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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

EARTH ISLAND INSTITUTE, *et al.*,

Plaintiffs,

v.

KIMBERLY NASH, *et al.*,

Defendants.

Case No. 3:19-cv-05792-RS

FEDERAL DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION (ECF No. 26)

Administrative Procedure Act Case,
5 U.S.C. §§ 701 *et seq.*

Judge: Honorable Richard Seeborg

Courtroom 3, 17th Floor,
450 Golden Gate Ave., San Francisco, CA

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Plaintiffs have known for years about the recovery work that they now seek emergency relief to halt. But instead of promptly filing their request for "emergency relief" at the commencement of work in April 2019, Plaintiffs delayed filing for 4-5 months. *See* Benech Decl., Exhibit 1, at ¶ 6. To the extent there is now an "emergency," it is of Plaintiffs' own making. Federal Defendants oppose Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction, ECF. No. 26 (the "Motion" or "Motion for TRO"), and request the Court deny Plaintiffs' Motion.[1]

As a threshold matter, Plaintiffs' Motion, and the action as a whole, should be decided by the United States District Court for the Eastern District of California ("Eastern District"). Venue is improper in the Northern District of California, but is appropriate in the Eastern District, because this lawsuit asserts federal question jurisdiction over federal lands and actions in the Eastern District. *See* Pls.' Mem. in Supp. of *Ex Parte* Mot. for TRO & Prelim. Inj. 8, ECF No. 27 (the "Brief" or "Pls.' Br.") ("Plaintiffs' injuries are caused by the Forest Service's logging and ground disturbing activities."); *see also* Fed. Defs.' Mot. to Dismiss for Improper Venue or, in the Alternative, to the E. D. of Cal., ECF. No. 15. Thus, this Court should transfer the Motion, and the action, to the Eastern District.

In addition to the defect in venue, Plaintiffs fail to meet their burden to make a "clear showing" that they are entitled to the "extraordinary remedy" of injunctive relief. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Specifically, Plaintiffs fail to establish that they are likely to succeed on the merits, that they will suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in their favor, and that the requested injunction is in the public interest. For these reasons and others set forth in the accompanying Memorandum, Plaintiffs' Motion should be denied.

[1] This Response solely addresses Plaintiffs' Motion for a TRO. It is not intended as a response to Plaintiffs' Motion for a Preliminary Injunction ("PI"). Following this Court's determination on Plaintiffs' Motion for a TRO, Federal Defendant's should be afforded additional time to respond to Plaintiffs' Motion for a PI given that Federal Defendants have had less than three days to reply to Plaintiffs' Motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. ISSUES PRESENTED

Whether Plaintiffs' Motion should be transferred to and decided by the Eastern District under 28 U.S.C. §§ 1391(e)(1), 1406(a), and FED. R. CIV. P. 12(b)(3). In the alternative, assuming venue is proper, should Plaintiffs' Motion nevertheless be transferred to and decided by the Eastern District pursuant to 28 U.S.C. § 1404(a). Have Plaintiffs made a "clear showing" that they are entitled to the "extraordinary remedy" of injunctive relief. *Winter*, 555 U.S. at 22.

II. FACTUAL BACKGROUND

A. History of the 2013 Rim Fire.

The Rim Fire started on August 17, 2013, in a remote area of the Stanislaus National Forest, about twenty miles east of Sonora, California. 2014 EIS 1, ECF No. 28-8. Over several weeks it burned 257,314 acres (or 400 square miles) of land. *Id.* At the time, the Rim Fire was the third largest wildfire in California's history and was the largest wildfire in the recorded history of the Sierra Nevada. *Id.*

A century of active fire suppression, together with drought-related mortality during the late 1980s and early 1990s, left much of the Sierra Nevada landscape dominated by dense stands of small trees and an abundance of heavy fuels, with high accumulations of ladder and canopy fuels. *Id*. at 156-57. The Rim Fire burned with significantly higher severity than is historically characteristic for this area. *Id*. at 158-59. In the end, nearly 40% of the quarter million acres that burned was consumed by high-severity fire, which effectively eliminated nearly all vegetation, leaving only occasional patches of shrub, litter,[2] and standing scorched trees. *Id*. at 158-59.

B. The 2014 Environmental Impact Statement ("EIS")

Following the Rim Fire, the Forest Service sought to address the damage caused by the fire. One plan the Forest Service adopted was the Rim Fire Recovery Project. This project was intended to: 1) capture economic value through salvage logging; 2) provide for worker and public safety; 3) reduce fuels for future forest resiliency; 4) improve road infrastructure to

[2] Duff and litter are organic ground cover created by fallen plant materials. Their removal through severe fire leaves the ground beneath subject to increased erosion. 2014 EIS at 236.

enhance hydrologic function; 5) enhance wildlife habitat; and, 6) provide opportunities for scientific research. 2014 Record of Decision at 1, 8, attached as Ex. 2 ("2014 ROD"). As part of the EIS for this project the Forest Service considered the ability of conifers to regenerate after a fire and found that conifer regeneration in high severity areas would be "limited" because "[l]arger patches of burn areas (such as those in the high severity areas) can result in openings in the forest that are larger than the reach of surviving neighboring conifers, whose seeds cannot cover the open area." 2014 EIS at 63.

C. The 2016 EIS

After the 2014 Rim Fire Recovery Project was approximately 70% complete, the Forest Service's focus turned to its 2016 Rim Fire Reforestation Project. 2016 EIS at 5, ECF No. 28-9. Whereas the 2014 project was directed at recovery of the affected areas and fuels reduction, the 2016 project was directed at long-term reforestation. *Id*. at 4-5. Specifically, the Forest Service aimed to "create a fire resilient mixed conifer forest that contributes to an ecologically healthy and resilient landscape rich in biodiversity." *Id*. at 7. Both the 2014 and 2016 projects were considered for their cumulative effects under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370m-12. *Id*. at 5.

In preparing the 2016 FEIS, the Forest Service thoroughly analyzed the likelihood, extent, and quality of natural conifer regeneration. *See*, *e.g.*, *id*. at 7, 233-34, 237-43, 256-58. The Forest Service concluded that "[w]ithout mature live trees to provide a seed source within close proximity to the burned areas, or the lack of a viable and healthy cone crop, natural conifer regeneration cannot be counted on within large portions of the Rim Fire." *Id*. at 7. Utilizing contemporaneous observations, the Forest Service found that "brush is already beginning to dominate sites, inhibiting conifer survival and growth." *Id*. Based on its findings, and on similar historical fires, the Forest Service determined that allowing the forest to regenerate by itself was not feasible. *See id*.

D. California Housing and Community Development Department's ("HCD") Community and Watershed Resilience Program ("CWRP")

In 2015, the State of California, via HCD, applied for competitive federal funding through HUD's Community Development Block Grant National Disaster Resilience Competition ("CDBG-NDRC"). After reviewing two phases of applications, HUD awarded California an NDRC block grant in the amount of approximately $70 million to fund HCD's CWRP. Notice of National Disaster Resilience Competition Grant Requirements, 81 Fed. Reg. 36,557.01, 36,560 (June 7, 2016) ("Grant Requirements"). The CWRP is composed of three separate projects. ECF Nos. 28-1 and 28-2. First, the Community Resilience Center will provide resources and community protection from future fires. Second, the Forest and Watershed Health Program ("FWHP") will restore forests and watersheds to be healthy and resilient to future disturbances. Third, a Biomass Utilization Facility ("BUF") will be constructed to generate electricity, utilize woody biomass, and support ongoing forest restoration efforts. ECF No. 28-1 at 4-5. Plaintiffs only challenge the FWHP and BUF aspects of the CWRP. Pls.' Br. 17-18.

The FWHP component of the CWRP seeks to implement the same recovery and reforestation actions the Forest Service studied in its 2014 and 2016 EISs. ECF No. 28-5, at 6, and ECF No. 28-6 at 7. Specifically, the FWHP is expected to remove dead material from forests that act as fuel, control and minimize the spread of noxious weeds, rebuild rangeland infrastructure, replant a diverse and resilient mixed conifer forest, and create and enhance strategic fuel breaks to reduce future fire risk throughout Tuolumne County. Benech Decl. at ¶¶ 6-7, 13, 17; ECF No. 28-2 at 3. Since HCD's FWHP implements a portion of the actions considered in the 2014 and 2016 EISs, it adopted those EISs under 40 C.F.R. §§ 1500.4(n), 1500.5(h), 1506.3. Work on the ground for the FWHP started in April 2019 for noxious weed eradication and reforestation site preparation spraying, and May 2019 for fuels reduction. Benech Decl. at ¶ 6.

Although it will be funded under the same grant, the BUF project is separate from the FWHP. *See* ECF No. 28-1 at 1-4; Benech Decl. at ¶¶ 24-25. The grant agreement for the CWRP allocates $22 million for the BUF and a separate $28,604,459 for the FWHP. Grant Agreement

at 3, attached as Ex. 3. Unlike the FWHP, the BUF is still in the planning stages to determine feasibility, meaning that details such as the location of the facility, participating entities, and method of development have not been determined. Community and Watershed Resilience Program 2d Quarter 2019 Status Report at 6-7, attached as Ex. 4 ("Status Report"). HUD has not yet authorized the release of federal funds for construction of the BUF.[3] By contrast, HUD has authorized the Request for Release of Funds and certification for the FWHP, allowing HCD to draw down funds from the $28.6 million allocated to the FWHP. ECF No. 28-7.

E. Plaintiffs' Prior Complaints to HCD, HUD, and the Forest Service

As detailed in their Brief, Plaintiffs have voiced their concerns to Defendants about HCD's adoption of the 2014 and 2016 EISs. *See* Pls.' Br. 2-4, 9-14. However, contrary to Plaintiffs' claims that "no additional analysis was completed" (*Id*. at 2), Defendants did seriously consider Plaintiffs' comments. HCD considered and responded to Plaintiffs' concerns in both records of decision adopting the 2014 and 2016 EISs and again when Plaintiffs challenged HUD's release of Long-Term Recovery funds. *See* ECF No. 28-5 at 21-31; ECF No. 28-6 at 26-40; Jan. 11, 2018 HCD Resp. to Objs. for Release of Funds, attached as Ex. 5. Furthermore, right before work began on the FWHP, in May 2019, Defendants even agreed to conduct a site visit with Plaintiffs. Pls.' Br. 3-4.

F. Events Leading up to Plaintiffs' Motion

Prior to this action, Plaintiff Earth Island Institute challenged the Forest Service's 2014 Rim Fire Project in *Center for Biological Diversity v. Skalski*, 61 F. Supp. 3d 945 (E.D. Cal. 2014), *aff'd*, 613 F. App'x 579 (9th Cir. 2015) (upholding Forest Service's NEPA analysis). Given Plaintiffs' past challenge to the 2014 Rim Fire Project and their numerous comments to HCD, HUD, and the Forest Service, Federal Defendants anticipated that Plaintiffs might challenge HCD's CWRP.

Therefore, on June 6, 2019, agency counsel for the Forest Service sent a letter to Plaintiff Earth Island Institute to "ask whether [Plaintiffs] intend to file suit challenging the

[3] To the extent Plaintiffs challenge HUD's funding of the BUF, their Motion is premature. *See* 24 C.F.R. § 58.34(a)(1).

implementation of the restoration and fuels reduction work" since "operations are imminent." ECF No. 30-1 at 1. Agency counsel requested that Plaintiffs provide "identification of the new information, supporting data, and an explanation of the information's relevance and significance . . . [to] provide the agencies the opportunity to resolve any issues " *Id*. To avoid "premature litigation or an unnecessarily compressed briefing schedule," agency counsel also asked Plaintiffs to engage in "early coordination." *Id*. However, Plaintiffs did not respond and did not file suit until over three months later.

III. STANDARDS OF REVIEW

A. Review of Decisions Under the Administrative Procedure Act

Under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706, an agency action will be set aside only if the challenging party demonstrates that the agency's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc) (quoting 5 U.S.C. § 706(2)(A)). "A court generally must be at its 'most deferential' when reviewing scientific judgments and technical analyses within the agency's expertise under NEPA." *Native Ecosys. Council v. Weldon*, 697 F.3d 1043, 1051 (9th Cir. 2012) (internal citation omitted).

B. Standard for a Temporary Restraining Order

"The standard for granting a temporary restraining order is identical to that for a preliminary injunction." *Arakaki v. Cayetano*, 198 F. Supp. 2d 1165, 1173 (D. Haw. 2002), *aff'd in part, rev'd in part*, 477 F.3d 1048 (9th Cir. 2007). An injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22. To obtain such an award, the Plaintiffs must establish that they are "likely to succeed on the merits," that they are likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in their favor, and that the requested injunction is in the public interest. *Id*. at 20.[4] All four factors of this test must be met, and the test is not

[4] The Ninth Circuit has also articulated an alternate formulation of the *Winter* test, suggesting that injunctive relief is appropriate where plaintiffs can show "serious questions" going to the merits and that "the balance of hardships tips sharply" towards the plaintiffs. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (internal quotation omitted). To the

altered simply because a plaintiff alleges an environmental injury or a violation of NEPA. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010); *McNair*, 537 F.3d at 1005 ("Our law does not . . . allow us to abandon a balance of harms analysis just because a potential environmental injury is at issue."). Indeed, the Supreme Court has made clear that courts should decline to grant injunctive relief for a NEPA violation where the public interest weighs against such relief, even if that means an irreparable injury to the plaintiff injury goes unaddressed. *Winter*, 555 U.S. at 25–26.

Plaintiffs suggest that "Courts may apply a sliding scale approach in their consideration of the success and harm factors." Pls.' Br. 4-5 (internal quotation and citation omitted). Plaintiffs are wrong. "Even in NEPA cases, an injunction should issue only if the traditional four-factor test is satisfied; no thumb on the scales is warranted." *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1184 (9th Cir. 2011) (internal quotation marks and alteration omitted) (quoting *Monsanto Co.*, 561 U.S. at 157).

IV. LEGAL BACKGROUND

A. The National Environmental Policy Act

Under NEPA, a federal agency must prepare an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). NEPA imposes procedural rather than substantive requirements. So long as "the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *see also Weldon*, 697 F.3d at 1051.

NEPA imposes a duty to supplement draft and final EISs in response to "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii). A supplemental EIS is not, however,

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extent that the "serious questions" formulation is different that the "likelihood" standard, *see e.g. Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d 1138, 1141 n.6 (C.D. Cal. 2012) (declining to apply the serious questions standard), Plaintiffs here have not satisfied their burden under either standard.

required "every time new information comes to light after the EIS is finalized. To require otherwise would render agency decisionmaking intractable, always awaiting updated information." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 373-74 (1989) (footnote omitted). Additionally, supplementation is necessary only if there remains "major Federal action" to occur, and "if the new information is sufficient to show that the remaining action will 'affec[t] the quality of the human environment' in a significant manner or to a significant extent not already considered." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 72-734 (2004) (quoting 42 U.S.C. § 4332(2)(C)). *See also Wisconsin v. Weinberger*, 745 F.2d 412, 420 (7th Cir. 1984) (new information or changed circumstances must present a "seriously different picture of the likely environmental harms stemming from the proposed action").

B. The Disaster Relief Appropriations Act

Congress passed the Disaster Relief Appropriations Act, 2013 ("Relief Act" or "Disaster Relief"), Pub. L. No. 113-2, 127 Stat. 4, to provide "supplemental appropriations for the fiscal year ending September 30, 2013, to improve and streamline disaster assistance for Hurricane Sandy, and for other purposes." Title X, chapter 9 of the Relief Act specifically appropriated $16 billion to HUD "for necessary expenses related to disaster relief, long-term recovery, restoration of infrastructure and housing, and economic revitalization in the most impacted and distressed areas" *Id.*, 127 Stat. at 36; *see also* Grant Requirements, 81 Fed. Reg. at 36,558 (same).

The Relief Act further provided, *inter alia*, that "funds shall be awarded directly to the State or unit of general local government as a grantee at the discretion of the Secretary of Housing and Urban Development" for "activities authorized under title I of the Housing and Community Development Act of 1974 (42 U.S.C. § 5301 et seq.)" Relief Act, tit. X, ch. 9, 127 Stat. at 36. Such authorized activities include, but are not limited to: the acquisition, construction, reconstruction, or installation of public works, facilities, and site or other improvements, and, provision of grants for activities which are carried out by public entities,

including construction, reconstruction, rehabilitation, or installation of public facilities, site improvements, and utilities. 42 U.S.C. § 5305(2), (14).

Under 31 U.S.C. § 1552(a), and as stated in the grant agreements, grantees must expend all grant funds by September 30, 2022: "[a]ny grant funds that have not been disbursed by September 30, 2022, will be canceled and will no longer be available for disbursement to the Grantee or for obligation or expenditure for any purpose." Grant Requirements, 81 Fed. Reg. at 36,562.

V. ARGUMENT

A. Plaintiffs Are Not Entitled to a Temporary Restraining Order.

Plaintiffs' motion for temporary restraining order should be denied on its merits because Plaintiffs fail to establish: (1) a likelihood of success on the merits; (2) irreparable harm, and (3) that the balance of the equities and the public interest weigh in favor of an injunction.[5]

1. Plaintiffs Have Failed to Demonstrate a Likelihood of Success on the Merits.

i. Federal Defendants Satisfied NEPA's Requirements.

a. Federal Defendants' Responsibility Under NEPA Is Limited in This Case.

The CWRP project Plaintiffs challenge belongs to HCD, a State of California agency. Federal Defendants' role in the CWRP is limited. First, HUD provided funding to HCD through a Disaster Relief grant. Pls.' Br. 1-2. Second, HCD used part of those funds to enlist the Forest Service to carry out HCD's FWHP (which mirrored what the Forest Service proposed in its 2014 and 2016 EISs). *Id.*; Benech Decl. at ¶¶ 6-7, 13, 17. The Forest Service is not involved with the BUF project. Benech Decl. at ¶ 25.

As part of the grant, HCD assumed all of HUD's NEPA responsibilities. *See* 42 U.S.C. § 5304(g)(1); 24 C.F.R. 58.77(a); *Brandon v. Pierce*, 725 F.2d 555, 560 & n.2 (10th Cir. 1984). HCD complied with NEPA by adopting the prior EISs. *See* 24 C.F.R. §§ 58.4(a), 58.77(a). HUD's NEPA regulations explicitly allow a responsible entity to adopt a final EIS prepared by

[5] When one party is a United States agency, the public interest "merge[s]" with that agency's interest, and the public interest weighs in favor of the agency's decision. *See Nken v. Holder*, 556 U.S. 418, 435 (2009).

another agency. *See* 24 C.F.R. § 58.52. Furthermore, the Council on Environmental Quality permits and encourages agencies to adopt a Final EIS, or portion thereof, issued by another federal agency, if the EIS or portion thereof "meets the standards for an adequate statement" and the actions covered by the original environmental impact statement and the proposed action are "substantially the same." 40 C.F.R. §§ 1506.3(a)-(b), 1500.4(n), 1500.5(h).

Because HCD's and the Forest Service's work on the FWHP implements a portion of the activities analyzed in the 2014 and 2016 EISs, HCD determined that adopting those EISs was appropriate because the area and activities evaluated are the same. ECF No. 28-5 at 3-4; ECF No. 28-6 at 3-4. Furthermore, HCD determined that the EISs met the standards for adequacy and the action covered is substantially the same as HCD's proposed action in the HUD approved NDRC application. *Id*.

For these reasons, Federal Defendants have satisfied their environmental review responsibilities concerning the sole CWRP project (FWHP) that Federal Defendants are involved in executing.

b. Supplemental Environmental Review is Not Necessary Because There Are Not Significant New Circumstances or Information.

Plaintiffs take a shotgun approach to their NEPA argument, asserting numerous theories of new information or changed circumstances in passing and citing to hundreds of pages of attachments to carry the weight of their arguments. But all of the circumstances or information they cite is either insignificant or was known/anticipated by the Forest Service and HCD when they prepared their NEPA documents. For instance, Plaintiffs claim "circumstances in the project area had changed" because the Forest Service is harvesting both live and dead trees "for either biomass or to be piled and burned onsite." Pls.' Br. 11. But as HCD has indicated, the FWHP does not involve "removing any green/live trees, only trees with no visible green needles would be treated for fuels reduction." ECF No. 28-5 at 21; Benech Decl. at ¶¶ 14, 16. Furthermore, the biomass and fuel reduction work Plaintiffs claim is new was considered as part of the 2014 EIS. *See* 2014 ROD at 8-10; Benech Decl. at ¶¶ 7, 15.

The heart of Plaintiffs' claim is that "conifer regeneration in the project area [is] much higher than analyzed in the 2014 and 2016 EIS." Pls.' Br. 11. However, conifer regeneration, even if it is occurring as Plaintiffs allege, is neither significant nor new. Benech Decl. at ¶ 22. The Forest Service expected conifer regeneration and analyzed for it in both the 2014 and 2016 EISs, but found that "natural conifer regeneration cannot be counted on within large portions of the Rim Fire." 2016 EIS at 7; *see also* 2014 EIS at 63. Following the completion of the 2016 EIS, HCD considered Plaintiffs' conifer regeneration claim and agreed that "that natural regeneration is occurring in some areas of the Rim Fire" but only "those [areas] that had or have a green tree seed source." ECF No. 28-6 at 26; *see also* ECF No. 28-5 at 21, 23; Ex. 5. HCD also considered claims, like Plaintiffs' (Pls.' Br. 12), that new field data indicated greater conifer regeneration than anticipated; however, HCD concluded that the data was incorrect or misleading. *See* ECF No. 28-6 at 32-35; *see also* Benech Decl. at ¶ 22. Thus, contrary to Plaintiffs' allegations, HCD considered appropriately conifer regeneration and reasonably determined it was not significant or new information requiring supplemental NEPA analysis. *Id*.

Similarly, Plaintiffs claim HCD did not consider that wildlife like the great grey owl, goshawk, California spotted owl, and fisher would occupy the FWHP project area. Pls.' Br. 3, 12. But once again, the 2014 and 2016 EISs anticipated the presence of these animals and HCD's proposed action "incorporated into the design" consideration of these and other species. ECF No. 28-5 at 29; *see also* 2014 EIS at 348-51, 368-71, 403-05; Benech Decl. at ¶¶ 19-21.

Next, Plaintiffs claim additional greenhouse gas emissions will result from different "project treatments." Pls.' Br. 11. But, yet again, Plaintiffs' claim is not based on new or significant information. Greenhouse gas emissions from various treatments were studied in the 2014 EIS and HCD considered their effects anew as part of its ROD. *See* ECF No. 28-5, at 22-27. And, as discussed above, the fuel reduction and biomass treatments to which Plaintiffs tether their greenhouse gas allegations have been part of the Forest Service's Rim Recovery Project since 2014; they are not "new" treatments with "new" impacts.

Lastly, Plaintiffs claim that the agencies should have supplemented their NEPA documentation in light of a 2019 scientific study by North *et al*. Pls.' Br. 4, 12. However the North *et al*. study does not constitute significant new information because the planting strategies adopted by the Rim Fire Reforestation decision are consistent with the recommendations by North *et al*. regarding a range of effective planting strategies, including variable density planting. *Compare* North *et al*. p. 213, ECF No. 25-10 at 10 (recommending a range of reforestation strategies, with variable density planting identified as a "middle ground") with 2016 Reforestation ROD at 8-9 (discussing a variety of planting strategies as part of the Community Alternative, including variable density planting).

As to the glyphosate notice, Plaintiffs' August 14, 2019 letter to HCD mentions the notice (Hanson Decl., ECF No. 25 at 8), but does not provide any explanation of how this notice presents a significantly different picture of the environmental consequences discussed in the 2014 and 2016 EISs. Indeed, the 2016 EIS already provided an exhaustive analysis of human health risks associated with glyphosate, including recognition of recent science finding that "glyphosate should be classified as 'probably carcinogenic to humans.'" 2016 EIS at 533-52. Furthermore, the U.S. EPA recently concluded that glyphosate is not likely carcinogenic to humans. Benech Decl. at ¶ 18. While Plaintiffs choose to interpret the findings of North *et al*. and the publication of the glyphosate notice differently than the Forest Service and HCD, federal agencies are given "broad discretion in choosing how to respond to opposing scientific evidence." *Carlton*, 626 F.3d at 472-73 (9th Cir. 2010) (citing 40 C.F.R. § 1503.4); *see also McNair*, 537 F.3d at 993 ("our law [ ] requires us to defer to an agency's determination in an area involving a 'high level of technical expertise.'"(quoting *Selkirk Conservation Alliance v. Fosgren*, 336 F.3d 944, 954 (9th Cir. 2003)).

Plaintiffs have not identified any significant, new information. Even if Plaintiffs were able to point to some piece of information that is genuinely new, NEPA does not require that agencies supplement an EIS each time new information comes to light; rather a "rule of reason" guides when supplemental analysis is necessary. *League of Wilderness Defs. v. Connaughton*,

752 F.3d 755, 760 (9th Cir. 201) (quoting *Marsh*, 490 U.S. at 373-74). Here, the record shows that the Forest Service and HCD took a "hard look" at the information and circumstances Plaintiffs cite, and reasonably concluded it was not "new information . . . sufficient to show that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered." *Id*. (quoting *Marsh*, 490 U.S. at 373-74).

In short, Plaintiffs have not presented significant new information that would warrant supplemental environmental analysis under NEPA. Each of the items Plaintiffs cite were either anticipated in the 2014 and 2016 EISs, or were properly considered by HCD and found to be factually inaccurate or not significant. For these reasons, Plaintiffs have not demonstrated any likelihood of success on the merits of their NEPA claim.

c. HCD's FWHP and BUF Programs Are Not Closely Related or Interdependent Parts of a Larger Action and Were Properly Considered Independently

Plaintiffs assert that HCD's CWRP "centers around the integration and interdependence of the FWHP logging project and the biomass power plant [(BUF)]." Pls.' Br. 16. However, other than the fact that these two projects fall under the umbrella of the same large disaster relief program (the CWRP), there is no real connection or interdependence between these two projects. Benech Decl. at ¶ 25.

Under the CEQ regulations, multiple projects should be considered in the same NEPA evaluation if they are "connected." 40 C.F.R. § 1508.25(a)(1). Actions are "connected" if: (1) one action automatically triggers the other, (2) one action cannot or will not proceed unless the other is taken, or (3) both actions are interdependent parts of a larger action, and depend on the larger action for their justification. 40 C.F.R. § 1508.25(a)(1)(i)-(iii).

Here, there is no connection, let alone an interdependence between the FWHP and BUF components. Benech Decl. at ¶ 25. Neither component "triggers," is "interdependent," or "depend[s] on" the other. *Id*. The most obvious proof of this complete lack of connection between the two is the fact that the FWHP has been ongoing for three months, and is halfway

complete, while the BUF project is still undergoing initial feasibility and viability studies.[6] Status Report at 3, 6-7; Benech Decl. at ¶ 24. Furthermore, the FWHP simply implements a Forest Service decision that was made five years ago, long before the BUF was even conceived, and is being implemented independent of the BUF project. Benech Decl. at ¶¶ 6, 7, 13; *see also Great Basin Mine Watch v. Hankins*, 456 F. 3d 955, 969 (9th Cir. 2006) ("When one of the projects might reasonably have been completed without the existence of the other, the two projects have independent utility and are not 'connected' for NEPA's purposes.").

Finally, NEPA does not require HCD to consider the cumulative impacts of FWHP and the BUF project. HUD's regulations require a responsible entity to aggregate projects "which are related either on a geographical or functional basis." 24 C.F.R. § 58.32(a). But for projects to be functionally related the "specific type of activity" must "take place in several separate locales." Here, there is no functional relationship because construction of the BUF is entirely different in character than FWHP's forest recovery and restoration project. *Id*. § 58.32(b). Nor are the projects related on a geographical basis because they are not "concentrated in a fairly specific project area." *Id*. Simply being located in the same county is not enough. Defendants properly determined that the FWHP and BUF projects did not require cumulative or connected analysis under NEPA.

For the reasons discussed above, Plaintiffs have no likelihood of success on their NEPA claims. Thus, their Motion should be denied.

ii. HUD Properly Granted Long-Term Recovery Funds to the State of California

Plaintiffs lack standing to bring a challenge to the HUD's compliance with the Relief Act because they are outside the zone of interests for those statutes. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129-32 (2014); *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 940-42 (9th Cir. 2005). Even assuming Plaintiffs have standing and are in the zone of interests, their claim that the CWRP grant to the State of California is arbitrary, capricious, or otherwise not in accordance with law (Pls.' Br. 18) still fails because the Relief

[6] HUD regulations specifically exempt these types of activities from environmental review under NEPA. *See* 24 C.F.R. § 58.34(a)(1).

Act confers upon HUD discretion to award grants to state or local governments for disaster recovery. *See* Relief Act, Pub. L. No. 113-2, 127 Stat. 4. Pursuant to that authority, HUD designed a grant competition (CDBG-NDRC) that "would work best to elicit the data needed to inform allocation choices, and ensure that the unmet disaster recovery and revitalization needs of communities around the country were appropriately considered." Grant Requirements, 81 Fed. Reg. at 36,557. California's action plan indicates that both the FWHP and the BUF constitute eligible activities under 42 U.S.C. § 5305(a)(2). *See* Action Plan, Ex. 6 at 1-2.

Furthermore, as stated in the Notice of National Disaster Resilience Competition Grant Requirements:

> Allowable costs for CDBG-NDR funds under this appropriation include only those expenses necessary to meet the Unmet Recovery Needs of the Most Impacted and Distressed target area(s), but once the necessary Tie-Back is established for a Project, it could be designed to also meet other community development objectives and economic revitalization needs, including greater Resilience to address the negative effects of climate change.

Grant Requirements, 81 Fed. Reg. at 36,557. Throughout the action plan, California indicates how the CWRP activities will address not only unmet recovery needs in the most impacted and distressed areas, but also the requirements to promote resilience and create a replicable model. *See* Action Plan at 59-69. Thus, the CWRP constitutes an eligible use of funds because it fulfills at least one required purpose under the Relief Act and pursues eligible activities as required under the Housing and Community Development Act.

In sum, Plaintiffs' NEPA and Disaster Relief claims will fail on the merits. For this reason the Court may reject Plaintiffs' application for a TRO. *Winter*, 555 U.S. at 20; *Cottrell*, 632 F.3d at 1135. As demonstrated below, even if Plaintiffs had carried their burden on the merits, their application for a temporary restraining order must be rejected because they have not demonstrated that they would suffer irreparable harm or that the balance of harms and the public interest favor injunctive relief.

2. Plaintiffs Have Failed to Demonstrate Irreparable Harm.

To obtain emergency injunctive relief, Plaintiffs bear the burden of proving it is likely that they will suffer substantial and immediate irreparable injury to their interests. *Winter*, 555 U.S. at 22. There is no presumption of irreparable harm, even when environmental injury is alleged. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 544-45 (1987).

Plaintiffs' claim that they have demonstrated irreparable harm because "implementation is harming naturally recovering young forests and habitat for a variety of wildlife." Pls.' Br. 19. To the extent that Plaintiffs base their claim of irreparable harm on potential harm to the forest itself or the wildlife within the forest, such a claim lacks merit, as a plaintiff's claim of irreparable harm must rely on a demonstration of harm to the plaintiff or its members, not the environment. *See, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000) (Article III remedies must redress an "injury to the plaintiff" rather than an "injury to the environment").

Even if Plaintiffs could rely on a claim of harm to wildlife or the forest itself, the record demonstrates that the FWHP will restore and protect the forest and wildlife habitat in the long term. For example, in regard to the California spotted owl – one of the species most frequently cited by Plaintiffs − the record makes clear that the FWHP will benefit the owl by protecting the species' remaining habitat from catastrophic fire. 2014 EIS 335-42; 2014 ROD at 18; *see Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1010–11 (9th Cir. 2006) (recognizing that long-term benefits from timber project may outweigh short-term harm to individual members of a species); *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1251 (9th Cir. 2005) (holding long-term benefit of preventing stand replacing fires, which completely destroy habitat, is preferable over short-term benefits derived from retaining the forest structure preferred by particular species). And, the FWHP includes numerous design features to avoid short term impacts to spotted owls. *See, e.g.*, 2014 EIS at 728, cmt. 534; 2014 ROD at 19-20. Therefore, as discussed more fully below, enjoining work under the FWHP poses a greater threat of irreparable harm to wildlife than does proceeding with project implementation.

To the extent Plaintiffs have demonstrated any irreparable harm, that harm is limited to the recreational, aesthetic, and similar interests asserted by a small handful of Plaintiffs' members. Furthermore, this claim of harm must be discounted in light of Plaintiffs' 4-5 month delay in bringing suit – during which time over 2,100 acres of treatments have been implemented – which calls into question the seriousness of any injury to Plaintiffs. Pls.' Br. 4; Benech Decl.at ¶ 6; s*ee Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) ("Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm."); *Lydo Enters., Inc. v. City of Las Vegas,* 745 F.2d 1211, 1213-14 (9th Cir. 1984) ("A delay in seeking a preliminary injunction is a factor to be considered in weighing the propriety of relief . . . . By sleeping on its rights a plaintiff demonstrates the lack of need for speedy action." (internal quotation omitted)).

Finally, as discussed in more detail below, Plaintiffs' alleged harm is de minimis when weighed against the public interest, especially because the FWHP only treats a very small portion of the Rim Fire area, and Plaintiffs may pursue their interests in the many thousands of acres that are not being treated. In sum, Plaintiffs fail to demonstrate sufficient irreparable injury to their interests.[7]

3. The Balance of the Equities and the Public Interest Favor Denying Plaintiffs' Broad Request for Injunctive Relief.

Even if Plaintiffs' allegations were sufficient to satisfy the irreparable harm requirement, that would not entitle Plaintiffs to injunctive relief; they must also prove that enjoining the FWHP would on balance serve the public interest. *eBay Inc. v. MercExchange*, 547 U.S. 388, 391 (2006).

Here, however, the public interest is best served by continued implementation of the FWHP. Any delay in project implementation will compromise the public interest in: (1) promptly reducing the fuel load and the risk of another severe wildfire in the area; (2) protecting

[7] While "Plaintiffs' members enjoy the scenic beauty, the ability to view wildlife, spiritual rejuvenation, recreation, and scientific research opportunities," Pls.' Br. 19-20, none of their declarants have identified anything unique about the particular areas being treated that precludes them from engaging in their pursuits in the massive area of the Rim Fire that is not being treated.

people and property; (3) protecting and restoring the environment; and (4) providing socio-economic benefits to communities impacted by the fire.

i. Continued Implementation of the FWHP Serves the Public Interest in Reducing the Risk of Future Fire.

Continuing implementation of the FWHP will reduce the fuel load in order to reduce the likelihood of another catastrophic fire like the Rim Fire. 2014 EIS at 5, 10; *see also id*. at 170, table 3.05-10 (noting Project will significantly reduce future fire intensity). In the absence of the FWHP, fuel loads in the Rim Fire area will grow ever higher, increasing the risk that future wildfires will burn − as Rim did − with uncharacteristic high severity, threatening people, property, and wildlife habitat. 2014 ROD at 14-15; 2014 EIS at 165-66; *see Sierra Forest Legacy Sherman* (*Sherman II*), 951 F. Supp. 2d 1100, 1113 (E.D. Cal. 2013) ("[T]he reduction of the risk of catastrophic wildfire is in the public interest . . . ."), appeal docketed, No. 13-16105 (9th Cir. May 31, 2013).

Even a relatively short delay in project implementation will have adverse impacts on the fuel reduction goals of the FWHP, for several reasons. First, the HUD grant supporting FWHP implementation expires in 2022, and the agencies and contractors are already hard pressed to accomplish the fuel reduction treatments by that time. *See* Benech Decl. at ¶ 9. Therefore, any loss in fuel treatments now will likely be permanent. *Id*. And, with only a small fraction of the Rim Fire area being treated and those treatments being in strategic locations, even small shortfalls in fuel treatments could have lasting adverse effects on the fire hazard in the area. *Id*. Second, while Plaintiffs assert (without foundation) that "any further deterioration of the trees is inconsequential," this is incorrect. Pls.' Br. 21. The fuel treatments that involve removing dead trees and converting them to energy at a biomass generation facility depend on the dead trees retaining enough structural integrity that they can be moved from where they are cut to a log landing. *See* Benech Decl. at ¶ 10. However, as time passes, it becomes more and more difficult, and an injunction would only compound this problem, resulting in a need to burn more fuels on site, which has no offsetting economic or energy-production benefits. *Id*. Third, even a short delay will likely result in the FWHP being delayed until summer or Fall 2020. Benech

Decl. at ¶ 9.

Therefore, an injunction, even for a short period, could have serious adverse impacts on the public's interest in reducing the risk of another catastrophic fire in the area. And, as discussed in more detail below, the reduction in fire hazard is critical not just for the safety of people and their property, but it is also an essential element in protecting wildlife habitat and restoring natural systems.

ii. Continued Implementation of the FWHP Serves the Public Interest in Safety of People and Property.

The FWHP addresses the threat that the fire area, if left untreated, poses a threat to human safety and to human property and infrastructure. First, the FWHP includes roadside hazard tree removal along Forest Service roads, reducing the risk that trees will fall and injure or kill road users, including Forest Service employees, fire fighters, the recreating public, and utility employees needing to access infrastructure. 2014 ROD at 13; 2014 EIS at 169. Plaintiffs' requested injunction, which asks the court to enjoin all tree cutting and removal (Pls.' Br. 1), would place forest visitors and employees at risk for as long as an injunction remains in place and hazard trees remain unabated. Second, continued fuel treatment increases fire fighter safety, allowing for safe access to the area in the event of another fire, and easing suppression by reducing the intensity of future fires. 2014 EIS at 169; *see also id*. at 165-66; 2014 ROD at 13.

Finally, the FWHP protects private property and public infrastructure. By reducing fuels in strategic locations, the FWHP reduces the risk that future fires in the area will destroy homes and other structures. 2014 EIS at 166-69 (explaining placement of Strategic Fire Management Features and Strategically Placed Landscape Area Treatments). The risk fire poses to private property and public infrastructure is not merely theoretical. The Rim Fire itself threatened the Hetch Hetchy Water and Power facilities, which provides drinking water and power to over 2.5 million people in the City of San Francisco and surrounding Bay Area communities. 2014 ROD at 3-4. Each of these public safety concerns weighs heavily in favor of allowing the FWHP to proceed.

iii. Continued Implementation of the FWHP Serves the Public Interest in Protecting the Old Forest Species like the California Spotted Owl, the Goshawk, the Fisher, and the Mule Deer.

In addition to protecting people and property, the FWHP will also serve the public interest in protecting wildlife species like the California spotted owl, the northern goshawk, and the fisher, which rely on old forest habitat characterized by large trees, large snags, and dense canopy cover. *See* 2014 EIS at 335-36, 358-59, 361-64, 386-93. Because the old forest habitat preferred by these species can take a century or more to develop, the loss of such habitat from wildfire can have long-term adverse impacts upon the species. 2014 ROD at 17-20. Indeed, the United States Fish and Wildlife Service concluded that habitat loss from severe wildfire *is the primary threat* to the viability of the California spotted owl. *Id*. at 18; *see also* 2014 EIS at 338-39. In the long-term, the FWHP provides a clear benefit to the California spotted owl, the goshawk, the fisher, and other old forest species by reducing the future loss of old forest habitat to severe wildfire. 2014 EIS at 348-51, 368-71, 403-05.

The public interest in old-forest dependent wildlife favors allowing the FWHP to proceed. *See, e.g.*, *Sherman II*, 951 F. Supp. 2d at 1113-14 (declining to issue injunction where evidence demonstrated the Forest Service action would benefit wildlife).

iv. Continued Implementation of the FWHP Serves the Public Interest in Restoring the Natural Environment.

The Forest Service designed the Rim Fire Recovery Project to help restore the natural environment, transitioning the forest toward conditions that would allow fire to play its historic role of complementing and sustaining the ecosystem rather than destroying it. This ecosystem restoration work is plainly in the public interest and weighs heavily in favor of allowing the FWHP to proceed. *See Carlton*, 626 F.3d at 476 (finding district court did not err in concluding that salvage logging would promote forest regeneration).

The FWHP is designed to help restore historic forest conditions, which featured patchy stands of primarily large, fire resistant tree species, resulting in frequent, low-intensity fire. 2014 ROD at 15 ("[T]he goal is to modify fire behavior and lower severity, to bring these areas back to a more natural fire regime."). Fuel reduction locations in the Rim Fire area are strategically

located so that a future fire will burn with less intensity, moving through the area with a more natural mosaic burn pattern. 2014 EIS at 167. Without the FWHP, fuel loads − augmented by falling dead trees − will quickly increase to a level that insures that future fires will burn like the Rim Fire, with catastrophic severity. 2014 ROD at 14-15; 2014 EIS at 165-66.

Reforestation is another essential forest restoration component of the FWHP that would be harmed by an injunction. The Rim Fire burned at such high severity over such large areas that natural seed sources are not available in many places to support natural regeneration. 2016 EIS at 7; *see also* 2014 EIS at 63. To restore forests in these areas and support the wildlife and ecological processes that depend on native forest cover, the FWHP calls for a reforestation program designed with ecological restoration in mind. *Id*. To ensure successful reforestation, the first phase of fuels reduction must be promptly completed so that young trees can be planted in an environment where they will not be killed by another severe fire. *Id*.; Benech Decl. at ¶ 7. Delaying this work just compounds the issue as vegetation that will compete for water and nutrients with young seedlings, and that also serves as fuel for future fires, increases in size and amount each passing season. *Id*.

v. The FWHP Serves Critical Socio-Economic Interests.

Plaintiffs suggest that the only harm associated with enjoining the FWHP is economic. Pls.' Br. 21. As discussed above, this is patently false. Nonetheless, an injunction would negatively affect the contractors implementing the FWHP and the communities in the fire area, causing real economic harm. Benech Decl. at ¶¶ 11-12. The Ninth Circuit has made clear that "economic harm may indeed be a factor in considering the balance of equitable interests." *Carlton*, 626 F.3d at 475. Nonetheless, Plaintiffs minimize the significance of economic harm by stating that such harm "does not represent a complete and total loss, akin to the loss of habitat, but rather a delay and potentially a reduction in revenue." Pls.' Br. 21. However, this casual disregard fails to recognize the immediate and irreparable economic impacts that can befall a contractor that suddenly loses its income stream. Similarly, Plaintiffs fail to recognize that the HUD grant supporting FWHP implementation lapses in 2022, such that FWHP activities that are

delayed may never get implemented. *See* 31 U.S.C. § 1552(a); Benech Decl. at 4-5. This means that an injunction now could result not just in delayed income, but a complete loss of income. And, this is not a loss of money to federal agencies; it is a loss to the people of Tuolumne County who are trying to recover from the environmental and economic impacts of the Rim Fire.

In sum, the record clearly demonstrates that, on balance, the public interest in seeing the FWHP continued without delay far outweighs the minor and narrow injuries alleged by Plaintiffs. *See Winter*, 555 U.S. at 26 (finding balance of harms tipped against environmental plaintiffs, where "the most serious possible injury would be harm to an unknown number of the [animals that the plaintiffs] study and observe"); *Wildwest Inst. v. Bull*, 472 F.3d 587, 592 (9th Cir. 2006) (upholding denial of injunction where district court weighed plaintiffs' claims of environmental injury against "the possibility of a severe wildfire in the area, and the inherent danger to human life"); *Native Ecosystems Council*, 428 F.3d at 1251 (holding long-term benefit of preventing stand replacing fires, which completely destroy habitat, is preferable over short-term benefits derived from retaining the forest structure preferred by particular species).

B. Plaintiffs Should Post a Meaningful Bond

Federal Rule of Civil Procedure 65(c) states that, "[t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Although the Ninth Circuit has "affirmed the district court's approval of nominal bonds in public interest cases," the court at the same time stressed that "each case is fact-specific" and that "[s]o long as a district court does not set such a high bond that it serves to thwart citizen actions, it does not abuse its discretion." *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2005).

In this case, damages to the HCD, HUD, and the Forest Service (not to mention the public interest) are real and "severe." *See* Benech Decl. at ¶¶ 9-12. The Court should therefore consider a meaningful bond that contributes to making the defendants whole, if the Court is inclined to grant Plaintiffs relief.

VI. CONCLUSION

Plaintiffs have known for 4-5 months that the Forest Service has been working on the FWHP. *See* Benech Decl. at ¶ 6. Even before the Forest Service began work, Plaintiffs knew years in advance that the work was planned. Plaintiffs had the opportunity − and indeed were urged by the Forest Service − to plan ahead and work with the agency to avoid emergency motions practice. Because Plaintiffs declined that opportunity, they are not entitled to a temporary restraining order. If that is not enough, Plaintiffs have also failed to demonstrate that they have a likelihood of success on the merits, or that they will suffer irreparable harm absent the relief they seek. Finally, the balance of the equities and the public interest favor denial of Plaintiffs' motion. For the foregoing reasons, the Court should deny Plaintiffs' Motion.

Respectfully submitted this 27th day of September, 2019.

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