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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

EARTH ISLAND INSTITUTE and CENTER FOR BIOLOGICAL DIVERSITY,

Plaintiffs,

v.

DEAN GOULD, in his official capacity as Forest Supervisor for the Sierra National Forest, and UNITED STATES FOREST SERVICE, an agency of the Department of Agriculture,

Defendants.

Case No. 1:14-cv-01140-KJM-SKO

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' REQUEST FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Hearing date: On or before August 1, 2014
Time: TBD
Courtroom: 3

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MEMORANDUM OF POINTS AND AUTHORITIES

REQUEST FOR RELIEF

Plaintiffs request that all logging of the Aspen project be enjoined unless and until Defendants fully comply with NEPA and NFMA, except that imminent hazard trees may be felled on roads maintained for public use (maintenance level 3-5 roads).

STATUTORY BACKGROUND

A. The National Environmental Policy Act

NEPA is "our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). NEPA's twin aims are to ensure that federal agencies consider the environmental impacts of their proposed actions and inform the public that environmental concerns have been considered. NEPA requires "responsible [federal] officials" to prepare an environmental impact statement ("EIS") to consider the effects of each "major Federal action[ ] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C)(i). Preparation of an EIS is mandated if "substantial questions are raised as to whether a project . . . *may* cause significant degradation of some human environmental factor." *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d 1172, 1219-20 (9th Cir. 2008) (emphasis added). To determine whether the impacts of a proposed action are significant enough to warrant preparation of an EIS, the agency may first prepare an environmental assessment ("EA"). The EA must take a "hard look" at the impacts, and must not minimize adverse side effects, of the proposed action; if the agency decides the impacts are not significant, it must supply a convincing statement of reasons why. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208 (9th Cir. 1998). In the analysis of impacts, the agency must articulate a rational connection between the facts found and the decision made. *Ocean Advocates v. United States Army Corps of Engineers*, 361 F.3d 846, 865 (9th Cir. 2003). If significant new information or changed circumstances arise, an agency must prepare a supplemental EA or EIS. 40 C.F.R. § 1502.9(c); *Price Road Neighborhood Ass'n, Inc. v. U.S. Dept. of Transp.*, 113 F.3d 1505, 1508-1509 (9th Cir. 1997).

B. The National Forest Management Act

NFMA establishes the statutory framework for management of the National Forest System. NFMA requires the Forest Service to develop a Land and Resource Management Plan ("Forest Plan")

for each national forest. Pursuant to NFMA, all site-specific actions taken within a national forest must be consistent with the applicable forest plan. 16 U.S.C. § 1604(i). In 2012, new NFMA planning regulations were issued, requiring consideration of the best available science. 36 C.F.R. § 219.3. Until all plan revisions are completed the Forest Service is required to "consider" the "best available science" in environmental analysis documents for site-specific projects. 36 C.F.R. § 219.35(a).

FACTS RELEVANT TO THE RESOLUTION OF PLAINTIFFS' CLAIMS

Background: "Complex early seral forest" (CESF) (AR1688), also known as snag forest habitat because of the high density of standing, dead trees, is one of the rarest and least protected of all forest habitat types in the Sierra Nevada (Hanson 2013 [AR 1689][1]). Due to fire suppression policies, most studies estimate that there is now about one-fourth as much higher-intensity fire—the type of fire that creates complex early seral forest—as there was prior to the early 20th century (Hanson and Odion 2014 [AR29150]; Odion et al. 2014 [AR29616]). This deficit of CESF is further exacerbated by losses of this habitat due to post-fire logging of snags (standing, fire-killed trees) and eradication of native fire-following shrubs. AR1688-89. Complex early seral forest habitat—if not subjected to post-fire logging—supports levels of native biodiversity and wildlife abundance comparable to, and even higher than, that of unburned mature/old forest (Raphael et al. 1987 [AR29668]; Burnett et al. 2010 [AR28533,]; Swanson et al. 2011 [AR30435]).

The Aspen fire occurred in July of 2013, covering about 22,350 acres on the Sierra National Forest in a remote area about 8 miles west of Huntington Lake. The fire had a mosaic of effects, with 80% of it comprised of low and moderate-intensity fire effects (AR32-34). The Aspen post-fire logging project, challenged herein, is located on the Sierra National Forest in the Sierra Nevada mountains. According to the EA for the Aspen project, it would involve the logging of 1,835 acres—mostly of CESF—as well as an additional 3,239 acres in areas wherein delayed tree mortality is predicted by the Forest Service, plus 1,125 acres of roadside logging (AR41). Defendants state that a key purpose of this logging project is to generate revenue for the Forest Service's budget (AR 36).

[1] AR____, indicates citation to the Aspen Preliminary Administrative Record DVD and, BHAR____, indicates citation to the Big Hope Preliminary Administrative Record DVD, both complied by the Forest Service on July 11, 2014.

According to the Decision Notice (DN) for the project, the Forest Service granted itself an economic "Emergency Situation Determination" (ESD) to maximize the revenue to Defendants (AR12, 20).

California Spotted Owl: The California Spotted Owl is a rare raptor designated as a Sensitive Species, meaning that the Forest Service recognizes that there is reason for concern about the population viability of this species. The Forest Service is required to maintain viable populations of Sensitive Species. Forest Service Manual, Amendment 2600-2005-1 (9/23/05), Section 2670.12. The most current body of research regarding California spotted owls concludes that they select dense, mature forest that is unburned or has low/moderate-intensity fire effects for nesting and roosting, while unlogged high-intensity fire areas provide the best foraging habitat; in fact, the owls *preferentially* select these unlogged high-intensity fire areas in mature conifer forest for foraging (Bond et al. 2009 [AR 28469]), and also have levels of reproduction 60% higher in mixed intensity fire areas than in green mature/old forest. (Roberts 2008 [AR29718]). This is often described as the "bedroom and kitchen" effect, whereby the juxtaposition of dense, live forest and high-intensity burned forest (where most or all trees have been killed by fire) provides optimal conditions for the owls (Bond comments on the Aspen EA [AR 27971). Spotted owls actively forage in post-fire habitat within 1.5 kilometers of their nest/roost site. AR28469. The scientific research has also found that recent fires in the Sierra Nevada, ranging from 0-93% high-intensity fire effects (average of 32% high-intensity), have not reduced California spotted owl occupancy, and over half (63%) of owl territories were found to remain occupied even with 50-93% high-intensity fire effects (Lee et al. 2012 [AR 29248, 29254]). However, when post-fire logging of moderate/high-intensity fire areas occurs near or adjacent to owl territory cores (such as designated areas called Protected Activity Centers, or "PACs"), the owls are often extirpated (Bond 2011 [AR 28361]; Lee et al. 2012 [AR 29256]; Clark et al. 2013 [BHAR7325]; Plaintiffs' Aspen EA comments, AR28217-23; Bond comments on Aspen EA, AR27973-75). In order to prevent serious adverse consequences to spotted owls and their habitat, Ms. Bond's research recommends that any post-fire logging be avoided within 1.5 kilometers of spotted owl nest/roost sites (Bond et al. 2009 [AR28475-76]). Under the Aspen EA and DN, however, post-fire logging is allowed to occur in moderate and high-intensity fire patches within 1.5 kilometers of multiple spotted owl sites (AR195, 281); *see also* maps showing overlay of salvage units in designated owl habitat (AR1683).

The most recent spotted owl research also has determined that California spotted owl populations are *declining* on national forest lands and private lands where logging occurs, but not on Sequoia/Kings-Canyon national park lands protected from commercial logging (Conner et al. 2013 [AR28847, 28854]; Tempel and Gutiérrez 2013 [AR30649, 30655]; Tempel 2014 [AR30580-82]). In the Aspen EA, the Forest Service argues that the new data on population declines of California Spotted Owls (the 2013 and 2014 studies cited above, which were submitted with Plaintiffs' comments) was not yet published (Aspen Project Response to Comments [AR452]). These studies are published, however.

Meanwhile, in the project area, portions of spotted owl Protected Activity Centers (PACs, or nest stands) and Home Range Core Areas (HRCAs, or areas adjacent to PACs designed to protect owl habitat) were dropped from these protected designations, opening them up to post-fire logging (*see, e.g.*, AR748 [2004 Framework at p. 53] ("salvage harvests are prohibited in PACs . . . ."). This occurred because the Aspen project relies on the Forest Service's 2004 Sierra Nevada Forest Plan Amendment ("2004 Framework") conclusion that moderate/high-intensity fire areas are not habitat for the owls, rather than on the most current spotted owl research (AR10, 197, 205-07, 220). This led to the claim by Defendants, following a citation to the 2004 Framework, that: "Implementation of action alternatives would not result in *any* additional reduction of habitat beyond what was caused by the Aspen Fire" (AR365, 433) (emphasis added); see also AR10 (Decision Notice, stating that areas rendered "no longer suitable" by the fire, were excluded from previous protections). During the administrative comment period, the public presented multiple lines of evidence showing that removal of Spotted Owl preferred foraging habitat, created by moderate/high-intensity fire, tends to extirpate the owls. The Aspen Project Response to Comments (AR365-67, 369) quoted public comments regarding serious adverse effects to spotted owls from post-fire logging (*citing e.g.,* Lee et al. 2012, Clark et al. 2013), but then offered no response to these studies. The EA's conclusion that each "Project may affect individuals, but is not likely to result in a trend toward Federal listing or loss of viability" (AR222) was predicated solely upon nesting and roosting habitat, and excluded impacts to preferred foraging habitat (the areas the owls rely upon most for the food they need to survive) (AR10, 222), despite Defendants' admission that the "high/moderate mortality category would be foraging habitat" for the owls where it is left unlogged. AR222. In the EA and associated documents, the Forest Service

did not deny that moderate/high-intensity fire areas are preferred foraging habitat, or that post-fire logging of this habitat tends to extirpate the owls; rather, they simply excluded this information from their final effects determinations.

Pacific Fisher: The Pacific fisher is a very rare carnivore—like a large mink or small wolverine—with a genetically distinct population restricted to the southern Sierra Nevada (Hanson 2013 [AR1684]). The Pacific fisher lives in the area affected by the Aspen fire of 2013, and has been detected using the fire area in 2014 (AR200). Due to threats to this species, especially logging, the U.S. Fish and Wildlife Service has determined that listing it under the federal Endangered Species Act (ESA) is warranted, and it is currently designated as a Candidate Species. AR198.

The fisher selects dense, mature forest for denning and resting (Zielinski et al. 2006 [AR]), but unlogged moderate- and high-intensity fire areas provide foraging habitat (Hanson 2013 [AR1684, 1689]). Hanson (2013), using teams of dogs specially trained by the University of Washington to detect fisher scat (droppings) in order to determine habitat use patterns, found that fishers used moderate/higher-intensity fire areas at levels comparable to their use of low-intensity fire areas and unburned mature forest, concluding that moderate/high-intensity fire areas provide good fisher habitat, and that post-fire logging would remove the habitat structures associated with fisher presence. AR1684, 1687-89. Neither the Aspen EA, nor the Aspen Response to Comments (AR371), incorporated these findings into impacts conclusions, and the Aspen EA (AR222) concluded that "the Project may affect individuals, but is not likely to result in a trend toward Federal listing or loss of viability" of the Pacific Fisher, ignoring impacts to fisher foraging habitat in the final impacts conclusion, and basing the conclusion only on "resting or denning habitat", relying upon the 2004 Framework's outdated definition of habitat. AR222; see also AR215 ("The Aspen fire burned 8,829 acres were burned in low/very low mortality category; therefore, the assumption is there it is still suitable habitat available. The remaining 6,583 acres is currently *not considered fisher habitat due to the high/moderate mortality*...") (emphasis added).[2]

[2] In their Response to Comments, Defendants claim that they could not interpret the findings of Hanson (2013) with regard to fire severity, ostensibly because Hanson (2013) used different fire severity thresholds than those used by the Forest Service in Miller et al. (2009), and they refused to consider the

Black-backed Woodpecker: The Black-backed Woodpecker is a very rare species that is strongly associated with large patches (generally at least 100-200 acres per pair) of dense, mature/old conifer forest that has experienced moderate- to high-intensity fire (especially high-intensity) within the past 8 years and has not been subjected to any significant amount of post-fire logging (AR223-25). This species is dependent upon these conditions because they provide a sufficient supply of the Woodpecker's primary prey (larvae of wood-boring beetles, found deep under the bark of recently fire-killed trees); further, Black-backed Woodpeckers have a natural camouflage against the charred bark of fire-killed trees, protecting them from predation from raptors (Bond et al. 2012 [AR12092]). One of only two woodpecker species in North America with only three toes instead of four, the Black-backed Woodpecker has enhanced heel mobility, and strike force, allowing it to access and extract beetle larvae that other woodpeckers often cannot access (Bond et al. 2012 [AR12079-80, 12092]). The Black-backed Woodpecker has evolved fluid sacks that fill just before each strike, cushioning the brain against impact that would otherwise cause damage. A "keystone species", the Black-backed Woodpecker excavates a new nest cavity every year, even when it stays in the same territory, allowing previous nest cavities to be used by the many cavity-nesting wildlife species that cannot make their own nest cavities, such as bluebirds and wrens (Bond et al. 2012 [AR12079]). Black-backed Woodpeckers only disperse about 30 miles (Bond et al. 2012 [AR12092, 12103]). The Black-backed Woodpecker is also the sole Management Indicator Species (MIS) chosen by the Forest Service to represent all other wildlife associated with high-intensity fire patches (Bond et al. 2012 [AR12081]).

In response to a 2012 Endangered Species Act ("ESA") listing petition, on April 9, 2013, the

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findings in their impacts analysis of effects to fisher habitat based upon this assertion. AR4108. However, Defendants' assertion is demonstrably incorrect, as they must know. Miller et al. (2009) used the very same fire severity thresholds as those used in Miller and Thode (2007). AR20257 ("Following Miller and Thode (2007)…). Miller and Thode (2007), in turn, used a satellite imagery value ("RdNBR" value) of 316 to define the lower limit of "moderate" severity fire, thus all areas with values of 316 and above pertain to all moderate- and high-severity fire areas. AR20229 (Table 4). This was *exactly* the same approach used in Hanson (2013), wherein moderate and high was defined by areas with RdNBR values of 316 and above (AR9622), and the moderate and high categories were analyzed together. AR9624 (Table 4). Hanson (2013) found that Pacific fisher's selection of dense, mature forest that burned at moderate/high-severity was "nearly identical" to the level of use of the most strongly selected of all unburned forest types/structures (dense, old mixed-conifer forest) and that the previously untested hypothesis that moderate/high-severity fire areas are not fisher habitat was incorrect. *Id.*

U.S. Fish and Wildlife Service issued a determination that the Black-backed Woodpecker population in the Sierra Nevada "may be warranted" for listing under the federal ESA, due in substantial part to habitat loss from fire suppression and post-fire logging (USFWS 2013). 78 FR 21086, 21096-97. The USFWS has not yet issued a final decision on the listing petition. In 2012, due to substantial concerns about threats to the viability of Black-backed Woodpecker populations in the Sierra Nevada, the Forest Service commissioned a panel of Black-backed Woodpecker scientists to produce a Conservation Strategy for this species (Bond et al. 2012 [AR12073]). The Strategy recommended, among other things, that nesting season (extending through July 31st each year) be completely avoided, and that no post-fire logging occur during this time period in order to avoid compounded adverse impacts, including the direct killing of chicks in the nest that cannot yet fly (Bond et al. 2012 [AR12086]). These recommendations were made in order to "avoid a serious risk to the viability of Black-backed Woodpecker populations" (Bond scoping comments on Aspen [AR1632]), yet logging within nesting season would be allowed in the Aspen project (Bond comments on Aspen EA [AR27976-77]; AR52).

The Aspen Response to Comments (AR430) concluded the following regarding the decision to reject the Conservation Strategy recommendation to avoid logging in nesting season: "Based upon the lack of effects to black-backed woodpecker habitat and nesting birds an additional alternative that limited harvests for black-backed woodpecker habitat [to avoid nesting season] was considered unnecessary". The Aspen project would remove 41% of suitable habitat (AR228) in the fire area.

The Aspen EA also asserts that, despite the logging of substantial Woodpecker habitat within the Project areas – 41% on the Aspen Project – there will not be significant impacts to the species. AR15. Monica Bond, the lead author of the Forest Service's Conservation Strategy for this species, in her comments, challenged: "[w]hat is the scientific basis for suggesting that removing this proportion of all potentially suitable woodpecker habitat in the fire area on the national forest will not seriously threaten Black-backed Woodpecker populations, especially in combination with large proportions to be removed in the post-fire logging projects on the adjacent national forests?" AR1632.

On the entire 1.3-million-acre Sierra National Forest, in addition to the 3,438 acres of suitable Black-backed habitat in the Aspen fire—1,464 acres (41%) of which would be removed by planned logging—there is only one other fire of any significant size on the entire national forest to provide

suitable habitat for this species—the 7,687-acre Tehipite fire (only a portion of which is suitable Black-backed habitat), which will be 7 years old next nest season (already nearly too old to provide suitable habitat) (BHAR10105, 10109). If and when the Aspen logging projects is completed, the Tehipite fire of 2008 will be too old to provide suitable habitat (AR230), and only about 2,000 acres of suitable habitat will remain on the entire national forest (less than one-sixth of one percent of the forest).

Significant New Information Arising Since the 2004 Framework was Issued: In 2004, the Forest Service issued what is now referred to as the 2004 Sierra Nevada Forest Plan Amendment ("2004 Framework"). Since 2004, however, significant new scientific information has arisen which directly contradicts, and has rendered outdated, the assumptions upon which the 2004 Framework's Environmental Impact Statement (EIS) and Record of Decision (ROD) were based with regard to fire and wildlife, and Plaintiffs submitted this new information to the Forest Service during comments on the Aspen Project (Plaintiffs' Aspen EA comments, pp. 33-51 [AR28228-46]) (citing specific assumptions, and corresponding pages, from the 2004 Framework, followed by the new science).

Defendants did not dispute that the foregoing represents significant new information that contradicts, and renders outdated, the fundamental assumptions upon which the 2004 Framework was based. Instead, Defendants stated that they are not obliged to reassess the 2004 Framework. AR456.

STANDARD OF REVIEW

Judicial review of Plaintiffs' claims is governed by the Administrative Procedures Act ("APA"). *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc). Under the APA, a court must "hold unlawful and set aside agency action found to be . . . arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with the law . . . [or] without observance of procedure required by law." 5 U.S.C. §§ 706(2). Courts must conduct a "searching and careful" review of challenged decisions. *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 859 (9th Cir. 2005). Though the scope of this review is narrow, a court "must not 'rubber-stamp' . . . administrative decisions that [we] deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Id.; see also NW Coalition for Alternatives to Pesticides v. U.S. Envtl. Prot. Agency*, 544 F.3d 1043, 1052 n.7 (9th Cir. 2008) (internal quotations and citations omitted).

Ultimately a Court must determine whether an agency decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Idaho Sporting Cong.*, 137 F.3d at 1149 (*citing Marsh v. Ore. Natural Res. Council*, 490 U.S. 360, 378 (1989)). A reviewing court may reverse an agency decision if the agency failed to consider an important aspect of the issue, offered an explanation for its decision in contradiction of the evidence before the agency, or made a determination so implausible that it could not be ascribed to a mere difference of opinion or the product of the agency's expertise. *Pac. Coast Fed'n of Fishermen's Ass'n, Inc. v. NMFS*, 265 F.3d 1028, 1034 (9th Cir. 2001). Issuance of injunctions and of temporary restraining orders is governed by Federal Rule of Civil Procedure 65.

> "The standard for issuing a temporary restraining order is essentially the same as that for issuing a preliminary injunction. The moving party must demonstrate that (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) that the relief sought is in the public interest. *Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). The Ninth Circuit has held that injunctive relief may issue, even if the moving party cannot show a likelihood of success on the merits, if "serious questions going to 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." *Alliance for the Wild Rockies v. Cottrel*l, 632 F.3d 1127, 1135 (9th Cir. 2011) (internal quotation omitted)."

Conservation Cong. v. U.S. Forest Serv., 2014 U.S. Dist. LEXIS 37774, 11-12 (E.D. Cal. Mar. 21, 2014).

ARGUMENT

Under either of the standards for injunctive relief, Plaintiffs, as explained below, are entitled to injunctive relief in light of the strength of Plaintiffs' claims and clear harm from Defendants' actions.

A. Plaintiffs Raise Serious Questions And Are Likely To Succeed On The Merits Because The Forest Service's Aspen Project Violates NEPA and NFMA

1. The Forest Service's Decision Not to Prepare an Environmental Impact Statement for the Aspen Project Violates NEPA

Preparation of an EIS is mandated if "substantial questions are raised as to whether a project . . . *may* cause significant degradation of some human environmental factor." *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 508 F.3d 508, 552 (9th Cir. 2007) (emphasis added) (citations omitted). Thus, the bar for whether "significant effects" may occur is a low standard. *Klamath Siskiyou Wildlands Center v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006). In

evaluating whether a proposed action may have a "significant" impact, an agency should consider both the context and intensity of the action. 40 C.F.R. § 1508.27. The context varies depending on the scope of the project. *Id*. The intensity, or the "severity of the impact" of the proposed action, should be evaluated based on a number of "significance" factors. *See* 40 C.F.R. 1508.27(b)(1)-(10). The factors pertinent to this case include considering the unique characteristics of the geographic area where the project is planned, including whether it is an "ecologically critical area", the degree to which the project's impacts are highly uncertain, or involve unique or unknown risks, and the project's impacts on threatened or endangered species. 40 C.F.R. §1508.27(b)(3),(5),(9). A court may find a substantial risk of a significant effect based on just one of these factors. *Ocean Advocates*, 361 F.3d at 865. In addition, evidence regarding the significance of the impacts need not be conclusive in order to compel preparation of an EIS. *LaFlamme v. F.E.R.C.*, 852 F.2d 389, 397 (9th Cir. 1988).

The Aspen project area, as a result of being burned in a wildfire, now consists of unique characteristics which are very rare on the Sierra National Forest. *See* Facts Relevant to Resolution of Plaintiffs' Claims ("Facts section") above, p. 8. These unique characteristics include an abundance of snags (standing dead trees) – about 100 per acre or more in places, as opposed to an average of 2-4 per acre that characterizes the unburned forest surrounding these areas, natural post-fire conifer seedlings, and native shrubs, oaks, and flowers regenerating after the fire. AR117, 129; Hanson Declaration, ¶¶5-7. In addition to these unique vegetation characteristics, these areas attract unique avian residents, such as the Black-Backed Woodpecker, which is dependent on moderate- and high-intensity fire areas for survival. AR223-225. Given the paucity of suitable Black-backed Woodpecker habitat on the Sierra National Forest – only several thousand acres, before logging (see Facts section above, p. 8), the fact that these areas will only serve as suitable habitat for 8 years post-fire, the fact that Black-backed Woodpeckers only disperse approximately 30 miles (AR12103 [Bond et al. 2012]), and the U.S. Fish and Wildlife Service's determination that this species may need to be listed under the ESA due to a severe scarcity of--and lack of protections for—habitat (see Facts above, pp. 7-8), these areas of unique habitat are "ecologically critical" to the survival of this species on these forests. Because Defendants' Aspen project approves the removal of such a large portion of these unique and ecologically critical fire areas (41% on the Aspen Project), and rejects the conservation recommendations of the Forest Service's

own experts regarding logging in nesting season, the third significance factor of the NEPA regulations, 40 C.F.R. §1508.27(b)(3), is implicated, and an EIS for each Project was required to be prepared.

Defendants' refusal to incorporate effects from loss of preferred California Spotted Owl foraging habitat (created by moderate/high-intensity fire), or the evidence that post-fire logging of such habitat causes extirpation of the owls, into the impacts conclusions for Spotted Owls, creates a circumstance in which the threats from foraging habitat removal were sidestepped by Defendants to avoid a finding of potentially significant impacts (see pp. 3-5 of Facts section above), and presents risks to this Sensitive Species—risks which are "highly uncertain, unique or unknown". 40 C.F.R. 1508.27(b)(5). Because further study in an EIS can help to resolve highly uncertain, unique/unknown risks of the Project, an EIS is required. *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 731 (9th Cir. 2001).

The Aspen Project will likely adversely affect the Pacific Fisher, a candidate for listing under the ESA (AR198), with only 125-250 adults remaining in the entire southern Sierra Nevada subspecies (AR9621). Defendants' refusal to incorporate loss of fisher foraging habitat into the effects conclusions (see pp. 5-6 of Facts section above) creates a circumstance in which the threats from foraging habitat removal were sidestepped by Defendants to avoid a finding of potentially significant impacts, and presents risks to this ESA Candidate Species—risks which are "highly uncertain, unique or unknown"; thus an EIS is required. 40 C.F.R. 1508.27(b)(5). The Pacific Fisher has already been observed using the Aspen fire area. AR200. The Aspen Project proposes to remove about 2,000 acres of suitable Fisher foraging habitat. AR222. Because, biologically, the federal government has recognized that the fisher should be listed under the ESA (but has not been yet due to administrative delays), intensity factor 40 C.F.R. 1508.27(b)(9) also applies. *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 558-59, and footnote 5 (9th Cir. 2000) (it is the recognition of a more imperiled *biological* status that matters under NEPA).

2. The Forest Service Did Not Take a Hard Look at Impacts of the Aspen Project on California Spotted Owls, Black-Backed Woodpeckers or Pacific Fishers

NEPA establishes procedural requirements to ensure that agencies take a "hard look" at the environmental impacts of their actions. *See Ocean Advocates*, 361 F.3d at 1125. Agencies must consider all foreseeable direct, indirect, and cumulative impacts and include a candid discussion of

adverse impacts – one that does not improperly minimize negative side effects. *Earth Island Inst. v. U.S. Forest Service,* 442 F.3d at 1154, 1159 (9th Cir. 2006) ("*Earth Island II"*) (citations omitted). In reviewing the adequacy of an EIS or EA, the Ninth Circuit applies the "rule of reason" standard, "which requires 'a pragmatic judgment whether the EIS's [or EA's] form, content and preparation foster both informed decision-making and informed public participation.'" *Native Ecosystem Counsel v. U.S. Forest Service*, 418 F.3d 953, 960 (9th Cir. 2005); *see also Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993 (9th Cir. 2004) (applying "hard look" requirement to EAs). Furthermore, "[i]f an agency decides not to prepare an [environmental impact statement], it must supply a convincing statement of reasons to explain why a project's impacts are insignificant. The statement of reasons is crucial to determining whether the agency took a hard look at the potential environmental impact of a project." *Blue Mts.,* 161 F.3d at 1212 (citing 42 U.S.C. § 4332(2)(C)).

Here, Defendants failed to take the required "hard look" at the adverse impacts of planned post-fire logging because, as described in the Facts section above (pp. 3-6), they based their ultimate impacts analysis, and FONSIs for the Aspen project, on the 2004 Framework's outdated and scientifically inaccurate definition of Spotted Owl and Pacific Fisher habitat (and refused to consider the evidence that removal of this habitat from post-fire logging harms both species) and, thus, deliberately excluded effects from loss of preferred foraging habitat (the areas these animals depend upon most for the food they need to survive) from the impacts conclusions, thus improperly minimizing adverse impacts.

Defendants also failed to take the required hard look at the impacts of the proposed Project because, as discussed in the Facts section above (pp. 6-8), they failed to disclose adverse impacts from logging in suitable Black-backed Woodpecker habitat during the 2015 nesting season, and failed to provide a rational basis or convincing statement of reasons for their conclusion that removal of such a large proportion of suitable Black-backed Woodpecker habitat – 41% on the Aspen Project – had no potential to significantly affect this species, particularly in light of Monica Bond's conclusion that the intensity and timing of the project represents a threat to the viability of the population (Facts, pp. 7-8).

Defendants' decision to implement the Project without taking the requisite "hard look" at the Project's impacts to California Spotted Owls, Black-backed Woodpeckers, and Pacific Fishers, violates NEPA. *Blue Mts.*, 161 F.3d at 1216.

3. The Forest Service Failed to Consider the Best Available Science on the Relationship between California Spotted Owls and Pacific Fishers, and Fire, when Developing the Aspen Project

The new 2012 NFMA Planning Rule provides that all Forest Plans must consider best available science. 36 CFR § 219.3. Due to the consistency requirements of the NFMA statute, this creates a circumstance wherein all projects associated with plans revised under the new rule will necessarily be informed by the best available science. 16 USC §1604(i). Unfortunately, it may take up to 15 years for all of the Forest Plans in the country to be revised (2012 NFMA Rule Final EIS, p. 275). Thus, in order to ensure continuity of management until the forest plan revision process has been completed "for each unit of the National Forest System, the responsible official must consider the best available science in implementing and if appropriate, amending the plan." 36 CFR §219.35 (2011); *Alliance for the Wild Rockies v. Bradford*, 2014 U.S. Dist. LEXIS 89590 (D. Mont. June 30, 2014).

The Ninth Circuit has determined that an agency violates the best available science requirement for projects implementing a forest plan, such as the Aspen project, when the science provided to the agency demonstrates that the agency's positions/studies are outdated or flawed, or where the agency refuses to carefully consider scientific evidence which directly undermines their conclusions. *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 658-660 (9th Cir. 2009); *N.C. Fisheries Ass'n,* 518 F.Supp.2d at 85 (citing *Building Indus. Ass'n of Superior Cal. v. Norton,* 247 F.3d 1241, 1246-47 (D.C. Cir. 2001)) ("Defendants fail to meet the best available science requirement where there is evidence that superior or contrary data was available and that the [Department] ignored such information."). This is exactly what occurred in the Aspen EA with regard to impacts to Spotted Owl and Pacific Fisher habitat, as discussed in the sections above.

4. Significant New Information, Including Best Available Science, Requires Rejection of the FONSIs, and Supplementation of the 2004 Framework

Rather than incorporate and adhere to the best available science regarding wildlife use of post-fire forest, the Forest Service continues to attempt to justify its actions by pointing to the 2004 Framework forest plan amendment that applies to all National Forests in the Sierra Nevada, including the Sierra National Forest. However, as discussed *supra* in the Facts section, the 2004 Framework offers no scientific support for the Aspen EA's conclusions regarding the relationship between

California spotted owls or Pacific fishers and burned forest. Quite simply, the 2004 Framework predates the scientific studies that investigated this relationship. As a result, the Framework's assumption that moderate- and high-intensity fire areas are not habitat for these species is outdated, as is the Framework's related assumption that logging such areas will not adversely affect spotted owls or fishers. Because the Finding of No Significant Impact (FONSI) in this case tiers to and implements the 2004 Framework, and because the 2004 Framework is no longer lawful under NEPA due to significant new information, the Forest Service must prepare a supplemental EIS to amend the 2004 Framework and align it with the best available science. 40 CFR 1502.9(c).

For example, as discussed on pages 3-5 of the Facts section above, not only does the best available science demonstrate that spotted owls use intensely burned forest, it shows they in fact *prefer* it as foraging habitat, if it is not logged. That is why Bond et al. (2009) explicitly recommended that post-fire logging not occur within 1.5 km of a nest or roost site. *See also Conservation Cong. v. United States Forest Serv.*, No. CIV. S-13-0832 LKK/DAD, 2013 U.S. Dist. LEXIS 127671, *20 (E.D. Cal. Sept. 6, 2013) ("Bond, in the cited papers, specifically recommended that 'post-fire logging be avoided within 1.5 kilometers (at least) of Spotted Owl nest sites.' . . . Also, defendant identifies no literature that indicates that it would be appropriate to log within 1.5 km from the nest site."). The 2004 Framework, on the other hand, assumes that intensely burned forest is *non*-habitat for California spotted owls (2004 Framework, AR7968-9), and in so doing, *facilitates* post-fire logging within 1.5 km of owl sites in burned forest areas that would otherwise serve as crucial habitat for what is currently a declining owl population[3] (2004 Framework, p. 37 [AR 7966]). Consequently, the 2004 Framework is not only scientifically invalid, but is acting in a way that serves to destroy preferred owl habitat while spotted owls are declining, facilitating the redrawing of owl PACs and HRCAs simply because they contain moderate/high-intensity fire areas, thus allowing suitable habitat that was previously protected to be opened to post-fire logging.

[3] The 2004 Framework FEIS (AR 920-921) also stated that, at the time, the data indicated "a stable population" for all of the Sierra Nevada spotted owl study areas. The best available science in 2014, however, establishes that California spotted owl populations are, and have been, *declining*. (Conner et al. 2013 [AR28847], Tempel and Gutiérrez 2014 [AR30649], Tempel 2014 [AR30521).

The 2004 Framework's assumptions about Pacific fishers and Black-backed woodpeckers and fire are similarly contradicted by new science, as discussed above in the Facts section (pp. 5-8). In 2004, very little was known about the Black-backed Woodpecker, and the 2004 Framework did not recognize any conservation issues with regard to this species or include provisions to protect its habitat. Now, however, this Woodpecker is being considered for listing under the ESA due to threats from the post-fire logging encouraged, with no meaningful limits, under the 2004 Framework ([AR7981-2]).

Because the 2004 Framework is outdated and is directly contradicted by new science, a supplemental environmental impact statement (SEIS) must be prepared. 40 C.F.R. section 1502.9(c)(1) states that agencies must prepare an SEIS when "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." Here, the new science that post-dates the 2004 Framework EIS is plainly "significant new circumstances or information relevant to environmental concerns." Moreover, because the Framework is "more than 5 years old," it already should have been "carefully reexamined . . . so that the agency has the best possible information to make any necessary substantive changes in its decisions . . . ."[4] Yet, instead, the Forest Service continues to point to, and hide behind, the 2004 Framework's scientifically invalid assumptions. This is especially egregious given that Plaintiffs submitted the new information to Defendants in the fall of 2013, during scoping comments on the Aspen project (and submitted it months earlier than that on other projects), so Defendants have had plenty of time to evaluate this information and make appropriate changes. *See Native Songbird Care & Conservation v. Lahood*, No. 13-cv-02265-JST, 2013 U.S. Dist. LEXIS 93120, *25 (N.D. Cal. July 2, 2013) ("If an agency has had time to respond to new information, and declines to make any expert determination, it foregoes any claim of deference and must submit to a court's *de novo* determination of whether a Supplemental EIS is

[4] *See* Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,036 (Mar. 23, 1981) ("As a rule of thumb, if the proposal has not yet been implemented, or if the EIS concerns an ongoing program, EISs that are more than 5 years old should be carefully reexamined to determine if the criteria in Section 1502.9 compel preparation of an EIS supplement. If . . .there are significant new circumstances - or information relevant to environmental concerns and bearing on the proposed action or its impacts, a supplemental EIS must be prepared for an old EIS so that the agency has the best possible information to make any necessary substantive changes in its decisions regarding the proposal.").

required."). Defendants have not done so. In fact, Defendants do not dispute the new science, and their response to it includes no expert determination; rather, they merely state that they do not have to reconsider the 2004 Framework, regardless of the new science (AR456). The Forest Service appears to believe it can ignore its duty to conduct an SEIS based on their assertion that the "2004 Framework is not an ongoing, agency action." (*See, e.g.*, BHAR 309). No legal citation is provided for this claim, but Defendants will likely attempt to argue that *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 73 (U.S. 2004) *(*SUWA*)*, supports their position. As explained below, it does not.

The Ninth Circuit, in *Center for Biological Diversity v. Salazar*, 706 F.3d 1085, 1094-95 (9th Cir. 2013) (*citing SUWA,* 542 U.S. at 73), explained that post-*SUWA*, "[s]upplementation of a prior NEPA environmental analysis is only required where 'there remains major Federal action to occur.'" In *SUWA*, the plaintiff environmental groups sought to force the BLM to prepare an SEIS because of an increase in off-road vehicle use on public lands. 542 U.S. at 60-61. These plaintiffs, however, could not point to any ongoing major federal action regarding off-road vehicle use, and the Supreme Court determined that BLM therefore did not have to prepare an SEIS. *Id.* at 73.

Here, on the other hand, there is no question that "there remains major Federal action to occur." The existence of the Project at issue in this case, and the fact that it tiers directly to, and implements, the 2004 Framework, demonstrates the 2004 Framework is ongoing.[5] Further, in *SUWA*, the Plaintiffs did not challenge any projects and could not show that the land management plan was itself explicitly promoting harmful environmental impacts. In this case, not only is the ongoing project being challenged, but the 2004 Framework is directly producing environmentally harmful actions via that project. The project at issue must comply with the 2004 Framework (*see* 16 USC 1604(i)), and the 2004 Framework explicitly promotes the destruction, rather than protection, of burned forest areas now known to be suitable habitat for Spotted Owls, Pacific fishers, and Black-backed Woodpeckers. Moreover, in *SUWA*, the Plaintiffs were trying to compel the agency to undertake an action that was not in the management plan. 542 U.S. at 55. Here, Plaintiffs are seeking to *stop* Defendants from taking

[5] *See, e.g.*, Aspen Project Response AR 370, AR 436: "According to the forest plan harvest activities may occur in PACs that have been rendered unsuitable"; "salvage is only proposed in areas where habitat has been rendered unsuitable . . . ."

actions that directly result from the 2004 Framework so those actions do not degrade the environment.

The situation in this case is most analogous to *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989), wherein the agency was constructing a dam, and supplemental NEPA documentation was being considered even though the dam was one-third completed. Here, the projects at issue are not only incomplete, they have yet to begin. As discussed in *Marsh*, 490 U.S. at 371-72, supplemental analysis is therefore necessary because

> NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct. . . . It would be incongruous with [NEPA's] approach to environmental protection, and with the Act's manifest concern with preventing uninformed action, for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval.

The Supreme Court explained that "[i]f there remains 'major Federal actio[n]' 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, a supplemental EIS must be prepared." *Id.* at 374; *see also id.* at 372. The Forest Service cannot hide behind *SUWA*, or any other case, to shirk its duty to conduct supplemental NEPA analysis as to the 2004 Framework.

This case is also similar to *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 555 (9th Cir. 2000), in which more than ten years had elapsed since the Forest Service completed a forest management EIS. During those 10 years, the Forest Service designated as "sensitive" seven species "whose viability [was] of concern," and had itself acknowledged that the Forest Plan's standards for old growth and snags—on which the EIS had relied—were inadequate. *Id.* at 555-56. The court held that the Forest Service violated NEPA by "fail[ing] timely to prepare, or even sufficiently to consider and evaluate the need for, an SEIS" in light of the new information. *Id.* at 558. Here, too, ten years has elapsed, and the California Spotted Owl is a designated "sensitive" species. And, as in *Friends of the Clearwater*, where the "standards on which the original . . . EIS relied were inadequate," here too the information on which the original EIS relied is inadequate as to Spotted Owl, Fisher, and Woodpecker habitat because the best available science directly contradicts that information. *See also Portland Audubon Soc'y v. Lujan*, 795 F.Supp. 1489, 1492, 1502 (D. Or. 1992) ("Within that decade, new information developed as to the effects of the planned actions . . . on the long-range survival of the

[species]. . . . The situation that the [agency] is in is precisely the situation in which a Supplemental Environmental Impact Statement is necessary."). In the absence of an SEIS, the 2004 Framework will simply be used to perpetrate the same harmful, misinformed, on-the-ground decisions in contravention of the twin aims of NEPA, informed decisions and an informed public.

B. Harm to Plaintiffs Will Be Irreparable Absent Preliminary Relief

An injury is "irreparable" where it cannot be adequately remedied by money damages or other legal remedies, and where such injury is "permanent or at least of long duration." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987). Such harm is likely if it is not speculative or remote. *Cottrell*, 632 F.3d at 1053 (logging that would harm "ability to 'view, experience, and utilize'" project area constitutes irreparable injury, even if some portion of the forest will remain after the logging).

The Aspen project would involve the logging of large areas of post-fire habitat, removing and degrading about 2,000 acres of rare and biodiverse complex early seral forest (see Facts section above, pp. 2-3), removing almost half of all Black-backed Woodpecker habitat which exists on the Sierra National Forest (*id*., at 7-8), and over 1,500 acres of foraging habitat for the imperiled California Spotted Owl and Pacific fisher. *Id*., at 3-6. Once the logging occurs this habitat would be irreparably removed and the areas would no longer be available to support these species. In fact, multiple data sources indicate that removal of Spotted Owl foraging habitat created by moderate/high-intensity fire *extirpates* (causes a loss of occupancy) the owls in the area (AR28217-22; AR27974-75), yet Defendants nowhere address this. In addition, if this substantial area of complex early seral forest is removed it would no longer be available for Plaintiffs' to use and enjoy in their lifetimes. Hanson Decl.; *Cottrell*, 632 F.3d at 1135 (loss of use and enjoyment of 1,652 acres is irreparable harm).

These irreparable harms outlined above—to both the Plaintiffs' members and the wildlife that currently inhabits this burned forest ecosystem which is proposed for logging—are likely because they would occur as soon as the trees are felled, which according to Defendants will begin on August 1, 2014. As described herein, these are exactly the type of harms the Ninth Circuit has found to be irreparable. *See, e.g.*, *Earth Island II,* 442 F. 3d at 1169-73 (logging of several thousand acres of post-fire California spotted owl habitat constitutes irreparable harm); *Envtl. Prot. Info. Ctr. v. Blackwell*, 389 F.Supp.2d 1174, 1221 (N.D. Cal. 2004) (injunction issued as no "means to replace such trees in

any meaningful fashion since it takes years for such trees to mature").

In addition, "[i]n the NEPA context, irreparable injury flows from the failure to evaluate the environmental impact of a major federal action." *Sierra Club v. Bosworth*, 510 F.3d 1016, 1033 (9th Cir. 2007) (citations omitted); *Nat'l Parks*, 241 F.3d at 737 n.18. Allowing a project to proceed absent compliance with NEPA forever eliminates the potential that NEPA procedures will foster better decision-making by the agency *before* they implement an action. *See*, *e.g.*, *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 558 (1978).

C. The Balance of Hardships Tips Sharply In Plaintiffs Favor and the Public Interest Would be Served by an Injunction

In contrast with the definite irreparable harm to Plaintiffs and their members (see section above), there will be no irreparable harm to the Forest Service from issuance of a preliminary injunction. "[I]f environmental injury is sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Sierra Club*, 510 F.3d at 1033 (quoting *Amoco Prod. Co.*, 480 U.S. 531, 545 (1987)); *Earth Island Inst. v. U.S. Forest Service*, 351 F.3d 1291, 1299 (9th Cir. 2003). Here logging is scheduled to proceed as early as August 1, 2014, and once the trees are cut down, Plaintiffs' harm, and the harm to wildlife is realized. In such a situation, the balance of harms tips strongly in favor of plaintiffs. *Forest Serv. Emp. for Envtl. Ethics v. U.S. Forest Serv.*, 2005 WL 1514071, *2 (N.D. Cal. June 27, 2005) (in suit where vegetation removal may harm the spotted owl and other birds, "the Court finds that the balance of hardships tips strongly in favor of plaintiffs").

The only hardship the Forest Service may claim is that their revenue will be reduced by $71,000 if logging is delayed until 2015 (AR12), but the "loss of anticipated revenues … does not outweigh the potential irreparable damage to the environment." *Earth Island II*, 442 F. 3d at 1177. The Forest Service's interest in selling timber for the sake of revenue is not compelling. *Sierra Forest Legacy v Rey*, 577 F.3d 1015, 1026 (9th Cir. 2009) (Noonan, J., concurring) ("Can an agency which has announced its strong financial interest in the outcome proceed objectively?")

Plaintiffs' request for injunctive relief also serves the public interest. In reviewing the public interest, a court must primarily address the "impact on non-parties rather than parties," particularly "where the impact of an injunction reaches beyond the parties, carrying with it a potential for public

consequences." *Inst. of Cetacean Res. v. Sea Shepherd Conservation Soc'y*, 708 F.3d 1099, 1104 (9th Cir. 2013) (other citations omitted). The Ninth Circuit has found that there is a "public interest in preserving nature and avoiding irreparable environmental injury," and that ensuring "careful consideration of environmental impacts before major federal projects go forward," and "suspending such projects until that consideration occurs 'comports with the public interest.'" *Cottrell*, 632 F. 3d at 1138 (citations omitted). Further, the forests Plaintiffs' seek to protect "will be enjoyed not principally by plaintiffs and their members but by many generations of the public." *Neighbors of Cuddy Mtn. v. U.S. Forest Service*, 137 F.3d 1372, 1382 (9th Cir. 1998).

Wholesale removal of a large proportion of this rare habitat type in the Sierra National Forest is not in the public interest because we now know how ecologically-important and rare this post-fire habitat is, including to the California Spotted Owl, a Forest Service Sensitive Species, the Black-backed Woodpecker, a species under ESA consideration, and the Pacific fisher, an ESA candidate species. Removing this habitat prevents enjoyment of these areas not only by Plaintiffs' members, but also members of the public, and it prohibits or seriously impedes continued scientific discovery of the ecological value of this moderate and high-intensity burned forest habitat overtime. Self-imposed ignorance of the natural world is not, and has never been, in the public's interest. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756 (2004) (quoting 42 U.S.C. § 4321) (NEPA's procedural safeguards are "intended to reduce or eliminate environmental damage and to promote 'the understanding of the ecological systems and natural resources important to' the United States"). An injunction also serves the public interest because this case "invokes a public interest of the highest order: the interest in having government officials act in accordance with law." *Seattle Audubon Society v. Evans*, 771 F. Supp. 1081, 1096 (W.D. Wash. 1991), *aff'd* 952 F.2d 297 (9th Cir. 1991).

Defendants may argue that public safety weighs against Plaintiffs' motion; however, argument is devoid of substance, considering that Defendants have already completed hazard tree removal on the main roads through the fire area. Hanson Decl. ¶9; AR99-101. Moreover, the fire area is not under a closure order (*id.*), campgrounds and trailheads (*e.g.*, West Kaiser and Pryor Lake) and Huntington Lake can be accessed through other roads (Highway 168 to Road 7S05) without crossing the fire area, and Plaintiffs are not seeking to enjoin hazard tree felling on public use roads.

CONCLUSION

Plaintiffs have met the requirements for issuance of a Temporary Restraining Order and Preliminary Injunction in this case, and respectfully request that the Court enjoin logging as specified above while Defendants comply with the law.

Dated: July 29, 2014

Respectfully submitted,

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