2436, 2447. That is, the public should at the very least be told when the Forest Service intends to use a Screens exception for a project for which it is also conducting NEPA scoping.

In other contexts, courts have emphasized the importance of federal agencies providing the public with accurate and complete information regarding significant issues so the public can make informed comments. For example, in *Connaughton*, the agency did not make the referenced Specialist Reports available. 2014 WL 6977611, at *17-18. The plaintiffs pointed to a specific omission (i.e., the pileated woodpecker preferences) that they would have commented on; the court held that the Forest Service violated NEPA by failing to provide the information. *Id.* The Ninth Circuit's opinion in *Connaughton,* 752 F.3d at 761, held that the public should not have to "parse" NEPA documents to determine what they actually disclose. Likewise, for three projects at issue in *Weingardt*, the Forest Service failed to make existing environmental documents available to the public while also seeking public input. 376 F. Supp. 2d at 992-93. For another, the court found that the scoping notice lacked "critical elements" in the final EA and that it "did not give the public adequate information to effectively participate in the decision-making process." *Id*. at 992. Ultimately, "[t]he agency's failure to provide for effective pre-decisional public involvement . . . [was] 'contrary to law' under the APA." *Id.* at 993.[21]

[21] For an example of sufficient dissemination of environmental information, see *Wilderness Soc. v. U.S. Forest Serv.*, 850 F. Supp. 2d 1144, 1165 (D. Idaho 2012) (given the plethora and thoroughness of outreach efforts and a large volume of comments in response, public had

Here, much as before the district court in *Connaughton,* Defenders can likewise identify the specific omissions that it would have commented on, such as the fact that the Forest Service planned to convert a beloved, densely forested Walton Lake area to an "open, parklike" setting. And, as in the Ninth Circuit's *Connaughton* opinion, the public should not have had to "parse" the scoping notice to determine the extent of the proposed logging. Moreover, the agency's failure to give the public an accurate understanding of the project is reminiscent of its failure to disclose existing environmental analysis in *Weingardt*. The Forest Service also failed to disclose that it intended to use the mechanism of Eastside Screens exceptions to log large fir trees, which is another piece which Defenders would have commented on. Constrained by the limited scoping notice, Defenders was not provided an opportunity to share its views about the misuse of the Eastside Screens exceptions either. As it is, the incomplete and misleading scoping notice prevented not only these contributions, but also an unknown amount of public interest and scrutiny regarding the logging of Walton Lake. The Forest Service therefore circumvented the public involvement requirements of NEPA as well as violated its own regulations by its failure to give the public sufficient information to participate in scoping.

2. The Forest Service Failed to Apply an Appropriate Categorical Exclusion to the Walton Lake Project, in Violation of NEPA.

The Forest Service also violated NEPA by applying a CE which does not cover the Walton Lake project by its own terms. Live, healthy trees – which includes trees which are not adjacent to infected trees in units with laminated root rot, as well as trees located in units without any current disease or insect infestation – do not fall within a category clearly meant to address

---

"sufficient environmental information" to weigh in on the project before the Forest Service issued its EA; notably, that court specifically found that the scoping document gave the public "as much information as is practicable," including a comparison of conditions before and after the project, and direction to additional materials).

present infection. Consequently, the Forest Service has here "offered an explanation for its decision that runs counter to the evidence before the agency," rendering its decision arbitrary and capricious. *State Farm.* 463 U.S. at 43.

The Ninth Circuit defers to an agency's determination that its own CE applies to an action, *unless* the application flies in the face of the CE's own terms. *Alaska Ctr. For Env't v. U.S. Forest Serv.,* 189 F.3d 851, 857 ("an agency's interpretation of the meaning of its own [CE] should be given controlling weight unless plainly erroneous or inconsistent with the terms used in the regulation"). Here, the Forest Service applied 36 CFR § 220.6(e)(14) ("sanitation harvest" CE), which excludes from further NEPA review "[c]ommercial and non-commercial sanitation harvest of trees to control insects or disease not to exceed 250 acres, requiring no more than 1/2 mile of temporary road construction, including removal of infested/infected trees and adjacent live uninfested/uninfected trees as determined necessary to control the spread of insects or disease." Examples given describe "[f]elling and harvest of trees infested with southern pine beetles and immediately adjacent uninfested trees[,]" and "[r]emoval and/or destruction of infested trees affected by a new exotic insect or disease[.]" 36 CFR § 220.6(e)(14)(i) and (ii). The application of this CE to the entire Walton Lake project is not plausible.

First, disease is certainly not present throughout the project area, a fact which the Forest Service fully acknowledges; as Patrick Lair, public affairs specialist with Ochoco National Forest, stated, "disease is only about 25 percent of the project, but it was the impetus to go out and look at Walton Lake as a whole … and do other types of thinning for general forest health." AR6409. Specifically, the Forest Service proposes to log in areas without laminated root rot altogether in units 6, 7, and almost all of 1 and 5, including removing large firs in the latter two which are neither infected nor "adjacent" to infection. The Forest Service does not argue that

they are; instead, it justifies this expansive project area by stating that, in areas without laminated root rot, it intends to log to "reduce competition and western bark beetle risk," although bark beetle is not currently present in the area. AR6358. That is, although the CE permits the "[c]ommercial and non-commercial sanitation harvest of trees to *control* insects or disease[,]" by interpreting "control" broadly to include preventative measures, the Forest Service is justifying logging areas merely *at risk of* bark beetle attack. AR6349 (describing "a risk that bark beetles could attack the pine"). This is flatly inapposite to the language of the CE; nothing in its text provides for removing healthy trees just because the stand they are in could become diseased in the future. Rather, it permits logging to control actual, present disease, as the exceptions show.[22]

The Forest Service also does not offer sufficient justification for applying this CE to logging in units with laminated root rot. Rather than logging currently infected firs and healthy trees that are adjacent to them, as the CE expressly allows, the Forest Service proposes to simply log all fir trees in those units, essentially reading the word "adjacent" out of the CE. Moreover, its DM does not properly explain how "adjacent" permits the logging of all fir trees, trees even where there is "[n]o apparent root disease within 50 feet of the plot" in peripheral parts of the units. AR6391. This contrasts with the common understanding of "adjacent," namely, "[l]ying near or close to, but not necessarily touching." *Black's Law Dictionary* (10th ed. 2014).[23] Instead of targeting diseased trees and their neighbors in keeping with this understanding, the Forest

[22] Moreover, interpreting this CE to encompass preventative measures renders it somewhat meaningless. With this broad definition, the Forest Service could log almost anywhere using this CE and call it a preventative measure. If so misused, the narrow and specific "exception" this CE provides would swallow the more generally applicable NEPA rules. The Forest Service could thereby justify a sequence of "small" preventative projects that never trigger more complete NEPA documentation, regardless of the magnitude of their total impact on the environment.

[23] The Forest Service even echoes this common understanding in its response to comments in the DM, stating that its understanding of the recreation area "is not just adjacent to the camping area, but encompasses approximately 200 acres around Walton Lake." AR6380.

Service chose to clearcut every fir tree in units 2, 3, and 4, without explaining in the DM why this satisfies the adjacency requirement. "Adjacent" is a limiting term that has to mean something;[24] whatever its boundaries, it certainly does not encompass the clearcutting of all possible, currently uninfected host trees. Therefore, the Forest Service is applying the sanitation harvest CE in a way that is plainly erroneous and inconsistent with its language.

Courts have previously looked to enumerated examples of categorically excluded agency actions as one way to gauge whether the agency correctly applied the CE. For example, in *West*, the court set aside the application of a CE, noting that the project far exceeded the enumerated examples. 206 F.3d at 928; *see also California ex rel. Lockyer*, 575 F.3d at 1017 (observing that examples of CE in agency handbook were less likely to affect environment).[25] Conversely, the Walton Lake project does not line up with the examples listed in the "sanitation harvest" CE: namely, the "harvest of trees infested with southern pine beetles and immediately adjacent uninfested trees" and the "removal and/or destruction of infested trees affected by a new exotic insect or disease[.]" 36 C.F.R. § 220.6(e)(14)(i) and (ii). Large sections of the Walton Lake project area are not infected, infested, or currently affected by disease at all – the CE is being stretched to cover allegedly preventative actions and healthy trees that are not "adjacent" to infected trees, unlike the enumerated examples in the agency regulation.

A prior proper use of this particular CE involved a timber-thinning project to treat a beetle infestation in Fishlake National Forest. *Utah Environmental Congress v. Bosworth*, 443 F.3d 732, 735 (10th Cir. 2006). However, the facts of that case differ in that the project involved

[24] A previous restriction of two tree lengths was revised to provide flexibility when dealing with fast-moving disease or infestation (which laminated root rot is not). *See* 68 Fed. Reg. 44598-01.
[25] *Cf. Florida Keys Citizens Coal., Inc. v. U.S. Army Corps of Engineers*, 374 F. Supp. 2d 1116, 1141 (S.D. Fla. 2005) (upholding CE application where project "[fell] within the types of actions specifically enumerated" among the agency's categorical exclusion examples).

the harvest of "beetle-infested mature, dead, diseased, or dying Englemann spruce timber stands[,]" which fits the CE's intended target of infested trees. *Id*. at 738.[26] Conversely, the Walton Lake Project does not plausibly fit within the "sanitation harvest" CE because the Forest Service proposes to use it here on timber *prior* to an actual beetle infestation. [27]

Although the Walton Lake project, at a size of 176 acres, is roughly as modest in size as actions which have been previously properly categorically excluded, the true issue before this Court "is not just whether the [agency action] 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." *West*, 206 F.3d at 929. The standard asks whether the application is plainly erroneous or inconsistent with the regulation's terms. Here, given the inconsistencies between the facts of the Walton Lake project and the applied CE's language, applying that CE to this project was not the "right path" for the Forest Service and represents another violation of NEPA.

III. The Balance of Harms Tips Sharply in Favor of Plaintiff

Defendants' harm from this Motion would be negligible and does not outweigh the interests of Defenders, its supporters, and the public in preventing irreparable environmental harm. In weighing the harms, the Ninth Circuit considers only the portion of the harm that would occur while the preliminary injunction is in place. *Connaughton*, 752 F.3d at 765. The focus must be on any interim or marginal harm to the Forest Service caused by delaying the

[26] S*ee also Conservation Cong. v. U.S. Forrest Serv*., 2013 WL 2457481, at *9 (E.D. Cal. 2013) (CE appropriate for project involving thinning to "limit mortality caused by western bark beetle attacks . . . an activity which plausibly fits within CE 14").

[27] The Walton Lake project also oversteps other Forest Service regulations. The logging within units 2-4, which would remove *all* fir, represents a type conversion (e.g., the Recreation Resource Report notes that removing host species from the previous "dense, mixed-conifer forest environment" would convert it to an "open, parklike dry pine forest environment[.]" AR6342. But other Forest Service CEs specifically prohibit use for type conversion. *See* 36 C.F.R. § 220.6(e)(5) and (12). As above, a forest plan amendment supported by an EA or EIS is the proper way for the agency to approve a type-conversion where necessary for forest health issues.

implementation of the commercial logging portion of the Walton Lake Project to a future date, rather than October 17, 2016. *See AWR,* 632 F.3d at 1137-38 (balancing plaintiffs' irreparable injury absent an injunction against harm to defendants from delay caused by preliminary injunction and rejecting arguments based on project never occurring as "speculative.")

Here, the balance of the harms tip sharply in Defenders' favor. While a preliminary injunction may temporarily postpone economic benefit from the Project, once the mature trees in the Project area are cut down, those trees along the aesthetic quality and recreational opportunities they provide, are irreparably lost. *AWR*, 632 F.3d at 1137. Furthermore, given that the Forest Service itself has already lagged roughly a year behind its original plan to begin cutting in fall/winter 2015, AR6360, temporarily enjoining the Project will have a negligible effect on long-term forest health. Moreover, laminated root rot, which is the target of some of the commercial logging, spreads very slowly, AR4289, AR5424, and therefore a short term delay would have almost no impact on that aspect of forest health.

Walton Lake is operated under a concessionaire permit. AR6341-42. The Forest Service admits that as long as Project work occurs while campground is closed and gated, from October 16 through May 14, there will be no impact to camping related recreation or the permit with the concessionaire. *Id*.[28] Thus, while the Service would like to begin logging the day after the campground closes, little if any harm would result from postponing cutting until late Winter or early Spring 2017. In short, any marginal harm caused by the delay imposed by a preliminary injunction is significantly outweighed by the irreparable harm to the plaintiff.

[28] In terms of any income from the commercial logging, temporary economic impacts are not irreparable. "(T)he temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury ... Mere injuries, however substantial, in terms of money, time and energy necessarily expended ... are not enough." *Sampson v. Murray*, 415 U.S. 61, 90 (1974); see also *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 738 (9th Cir. 2001) ("loss of anticipated revenues ... does not outweigh the potential irreparable damage to the environment").

IV. The Public Interest Weighs Heavily in Favor of a Preliminary Injunction

The public interest weighs heavily in favor of preserving the status quo and preventing irreparable environmental and other harms until this Court has fully reviewed the merits. *Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers*, 472 F.3d 1097, 1101 (9th Cir. 2006). Although the public has an indirect economic interest in the forest, there is no reason to believe that the delay in logging caused by the court's injunction will reduce significantly any future economic benefit that may result from the forest. *Id*. "The preservation of our environment, as required by NEPA … is clearly in the public interest." *Sierra Club. v. Bosworth*, 510 F.3d 1016, 1033 (9th Cir. 2007). Although "the effect on the health of the local economy is a proper consideration in the public interest analysis":

> [W]e recognize the well-established "public interest in preserving nature and avoiding irreparable environmental injury." *Lands Council*, 537 F.3d at 1005. This court has also recognized the public interest in careful consideration of environmental impacts before major federal projects go forward, and we have held that suspending such projects until that consideration occurs "comports with the public interest." [citation omitted].

AWR, 632 F.3d at 1138 (concluding that a preliminary injunction was in the public interest despite the Forest Service's assertions that the logging project would provide local economic benefit and prevent job loss). Overall, because Defenders seeks to enforce federal laws designed to protect the environment, and because the injunction would preserve the status quo until the case is resolved, the injunction would serve the interests of the public. *See Id*.

It would take hundreds of years for seedlings to replace the old growth Grand and Douglas fir trees if they are logged. These mature trees, along with the aesthetic quality and recreational opportunities they lend to the Walton Lake Project area, will be enjoyed not principally by Defenders and its supporters but by many generations of the public at large.

Neighbors of Cuddy Mtn v. U.S. Forest Serv., 137 F.3d 1372, 1382 (9th Cir. 1998). Thus, the public interest weighs heavily in favor of a preliminary injunction.

V. The Bond Requirement Should be Waived

Plaintiffs respectfully request that this Court waive the bond requirement or require only a nominal bond under FRCP 65(c). Longstanding Ninth Circuit precedent instructs that bonds should not be required if the effect would be to discourage public interest environmental litigation. *People ex rel. Cal. v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985); *City of South Pasadena v. Slater*, 56 F. Supp. 2d 1106, 1148 (C.D. Cal. 1999) ("[c]ourts routinely impose either no bond or a minimal bond in public interest environmental cases").[29]

In determining whether to require a bond, courts consider factors such as the size of plaintiff's organization and its ability to pay. *See, e.g., Cntr. for Food Safety v. Vilsack*, 753 F.Supp.2d 1051, 1061-62 (N.D. Cal. 2010) (dispensing with the bond requirement as applied to a non-profit organization with a staff of only twelve full-time employees), *vacated on other grounds,* 636 F.3d 1166 (9th Cir. 2011). Defenders is a small, non-profit organization bringing suit in the public interest and it does not have the resources to post a substantial bond. This Court should exercise its discretion and waive or require only a nominal bond. *See* Coulter Decl. ¶ 7-9.

CONCLUSION

For the reasons set forth above, plaintiff respectfully requests that the Court issue an order preliminarily enjoining defendants from allowing or implementing any of the commercial

[29] *See also Oregon State PIRG v. Pac. Coast Seafoods Co.,* 374 F. Supp.2d 902, 908 (D. Or. 2005) (waiving bond); *Save Strawberry Canyon v. DOE*, 613 F.Supp.2d 1177, 1190 (N.D. Cal. 2009) (same); *ONDA v. Kimbell*, 2009 WL 1663037, *2 (D. Or. 2009) (same); *LOWD v. Forsgren,* 184 F. Supp 2d 1058, 1071 (D. Or. 2002) (same).

sanitation logging or commercial thinning authorized in units 1-5 by the December 15, 2015 Decision Memo.

Dated this 13th day of September 2016.

s/ Jesse A. Buss
Jesse A. Buss, OSB # 122919
Tel: 503-656-4884
Email: jessebuss@gmail.com

Tom Buchele, OSB # 081560
Earthrise Law Center
Tel: 503-768-6643
Email: tbuchele@lclark.edu

Attorneys for Plaintiff League of Wilderness Defenders/Blue Mountains Biodiversity Project