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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

LEAGUE OF WILDERNESS DEFENDERS / BLUE MOUNTAINS BIODIVERSITY PROJECT Plaintiff, v. SLATER R. TURNER, *et al.*, Defendants.	Case No. 2:16-CV-01648-MO RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION OR IN THE ALTERNATIVE FOR A TEMPORARY RESTRAINING ORDER [ECF No. 9] Date: October 6, 2016 Time: 11:00 a.m. Judge: Hon. Michael W. Mosman Place: Courtroom 16 Portland, Oregon

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CE	Categorical Exclusion
dbh	Diameter at Breast Height
DM	Decision Memorandum
EA	Environmental Assessment
EIS	Environmental Impact Statement
FOIA	Freedom of Information Act
LOS	Late and Old Structure
LRMP	Land and Resource Management Plan
MA	Management Area
NEPA	National Environmental Policy Act
NFMA	National Forest Management Act

Federal Defendants lodged the Administrative Record on September 9, 2016. ECF No. 7. Citations are to the bates-numbered page.

I. INTRODUCTION

The Walton Lake Restoration Project ("Project") authorizes commercial timber harvest, non-commercial thinning, hardwood enhancement treatments, and reforestation activities on 176 acres in the Ochoco National Forest. The Project is located entirely within a developed recreation area that receives thousands of visitors per year and is the most visited site in the Forest. The Project is necessary to improve public safety and forest health. Douglas-fir and grand fir in the Project area are infested with laminated root rot, a fungal infection that causes severe decay in the roots and rot in the base of the tree. The disease can cause trees to fall at any time and without warning, since infected trees often appear healthy. The Project also is necessary to thin the dense understory in dry mixed conifer stands. Thinning will reduce competition and stress in the stands, protect and improve the health of ponderosa pine, and reduce the area's susceptibility to a bark beetle outbreak and catastrophic wildfire.

After careful consideration of input from Agency experts and the public, the Forest Service authorized the Project on December 15, 2015, and finalized the contract on May 3, 2016. Work on the Project must begin this October as soon as the campground closes. The work is expected to take approximately four months to complete, but given the inevitable periods of inclement weather and the adverse soil conditions that follow storm events, the Forest Service expects the Project to take up to seven months to complete. If the Project is not implemented during the upcoming closure, the campground and recreation area will be closed in 2017 and until such time as the Forest Service can address the serious problem of laminated root rot.

Plaintiff filed this action on August 15, 2016 – nine months after the Forest Service authorized the Project and more than three and half months after the Forest Service told Plaintiff in writing that operations would begin this October. Plaintiff now seeks a preliminary injunction

against just the commercial timber harvest authorized by the Project.

The Court should deny the motion. Plaintiff cannot satisfy any of the elements for the extraordinary remedy of emergency injunctive relief under *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008). Plaintiff has failed to show a likelihood of success on the merits of its claims, or even serious questions under the lesser showing allowed in *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011). The Project complies with the National Forest Management Act because the Ochoco Forest Plan, as amended by the Regional Forester's Forest Plan Amendments Nos. 1 and 2 (the "Eastside Screens"), contains two exceptions that allow for the removal of large trees under the circumstances present here. The Project also complies with the National Environmental Policy Act because the Forest Service accurately informed the public about the Project and provided an opportunity to comment, and because the Forest Service appropriately determined that the Project falls within the Agency's categorical exclusion for a sanitation harvest.

Plaintiff cannot establish the three other elements under *Winter*. Plaintiff's allegation of imminent irreparable harm is undermined by its long delay in seeking injunctive relief. The Project is in the public interest because it addresses threats to public safety from trees infected with laminated root rot and from high fuel loads. It also reforests the area with a variety of native trees and shrubs and will enhance the recreation experience. Finally, the balance of hardships favors the Agency because the operating season is limited; if the Project does not begin this fall, the campground and recreation area will be closed next year. The Forest Service does not have the funds, personnel, or equipment to implement the Project itself.

The Walton Lake Restoration Project is important for both the Forest Service and the public. It should be allowed to proceed. The Court should deny Plaintiff's motion.

II. FACTUAL BACKGROUND

The Walton Lake recreation area is located on the Lookout Mountain Ranger District of the Ochoco National Forest in central Oregon and is about 200 acres in size. AR5862. The area provides a variety of activities for visitors, including fishing, hiking, and overnight camping. AR5862, AR5867. It is the most visited developed recreation site in the Forest. AR5869. Between May and October 2015, more than 14,500 people visited the Walton Lake recreation area. Declaration of Slater Turner, District Ranger ("Turner Decl.") ¶ 4. Comparable numbers are expected this year. *Id.* With so many visitors from a wide swath of the public, developed recreation sites such as Walton Lake demand the highest degree of public safety. AR6340.

While there are inherent risks in any natural setting, the area around Walton Lake presents particular challenges. The moist mixed conifer stands have a high incidence of laminated root rot, a native fungal condition that weakens the base of trees and causes trees to break off and fall at any time, without warning. AR5862, AR6349; *see* AR6316-20 (Forest Health Biological Evaluation). Many diseased trees show no visible symptoms until they fall. AR6340, AR6349. In natural settings, this process creates wildlife habitat and contributes to soil production, but in recreation areas the process creates hazards to public safety from falling trees and from increased fuels on the ground in the event of a wildfire. AR5862. The Forest Service mitigates hazard trees on an annual basis, but because of the nature of the infection, the problem of laminated root rot at Walton Lake is now so severe the Agency must take immediate and comprehensive action if the campground is to remain open. AR6340; Turner Decl. ¶¶ 7, 9, 10.

The dry mixed conifer stands and ponderosa pine stands in the recreation area present a different challenge. The understory of the large, legacy ponderosa pine is crowded with shade-tolerant fir, which compete with the larger trees for resources. AR5862. This competition

stresses all trees and makes them susceptible to infestations from bark beetles, which can cause mass mortality and increase fuel load in the area. AR5862, AR6349. The area is highly vulnerable to an outbreak. AR6314. An estimated 91% of the large ponderosa pines in the Project area are currently growing under conditions of elevated density, and some areas are two to three times the recommended guidelines. *Id.*

To address these risks to visitor safety and forest health, the Forest Service developed the Walton Lake Restoration Project. The Project uses commercial timber harvest to remove the host species (Douglas fir and grand fir) in moist mixed conifer stands while retaining and enhancing ponderosa pine and larch. AR5863. Fir of all sizes will be removed, although some groups of fir will be retained. *Id.* Ponderosa pine, larch, and native shrubs will be replanted throughout, and in particular between the retained firs to curtail the spread of laminated root rot. *Id.* Within the dry mixed conifer areas, the Project thins the understory through commercial and non-commercial harvest to maintain and protect existing old growth ponderosa pine. *Id.* To inform the decision on whether and how to proceed, the Forest Service prepared a number of specialist reports, including a Forest Health Biological Evaluation (AR6314-31), a Recreation Resource Report (AR6340-45), and a Fire and Fuels Report (AR6123-27).

The Forest Service engaged in extensive public outreach as part of the Project. The Agency mailed a detailed scoping package to approximately 200 individuals, organizations and agencies. AR5862-69; AR5870-76. The Forest Service issued a media release, posted flyers in the campground, and provided information on social media. AR5868-69, AR5877-86, AR5889-91. Three local news outlets reported on the Project in June 2015. AR 5887-78, AR5896, AR5897-99. Twelve individuals or organizations (including Plaintiff) submitted written comments on the proposed Project. *See* AR5892-6036 (index including comments), AR5970-99

(Plaintiff's comments); AR6368-87 (response to comments). The Forest Service also organized a field trip for mid-August 2015 and invited the Ochoco Forest Restoration Collaborative and each of the commenters. AR6049, AR6058-59. Three individuals or representatives participated in the field trip and provided their views to the Forest Service. AR6084.

After careful consideration of input from the Agency's experts and the public, the Forest Service determined that the Project does not individually or cumulatively have a significant effect on the environment and did not require either an environmental impact statement ("EIS") or an environmental assessment ("EA") under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370(h). AR6354. The Forest Service determined that the proposed action fell within the sanitation harvest categorical exclusion ("CE"), which allows "[c]ommercial and non-commercial harvest of trees to control insects or disease not to exceed 250 acres, requiring no more than ½ mile of temporary road construction, including removal of infested/infected trees and adjacent live uninfested/uninfected trees as determined necessary to control the spread of insects or disease." 36 C.F.R. 220.6(e)(14). The Forest Service evaluated resource conditions to determine if extraordinary circumstances were present that would require documentation in an EA or EIS and found none. AR6354-57. The Forest Service also determined that the Project complied with the Forest Plan and was not subject to the Eastside Screens, which generally prohibit timber harvest of trees greater than 21-inches diameter at breast height ("dbh"), because sales to protect health and safety, and sales to modify vegetation within recreation special use areas, are specifically exempt from the Eastside Screens. AR6359.

The District Ranger signed the Decision Memo on December 15, 2015. AR6349-91. The Project authorizes timber harvest, pre-commercial thinning, hardwood enhancement treatments, and reforestation activities on 176 acres, all of which are located within the Forest

Plan's Developed Recreation Area, MA-F13. AR6349. The density of the area will be variably thinned, and tree species of all classes and sizes will be maintained to add to the visual diversity of the area. AR6361. In the dry mixed conifer areas, young fir greater than 21-inches dbh may be removed if they are growing within 30 feet of old growth ponderosa pine. AR6361. Fir that are determined to be old trees (150 years or greater) will not be removed. *Id.* The four broad treatment blocks from the scoping notice were subdivided into eight treatment units after field review and further investigation. AR6357; *see* AR6358 (Table 1). Within the three weeks after the Decision Memo was signed, the Forest Service informed interested citizens by email or letter (including those who commented), issued a press release, and posted to social media. AR6392-400, AR6403-05. Three local news outlets carried stories about the decision. AR6401-02, AR6406-07, AR6409-10.

The Forest Service awarded the contract on May 3, 2016. AR6653-56. The following day the Forest Service advised Plaintiff by email that "[t]he work is planned to start this fall after the campground is closed." AR6657. Prior to this notification, Plaintiff and the Forest Service corresponded about the timing of the Project. *See* AR6642-52.

Plaintiff filed this action on August 15, 2016, and alleged four violations of NEPA and three violations of the National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1600-1614. Complaint ("Compl."), ECF No. 1. Plaintiff then moved for emergency injunctive relief on September 13, 2016. Pl.'s Mot. for Prelim. Inj. ("Pl.'s Mot."), ECF No. 9. Plaintiff presents four of the seven claims from its Complaint and seeks to enjoin the commercial timber harvest authorized in units 1 through 5.[1] Pl.'s Mot. 1.

[1] Three of the seven counts in Plaintiff's Complaint are not before the Court: Claim 1, Count 2 (NEPA, extraordinary circumstances) and Count 4 (NEPA, preparation of an EA or EIS); and Claim 2, Count 3 (NFMA, compliance with Forest Plan management goals). Pl.'s Mot. 2 n.1.

III. STATUTORY BACKGROUND AND STANDARD OF REVIEW

A. Review of agency action under the Administrative Procedure Act.

In order to prevail in a challenge brought under the Administrative Procedure Act, a plaintiff must show that the agency's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2009) (en banc), *rev'd on other grounds by Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). An agency action will be upheld if the agency has considered the relevant factors and articulated a rational connection between the facts found and choice made. *Bal. Gas & Elec. v. Nat. Res. Def. Council*, 462 U.S. 87, 105 (1983). The scope of review is narrow and the court is not to substitute its judgment for that of the agency. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 29-30 (1983); *accord Earth Island Inst. v. Carlton*, 626 F.3d 462, 468-69 (9th Cir. 2010).

B. National Environmental Policy Act

NEPA is a procedural statute that requires the federal government to carefully consider the impacts of, and alternatives to, federal actions significantly affecting the environment. 42 U.S.C. §§ 4321, 4331. Its purpose is to ensure that federal agencies take a "hard look" at the environmental consequences of their proposed actions before deciding to proceed. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350–51 (1989). Although NEPA establishes procedures by which agencies must consider the environmental impacts of their actions, it does not dictate the substantive results of agency decision making. *Id.* at 350. Courts may not impose themselves "as a panel of scientists that instructs the [agency] ..., chooses among scientific studies ..., and orders the agency to explain every possible scientific uncertainty." *McNair*, 537 F.3d at 988. "When specialists express conflicting views, an agency must have discretion to rely

on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Id.* at 1000.

C. National Forest Management Act

NFMA and its implementing regulations provide for forest planning and management on two levels: (1) the forest and (2) the site-specific project. 16 U.S.C. § 1604; *see also Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 729–30 (1998). On the forest level, the Forest Service develops a Land and Resource Management Plan ("LRMP" or "forest plan"), which consists of broad, long-term plans and objectives for the entire forest. Forest plans are designed to manage forest resources by balancing the consideration of environmental and economic factors. *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 966 (9th Cir. 2003). After a forest plan is approved, site-specific project decisions must comply with the forest plan. 16 U.S.C. § 1604(i); *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1092 (9th Cir. 2003). The Forest Service's interpretation and implementation of its own forest plan is entitled to substantial deference. *Forest Guardians*, 329 F.3d at 1097. Agency decisions challenged under NFMA may be set aside only if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *Id.* at 1096–97. The Forest Service's "interpretation and implementation of its own forest plan is entitled to substantial deference." *Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836, 850 (9th Cir. 2013).

D. Emergency injunctions are extraordinary remedies.

An injunction is "an extraordinary remedy that may only be awarded upon a *clear showing* that the plaintiff is entitled to such relief." *Earth Island*, 626 F.3d at 469 (quoting *Winter*, 555 U.S. at 22) (emphasis added). "A plaintiff seeking a preliminary injunction must establish 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." *Am. Trucking Ass'ns*, 559 F.3d at 1052 (quoting *Winter*, 555 U.S. at 20). In balancing the relative hardships, there is no presumption that environmental harm should outweigh harm to others or the public interest. *McNair*, 537 F.3d at 990 ("[W]e decline to adopt a rule that any potential environmental injury automatically merits an injunction, particularly where, as in this case, we have determined that the plaintiffs are not likely to succeed on the merits of their claims.").

Alternatively, "'serious questions going to the merits' [rather than a likeliness of success on the merits] and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met." *All. for the Wild Rockies*, 632 F.3d at 1132. Under either test a plaintiff must "establish that irreparable harm is *likely*, not just possible, in order to obtain a preliminary injunction." *Id.* at 1131. The showing required for a temporary restraining order is the same as that required for a preliminary injunction. *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 (9th Cir. 2001).

IV. ARGUMENT

A. Plaintiff is not likely to succeed on the merits of its claims.

An essential factor in obtaining emergency injunctive relief is for a party to establish that it is likely to succeed on the merits. *Winter*, 555 U.S. at 20). Alternatively, a party must present "serious questions going to the merits." *All. for the Wild Rockies*, 632 F.3d at 1132. Plaintiff has failed to satisfy either of these standards, and the Court should deny the request for emergency relief on this basis alone.

1. The Forest Service complied with NFMA because the Agency properly applied two exceptions to the Eastside Screens.

Plaintiff alleges the Forest Service violated NFMA because the Agency improperly relied

on two forest plan exceptions to authorize harvest of trees greater than 21-inches dbh in most of the Project area. Pl.'s Mot. 12-19.[2] Plaintiff is wrong. The Forest Service correctly interpreted its own forest plan to authorize the removal of large trees where necessary to protect public safety, forest health, and the campground concession.

The Forest Service issued the Forest Plan for the Ochoco National Forest in 1989. AR2184-253 (Record of Decision), AR0022-1398 (final EIS). The Regional Forester's Forest Plan Amendments No. 1 and 2, known as the "Eastside Screens," amended the Forest Plan in 1994 and 1995. AR2409-548. The Eastside Screens are a set of interim riparian, ecosystem, and wildlife standards for timber sales applicable to public lands east of the Cascade Mountains. AR2447, AR2549. The Screens prohibit timber harvest of late and old seral and/or structural ("LOS") trees 21-inches dbh or greater. *Lands Council v. Martin*, 529 F.3d 1219, 1223 (9th Cir. 2008) ("In short, the Forest Plan prohibits the harvest of old-growth 'live trees.'"). There are exceptions to this general prohibition. AR2447. The two exceptions relevant to this action are "sales to protect health and safety" and "sales to modify vegetation within recreation special use areas." AR2447, AR6359. Absent an applicable exception, the Forest Service must apply the screens to determine whether it can harvest trees greater than 21-inches dbh without amending the Forest Plan. *See* 16 U.S.C. § 1604(i) (projects "shall be consistent with the land management plans"); *id.* § 1604(f)(4) (forest plans may "be amended in any manner whatsoever").

The Forest Service determined that the Project is not subject to the Eastside Screens "because sales to protect health and safety, and sales to modify vegetation within recreation

[2] Plaintiff's brief contains twenty-nine footnotes, many of them substantive in nature. Had these footnotes been included in the body of the brief and formatted according to the Local Rules, they would total almost six pages, which would make Plaintiff's brief exceed the thirty-five page limit under the Local Rules. This is not allowed absent a word count certification. LR 7-2(b)(1).

special uses areas are specifically exempt from the Eastside Screens…." AR6359. The parties agree that the latter exception allows removal of trees greater than 21-inches dbh within the campground concession. *Id.*; Pl.'s Mot. 18-19. The campground concession is bounded by Forest Road 2220 and includes the access road to Walton Lake. The campground concession is approximately 68.8 acres, or 39% of the 176-acre Project. *See* AR5866-67; Turner Decl. ¶ 5. The treatment units located within the campground concession are all of unit 7 and portions of units 1, 2, 3, 4, and 6. *See* AR6390 (map, showing units bounded by Forest Road 2220).

The parties disagree, however, over the applicability of the "protect health and safety" exception to the Eastside Screens. Plaintiff argues the exception can only be relied on to protect public health, not forest health, and thus does not apply to most of the Project area. Pl.'s Mot. 13-18. Plaintiff's interpretation of the exception is at odds with both Eastside Screens themselves and with the Forest Service's rational application of the exception to the Project.

Plaintiff's argument that the health and safety exception "only applies to the removal of roadside or campground hazard trees" relies on a parenthetical in an August 18, 1993 letter that pre-dates the final Eastside Screens decision. Pl.'s Mot. 14 (citing AR2285) (1993 letter exempting "[s]ales made to protect health and safety (roadside or campground hazard trees)"). This parenthetical is not contained in the final language of the 1994 EA for the Eastside Screens, which states that the Forest Service is adopting a proposed action that is a modified version of the 1993 letter. AR2264, AR2436. In addition to not including this parenthetical from the 1993 letter, the 1994 EA contains four exceptions whereas the 1993 letter contains only three. *Compare* AR2447 (including "sales to modify vegetation within recreation special use areas") *with* AR2285 (1993 letter excluding the exception); *see* AR2353-54 (May 26, 1994 letter explaining addition of fourth exception).

More importantly, the Forest Service revised the 1994 Eastside Screens direction the following year. AR2409-548 (June 1995 Revised EA), AR2549-58 (June 1995 Revised Decision Notice). The 1995 revision was necessary, in part, because the 1994 direction classified stands of large and old trees filled with dense understory as LOS and not available for harvest. AR2415. The Forest Service stated

> similarly incongruent [with the intent of the 1994 direction] was the inability to remove, or at least thin, the dense understory in the stands of large trees, often stressed and threatened with fire, insect and disease risk. The 1994 interim direction intended that harvest, specifically thinning, should occur in these types of stands. Clearly, the structural changes in the 1994 interim direction did not accurately portray the eastside forest settings.

AR2415-16. The Forest Service found that the 1994 direction "as written may put at risk some important old-growth features in some environments." AR2416. The Forest Service then explained how dense understory stresses entire stands and makes them more vulnerable to threats from drought, insects, disease, and catastrophic fire. AR2420-21. The Forest Service also explained how timber harvest removing dense understory improves forest health, preserves LOS characteristics, and decreases the risk of catastrophic wildfire. AR2432. Nothing in the revision said that the Forest Service could not remove trees greater than 21-inches dbh when the objective is to treat dense understory to improve forest health and protect old-growth features. Indeed, the forest health standards and guidelines for allowable treatment options for pests in developed recreation areas (such as MA-F13) instruct the Forest Service to "[u]tilize all methods to prevent or suppress insect and disease outbreaks. Emphasize detection and treatment of bark beetle and root disease occurrences, as these relate to providing a safe environment." AR1590.

The silvicultural treatments in the Project Decision Memo explain how the select removal of trees greater than 21-inches dbh will enhance old-growth features and protect forest health. AR6361-63. In units 1 and 5, the major emphasis includes "[m]aintain existing old growth

ponderosa pine trees by reducing stand densities and reducing susceptibility to bark beetles and crown fires." AR6361. Young fir trees greater than 21-inches dbh "may be removed where they are growing within 30 feet of old growth ponderosa pine trees." *Id*. Old fir (150 years and older) will not be removed. *Id.* The treatment "is designed to restore historic species compositions as well as increase the resiliency of existing old trees." *Id.* In units 2, 3, and 4, almost all fir are removed because they are highly susceptible to laminated root rot, which is present throughout the units. AR6358, AR6362-63. In addition to removing species that are at high risk of becoming future safety hazards, the removal of fir reduces stand density and helps maintain existing old growth ponderosa pine. AR6362. The proposed activities are consistent with the forest plan, as amended by the Eastside Screens. The Forest Service's interpretation of its own forest plan is entitled to substantial deference. *Forest Guardians*, 329 F.3d at 1097.

Plaintiff claims that the forest plan uses "'health and safety' in the context of public human health and safety." Pl.'s Mot. 14 (citing AR1614). Plaintiff takes this quotation out of context, as the cited portion applies to the provision of facilities, not management actions. AR1614 ("Provide facilities needed to protect public health and safety (e.g., portable toilets, campfire rings), and for environmental protection."). Furthermore, The Forest Service's interpretation of the exception does not "swallow the rule" as Plaintiff claims. Pl.'s Mot. 14 n.9. It is a narrow interpretation consistent with the 1995 revision that found the failure to thin (including select removal of large trees) could threaten the very old-growth features that the Eastside Screens protect. AR2415-16. The Eastside Screens simply do not define or limit application of the "protect health and safety" exception to human health and safety.

Even if the Court were to find that the exception applies only to public human health, it would still cover the entire Project area. The Project area is heavily visited and located entirely

within the Developed Recreation management area MA-F13. AR6349. The management area prescription requires the Forest Service to "[p]rovide safe, healthful, and aesthetic facilities for people to utilize, within a relatively natural outdoor setting, while they are pursuing a variety of recreation experiences." AR0170 (LRMP description for MA-F13: Developed Recreation). The Recreation Resource Report prepared for the Project states that "[d]eveloped recreation sites demand the highest degree of public safety" and called attention to the threat of trees weakened by laminated root rot. AR6340. The Report also states that the Project would reduce fuel load "to prevent catastrophic fire events, thereby benefitting long-term recreation in the area." AR6342. The exception has little applicability elsewhere on the Forest, since all of Management Area MA-F13 totals just 1,180 acres, or approximately 0.14% of the 844,640 acre National Forest. AR0038, AR1507. Even Plaintiff concedes the exception "may apply to portions of the project (e.g. campground and roadsides)." Pl.'s Mot. 13. But it makes no sense to then limit the reduction of known threats to just campgrounds and roadsides, as Plaintiff urges, when the entire Project area is located within a developed recreation area where visitors recreate away from campgrounds and off roads and trails.

Finally, Plaintiff claims that guidance from 2003 and 2015 requires a forest plan amendment if the Forest Service wants to remove trees greater than 21-inches dbh. Pl.'s Mot. 15-16 (citing AR2846-47; Decl. of Jesse Buss Ex. 1 at 1, ECF No. 13-1). This guidance provides a number of "[e]xamples of where amendments may be appropriate." AR2847. It does not provide a list of situations where amendments are required. *Id.* As discussed above, two of the four exceptions in the Eastside Screens apply to the small acreage harvested by this Project. No forest plan amendment is needed because the Project is consistent with the Forest Plan, as amended by the Eastside Screens. *Forest Guardians*, 329 F.3d at 1092.

Clearly, the Eastside Screens allow the exception to be applied to address both public safety and forest health. The Agency reasonably interpreted the exception to "protect health and safety" to apply to the entire Project. *Great Old Broads for Wilderness*, 709 F.3d at 850. Plaintiff has not shown a likelihood of success or even serious questions on its NFMA claim.

2. The Forest Service scoped the Project in accordance with NEPA.

Plaintiff alleges the Forest Service violated NEPA because it did not properly scope the Project. Pl.'s Mot. 21-27. Specifically, Plaintiff alleges the Forest Service "failed to properly inform members of the public of the scale and impacts of the proposed logging" and "failed to disclose its intent to use exceptions to the Eastside Screens to log trees greater than 21-inch dbh." Pl.'s Mot. 21. The record directly contradicts these allegations.

NEPA requires federal agencies to "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures." 40 C.F.R. § 1506.6(a). As part of NEPA's public involvement process, an agency must conduct "an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action." 40 C.F.R. § 1501.7. The Forest Service conducts this process (known as scoping) for all proposed actions, including actions falling within CEs. *Alaska Ctr. for the Env't v. U.S. Forest Serv.*, 189 F.3d 851, 858 (9th Cir. 1999); 36 C.F.R. § 220.4(e). The purpose of the scoping period is to "notify those who may be affected by a proposed government action…this notice requirement ensures that interested parties are aware of and therefore are able to participate meaningfully in the entire [NEPA] process, from start to finish." *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1116–17 (9th Cir. 2002), *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011). Neither NEPA nor Forest Service regulations set forth specific procedures for scoping. *Id.* at 1117 ("[T]he affirmative

duties NEPA imposes on a government agency during the scoping period are limited."); *see* 36 C.F.R. §§ 220.4(e), 220.6(c).

The crux of Plaintiff's scoping claim is that the Forest Service did not inform the public of the proposal to remove all Douglas-fir and grand fir trees from Block 1, including those greater than 21-inches dbh. *See* Pl.'s Mot. 21-27. This allegation is directly contracted by the clear language of the scoping notice, which states:

> Within the moist mixed conifer areas (Block 1 on Map 2, enclosed), the objective is use commercial harvest *to remove the host species (Douglas-fir and grand fir)* while retaining and enhancing any ponderosa pine or western larch. Activities would include:
>
> - Harvest of Douglas-fir and grand fir *of all sizes* that are within striking distance of Forest Road 2220.
> - Further into the stand, harvest of fir *of all sizes* to create openings within which ponderosa pine, western larch, and native shrubs would be planted following harvest; some areas would be left unplanted to encourage the growth of native wildflowers.
> - Harvest of fir *of all sizes* around large ponderosa pine and western larch.

AR5863 (emphasis added); AR5862-69 (scoping notice). Proposing to "remove the host species" and harvest Douglas-fir and grand fir "of all sizes" means that the Project proposes to remove *all* Douglas-fir and grand fir trees from Block 1, including those greater than 21-inches dbh. Plaintiff's cherry-picking of phrases from the above block quotation fails to show that the Forest Service misrepresented the Project. *See* Pl.'s Mot. 23-24 (quoting segments of AR5863).

Plaintiff also complains that the scoping notice did not inform the public that trees greater than 21-inches dbh could be removed from Block 3. Pl.'s Mot. 25 n.20. Not so. The scoping letter states:

> [w]ithin the dry mixed conifer and ponderosa pine stands (Blocks 2, 3 and 4 on Map 2, enclosed) the objective would be to reduce the risk of bark beetle infestation and competitive stress of legacy ponderosa pine by commercially and non-commercially thinning the understory….Commercial and precommercial thinning is proposed in Block 3 surrounding legacy ponderosa pine.

AR5863. Nothing in this description imposes any limitation on the diameter of trees that may be thinned. Plaintiff quibbles about news releases that refer to thinning rather than the full description of the proposed activities in the scoping notice. Pl.'s Mot. 23-24. But media releases necessarily need to be brief, and all of the Forest Service's news releases contain links to a website that provided more information about the Project and how the public could provide comments. *See* AR5878, AR5880 (news release providing website and email address); AR5889 (Twitter post with link); AR5891 (Facebook post with website).

Importantly, Plaintiff cannot show that it was prejudiced by the information contained scoping notice. Plaintiff clearly understood that the Project proposed to remove all Douglas-fir and grand fir from moist mixed conifer areas and thin the understory in dry mixed conifer and pine stands, including trees greater than 21-inches dbh. Plaintiff's scoping comments state:

> The proposed thinning would log large, old growth trees including Douglas fir, and Grand fir. The Forest Service proposes to retain mostly Ponderosa pine and Western larch, and to replant after project completion with these industry-preferred tree species. Grand fir and Douglas fir are targeted for removal, even though these trees species are abundant as large, old growth legacy trees in an area (Block One) that is obviously historic moist mixed conifer.
> ….
> The Walton Lake area proposed for commercial logging is magnificent old growth forest with Ponderosa pines up to 61" diameter at breast height trees (dbh), Douglas firs up to 60" dbh, and Grand firs up to 57" dbh. This proposed timber sale is an effort to get away with logging large old trees in a popular recreation area. It's a violation of the Forest Plan's Eastside screens to log live trees >21" dbh that are not officially defined OSHA "hazard trees", so this timber sale would violate the Forest Plan.

AR5970. Plaintiff submitted a number of photos with its scoping comments (AR5982-99), including photos of one of the declarants with her arms around or sitting beside large diameter trees. AR5989-90. And the same declarant was quoted in a local news story about Plaintiff's opposition to the removal of large trees. AR5897-98. Plaintiff has not shown a NEPA violation during scoping because it "clearly participated in the project and communicated [its] views."

Nw. Coal. for Alts. to Pesticides v. Lyng, 844 F.2d 588, 596 (9th Cir. 1988). The Forest Service fully disclosed the scope of the Project to the public.

Plaintiff alleges the Forest Service selected a CE to avoid an objection period. Pl.'s Mot. 22 at n.15 (citing AR5813). Plaintiff does not allege bad faith, and any such allegation is baseless. The page of notes cited by Plaintiff shows a discussion of possible implementation dates, and indicates that a CE decision can be implemented immediately because there is no objection period. AR5813. Subsequent lines show that the Forest Service would use the responses to scoping to assist the Agency in determining whether a CE was appropriate. *Id.* The same notes show that another option was an EA, but that would mean the Project could not be implemented this year. *Id.* Furthermore, Plaintiff participated in the scoping process and provided its views to the Agency. Plaintiff has failed to show that the Forest Service's consideration of a CE was done to avoid public participation or resulted in prejudice. *See Cent. Delta Water Agency v. U.S. Fish & Wildlife Serv.*, 653 F. Supp. 2d 1066, 1087 (E.D. Cal. 2009) ("Absent an allegation of bad faith, which is not made, procedural irregularities in the early stages of the NEPA process cannot result in harm because Plaintiffs will have additional legally-guaranteed opportunities to participate.").

Plaintiff and the public had adequate notice of the Project, which in turn enabled meaningful participation in the decision process. *Kootenai Tribe*, 313 F.3d at 1116-17. Plaintiff has not shown either a likelihood of success or serious questions on the merits of its NEPA scoping claim.

3. The Forest Service's interpretation of the sanitation harvest categorical exception is entitled to deference.

Plaintiff's second NEPA claim is that the Forest Service erroneously applied the sanitation harvest CE to the Project. Pl.'s Br. 27-31. Plaintiff presents a strained interpretation

of the CE and fails to show that the Forest Service's application is arbitrary and capricious.

"[A]n agency's interpretation of the meaning of its own categorical exclusion should be given controlling weight unless plainly erroneous or inconsistent with the terms used in the regulation." *Alaska Ctr. for Env't*, 189 F.3d at 857; *See Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1456 (9th Cir. 1996) (arbitrary and capricious standard "applies to an agency's determination that a particular action falls within one of its categorical exclusions"). The sanitation harvest CE used here allows

> [c]ommercial and non-commercial harvest of trees to control insects or disease not to exceed 250 acres, requiring no more than ½ mile of temporary road construction, including removal of infested/infected trees and adjacent live uninfested/uninfected trees as determined necessary to control the spread of insects or disease. The proposed action may include incidental removal of live or dead trees for landings, skid trails, and road clearing.

36 C.F.R. 220.6(e)(14). The exclusion enumerates two examples that include, but are not limited to, harvest of trees infested with southern pine beetles and removal of trees affected by a new disease. *Id.* As explained in the Interim Directive that established the sanitation harvest, the exclusion "allows commercial and non-commercial felling and removal of any trees necessary to control the spread of insects and disease" and "allows the agency to apply harvest methods to control insects and disease before they spread to adjacent healthy trees." NEPA Documentation Needed for Limited Timber Harvest, 68 Fed. Reg. 44,598-01, 44,598 (July 29, 2003). The exclusion "permit[s] timely response to small timber harvest requests and to forest health problems involving small areas of National Forest System land." *Id*. at 44,606.

The Forest Service found that the CE "is appropriate because the proposed action involves sanitation harvest on less than 250 acres utilizing less than ½ mile of temporary roads." AR6354. The need to control insects and disease is well-documented in the Decision Memo and elsewhere in the Project record. *See e.g.*, AR6349 (decision memo), AR5862 (scoping notice),

AR6314-15 (Forest Health Biological Evaluation). The Project involves commercial and non-commercial thinning on 176 acres that will use 0.41 miles of temporary roads, which will be closed and seeded with native grasses after Project completion. AR6349-50. The Project clearly falls within the sanitation harvest CE. The application of this CE to the Project is not arbitrary and capricious. *Bicycle Trails Council*, 82 F.3d at 1456.

Plaintiff disagrees with the Forest Service's interpretation and argues that the CE does not allow the removal of live healthy trees. Pl.'s Mot. 27. Plaintiff's interpretation is wrong. First, Plaintiff's interpretation relies on the presumption that the phrase in the CE "*including* removal of infested/infected trees and adjacent live uninfested/uninfected trees" means that the Forest Service is *limited* to the removal of infested/infected trees and adjacent live uninfested/infected trees. But the phrase provides an illustration of what the Forest Service may do to control the spread of insects and disease, not the only activity it may do. Plaintiff raises an unfounded concern that use of the CE for preventive measure will lead to "a sequence of 'small' preventative projects that never trigger more complete NEPA documentation." Pl.'s Mot. 29 n.22. The very nature of CEs is that they are actions which do not, individually or cumulatively, have a significant effect on the human environment. 40 C.F.R. § 1508.4. The Project does not have any cumulative effects, and Plaintiff has not shown or argued otherwise.

Second, even if this phrase prescribed what the Forest Service should do to control the spread of insects or disease, laminated root rot is present "throughout" three of the units (2, 3, and 4) and in isolated locations in another three units (1, 5, and 8). AR6358; *see* AR6314 (laminated root rot is "widespread throughout units 2, 3, 4."); AR6391 (map showing severity). Bark beetles have not yet infested the Project area, but the area is highly vulnerable to an outbreak. AR6314. An estimated 91% of the large ponderosa pines in the Project area are

currently growing under conditions of elevated density, and two of the units (1 and 6) are two to three times the recommended guidelines. *Id.* Additionally, the beetles are present throughout Oregon. AR4271. Plaintiff's argument that live trees can only be removed if they are "near or close to, but not necessarily touching," Pl.'s Mot. 29, makes no sense in the forest environment. All of the units in the small Project area are adjacent to one another. AR6390 (map). And as Plaintiff itself partially acknowledges, a previous restriction of a set number of tree lengths was expressly removed to provide the Agency with the flexibility necessary to deal with outbreaks of a wider variety of pests – not just those that are fast moving. *See* Pl.'s Mot. 30 n. 24 (citing 68 Fed. Reg. at 44,598-01).

Third, Plaintiff ignores that trees identified for removal are "as determined necessary to control the spread of insects or disease." *See* 36 C.F.R. 220.6(e)(14). Five Forest Service scientists analyzed the threat to the Project area from laminated root rot and western pine beetle. AR6314-31 (Forest Health Biological Evaluation). The evaluation provided a detailed description of the problem in each management unit and recommended the actions that are being implemented by the Project. AR6320-22. The evaluation concluded, "[p]roactive management at Walton Lake is important to protect the longevity of the large ponderosa pine and long term visitor safety." AR6323. Here, the Forest Service determined that the Project is necessary to control the spread of insects and disease in a highly visited site. Plaintiff presents no other opinions on how to assess or address the threats to forest health and visitor safety. But even if it did, the Forest Service's analysis of the threat and treatment options implicates a high level of technical expertise to which courts must defer. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377 (1989); *see also Balt. Gas & Electric Co.*, 462 U.S. at 103 ("When examining this kind of scientific determination ... a reviewing court must generally be at its most deferential").

Plaintiff claims the Forest Service incorrectly applied the CE because it "does not line up" with the two examples listed in the sanitation harvest CE. Pl.'s Mot. 30. But the CE provides examples that "include, but are not limited to" the two listed examples and are not exclusive. 36 C.F.R. 220.6(e)(14). Plaintiff's citation to *West v. Secretary of the Department of Transportation* is inapposite. Pl.'s Mot. 30 (citing 206 F.3d 920, 928 (9th Cir. 2000)). In *West*, it was undisputed that the challenged highway interchange did not fit within any of the agency's defined CEs. 206 F.3d at 927. The parties disagreed over whether the interchange was covered by a separate, more general category known as a "documented categorical exclusion." *Id.* at 928. The court held that it was not because of the magnitude of the project—an entirely new, $18.6 million, four-lane, fully-directional interchange constructed over a former Superfund site and requiring 500,000 cubic yards of fill material. *Id.* Here, the parties dispute whether one of the Forest Service's defined CEs applies to the Project and specific provisions of that CE.

Plaintiff's citation to two other cases where courts upheld the application of the sanitation harvest CE likewise do not show that the Forest Service's use of the CE here is arbitrary and capricious. Pl.'s Mot. 30-31, 31 n.26 (citing *Utah Envtl. Cong. v. Bosworth*, 443 F.3d 732, 735 (10th Cir. 2006) and *Conservation Cong. v. U.S. Forest Serv.*, No. CIV 2:12-2416-WBS-KJN, 2013 WL 2457481 at *9 (E.D. Cal. June 6, 2013)). To the contrary, the two cases support the application of the CE here because the Forest Service provided a reasoned explanation for the application of the exclusion that is consistent with the terms of the CE. *Alaska Ctr. for Env't*, 189 F.3d at 857.

The Forest Service correctly applied the sanitation harvest CE to the Project. Plaintiff has failed to show a likelihood of success, or even serious questions, on its NEPA challenge to the applicability of the CE.

In sum, the thoroughness of the Forest Service's analysis throughout the process, and measures to involve the public, shows not only compliance with NEPA and NFMA, but that the Agency has given due consideration to the environmental impacts of the Project. Plaintiff presented what it thinks are its four best claims from its Complaint (out of seven), and none show either a likelihood of success or even serious questions on the merits. The Court should deny Plaintiff's motion for a preliminary injunction.

B. Plaintiff has not shown imminent and irreparable harm.

Plaintiff fails to carry its burden "to demonstrate that irreparable injury is likely in the absence of an injunction." *Winter*, 555 U.S. at 22. Plaintiff's allegations of injury focus on the removal of trees and its members' desire to experience and recreate in the Forest it its "undisturbed state." Pl.'s Mot. 8-10. Plaintiff's allegations and declarations are insufficient here due to Plaintiff's long delay in filing this action and in seeking emergency relief as well as the developed nature of the Project area.

Plaintiff's long delay in bringing suit – and seeking emergency relief – significantly undermines its claim of irreparable harm. *Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) (delay "implies a lack of urgency and irreparable harm"); *Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984) ("A delay in seeking a preliminary injunction is a factor to be considered in weighing the propriety of relief"). The Forest Service issued the Decision Memo on December 15, 2015, and informed interested citizens by letter on the same day. AR6349-91, AR6392. The following week, the Forest Service emailed interested citizens, issued a press release, and posted information on its website and in social media. AR6393, AR6398, AR6403-05. Three local news outlets carried stories about the decision by the first week in January 2016. AR6401-02, AR6406-07, AR6409-10.

Plaintiff then waited nine months to file suit. *See* Compl. (filed Aug. 15, 2016). During this time, Plaintiff received responsive documents from the Forest Service under the Freedom of Information Act ("FOIA") and corresponded with the Agency about the timing of the Project. AR6411-641 (Feb. 23, 2016 FOIA response), AR6642 (email correspondence from March and April). On May 4, the day after the Forest Service awarded the contract, the Agency emailed Plaintiff and said the Project "is planned to start this fall after the campground is closed." AR6657; AR6653-56 (contract). Plaintiff then sat on its hands for more than three months before filing this action.

Plaintiff clearly contemplated legal action long before filing suit in August. In addition to the January FOIA request (AR6411), the Administrative Record contains correspondence dated June 28 and 29 between the Forest Service and an individual who, at the time of the exchange, worked as a law clerk in the law school clinic of one of Plaintiff's current counsel.[3] AR6663-66. Yet neither Plaintiff nor its counsel acted with any haste until late August, when the Project was scheduled to begin in less than two months.

Plaintiff may claim in its reply that the changing timeline for Project implementation delayed its decision to file this action. *See* Pl.'s Mot. 7. While the Agency had hoped to implement the Project before the campground opened in May 2016, weather conditions (including a late snowstorm) prevented layout and cruise of the Project area and preparation of the contract.[4] Turner Decl. ¶ 13; AR6646-47 (April 28 email from Forest Service to Plaintiff stating "[w]ork in May is not dependent on weather, the issue is contracting and whether the

[3] *See* https://law.lclark.edu/live/news/33430-meet-2l-tessa-chillemi-legal-clerk-with-earthrise (last visited Sept. 26, 2016). Print out of webpage available upon request.

[4] "Layout" establishes the boundary around a treatment area or unit. "Cruising" is an estimate of timber volume in board feet (12" wide x 12" long x 1" thick).

contract issued has the ability to work a little in May or they will need to do it all at once in fall/winter."). The Forest Service issued the decision as soon as it could complete a thorough analysis of the environmental effects and provide sufficient notice to the public. Turner Decl. ¶ 12. Once the campground closes for the season on October 15, the Forest Service will have the first opportunity to implement the Project under the contract issued on May 3. *Id.* ¶ 13; AR6653-56 (contract). Plaintiff cannot rebut the fact that it could have filed this cause of action after the decision issued on December 15, 2015. Nor can Plaintiff rebut the fact that it knew for certain in early May that the Project would begin this October. Plaintiff's delay is inexcusable.

Plaintiff's claim of irreparable harm to its "ability to view and utilize the area in its undisturbed state," Pl.'s Mot. 9, also is undermined by the developed nature of the Project area. The Ninth Circuit has found that such allegations could establish harm for the purposes of a preliminary injunction. *See e.g.*, *All. for the Wild Rockies*, 632 F.3d at 1135 (finding a likelihood of irreparable harm when a plaintiff alleged harm to its members' "ability to view, experience, and utilize the areas in their undisturbed state."). But the finding of harm in *Alliance for the Wild Rockies* does not apply here because the Project area is not "undisturbed" – it is located entirely within a developed recreation area, where the emphasis is to "[p]rovide safe, healthful, and aesthetic facilities for people to utilize, within a *relatively* natural outdoor setting, while pursuing a variety of recreational experiences." AR0170 (LRMP description for MA-F13: Developed Recreation) (emphasis added); AR6349. Developed recreation areas "consist of natural-appearing areas with obvious man-made controls and structures to direct users, provide for comfort and sanitation, and protect the natural resources." AR0170. The two cases Plaintiff cites are inapposite because neither involved actions in developed recreation Management Areas like the action here. Pl.'s Br. 10 (citing *League of Wilderness Defenders/Blue Mountains*

Biodiversity Project ("LOWD") v. Connaughton, 752 F.3d 755, 764 (9th Cir. 2014) and *All. for the Wild Rockies*, 632 F.3d at 1129, 1135). While Plaintiff's declarations may suffice to establish standing, which Defendants do not concede, they do not meet the higher bar to prove irreparable harm for purposes of obtaining emergency injunctive relief. *See Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1171 n.6 (9th Cir. 2011) ("a plaintiff may establish standing to seek injunctive relief yet fail to show the likelihood of irreparable harm necessary to obtain it.")

Plaintiff's long and unexplained delay demonstrates a lack of urgency and undermines its claim of irreparable harm. *Oakland Tribune*, 762 F.2d at 1377. The delay also prejudices Defendants and the Court by bringing a self-inflicted motion for emergency relief when, had Plaintiff promptly filed suit, the case could have been briefed on the merits on a reasonable schedule with ample time for a decision. Plaintiff's delay, coupled with the developed nature of the Project site, shows that Plaintiff has not established the imminent irreparable harm necessary for emergency injunctive relief. *Winter*, 555 U.S. at 22.

C. <u>The public interest favors allowing the Project to proceed.</u>

Even if Plaintiff had demonstrated irreparable harm from the Project and a likelihood of success on the merits (or serious questions), the Supreme Court has made clear that courts may decline to grant injunctive relief where the public interest weighs against such relief. *Id.* 25-26. Here, the public interest clearly favors allowing the Project to proceed now.

When evaluating the public interest, courts consider "whether there exists some critical public interest that would be injured by the grant of preliminary relief." *Cal. Pharmacists Ass'n v. Maxwell–Jolly*, 596 F.3d 1098, 1114-15 (9th Cir. 2010), *overruled on other grounds by Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204 (2012). "The public interest inquiry primarily addresses impact on non-parties rather than parties." *Sammartano v. First*

Judicial Dist. Court, 303 F.3d 959, 974 (9th Cir.2002), *abrogation on other grounds recognized by Seattle Mideast Awareness Campaign v. King Cnty.*, 781 F.3d 489, 501 (9th Cir. 2015). Mitigating risks from fire, insects, and disease are valid public interests. *See McNair*, 537 F.3d at 1005 (citing *Wildwest Inst. v. Bull*, 472 F.3d 587, 592 (9th Cir. 2006)). So too are safety concerns to the public and Forest Service employees from falling trees. *Earth Island Inst.*, 626 F.3d at 475 (Affirming district court finding that "the economic stakes, in combination with the safety concerns and reforestation efforts, outweighed any harm to environmental interests.")

The Project addresses the safety risk posed by laminated root rot in moist mixed conifer stands. AR5862, AR6349. The fungal infection is present throughout three of the eight treatment units (units 2, 3, and 4), totaling 40 acres, and in isolated locations on a few acres in three other treatment units (units 1, 5, and 8), totaling 54 acres. AR6358. The infection weakens the base of trees, causing the trees to break off and fall at any time, without warning. AR5862, AR6349; *see* AR6316-20 (Forest Health Biological Evaluation). This is happening now. AR5821 ("Trees have come down over some roads at Walton Lake or near other targets and pose significant hazards, especially in the mixed-conifer stands along roads, near campsites and on trails."); *see* AR6280-87 (photos of fallen fir trees after windstorm, with email noting "[e]very tree below is within a campsite or within striking distance of facilities."). Indeed, one of the major reasons for the Project is that the problem of laminated root rot "has now become large enough that it makes sense to address it at a larger scale." AR5862. All of the host trees are probably infected to some degree now, and within a decade many will become severely infected. Turner Decl. ¶ 9. While the Forest Service evaluates and fells infected trees each year according to regional hazard guidelines, this removes only outwardly symptomatic trees and does not provide an opportunity for restoration that will address the problem over the long term. *Id.* ¶ 10.

The Forest Service acknowledges that laminated root rot is part of a natural forest ecosystem. AR5862, AR6349. But in a developed recreation area, laminated root rot "creates hazards to public safety from falling snags and from increased fuels." AR6349. The fungal infection creates imminent, and often unseen, hazards that have no place in a developed recreation area with high visitor use. AR6318 ("laminated root rot should be of particular concern to managers of infested sites" in developed recreation sites.); AR5569 (laminated root rot "is the most damaging root disease of forest trees in Oregon and Washington and one of the most hazardous to people and property in developed sites."). Removal of host species in this particular and limited setting thus is in the public interest because it removes a serious risk to public safety. *See LOWD*, 752 F.3d at 766 ("We have given this claim [risk of forest fire and insect infestation] great weight when the risk is imminent or the danger has begun).

If the laminated root rot problem is not addressed in Walton Lake this winter, the campground and associated roads and trails will be closed in 2017, and possibly beyond, to protect the recreating public and Forest Service employees. Turner Decl. ¶ 19. Closures due to the safety risks posed by laminated root rot have already occurred in other campgrounds in Oregon. AR5824 (closing the Herman Creek Campground in the Columbia River Gorge National Scenic Area for the 2014 summer season due to risks from laminated root rot). Completing the Project this winter, while the campground is closed, will enable thousands of visitors – including Plaintiff and its members – to return next summer.

The Project also addresses the safety risk posed by dense, dry mixed conifer and ponderosa pine stands that have high fuel loads and are susceptible to bark beetle infestations. AR5862, AR6349. Rapidly-growing, shade-tolerant fir in the understory competes with legacy trees for water, nutrients, and other resources. AR5862. This untenable situation stresses all

trees and creates favorable conditions for beetles. *Id.*; AR6314 ("High bark beetle vulnerability in the ponderosa pine due to overstocking exists throughout much of the developed recreation area."). Bark beetle infestations can cause mass tree mortality and increase fuel load, which increases the risk of catastrophic wild fire. AR6315, AR6127. To prevent conditions that would allow an infestation to occur, the Project proposes commercial thinning in two units (units 1 and 5), totaling approximately 47 acres, and non-commercial thinning in three units (units 6, 7, 8), totaling approximately 88 acres. AR6358. The thinning will protect and improve the health and resiliency of the large, legacy ponderosa pine stands. AR6349, AR6361-63. While the Project area has not yet experienced a bark beetle outbreak, the proactive measures to reduce stand density and improve the health of legacy trees to avoid such an outbreak are in the public interest. *LOWD*, 752 F.3d at 766 ("Even though fire and insect risks are to a degree speculative, mitigating such risks is a valid public interest.").

The Project benefits the public interest in other ways. For example, the proposed treatments have long-term benefits to recreation and camping. In addition to creating a safer recreation environment, the proactive nature of the Project reduces the likelihood of delayed openings, emergency closures, or full closures. AR6342; *see* AR5824 (emergency full closure of Herman Creek Campground because of laminated root rot). The Project removes the heavy fuel loads from roadsides and campsites that are the result of years of ongoing hazard tree mitigation. AR6342. The Project also plants a variety of native trees and shrubs that would attract pollinators as well as show fall colors. *Id.* The replanting is not just aesthetic – it will focus on areas between any fir that remain, so as to curtail the spread of laminated root rot. AR5863. Finally, both the Project and the continued operation of the campground contribute to the local economy. *Earth Island Inst.*, 626 F.3d at 475 ("Economic harm may indeed be a factor in

considering the balance of equitable interests."). The Project is expected to employ between five and eight people. Turner Decl. ¶ 18. A concessionaire operates the campground and employs between one and two people. Turner Decl. ¶ 5. If the Project does not proceed and the campground is closed next summer, these economic benefits will not materialize.

Plaintiff claims an injunction is in the public interest because it will preserve the status quo until the case is resolved. Pl.'s Mot. 33-34. There is no presumption, however, that the environmental harms alleged by Plaintiff outweigh harm to others or the public interest. *McNair*, 537 F.3d at 1004. Plaintiff does not acknowledge the important public safety interest that the Project serves by removing hazards caused by laminated root rot and a dense understory. *See* Pl.'s Mot. 33-34. Nor does Plaintiff acknowledge that the limited operating season requires the Project to start as soon as the campground closes in October so that the recreation area can open next May. *See id.* Instead, Plaintiff addresses only the public's indirect economic interest in the Project. *Id.* at 33. But as discussed above, the economic benefit of the Project is relatively small and only one reason why the Project is in the public's interest.

Finally, it is important to note that Plaintiff represents only one of the public's many voices. Plaintiff's declarations rely heavily on personal recreational and aesthetic interests in the Project area, such as hiking and bird-watching. Many other members of the public have divergent interests in safety, job creation, recreation, timber resources, and reforestation with diverse native species of the Project area. Some commenters expressed their support for the Project. AR6354, AR6369. The Court should not let the interests of a few individuals overshadow the broader public interest that this Project serves. *See All. for the Wild Rockies v. U.S. Forest Serv.*, No. 1:15-CV-0193-EJL, 2016 WL 3349221, at *5 (D. Idaho June 14, 2016) ("The Project's intended purpose in restoring forest conditions, reducing wildfire risks, and

improving watershed and wildlife habitat all benefit the public."); *Conservation Nw. v. U.S. Forest Serv.*, No. CV-05-0220-EFS, 2005 WL 2077807, at *14-15 (E.D. Wash. Aug. 26, 2005) (denying injunctive relief where plaintiff's recreational and aesthetic interests were outweighed by Forest Service's and public's interests).

Based on these considerations, the public interest favors allowing the Forest Service to proceed with this Project because it will improve the safety and ecological health of the most visited site on the Forest. The Court should deny Plaintiff's motion for preliminary injunction.

D. <u>The balance of hardships favors the Forest Service.</u>

Winter requires a plaintiff seeking a preliminary injunction to establish that the balance of equities tips in its favor. 555 U.S. at 20. But if a plaintiff only shows "that there are 'serious questions going to the merits – a lesser showing than likelihood of success on the merits – then a preliminary injunction may still issue if the 'balance of hardships tips *sharply* in the plaintiff's favor,' and the other two *Winter* factors are satisfied." *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013) (quoting (*All. for the Wild Rockies*, 632 F.3d at 1135). Courts have denied injunctions on equitable considerations alone. *See e.g., W. Watersheds Project v. Salazar*, 692 F.3d 921, 923 (9th Cir. 2012) (the district "court properly analyzed the balance of equities and the public interest, and did not abuse its discretion in finding that these factors weighed against issuing a preliminary injunction."); *Native Ecosystems Council v. Weldon*, CV 16-106-M-DWM, 2016 WL 4591897, at *2 (D. Mont. Sept. 2, 2016) (denying preliminary injunction where plaintiff "has not shown that the balance of hardships tips sharply in its favor" even though it showed irreparable harm and serious questions on the merits). Here, Plaintiff cannot show that the balance of equities tips in its favor – sharply or otherwise.

Immediate implementation of the Project is necessary due to the limited operating season.

The campground closes on October 15 and is scheduled to re-open in mid-May 2017. Turner Decl. ¶ 15. Project operations need to finish one week before the campground opens because the concessionaire needs time prepare the site for visitors. *Id.* The timber harvest portion of the Project is estimated to take four months to complete, but given periods of inclement weather and adverse soil conditions, the Project will take up to seven months to complete. *Id.* ¶ 16. Beginning the Project as soon as possible will allow the contractor the best opportunity to operate in dry, warm fall weather before inclement weather begins. *Id.* And beginning the Project now will allow replanting to take place in the spring, when soils are moist. *Id.* ¶ 17.

If the Project is not implemented during the upcoming closure and as soon as possible, two things will happen. First, the campground and associated roads and trails in the designated recreation area will be closed in 2017 and until such time as the Forest Service can address the laminated root rot. *Id.* ¶ 18; AR6341 (stating "risks could cause temporary or permanent closure of the most visited recreation site on the Forest."). This drastic step is necessary to protect the recreating public and is completely avoidable by allowing the Project to proceed. Closing the campground not only will greatly inconvenience the recreating public, *see supra* Part IV.C, but will hinder the Forest Service's multiple use mandate to provide for recreation and will deprive the Forest Service of funds that can be used for campground maintenance and improvements. Turner Decl. ¶ 6 (stating that in 2015 the Agency received $7,129.65 from the concession).

Second, if the Project is enjoined, it cannot proceed in its current form. The Project is awarded as an Integrated Resource Service Contract, which is used when the cost of services (public safety improvements and ecosystem services) exceeds the value of the goods (marketable timber and wood products). *See* Forest Service Handbook § 2404.19, Ch. 62.12 (describing integrated resource service contracts). If the Forest Service had to complete the Project on its

own, it would cost two to three times the amount of the contract. Turner Decl. ¶ 20; AR6653 (contract award of $78,262). But the Forest Service does not have the funds, personnel or equipment to implement the Project on its own. Turner Decl. ¶ 21.

Plaintiff's allegations that a temporary delay in the Project will not harm the Forest Service are uninformed and lack merit. *See* Pl.'s Br. 31-32. To the contrary, delaying the Project harms the Agency, jeopardizes the Project, and provides yet another basis for the Court to deny Plaintiff's motion. *Friends of the Wild Swan v. Christiansen*, 955 F. Supp. 2d 1197, 1203 (D. Mont. 2013) ("The temporary delay Plaintiffs seek will actually have significant consequences on the Project."), *aff'd* 767 F.3d 936 (9th Cir. 2014); *Earth Island Inst. v. Quinn*, No. 2:14–cv–01723–GEB–EFB, 2014 WL 3842912 at *8 (E.D. Cal. July 31, 2014) (denying preliminary injunction for a salvage timber project without considering the merits because the balance of equities and public interest favored allowing the project to proceed and delay "jeopardize[d] the entire project.").

The Court should also reject Plaintiff's attempt to minimize the burden of delay by claiming that the Forest Service planned to complete the Project last winter. Pl.'s Br. 32. As previously discussed, the Forest Service completed the analysis and issued the contract as soon as was practicably possible. Turner Decl. ¶ 12. This October is the first opportunity for the Forest Service to proceed with the Project under the contract. It is *Plaintiff's* delay in bringing suit and seeking injunctive relief that weighs against its alleged hardships. *Lydo Enters.*, 745 F.2d at 1213 ("A delay in seeking a preliminary injunction is a factor to be considered in weighing the propriety of relief"); *Headwaters, Inc. v. Bureau of Land Mgmt.*, 665 F. Supp. 873, 876 (D. Or. 1987) (considering organization's six-month delay in seeking a preliminary injunction as a factor in the balance of hardships). Plaintiff waited nine months after the Forest

Service issued the Decision Memorandum before filing suit, and it waited more than three months to file suit after learning that the Project would begin this October. This delay weighs against Plaintiff when the Court evaluates the relative hardships.

The harm to the Forest Service if the Project is delayed is real and easily outweighs Plaintiff's alleged injuries and interests. Plaintiff cannot show that this factor weighs in its favor under *Winter*, let alone that it tips *sharply* in its favor if the lesser showing of serious questions under *Alliance for the Wild Rockies* applies. The Court should deny Plaintiff's motion.

E. Plaintiff is required to post a bond.

Plaintiff asks the Court to waive the bond requirement. Pl.'s Mot. 34. Prior to any emergency injunctive relief, a plaintiff must post a compensatory security bond. Fed. R. Civ. P. 65(c). The posting of a bond is a precondition to the issuance of an injunction, regardless of the identity of the plaintiff. *See Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1125-26 (9th Cir. 2005) ("[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."). If the Court concludes that injunctive relief is warranted, Defendants submit that the Court should require Plaintiff to post a security in an amount appropriate to pay costs and damages, should the Project be wrongfully enjoined.

F. Any injunction should be narrowly tailored.

Plaintiff did not meet its burden to establish the four factors for a preliminary injunction. *See supra* Parts IV.A-D. Should the Court find otherwise, any injunction should be narrowly tailored. *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1080-81 (9th Cir. 2010) ("Relief for a NEPA violation is subject to equity principles."); *N. Cheyenne Tribe v. Norton*, 503 F.3d 836, 843 (9th Cir. 2007) ("[I]injunctive relief is not automatic, and there is no rule requiring automatic issuance of a blanket injunction when a violation is found."). Plaintiff does not seek

an injunction against non-commercial thinning in units 6, 7, and 8, or "Forest Service efforts to remove real hazard trees immediately adjacent to roads and campgrounds." Pl.'s Mot. 1. These activities should be allowed to proceed in the event the Court determines Plaintiff satisfied all four factors and that an injunction is warranted.

Defendants do not concede that partial implementation of the Project will address the threats to public safety identified by the Forest Service, or that partial implementation would even be possible. Nor does partial implementation address the long-term threats to visitor safety and forest health the Project will address in a comprehensive and proactive way.

V. CONCLUSION

For the foregoing reasons, the Court should deny Plaintiff's motion for preliminary injunction and allow the Walton Lake Project to proceed.

Respectfully submitted on this 27th day of September, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2016, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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