United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

EARTH ISLAND INSTITUTE, et al.,

Plaintiffs,

v.

KIMBERLY NASH, et al.,

Defendants.

Case No. 19-cv-05792-RS

ORDER DENYING MOTION FOR TEMPORARY RESTRAINING ORDER AND TRANSFERRING CASE TO THE EASTERN DISTRICT OF CALIFORNIA

I. INTRODUCTION

Plaintiffs Earth Island Institute ("EII"), Sequoia Forestkeeper, Greenpeace, Inc., and James Hansen (collectively "Plaintiffs") move for a temporary restraining order ("TRO") and preliminary injunction to halt a post-wildfire logging project in the Stanislaus National Forest. The United States Department of Housing and Urban Development (HUD), the United States Forest Service ("Forest Service") (the "Federal Defendants"), and the California Department of Housing and Community Development ("HCD") (collectively "Defendants") oppose Plaintiffs' motion for emergency relief. Separately, the Federal Defendants move to dismiss for improper venue under 28 U.S.C. §§ 1391(e)(1), 1406(a), and Federal Rule of Civil Procedure 12(b)(3), or, in the alternative, request a discretionary transfer to the Eastern District of California under 28 U.S.C. § 1404(a).[1] Pursuant to Civil Local Rule 7-1(b), these motions are suitable for disposition

[1] Defendant HCD joins the Federal Defendants' motion to dismiss or transfer only to the extent it seeks a discretionary transfer under 28 U.S.C. § 1404(a). Furthermore, HCD expressly reserves its right to assert a sovereign immunity defense for any applicable aspect of this litigation. Understandably, HCD did not fully brief the Eleventh Amendment issue given the extremely

without oral argument. For the reasons outlined below, Plaintiffs' motion for a TRO is denied, and the case is hereby transferred to the Eastern District of California pursuant to § 1404(a) for resolution of Plaintiffs' motion for a preliminary injunction and all subsequent matters.

II. BACKGROUND

In 2013, the Rim Fire ravaged over 257,000 acres in and around the Stanislaus National Forest in what, at the time, was the largest wildfire ever recorded in the history of the Sierra Nevada and the third largest wildfire in California's history. Once the smoke subsided, the Forest Service spearheaded the 2014 Rim Fire Recovery Project, a multi-purpose effort to improve the land and local economies most affected by the Rim Fire, which included the salvage of dead trees. In connection with the project, the Forest Service prepared a 778-page Environmental Impact Statement ("EIS") (the "2014 EIS"). Plaintiff EII, along with other environmental groups, challenged this 2014 Forest Service project by bringing two claims under the National Environmental Policy Act ("NEPA) which focused on the Forest Service's decision not to prepare a supplemental EIS to assess the project's impact on the spotted owl habitat and the agency's alleged failure to take the requisite "hard look" at the comments and evidence submitted during the review period. The District Court denied the motion for a preliminary injunction, and the Ninth Circuit affirmed, so the project went forward. *See Center for Biological Diversity v. Skalski*, 61 F. Supp. 3d 945 (E.D. Cal. 2014), *aff'd*, 613 Fed. Appx. 579 (9th Cir. 2015).

When this 2014 project was nearing completion, the Forest Service shifted its focus to its 2016 Rim Fire Reforestation Project, aimed at long-term reforestation as opposed to shorter-term recovery. The Forest Service's stated goal of this 2016 initiative was "to create a fire resilient mixed conifer forest that contributes to an ecologically healthy and resilient landscape rich in biodiversity," and to support the project, the Forest Service published another EIS (the "2016 EIS"), this one 690 pages in length. (Dkt. 28-9 at 7.)

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expedited briefing schedule. Because any Eleventh Amendment issue does not impact the outcome here, this Order need not consider its applicability.

Meanwhile in 2015, the State of California, via HCD, applied for federal disaster relief funding through HUD's National Disaster Resilience Competition and ultimately won a $70 million grant to fund its proposed Community Watershed Health and Resilience Program ("CWHRP"). This state program consists of three "pillars": (1) the Forest and Watershed Health Project ("FWHP"), which received $28 million in funding; (2) creation of a Biomass Utilization Facility, which received $22 million; and (3) creation of Community Resilience Centers, which received $20 million. Plaintiffs only challenge the first two aspects of the three-pronged initiative.

The FWHP component is focused on "removing [i.e. logging] dead materials from forests that act as fuel" on up to 4,600 acres and replanting up to 4,500 acres in strategic areas most impacted by the Rim Fire. As part of the environmental review of the FWHP, HCD issued a public notice for comment on HCD's adoption of the Forest Service's 2014 and 2016 EISs in May 2017. Plaintiff EII submitted comments opposing adoption of these two EISs and requesting HCD not accept the disaster relief grant funding it had won for the FWHP. Specifically, EII argued the proposed logging and replanting project would: "1) severely undermine California's climate change goals; 2) destroy abundant forest regeneration that had substantially increased since the Forest Service's data supporting the EISs; 3) strip vegetation from thousands of acres of post-fire growth where soil has re-stabilized; and 4) destroy thousands of acres of unique, ecologically vital, post-fire habitat." (Dkt. 26 at 2.) HCD adopted the two EISs unchanged, EII's comments notwithstanding.

In October 2017, EII wrote to HUD again objecting to the release of disaster relief funds in connection with the FWHP. EII argued the circumstances in the project area had changed significantly, meaning the adopted EISs were out-of-date and a supplemental EIS was required. Asked by HUD to respond to EII's letter, HCD issued a 10-page response addressing each of EII's grievances and concluding "circumstances and condition have not changed significantly in the project area . . . . Thus, a supplemental EIS is not required . . . ." (Dkt. 35-5 at 1.)

In June 2018, Plaintiffs wrote HCD and HUD again and provided additional data in support of their earlier argument that forest regeneration in the project areas was significantly

greater than estimated in the EISs relied on by HCD and reported that various species of wildlife were occupying the project area. The Forest Service confirmed, in response to a FOIA request, that it had not performed any additional surveys of conifer regeneration in the project area between 2016 and 2018.

The noxious weed eradication portion of FWHP began in April 2019, and the logging began one month later. That same month, defendants HCD and the Forest Service conducted a site visit in the project area. On June 6, 2019, counsel for the Forest Service reached out to EII asking "whether [EII] intend[s] to file suit challenging the implementation of the restoration and fuels reduction work" to facilitate "early coordination" and avoid "litigation or an unnecessarily compressed briefing schedule," but EII did not respond.[2] (Dkt. 30-1 at 1.) Since May, nearly half of the units set for logging have already been logged.

Plaintiffs filed their complaint for declaratory and injunctive relief on September 16, 2019 and their motion for a TRO and preliminary injunction on September 24, 2019. This Court requested expedited briefing to address both the request for emergency injunctive relief and Defendants' motion to dismiss or transfer, filed on September 23, 2019 and also pending.[3]

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[2] Plaintiffs, in reply, aver that they did not respond to this request to coordinate because Mr. Rosen, General Counsel for the U.S. Department of Agriculture, "has a known pattern and practice of baiting members of the public, who may or may not be represented, with letters like Dr. Hanson received from him" and that Mr. Rosen "has a reputation for not engaging in good faith." (Dkt. 44 at 10.) Given these allegations are conclusory and not substantiated with anything other than vague reference to "past experience," Plaintiffs' allegations of bad faith will not be entertained. Indeed, the actual language of Mr. Rosen's letter to Mr. Hanson of EII (Dkt. 30-1) merely inquired whether EII intended to litigate so as to coordinate proactively in hopes of avoiding the very expedited briefing in which the parties and the Court are now embroiled, nearly four months later and with nearly half the project area already having been logged.

[3] On October 2, 2019, Defendants filed a motion to strike various declarations submitted by Plaintiffs after Defendants had already filed their briefs in opposition to the motion for injunctive relief. (*See* Dkt. 47.) Defendants argue the content of these declarations constitutes new evidence improperly submitted in reply. *See Bazuaye v. Immigration & Naturalization Serv.*, 79 F.3d 118, 120 (9th Cir. 1996) (per curiam). Defendants particularly object to the three videos hyperlinked within two of the declarations (*see* Dkts. 41 and 45), arguing they were not properly submitted into the record and therefore run afoul of Federal Rule of Civil Procedure 43(c). Defendants contend that, at the very least, they should be afforded an opportunity to reply to this new evidence. *See Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996). Because the Court declines to grant a TRO for the reasons outlined below, however, Defendants' motion to strike is moot for purposes of this Order. Furthermore, this Order reserves the question of whether any of the

III. MOTION TO DISMISS OR TRANSFER

Defendants' pending motion to dismiss for improper venue or, alternatively, to transfer to the Eastern District must be addressed at the outset, given it is a threshold question, the resolution of which could render Plaintiffs' motion for temporary injunctive relief moot. While the Northern District is a permissible venue under 28 U.S.C. § 1391(e), the case should nevertheless be transferred "in the interest of justice" under 28 U.S.C. § 1404(a) to the Eastern District of California.

A. Legal Standard

A district court may dismiss a complaint for improper venue under Federal Rule of Civil Procedure 12(b)(3) only when venue is "wrong" or "improper." *See Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 571 U.S. 49, 55 (2013). Plaintiff bears the burden of demonstrating proper venue. *Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 496 (9th Cir. 1979). When deciding a motion under Rule 12(b)(3), a court need not accept all allegations in the pleadings as true without transforming the Rule 12 motion into a motion for summary judgment, and the court may consider facts and supplemental written materials outside of the pleadings. *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1137 (9th Cir. 2004). A court, however, draws all reasonable inferences on contested factual issues in favor of the non-movant. *Id.* at 1138-40.

"Whether venue is 'wrong' or 'improper' depends exclusively on whether the court in which the case was brought satisfies the requirements of federal venue laws . . . ." *Fine v. Cambridge Intern. Sys., Inc.*, 584 Fed. Appx. 695 (9th Cir. 2014). For civil actions in which a defendant is an officer or agency of the United States, venue is governed by 28 U.S.C. § 1391(e)(1). This provision explains that venue is proper in any judicial district in which:

> (A) a defendant in the action resides, (B) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the

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challenged declarations or video evidence referenced therein should be considered by the transferee court in the Eastern District when deciding whether to issue a preliminary injunction.

action is situated, or (C) the plaintiff resides if no real property is involved in the action. Furthermore, pursuant to 28 U.S.C. § 1406(a), where venue is found to be improper, a district court has discretion whether to dismiss under Rule 12(b)(3) or to transfer the case in the interests of justice to an appropriate district. *See King v. Russell*, 963 F.2d 1301, 1304 (9th Cir. 1992).

Moreover, even where a case is brought in a statutorily authorized venue, a district court may nonetheless grant a discretionary transfer to any other district where it might have been brought "[f]or the convenience of parties and witnesses, in the interest of justice." 28 U.S.C. § 1404(a). A motion for transfer under § 1404(a) requires the court to make an "individualized, case-by-case consideration" and weigh multiple factors to determine whether transfer is appropriate. *See Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498-99 (9th Cir. 2000) (citing *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 29-31 (1988)). The party moving to transfer under § 1404(a) bears the burden of demonstrating the factors favoring transfer are met. *Id.* at 499.

B. Analysis

Defendants argue that this action must be transferred or dismissed pursuant to 28 U.S.C. § 1406(a) and Rule 12(b)(3) because venue is improper in this district under 28 U.S.C. § 1391(e). In the alternative, Defendants argue that, even if venue were permissible in this district, the Court should still exercise its discretion to transfer the case to the Eastern District pursuant to 28 U.S.C. § 1404(a).

1. Mandatory dismissal or transfer

A mandatory dismissal or transfer would be inappropriate, because venue is proper under § 1391(e)(1)(C). Because no "real property" is involved in this litigation and two of the four Plaintiffs reside in the Northern District, this venue is permissible.

"The Ninth Circuit has not addressed the meaning of 'real property' in § 1391(e)(3) [the predecessor provision to § 1391(e)(1)(C)]." *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, No. 08-cv-5646, 2009 WL 1025606, at *2 (N.D. Cal. Apr. 14, 2009). In keeping with numerous district courts that have considered the question, however, "real property" for purposes of § 1391(e)(1)(C) refers only to a legal dispute over real property interests. *See, e.g., Earth*

Island Inst. v. Quinn, 56 F. Supp. 3d 1110, 1115-17 (N.D. Cal. 2014) (finding venue satisfied under § 1391(e)(1)(C) because, although lawsuit involved the environmental impact of logging on certain lands, it was a not a dispute involving "real property" within the meaning of the statute). As the court in *Quinn* points out, "by using the legal term 'real property,' rather than allowing venue whenever 'the action relates [to] a particular area of land,' Congress seems to have indicated that it intended mainly to cover disputes over legal interests in real property." *Id.* at 1115-16. *See also Nat. Res. Def. Council, Inc. v. Tennessee Val. Auth.*, 340 F. Supp. 400, 406 (S.D.N.Y. 1971), *rev'd on other grounds*, 459 F.2d 255 (2d Cir. 1972) (analyzing § 1391(e)(1)(C)'s predecessor statute and noting that "almost any dispute over public or private decisions will in some way 'involve real property,' taken literally. The touchstone for applying § 1391(e)(4) cannot sensibly be whether real property is marginally affected by the case at issue. Rather, the action must center directly on the real property, as with actions concerning the right, title or interest in real property").

Ctr. for Biological Diversity, 2009 WL 1025606, on which Defendants rely, is distinguishable. There, the litigation centered on the Coachella Valley Plan, which the court found "govern[ed] a range of real property issues, including access to public and private lands, rights of way and easements across these lands, land withdrawals, and land exchanges and acquisitions." *Id.* at *1. Here, while Plaintiffs' lawsuit certainly involves public land, the claims focus on compliance with NEPA and other environmental statutes and therefore do not involve real property for purposes of the venue statute. *See Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, No. 08-cv-1730, 2009 WL 10668581, at *4 (W.D. Wash. May 12, 2009) ("Plaintiffs seek to compel Defendants to comply with NEPA, and the case does not present any issues of a property right, title, or interest. Because the Plaintiffs' claims only tangentially reference real property but do not center on the property itself, the court concludes that, for purposes of Section 1391(e)(3), this action does not 'involve' real property."). Venue is therefore proper under 28

U.S.C. § 1391(e)(1)(C).[4]

2. Discretionary Transfer

Defendants, in the alternative, move for discretionary transfer under 28 U.S.C. § 1404(a). Under this section, the court must first determine whether the potential transferee district is one where the case could originally have been brought. 28 U.S.C. § 1404(a). The court then considers: (1) the convenience of the parties, (2) the convenience of the witnesses, and (3) "the interest of justice." *Id.*

In making this case-specific determination on convenience and fairness, the Ninth Circuit has outlined additional factors the court may consider, including:

> (1) the location where the relevant agreements were negotiated and executed, (2) the state that is most familiar with the governing law, (3) the plaintiff's choice of forum, (4) the respective parties' contacts with the forum, (5) the contacts relating to the plaintiff's cause of action in the chosen forum, (6) the differences in costs of litigation in the two forums, (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses, and (8) the ease of access to sources of proof.

Jones, 211 F.3d at 498–99. "No single factor is dispositive, and a district court has broad discretion to adjudicate motions for transfer on a case-by-case basis." *Park v. Dole Fresh Vegetables, Inc.*, 964 F.Supp.2d 1088, 1093 (N.D. Cal.2013) (citations omitted).

As an initial matter, this case clearly could have been filed in the Eastern District, given § 1391(e)(1) is easily satisfied through subsection (B); without a doubt, "a substantial part of property that is the subject of the action is situated" in that district. This case turns on the treatment of the vast tracts of forest devastated by the 2013 Rim Fire, which, despite its unprecedented scale, burned entirely within the Eastern District.

Turning then to the convenience and fairness considerations, these point strongly in favor of a discretionary transfer. First, the Eastern District has already adjudicated a case focused on the Forest Service's logging plans following the Rim Fire in connection with the 2014 EIS, a case

[4] This Order expresses no opinion on whether venue is also proper under other subsections of § 1391(e)(1).

which Plaintiff EII chose to file in that district. *See Skalski*, 613 Fed. Appx. 579. Moreover, the 2014 and 2016 EISs central to Plaintiffs' complaint analyze lands entirely within the Eastern District, and the May site visit likewise occurred there. In addition, Plaintiffs' asserted interests in the case (namely the recreational and aesthetic interests in public lands within the Stanislaus National Forest) concern lands exclusively within the Eastern District. Furthermore, citizens living near this wildfire-prone area have the paramount interest in the proper management of these public lands. *See* Wright & Miller, 15 Fed. Prac. & Proc. Juris. § 3854 (4th ed.) ("An additional reason for litigating in the forum that encompasses the locus of operative facts is the local interest in having local controversies resolved at home, especially in environmental cases or other matters involving land or matters of local policy.").

At bottom, although HUD's regional office happens to be located in San Francisco and some decisions on the HUD grant were likely made there, this dispute's primary concern is one of the Eastern District's most prized environmental assets—the Stanislaus Forest which abuts Yosemite National Park. Any deference owed to Plaintiffs' decision to file in the Northern District is outweighed by this district's lack of a significant connection to the activities central to the complaint. *See* Wright, Miller & Cooper, 15 Fed. Prac. & Proc. Juris. § 3848 (4th ed.) ("The plaintiff's preference may also be given less weight if the plaintiff sued in a district that has no obvious connection to the case . . . . [A]lthough not universally followed, this approach is one of sound judicial administration and reflects good common sense"). Many courts within the Ninth Circuit have granted discretionary transfers under similar facts. *See, e.g.*, *Quinn*, 56 F. Supp. 3d 1110 (finding venue proper in the Northern District but nonetheless granting a discretionary transfer to the Eastern District of California because the land and projects at issue were within that district); *Ctr. for Biological Diversity*, 2009 WL 10668581 (in a lawsuit alleging NEPA violations, granting discretionary transfer to the Eastern District of Washington where "[t]he land and water to be directly affected by [the Bureau of Reclamation's] proposed action is located"). Because a discretionary transfer under § 1404(a) is "in the interest of justice," the case is hereby transferred to the Eastern District of California.

III. MOTION FOR A TEMPORARY RESTRAINING ORDER[5]

A. Legal Standard

A TRO may be granted upon a showing "that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition." Fed. R. Civ. P. 65(b)(1)(A). The purpose of such an order, as a form of preliminary injunctive relief, is to preserve the status quo and prevent irreparable harm "just so long as is necessary to hold a hearing, and no longer." *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 439 (1974). A request for a TRO is evaluated by the same factors that generally apply to a preliminary injunction, *see Stuhlbarg Int'l. Sales Co. v. John D. Brushy & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001), and as a form of preliminary injunctive relief, a TRO is an "extraordinary remedy" that is "never granted as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Rather, the moving party bears the burden of demonstrating that "he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. Alternatively, if the moving party can demonstrate the requisite likelihood of irreparable harm and show that an injunction is in the public interest, a preliminary injunction may issue so long as there are "serious questions" going to the merits and the balance of hardships tips sharply in the moving party's favor. *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir.2011). Where a plaintiff fails to demonstrate even serious questions going to the merits of his or her claim, the court need not consider the remaining *Winter* factors. *Association des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 944 (9th Cir. 2013).

B. Analysis

[5] The Court declines to rule on Plaintiffs' motion to the extent it requests a preliminary injunction so as not to tie the hands of the transferee court on this important question. Rather, this Order only analyzes Plaintiffs' request for emergency relief to the extent it seeks a TRO in the intervening period before the transferee court is able to resolve the preliminary injunction question after full briefing and argument. As explained below, Plaintiffs have failed to meet the high burden to justify such extraordinary relief in the interim.

Because venue is proper in this district even though the case is to be transferred in the interest of justice, a ruling on Plaintiffs' request for a TRO is warranted. Plaintiffs allege four claims for relief: two NEPA violations alleging Defendants failed to supplement the environmental analysis of the FWHP logging in light of "significant new information and changed circumstances"; a third NEPA violation centered on Defendants' alleged failure to analyze the *combined* impact of the FWHP logging and the biomass facility; and a violation of the Disaster Relief Appropriations Act of 2013 (P.L.113-2, 127 Stat. 4). Because Plaintiffs have failed in showing even "serious questions" going to the merits on any of these claims, Plaintiffs' motion for a temporary restraining order is denied without reaching the remaining *Winter* factors of irreparable harm, balance of equities, and public interest. *Alliance for the Wild Rockies,* 632 F.3d at 1131-32; *Association des Eleveurs de Canards et d'Oies du Quebec,* 729 F.3d at 944.

1. NEPA Violations for Failure to Supplement Environmental Review and Analysis Based on "Significant New Information and Changed Circumstances"

Under NEPA, agencies have an obligation to prepare an EIS for "major Federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Moreover, NEPA imposes a duty to supplement even 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). That said, a supplemental EIS is not 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). Rather, supplemental environmental analysis 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." *Id.* at 374 (quoting 42 U.S.C. § 4332(2)(C)). A "rule of reason" applies, which "turns on the value of the new information." *Id.*

To prevail, Plaintiffs must establish that HUD's decision to award and ultimately release

$28 million to HCD for the FWHP logging project without first requiring a supplemental EIS was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). "Review under the arbitrary and capricious standard is narrow, and the reviewing court may not substitute its judgment for that of the agency." *Earth Island Inst. V. U.S. Forest Service*, 442 F.3d 1147, 1156 (9th Cir.) (citation omitted), abrogated on other grounds by *Winter*, 555 U.S. at 7.

Plaintiffs assert a variety of allegedly new circumstances which they argue compel a supplemental EIS. First, Plaintiffs allege that conifer regeneration in the areas set for logging under the FWHP is "much higher than analyzed in the 2014 and 2016 EIS[s]." (Dkt. 26 at 11.) Modest regeneration does not render the circumstances so significantly changed as to render the existing EISs inadequate, however. In fact, the Forest Service anticipated some level of natural regeneration but nonetheless concluded 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; Dkt. 35-5 at 3.)

Plaintiffs also suggest evidence of wildlife inhabiting the recovering landscape reinforces the changed circumstances, but again, the presence of wildlife in the project areas was anticipated. *See, e.g.*, 2014 EIS at 348-51, 368-71, 403-05. Plaintiffs likewise argue the existing environmental analyses did not adequately account for greenhouse gas emissions from the project, because the project treatments contemplated by the Forest Service EISs were different than those ultimately adopted as part of the FWHP. Yet the 2014 EIS analyzed greenhouse gas emissions under various alternatives, and, more importantly, the 2017 Record of Decision issued by HCD addressed this very argument and concluded:

> [R]emoving trees for either lumber or as feedstock for bioenergy facilities has a significantly lower impact on air quality emissions, including greenhouse gasses, than piling and burning/jackpot burning or the no action alternative due to the modelled wildfire predictions. For this reason, HCD has prioritized biomass removal over piling and burning wherever possible.

(Dkt. 28-5 at 26-27.) Lastly, Plaintiffs claim a new study by North et al. contradicts the need to do replanting in most fire-prone areas, a development which Plaintiffs argue requires supplemental analysis. Yet, this study recommends an approach which includes "planting a combination of

clustered and regularly spaced seedlings" in areas "beyond effective seed dispersal range." (Dkt. 25-10, at 10.) This is largely consistent with the FWHP, where the project area is focused on locations most severely burned in the Rim Fire. The insights from the North et. al. study fall short of triggering a duty to supplement due to "significant new information" under NEPA.

In short, the various new or changed circumstances alleged by Plaintiffs were in fact anticipated and addressed by Defendants in the existing analyses for the FWHP logging. To require additional analysis would unfairly hamper agency action and violate the "rule of reason" which governs an agency's duty to supplement under NEPA. *Marsh*, 490 U.S. at 373-74. Plaintiffs have failed to show a likelihood of success on the merits in their argument that Defendants' decision not to prepare a supplemental EIS under NEPA was arbitrary or capricious.

2. NEPA Violation for Failure to "Evaluate as a Single Project" the FWHP Logging and the Biomass Facility

Plaintiffs also argue HUD and HCD violated NEPA by failing to analyze two of the three "pillars" of the CWHRP—the FWHP logging and the biomass utilization facility—together in a single EIS. NEPA requires that "[p]roposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement." 40 C.F.R. § 1502.4(a). "A single NEPA review document is required for distinct projects when there is a single proposal governing the projects . . . or when the projects are connected, cumulative, or similar actions under the regulations implementing NEPA." *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 893–94 (9th Cir. 2002) (citations and internal quotation marks omitted). Actions are "connected" if they: "(i) [a]utomatically trigger other actions which may require environmental impact statements; (ii) [c]annot or will not proceed unless other actions are taken previously or simultaneously; (iii) [a]re 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). "Cumulative" actions are those "which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement." § 1508.25(a)(2). "Similar" actions are those "which when viewed with other reasonably

foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography." § 1508.25(a)(3). When actions are merely "similar" as opposed to "connected" or "cumulative," however, the Ninth Circuit has recognized a comprehensive EIS is not *required* for such projects. *See Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1306 (9th Cir. 2003) (citing 40 C.F.R. § 1508.25).

At the outset, it must be acknowledged that for purposes of HCD's grant application for federal funding for the CWHRP, the state agency pitched the three components as three pillars of an "integrated" recovery and resilience plan for the region. (*See, e.g.*, Dkt. 28-1 at 3-5.) A closer look at the Ninth Circuit's analysis under the "cumulative" and "connected" definitions of NEPA, however, makes clear that the decision not to analyze these two components collectively was neither arbitrary nor capricious.

To determine whether actions are "connected" for purposes of NEPA review, the Ninth Circuit applies an "independent utility" test. *Native Ecosystems*, 304 F.3d at 894. ("Where each of two projects would have taken place with or without the other, each has 'independent utility' and the two are not considered connected actions."); *see also Earth Island Inst.*, 351 F.3d at 1305 ("[T]he two restoration projects in this case have independent utility in that they each generate revenue and implement distinct forest conservation measures, and each plan would go forward without the other."). The FWHP logging is primarily aimed at reducing the amount of fuel in the project area to reduce the probability of another devastating fire in the region. (*See* Dkt. 28-1 at 50.) This project is useful to the region, separate and apart from its potential to provide fuel to the anticipated biomass utilization facility, still in the planning stages. The fact that the FWHP is well underway while the biomass project is still undergoing initial feasibility and viability studies is enough to support Defendants' conclusion that these projects are not "connected" under NEPA.

Plaintiffs' argument that the two pillars constitute "cumulative" actions for NEPA purposes likewise falls short of establishing a likelihood of success in proving Defendants' decision not to aggregate the analysis of the two projects was arbitrary or capricious. As the Supreme Court has acknowledged:

> The determination of the region, if any, with respect to which a comprehensive statement is necessary requires the weighing of a number of relevant factors, including the extent of the interrelationship among proposed actions and practical considerations of feasibility. Resolving these issues requires a high level of technical expertise and is properly left to the informed discretion of the responsible federal agencies. . . . Absent a showing of arbitrary action, we must assume that the agencies have exercised this discretion appropriately.

Kleppe v. Sierra Club, 427 U.S. 390, 412 (internal citations omitted). This is not a situation in which the responsible entities are "dividing a project into multiple 'actions,' each of which individually has an insignificant environmental impact, but which collectively have a substantial impact" to avoid the need to perform a meaningful, holistic environmental review. *Thomas v. Peterson*, 753 F.2d 754, 758 (9th Cir.1985). Rather, the FWHP implements a Forest Service decision on how to deal with this critical post-wildfire area dating back over five years, the impact of which was analyzed through two detailed EISs. The decision not include in the environmental analysis the impact of the creation of a biomass facility, currently undergoing its own feasibility analysis with the funding yet to be released, appears neither arbitrary nor capricious. Plaintiffs are unlikely to succeed in their claim to the contrary.

3. Violations of Disaster Relief Appropriations Act[6]

Lastly, Plaintiffs allege HUD and HCD violated the Disaster Relief Appropriations Act of 2013 (P. L. 113-2, 127 Stat. 4), which states that funding appropriated by Congress for the Community Development Fund can be used for "necessary expenses related to disaster relief, long-term recovery, restoration of infrastructure and housing, and economic revitalization . . . for activities authorized under title 1 of the Housing and Community Development Act of 1974 (42 U.S.C. 5301 et seq.)." To prevail, Plaintiffs must establish that HUD's decision to award and ultimately release $28 million to HCD for the FWHP logging project was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A).

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[6] Defendants challenge Plaintiffs' standing to bring this claim, alleging Plaintiffs cannot challenge HUD's compliance with the Relief Act because they are "outside the zone of interests for those statutes." (Dkt. 35 at 14 (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129-32 (2014)).) This Order need not reach the standing question, however, because assuming Plaintiffs have standing, they still have not shown a likelihood of success or even a "substantial question" on the merits to justify a TRO.

Plaintiffs again fail to raise "serious questions" going to the merits on this claim for relief. In 42 U.S.C. § 5305(a), Congress enumerated 26 categories of activities eligible for assistance under community development, many of which are phrased quite broadly. Subsection (a)(2) for instance, the provision under which Defendants argue the FWHP falls, identifies as eligible activities:

> [T]he acquisition, construction, reconstruction, or installation (including design features and improvements with respect to such construction, reconstruction, or installation that promote energy efficiency) of public works, facilities (except for buildings for the general conduct of government), and site or other improvements.

Logging is certainly not expressly identified as an eligible activity. Yet the provision does broadly authorize "site or other improvements," which could plausibly encompass removing fuel which constitutes a severe fire hazard. Furthermore, when viewed within the purpose of the broader appropriations bill authorizing $60 billion for disaster relief and which explicitly conferred on HUD discretion to awards grants to local or state governments for disaster recovery, it was reasonable for HUD to conclude the logging currently underway would fall within the ambit of the statute and HUD's authority. Plaintiffs have therefore again failed to raise a "serious question" going to the merits in their final claim that HUD's grant of funds to the State of California for "disaster relief" and "long-term recovery" was arbitrary or capricious. *Alliance for Wild Rockies*, 632 F.3d at 1131. This makes it unnecessary to consider the remaining *Winter* elements of whether Plaintiffs will suffer irreparable harm; whether the balance of the equities tip in Plaintiffs' favor; or whether an injunction is in the public interest. *Association des Eleveurs de Canards et d'Oies du Quebec*, 729 F.3d at 944.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' request for a TRO is denied, and the case is hereby transferred to the Eastern District of California for all further proceedings, including the question of whether a preliminary injunction should issue, notwithstanding this denial of emergency injunctive relief.

IT IS SO ORDERED.

Dated: October 7, 2019

RICHARD SEEBORG
United States District Judge

United States District Court
Northern District of California