

1 Thomas Buchele, CA Bar No. 129657
2 Earthrise Law Center
3 Lewis & Clark Law School
4 10101 S Terwilliger Blvd.
5 Portland OR 97219-7799
6 Tel: 503-768-6736
7 Fax: 503-768-6642
8 Email: tbuchele@lclark.edu

9 Rachel M. Fazio, CA Bar No. 187580
10 John Muir Project of the Earth Island Institute
11 P.O. Box 897
12 Ridgecrest, CA 92314
13 Tel: 530-273-9290
14 Email: rachelmfazio@gmail.com

15 *Attorneys for Plaintiffs*

16 UNITED STATES DISTRICT COURT
17 EASTERN DISTRICT OF CALIFORNIA

18 **EARTH ISLAND INSTITUTE**, a non-
19 profit corporation; **SEQUOIA**
20 **FORESTKEEPER**, a non-profit
21 corporation; **SIERRA CLUB**, a non-profit
22 corporation,

23 Plaintiffs,

24 v.

25 **RANDY MOORE**, in his official capacity
26 as the Chief of the United States Forest
27 Service; **DEAN GOULD**, in his official
28 capacity as the Forest Supervisor for the
Sierra National Forest; **JENNIFER**
EBERLIEN, in her official capacity as the
Regional Forester for the Pacific Southwest
Region; **UNITED STATES FOREST**
SERVICE, an agency of the United States
Department of Agriculture,

Defendants.

No. 1:23-cv-1045-EPG

**FIRST AMENDED COMPLAINT FOR
PARTIAL VACATUR, INJUNCTIVE, AND
DECLARATORY RELIEF**

Administrative Procedure Act, 5 U.S.C. §§ 701
et seq.; National Environmental Policy Act, 42
U.S.C. §§ 4321 *et seq.*; National Forest
Management Act, 16 U.S.C. §§ 1600 *et seq.*

JURISDICTION AND VENUE

1
2 1. This Court has jurisdiction over this action pursuant to 5 U.S.C. §§ 701–706
3 (APA) and 28 U.S.C. §§ 1331 (federal question) & 2412 (costs and fees). Plaintiffs are
4 challenging final agency actions of the U.S. Forest Service (“Forest Service” or “Service”), and
5 agency actions unlawfully withheld, as defined by the Administrative Procedure Act (“APA”), 5
6 U.S.C. § 704 (actions reviewable) and § 706 (scope of review).

7 2. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e) because the
8 events or omissions giving rise to this claim occurred, and are occurring, in this district, primarily
9 in Madera and Fresno Counties.

10 3. An actual judiciable controversy exists between the parties hereto.

INTRADISTRICT VENUE

11
12 4. This case is properly filed in Fresno, California and properly before the Fresno
13 Division of this District pursuant to Local Rule 120(d) because the events or omissions giving rise
14 to this claim occurred, and are occurring, primarily in the Sierra National Forest in Madera and
15 Fresno Counties.

INTRODUCTION

16
17 5. Plaintiffs Earth Island Institute, Sequoia ForestKeeper, and Sierra Club
18 (collectively “Plaintiffs”) challenge Defendant U.S. Forest Service’s (“Forest Service” or
19 “Service”) R5 Fuels Reduction Treatments within Giant Sequoia Groves, Sequoia and Sierra
20 National Forests Decision Memo on July 22, 2022 (“July 2022 Decision Memo”), approving
21 procedures that were described in the document Emergency Response For Giant Sequoia Groves
22 (“Emergency Response Procedures”). The July 2022 Decision Memo was signed by Defendant
23 U.S. Forest Service Chief Randy Moore (“Moore”).

24 6. The Emergency Response Procedures were initially proposed by Defendant
25 Jennifer Eberlien, the Pacific Southwest Regional Forester, and describe wildfire fuels reduction
26 logging alleged to mitigate fire risks in twelve Giant Sequoia groves.

27 7. Although the July 2022 Decision Memo authorizes seven separate projects
28 involving logging and other activities in twelve Giant Sequoia groves in the Sequoia and Sierra

1 National Forests, each of these seven projects is being considered separately for NEPA
2 compliance. At this time, Plaintiffs are solely challenging the legal compliance of those activities
3 authorized by the July 2022 Decision Memo relevant to the Nelder Grove Historical Area in the
4 Sierra National Forest—the Nelder Grove Fuels Reduction Project (“Nelder Grove Project” or
5 “Project”).

6 8. The July 2022 Decision Memo allows the Service to begin implementing the
7 Nelder Grove Project without preparing any National Environmental Policy Act (“NEPA”)
8 analysis documents, including the preparation of a decision memorandum that identifies the
9 specific categorical exclusion (“CE”) that the Service is invoking. However, the Proposed
10 Emergency Response indicates that the Nelder Grove Project was initially developed under one of
11 the CEs found in 36 C.F.R. § 220.6(e). As of the filing of this Amended Complaint, the Service
12 has not indicated any plans to complete the decision memorandum and supporting record for the
13 CE as required by 36 C.F.R. § 220.6(e). As of the filing of this Amended Complaint, the Service
14 has not indicated any plans to reveal which specific CE allegedly covers the Nelder Grove
15 Project. The Service’s refusal to conduct these actions appears to seemingly exempt the Project
16 from ever complying with the regulatory requirements to scope and document certain CEs under
17 36 C.F.R. § 220.6(e).

18 9. Even if the Service’s July 2022 Decision Memo could somehow properly meet the
19 requirements to invoke a CE, the Service failed to consider or establish that extraordinary
20 circumstances do not bar the invocation of a CE for the Nelder Grove Project. At the time the July
21 2022 Decision Memo was issued, the Services was aware of several extraordinary circumstances
22 which are present in the project area, including the existence of Federally listed threatened or
23 endangered species, proposed critical habitat, Forest Service Sensitive Species, and religious or
24 cultural sites. The Service failed to analyze or even mention the existence of these resource
25 conditions which could preclude the use of a CE.

26 10. Not only has the Service failed to provide sufficient CE documentation, but the
27 Service also failed to meet the requirements of 36 C.F.R. § 220.4(b) to exempt itself from
28 documentation. The Service alleged that its actions in the Nelder Grove project and the July 2022

1 Decision Memo were authorized by 36 C.F.R. § 220.4(b). 36 C.F.R. § 220.4(b) only authorizes
2 the development of alternative arrangements. To meet the requirements for an alternative
3 arrangement under 36 C.F.R. § 220.4(b)(3), the Forest Service needed to consult with the Council
4 on Environmental Quality (“CEQ”) to develop alternative arrangements for NEPA compliance
5 prior to finalizing the July 2022 Decision Memo. The Service did not do so.

6 11. On November 8, 2022, the Forest Service published a scoping notice for logging
7 activities claimed to protect Giant Sequoias in Nelder and McKinley Groves (“November 2022
8 Scoping Notice”). This scoping notice states that it will include the previously authorized Nelder
9 Grove activities in its unspecified “environmental analysis,” even though that work is already
10 underway. The Nelder Grove portion of the scoping notice describes the activities “covered by
11 the emergency order” to include “treatments” that were not authorized by the July 2022 Decision
12 Memo.

13 12. In addition to challenging the legal compliance of the July 2022 Decision Memo
14 with NEPA, Plaintiffs are also challenging the ensuing activities that the Service undertook and is
15 continuing to undertake in Nelder Grove that are not authorized by the July 2022 Decision Memo.
16 Plaintiffs allege on information and belief that these unauthorized activities were approved by
17 Defendant Dean Gould, the Forest Supervisor for the Sierra National Forest.

18 13. The July 2022 Decision Memo does not authorize the thinning activities in the
19 approximately 80% of Nelder Grove that recently experienced fire where the risk of re-burn is
20 low as well as mechanical thinning activities—involving heavy machinery—throughout the
21 entirety of the Grove. Not only do these activities contradict the authority provided by the July
22 2022 Decision Memo, but they also pose a risk to naturally-regenerating young sequoias—
23 seedlings and saplings that have thrived in the post-fire ecology of Nelder Grove in the past few
24 years.

25 14. In 2017, the Railroad fire burned approximately 80% of Nelder Grove, leaving
26 only the Southeastern portion unburned. Some areas of Nelder Grove burned at high-intensity,
27 killing all mature Giant Sequoias in these portions of the Grove. In the intervening years, young
28 Giant Sequoias have been naturally regenerating in these portions of the Grove, reestablishing in

1 the areas where the high-severity fire killed the mature sequoias but also allowed the Giant
2 Sequoia’s life cycle—which is dependent on high-intensity fire to allow for seed dispersal and
3 reproduction—to continue.

4 15. Young Sequoias in these portions of Nelder Grove are quickly regenerating and
5 becoming established, with some measuring up to twelve feet high in spring 2023. Activities,
6 particularly those involving mechanical thinning in areas that burned with high severity where no
7 mature sequoias remain alive, crush and kill these young Giant Sequoias, threatening the very
8 species the Proposed Emergency Response and July 2022 Decision Memo purport to protect.
9 These activities have killed some of the Giant Sequoias’ offspring reproducing in the Nelder
10 Grove Project Area as a result of the 2017 Railroad Fire. If allowed to continue, these activities
11 will kill more of these offspring.

12 16. The July 2022 Decision Memo, the Emergency Response Procedures it authorizes,
13 and the past and continuing unauthorized activities in Nelder Grove violate NEPA, the
14 implementing regulations promulgated by the CEQ, the implementing regulations promulgated by
15 the Forest Service, the National Forest Management Act (“NFMA”), and the APA.

16 17. Plaintiffs seek from this Court declaratory and injunctive relief, and partial vacatur
17 of the July 2022 Decision memo, including any necessary injunctive relief to ensure that
18 Defendants take no further actions toward proceeding with the challenged actions in Nelder
19 Grove until they have complied with NEPA and NFMA. Such relief prevents the Forest Service
20 from conducting logging and other activities with the potential to have significant environmental
21 impacts in Nelder Grove prior to finalizing any environmental analysis under NEPA, including
22 logging in areas where no “emergency” exists because the recently burned areas have low
23 potential for high severity wildfire and because the logging would kill the natural regeneration of
24 Giant Sequoias, the very tree the Emergency Response Procedures claims to protect.

25 **PARTIES**

26 18. Plaintiff **EARTH ISLAND INSTITUTE (“Earth Island”)** is a nonprofit
27 corporation organized under the laws of the State of California and headquartered in Berkeley,
28 California. Earth Island’s mission is to develop and support projects that counteract threats to the

1 biological and cultural diversity that sustains the environment. Through education and activism,
2 these projects promote the conservation, preservation, and restoration of the earth. One of these
3 projects is the John Muir Project—whose mission is to protect all federal public forestlands from
4 commercial exploitation that undermines and compromises science-based ecological
5 management. John Muir Project offices are located in Tulare County, California. Earth Island is a
6 membership organization with over 15,000 members in the United States, over 3,000 of whom
7 use and enjoy the National Forests of California for recreational, educational, aesthetic, spiritual,
8 and other purposes. Earth Island through its John Muir Project has a longstanding interest in
9 protection of national forests. Earth Island’s John Muir Project and Earth Island members actively
10 participate in governmental decision-making processes with respect to national forest lands in
11 California and rely on information provided through the NEPA processes to increase the
12 effectiveness of their participation. Earth Island’s members include individuals who regularly use
13 public lands within the Sierra National Forest, including the Nelder Grove areas currently being
14 logged in particular, for scientific study, recreational enjoyment, aesthetic beauty, and nature
15 photography. These members’ interests will be irreparably harmed by the ongoing logging, as
16 they will no longer be able to scientifically study these areas in their current state, take nature
17 photographs of the area in its current state, or enjoy the aesthetic beauty of the unlogged forest
18 habitat and its inhabitants.

19 19. Plaintiff **SEQUOIA FORESTKEEPER** is a non-profit corporation residing in
20 Kernville, California. Its mission is to protect and restore the ecosystems of the Southern Sierra
21 Nevada, including, but not limited to, the Giant Sequoia National Monument, Sequoia National
22 Forest, and Sierra National Forest through monitoring, enforcement, education, and litigation.
23 Sequoia ForestKeeper’s members use and continue to use the national forests of the Southern
24 Sierra Nevada for activities such as hiking, bird and animal watching, aesthetic enjoyment, quiet
25 contemplation, scientific study, and to improve their health, including Nelder Grove. Many of its
26 members also have been actively involved in formulating management policies for public lands
27 and preserving local areas, including participating in revising the Sierra National Forest plan.
28 These members’ interests will be irreparably harmed by the planned logging and other activities,

1 as they will no longer be able to scientifically study these areas in their undisturbed state, take
2 nature photographs of the area in its pre-logging state, or enjoy the aesthetic beauty of the
3 naturally regenerating Sequoia forest habitat and its inhabitants.

4 20. Plaintiff **SIERRA CLUB** is a 501(c)(4) non-profit organization and the nation's
5 oldest grassroots environmental organization. Sierra Club's members and supporters are
6 dedicated to the purpose of exploring, enjoying, and protecting the wild places of the Earth;
7 practicing and promoting the responsible use of the Earth's ecosystems and resources; educating
8 and enlisting humanity to protect and restore the quality of the natural and human environment;
9 and using all lawful means to carry out these objectives. The Sierra Club has more than 695,000
10 members nationwide, more than 147,000 members in California, and more than 1,700 members in
11 its Tehipite Chapter, which includes the Sierra National Forest. Sierra Club members in the
12 Tehipite Chapter enjoy Nelder Grove for hiking, birdwatching, and experiencing its natural
13 beauty.

14 21. This suit is brought by Plaintiffs on behalf of themselves and their adversely
15 affected members and staff. Each plaintiff has an organizational interest in the proper and lawful
16 management of the Sierra National Forest. Plaintiffs' and their members' present and future
17 interests in the use of Nelder Grove are and will be directly and adversely affected by the
18 challenged decision. Those adverse effects include, but are not limited to: (1) impacts to wildlife
19 and their habitats within and around the Nelder Grove Project area from logging and other Project
20 activities; (2) reduction and impairment of recreation opportunities related to Giant Sequoias,
21 including loss of young, naturally regenerating sequoia forests; (3) impaired aesthetic value of
22 forest lands, trails, and landscapes caused by Defendants' logging and other Project activities; and
23 (4) loss of scientific study and viewing opportunities with regard to wildlife in areas subject
24 logging and other Project activities—specifically regarding the natural regeneration of Giant
25 Sequoias. In addition, Plaintiffs and their members and staff have an interest in ensuring that
26 Defendants comply with all applicable laws, regulations, and procedures pertaining to the
27 management of national forests. These are actual, concrete injuries caused by Defendants' failure
28 to comply with mandatory duties under NEPA, NFMA, and other federal laws. Because

1 Defendants' actions approving the Project violate the law, a favorable decision by this Court will
2 redress the actual and imminent injury to Plaintiffs.

3 22. Beyond submitting two comments—one in December 2022 and one in June
4 2023—on the belated November 2022 Scoping Notice, Plaintiffs have not had the opportunity to
5 participate in administrative actions to protect Plaintiffs or their interests within the Nelder Grove
6 Project area because the Forest Service did not make the July 2022 Decision Memo, the
7 underlying Emergency Response Procedure, or other information pertaining to the proposed
8 Nelder Grove Project available to the public for notice and comment. In addition, many of the
9 documents upon which the Forest Service relies are not publicly available. Plaintiffs have
10 exhausted any and all available administrative remedies. Reviewable final agency action exists
11 that is subject to this Court's review under 5 U.S.C. §§ 702 & 704.

12 23. The Forest Service's past and continuing implementation of the Nelder Grove
13 Project is in contravention of NEPA and NFMA. Because Defendants' actions affecting Nelder
14 Grove violate the law, a favorable decision by this Court will redress the actual and imminent
15 injuries to Plaintiffs. If the Forest Service were to comply with NEPA and NFMA, it would cease
16 Project implementation until it has completed the requisite NEPA analysis demanded by the
17 Project. At a minimum, this would involve publishing a properly scoped and documented CE for
18 the Nelder Grove Project.

19 24. It is much more likely, however, that the necessary NEPA procedure would be to
20 prepare an environmental impact statement ("EIS"), according to alternative arrangements
21 developed with the CEQ, given the potential significant effects to the historic Nelder Grove and
22 its resident Giant Sequoias, the certainty that logging will kill young Giant Sequoias regenerating
23 as a result of the 2017 Railroad Fire, and the possibility that logging and other project activities
24 will increase wildfire severity in and around mature Giant Sequoias, as plaintiffs documented in
25 their comments in the form of dozens of scientific studies, including many Forest Service studies,
26 finding that mechanical thinning and post-fire logging tend to increase severity in wildfires.
27 Proper NEPA analysis would consider additional alternatives to the proposed action, and could
28 minimize or avert the harm to Plaintiffs' members that will be caused from the logging of trees.

1 environmental analysis and decision-making. 40 C.F.R. §§ 1500.1(a), (b). NEPA’s public
2 disclosure goals are twofold: (1) to ensure that the agency has carefully and fully contemplated
3 the environmental effects of its action; and (2) to ensure that the public has had sufficient
4 information to review, comment on, and challenge (if necessary) the agency’s action. See 42
5 U.S.C. §§ 4321, 4332.

6 30. The CEQ promulgates regulations implementing NEPA. CEQ’s regulations are
7 binding on all federal agencies, 40 C.F.R. § 1500.3(a), and can be found at 40 C.F.R. Parts 1500–
8 1508.

9 31. Agency actions taken pursuant to NEPA are reviewable by this Court under the
10 APA. 5 U.S.C. §§ 702, 704, 706.

11 32. There are three potential avenues for federal agencies to comply with NEPA, each
12 reflecting a different level of analysis required to meet statutory and regulatory requirements.
13 These are, in descending level of complexity, an Environmental Impact Statement (“EIS”), an
14 Environmental Assessment (“EA”), or a Categorical Exclusion (“CE”).

15 33. An EIS is appropriate where the agency anticipates that the proposed action will
16 likely have a significant impact, 40 C.F.R. § 1501.3(a)(3), because federal agencies must prepare
17 an EIS for all “major federal actions significantly affecting the quality of the human
18 environment.” 42 U.S.C. § 4332(2)(C). Under NEPA, both adverse and claimed beneficial
19 impacts are relevant and may be significant. See 40 C.F.R. § 1508.1(g)(4). Agencies must
20 consider scientific controversy when determining whether a proposed action may have significant
21 impacts.

22 34. An EA is appropriate where the agency anticipates that the proposed action is not
23 likely to have significant impacts, or if the significance of impacts is unknown. 40 C.F.R. §§
24 1501.3(a)(2), 1501.5(a), 1508.1(h). If, after preparing the EA, the agency determines that the
25 action *is likely to* have significant impacts, then it must prepare an EIS. 40 C.F.R. § 1501.3(a)(3).
26 If the agency determines that it *will not* have significant impacts, then it must issue a finding of no
27 significant impact (“FONSI”). 40 C.F.R. § 1501.6(a).

28 35. A CE is appropriate for “categories of actions that normally do not have a

1 significant effect on the human environment, and therefore do not require preparation of an
2 environmental assessment or environmental impact statement.” 40 C.F.R. § 1501.4(a). CEs must
3 be identified in an agency’s NEPA procedures and “[a]gency NEPA procedures shall identify
4 when documentation of a categorical exclusion determination is required.” 40 C.F.R. §
5 1507.3(e)(2)(ii). The agency should only use a CE if the agency “*determines* that a categorical
6 exclusion identified in its agency NEPA procedures covers a proposed action.” *See* 40 C.F.R. §
7 1501.4(b)(1) (emphasis added).

8 36. A CE is inappropriate, however, where its use is precluded by the presence of
9 “extraordinary circumstances in which a normally excluded action may have a significant effect.”
10 40 C.F.R. § 1501.4; *see* 40 C.F.R. § 1507.3(e)(2)(ii). Therefore, if the agency determines that
11 extraordinary circumstances exist, the agency may only “categorically exclude the proposed
12 action if the agency determines that there are circumstances that lessen the impacts or other
13 conditions sufficient to avoid significant effects.” 40 C.F.R. § 1501.4(b)(1).

14 37. Consequently, to avoid preparation of either an EA or EIS, the agency must
15 determine that an established CE applies which specifically exempts the proposed action from
16 additional NEPA review, conduct any necessary scoping, and determine that no extraordinary
17 circumstances preclude use of the CE. Agencies have an affirmative duty to contemporaneously
18 document their determination that a CE applies and their consideration of extraordinary
19 circumstances so that a reviewing court may determine if their application of the CE was arbitrary
20 and capricious. An agency cannot use a CE to exclude multiple phases of a project from
21 environmental review when it does not itself understand the parameters of those phases or its
22 timetable for completing those phases.

23 38. Until an agency publishes a finding of no significance (“FONSI”) or record of
24 decision demonstrating compliance with these requirements, it may not take any action that has
25 an adverse environmental impact. 40 C.F.R. § 1506.1.

26 39. When there are “emergency circumstances” that make it necessary for an agency
27 to take actions that are likely to have a significant environmental impact, the agency may consult
28 with the CEQ to make “alternative arrangements” for NEPA compliance. 40 C.F.R. § 1506.12.

1 These alternative arrangements are limited “to actions necessary to control the immediate impacts
2 of the emergency,” while “[o]ther actions remain subject to NEPA review.” *Id.*

3 40. According to a chart published by the CEQ in May 2019, the CEQ only approved
4 alternative arrangements 47 times between 1980 and 2019.

5 **U.S. Forest Service’s NEPA-Implementing Regulations (36 C.F.R. Part 220)**

6 41. At 36 C.F.R. § 220.6, the Forest Service’s NEPA-implementing regulations list
7 CEs “for which a project or case file and decision memo are required,” 36 C.F.R. § 220.6(e), as
8 well as categories for which a “supporting record and decision memo are not required” but “may
9 be prepared,” 36 C.F.R. § 220.6(d). The use of these CEs is also explicitly limited to situations in
10 which there are no extraordinary circumstances. 36 C.F.R. § 220.6(a); *see also* 40 C.F.R. §
11 1501.4.

12 42. 36 C.F.R. § 220.6(b) lists “resource conditions” that should be considered in
13 determining whether extraordinary circumstances preclude the use of a CE and thus require an
14 EA or EIS. These resource conditions include “[f]ederally listed threatened or endangered
15 species” or “species proposed for Federal listing or proposed critical habitat, or Forest Service
16 sensitive species,” *id.* § 220.6(b)(1)(i), “American Indians and Alaska Native religious or cultural
17 sites,” *id.* § 220.6(b)(1)(vi) and “[a]rchaeological sites, or historic properties or areas,” *id.* §
18 220.6(b)(1)(vii). Such Federally listed species include those listed under the Endangered Species
19 Act (“ESA”). 16 U.S.C. § 1531–1544; 50 C.F.R. § 17. The Forest Service maintains a list of
20 Forest Service Sensitive Species for each region. The Forest Service also tracks native and
21 cultural sites as well as archaeological sites or historic properties or areas on Forest Service
22 property.

23 43. Although the CEQ’s regulations only explicitly apply the scoping process to the
24 preparation of EISs, *see* 40 C.F.R. § 1501.9(a), the Forest Service’s regulations specify that
25 “[s]coping is required for all Forest Service proposed actions, including those that would appear
26 to be categorically excluded from further analysis and documentation.” 36 C.F.R. § 220.4(e); *see*
27 *also* 36 C.F.R. § 220.6(c).

28 44. When using a CE to avoid further NEPA analysis, the Service must document in

1 its scoping documents that there are no extraordinary circumstances that may result in an
2 otherwise excluded action having significant impacts.

3 45. Regarding emergencies, the Forest Service’s regulations supplement the CEQ’s
4 regulations and define three categories of actions for when “an emergency exists that makes it
5 necessary to take urgently needed actions before preparing a NEPA analysis.” *See* 36 C.F.R. §
6 220.4(b). First, the agency “may take actions necessary to control the immediate impacts of the
7 emergency and are urgently needed to mitigate harm to life, property, or important natural or
8 cultural resources.” *Id.* § 220.4(b)(1). When additional actions are urgently needed, the agency
9 may take such actions which are not likely to have significant environmental impacts only after
10 consulting with the Washington Office of the Forest Service about “alternative arrangements” for
11 NEPA compliance. *Id.* § 220.4(b)(2).

12 46. Finally, the agency may only take actions that are likely to have significant
13 environmental impacts after consulting with the CEQ about “alternative arrangements” in
14 accordance with 40 C.F.R. § 1506.12. *See* 36 § 220.4(b)(3).

15 47. “Emergency” is a term generally defined as “unforeseen combination of
16 circumstances or the resulting state that calls for immediate action.” USFS National
17 Environmental Policy Act Procedures, 73 Fed. Reg. 43084, 43087–88 (July 24, 2008) (codified at
18 36 CFR Part 220) (citing Webster’s Third New International Dictionary Of The English
19 Language (1961) and Merriam-Webster’s Collegiate Dictionary (11th ed. 2004)).

20 48. The Service’s application of 36 C.F.R. § 220.4(b)(2), when approving the Nelder
21 Grove Project, to authorize intra-agency alternative arrangements that entirely circumvent both
22 the agency’s and the CEQ’s NEPA regulations is not supported by the CEQ’s NEPA regulations.
23 *See* 40 C.F.R. § 1506.12.

24 **U.S. Forest Service Special Area Regulations (36 C.F.R. § 294.1)**

25 49. Under 36 C.F.R. § 294.1, the Service designates special interest areas “which
26 should be managed principally for recreation use substantially in their natural condition.”

27 **National Forest Management Act (16 U.S.C. §§ 1600 *et seq.*)**

28 50. The National Forest Management Act (“NFMA”), 16 U.S.C. §§ 1600 *et seq.*, is the

1 primary statute governing the administration of national forests. Agency actions taken pursuant to
2 NFMA are reviewable under the APA. 5 U.S.C. §§ 702, 704, 706.

3 51. NFMA requires the Forest Service to develop and implement a Land and Resource
4 Management Plan (“LRMP” or “Forest Plan”) for each unit of the National Forest System. 16
5 U.S.C. § 1604. Forest Plans guide natural resource management activities forest-wide, setting
6 standards, management area goals and objectives, and monitoring and evaluation requirements. A
7 Forest Plan must provide for multiple uses for the forest, including: recreation, range, wildlife,
8 fish, timber, and wilderness.

9 52. Under NFMA all permits, contracts, and other instruments for the use of National
10 Forest System lands “shall be consistent with the land management plans.” *Id.* § 1604(i).
11 Therefore, after a forest plan is developed, all subsequent agency action, including site-specific
12 actions, must comply with NFMA and the governing Forest Plan. The Emergency Response
13 Procedures document claims the proposed actions are “consisten[t] with each respective forest’s
14 land management plan.”

15 53. When the Nelder Grove Project was approved in July 2022, the LRMP governing
16 the Sierra National Forest was from 1991 (“1991 Sierra Forest Plan”). During the 2000’s the
17 Forest Service amended every Forest Plan in the Sierra Nevada by adopting the “Sierra Nevada
18 Forest Plan Amendment of 2004” (“2004 Framework”). The 2004 Framework was designed to
19 address inefficiencies within previous Forest Plans and amendments by focusing on old forest
20 ecosystems and associated species and fire and fuels.

21 54. The 1991 Sierra Forest Plan requires District Rangers to prepare projects to meet
22 the features outlined in the Plan and conduct site-specific analysis in accordance with NEPA’s
23 procedures.

24 55. The 1991 Sierra Forest Plan designated Nelder Grove as a “Historical Area”—a
25 subset of the “Special Interest Area” category. *See* 36 C.F.R. § 294.1. The Record of Decision for
26 the Sierra Forest Plan also requires the Service to “Develop a detailed long-term implementable
27 strategy for the Grove” and mandates that “[u]ntil the long-term implementation strategy is
28 approved, only human hazard trees will be removed.” If such a strategy exists, Plaintiffs have not

1 been able to find it and thus allege on information and belief that it is not publicly available and
2 does not exist.

3 56. In July 2022, the effective LRMP was the 1991 Sierra National Forest Plan, as
4 amended by the 2004 Sierra Nevada Forest Plan Amendment. However, in May 2023, the Forest
5 Service published a new LRMP for the Sierra National Forest (“2023 Sierra Forest Plan”),
6 replacing the 1991 Sierra Forest Plan. Like the 1991 Sierra Forest Plan, the 2023 Sierra Forest
7 Plan also requires projects to be analyzed using appropriate NEPA procedures. Additionally, this
8 plan continues to designate Nelder Grove as a “Historical Area.” Unlike the prior plan, however,
9 the 2023 Sierra Forest Plan also describes Desired Conditions, Goals, Suitability, and Guidelines
10 for Nelder Grove. The Desired Conditions describe “Giant sequoia trees...successfully
11 regenerating and recruiting into older age classes” and “[f]ires burn[ing] primarily at low to
12 moderate severity with limited patches of high severity creating canopy gaps of variable sizes and
13 shapes (generally less than one-half acre) and bare mineral soil to promote sequoia regeneration.”
14 The Guidelines include maintaining the “[e]cological and hydrologic function of giant sequoia
15 groves” and “thin[ning] conifers to increase heterogeneity and resilience, emphasizing retention
16 of the oldest and largest trees such as giant sequoias and pines.” Additionally, the Guidelines
17 specify that “Litter and duff should be removed at least 2 feet and shrubs and small trees at least 6
18 feet from the base of large and old sequoias (especially those containing cat faces) to limit fire
19 impacts.” Read together, these guidelines create both a ceiling and floor on the scope of activities
20 that are required or permissible in Nelder Grove.

21 **Administrative Procedure Act (5 U.S.C. §§ 701–706)**

22 57. Section 702 of the APA, 5 U.S.C. § 702, provides a private cause of action to any
23 person “suffering legal wrong because of agency action, or adversely affected or aggrieved by
24 agency action within the meaning of a relevant statute[.]” The APA provides a cause of action to
25 challenge any final agency action where there is no other adequate remedy in a court. 5 U.S.C. §
26 704.

27 58. Under Section 706 of the APA, reviewing courts “shall . . . (1) compel agency
28 action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency

1 action, findings, and conclusions found to be... arbitrary, capricious, an abuse of discretion, or
2 otherwise not in accordance with law” or “without observance of procedure required by law[.]” 5
3 U.S.C. §§ 706(1), 706(2)(a), (d).

4 59. NEPA and NFMA do not contain specific judicial review provisions, and the
5 Forest Service’s actions governed by NEPA and NFMA are therefore subject to judicial review
6 under the APA.

7 **ADDITIONAL FACTS GIVING RISE TO THE PLAINTIFFS’ CAUSE OF ACTION**

8 60. The Sierra National Forest (“Forest”) was originally established as a forest reserve
9 by presidential proclamation in 1893. As it currently stands, the Forest encompasses
10 approximately 1.3 million acres. Located in Central California near the town of Oakhurst, Nelder
11 Grove of Giant Sequoias is a relatively small portion of the Sierra National Forest, covering just
12 1,432 acres.

13 61. Nelder Grove is most well-known for its mature Giant Sequoias and abundant
14 wildlife. As one of roughly 70 groves in the Sierra Nevada range, Nelder Grove is a popular
15 destination among the recreating public due to its breathtaking scenery and relatively undisturbed
16 natural settings. The Grove is used by members of the public for wildlife viewing, photography,
17 and scientific studies of species, habitats, and other important biological processes. Plaintiffs’
18 members use Nelder Grove for such purposes, and have an interest in the proper management of
19 the Grove’s resources.

20 62. The 2017 Railroad Fire burned through approximately 80% of Nelder Grove in
21 2017, leaving only the southeast portion of the grove unburned. The fire burned at various
22 severities in affected areas of the Grove, including at low- to moderate-severity in most areas and
23 high-severity in other areas.

24 63. Prior to the Railroad Fire in 2017, Nelder Grove contained approximately 106
25 mature Giant Sequoias. The Railroad Fire killed more than 30 mature Giant Sequoias. No mature
26 giant sequoias remain alive in severely-burned portions of Nelder Grove. High-severity fires are
27 necessary for natural Giant Sequoia reproduction because the high temperatures involved are
28 necessary for the release of seeds, and high-severity fire consumes the thick duff and litter on the

1 forest floor, turning it into a nutrient-rich red of mineral ash. Young sequoias need this because it
2 allows them to sink their roots into soil (not just duff and litter), and the mineral ash aids the
3 growth of young sequoias for many years. Giant Sequoias naturally regenerate in high-severity
4 burned areas and this regeneration is occurring in Nelder Grove: Observations by Plaintiffs’
5 members have found that areas of Nelder Grove impacted by recent fires, particularly those
6 impacted by high-severity fire from the 2017 Railroad Fire, are regenerating successfully as
7 young sequoias are becoming established in the Nelder Grove.

8 64. Ground-based post-fire logging kills naturally-regenerating trees, including young
9 sequoias. Plaintiff’s members have observed that thinning activities in Nelder Grove, and in
10 particularly mechanical thinning activities, have killed naturally-regenerating young Giant
11 Sequoias in previously burned areas of the grove.

12 65. Logging activities performed pursuant to the Project, particularly those using
13 mechanical thinning in areas previously recently burned by high-intensity fires, are killing these
14 naturally-regenerating young sequoias, harming the species the Decision Memo seeks to protect
15 and disrupting the natural processes highlighted by the May 2023 Sierra Forest Plan.

16 66. In July 2022, Defendant Regional Forester Jennifer Eberlien requested an
17 emergency response to address the purported “emergency” of risk of wildfires in Giant Sequoia
18 groves by issuing the Proposed Emergency Response. The stated objective of the response
19 requested in the Proposed Emergency Response is “to provide for long term survival of Giant
20 Sequoias by reducing the likelihood and effects of high severity wildfire before it occurs in
21 previously unburned or moderately burned Giant Sequoia groves.” The Proposed Emergency
22 Response stated, “urgent treatments include removal of green and dead surface and ladder fuels
23 from immediately around large Giant Sequoias to prevent trees from torching.” The Proposed
24 Emergency Response further states “unburned groves and portions of groves that did not burn in
25 recent wildfires are at greatest risk.” The same document notes the 2017 Railroad Fire affected
26 Nelder Grove and includes a map showing that most of Nelder Grove burned in the Railroad Fire
27 in 2017. The July 2022 Decision Memo also states that “unburned groves and unburned portions
28 of burned groves are under severe threat to wildfire.”

1 67. The Forest Service’s assessments shown in the Proposed Emergency Response are
2 consistent with science showing low-risk of re-burn of fires of any intensity, but especially of
3 high-intensity fires, after a previous fire. Since the Railroad Fire burned in Nelder Grove in 2017,
4 there is a low risk of reburn of the 80% of the grove which was burned by the 2017 Fire.

5 68. Despite limiting the activities planned for Nelder Grove to the area “immediately
6 around” live, mature Giant Sequoias in previously unburned or only moderately burned Giant
7 Sequoia groves, the Proposed Emergency Response and July 2022 Decision Memo do not clearly
8 describe the activities planned for Nelder Grove. On one hand, the Proposed Emergency
9 Response includes a chart listing activities planned for each of the seven projects included in the
10 July 2022 Decision Memo and specifies that only “handwork” activities are proposed for the
11 Nelder Grove Project, while “mechanical” activities are proposed for other projects. This
12 assertion was supported by Jennifer Christie, the District Ranger for the Bass Lake Ranger
13 District of the Sierra National Forest, who emailed parties interested in the Nelder Grove Project
14 an update on the On August 23, 2022, (“August 2022 Email Update”) responding to questions
15 about the Nelder Grove Project description.

16 69. The August 2022 Email Update described the specific activities that would occur
17 during “Phase 1” of Project, as well as explaining for the first time that that the Project would be
18 implemented in three to four phases, the remainder of which had not been “worked out or
19 developed” at the time. The August 2022 Email Update specified that “[n]one of the work
20 planned for Phase 1 will be completed via mechanical treatments,” and that Phase 1 included
21 felling—but not removing—hazard trees along roads, felling hazard trees immediately around the
22 base of live mature Giant Sequoias, and creating fuel buffers around the base of live mature Giant
23 Sequoias. Notably, the August 2022 Email Update is the first public document that explicitly
24 mentions felling hazard trees in Nelder Grove—particularly outside of the area immediately
25 around live, mature Giant Sequoias in previously unburned and moderately burned groves.
26 Felling of hazard trees is unauthorized because it is outside the scope of the 2022 Decision
27 Memo.

28 70. On the other hand, the Proposed Emergency Response also contradicts the project-

1 specific description documented in paragraph 68 and broadly describes the activities that the
2 Service is implementing in Sierra National Forest to include both manual and mechanical
3 treatments. This portion of the Proposed Emergency Response specifically lists “emergency fuels
4 treatments” that include the mechanical removal of live trees less than or equal to twenty inches
5 in diameter at breast height.

6 71. Regardless of this inconsistency, the geographic scope of these activities is still
7 circumscribed to the area immediately around live, mature Giant Sequoias in previously unburned
8 or moderately burned groves that are highly susceptible to severe wildfire due to high fuel
9 accumulation. The focus of the Project is reducing the risk of mortality to monarch Giant
10 Sequoias during the next wildfire. The emergency fuel “treatments” listed for all groves
11 encompassed by the Project, not just Nelder Grove, solely include removing surface and ladder
12 fuels which present the greatest risk from wildfire to living, mature Giant Sequoias.

13 72. Procedurally, the July 2022 Decision Memo specified that four projects covered by
14 CEs would be “exclude[d] [from] the requirement at 36 CFR 220.6(e) to document a decision to
15 proceed with an action in a decision memo for certain Categorical Exclusions.” The Proposed
16 Emergency Response documents that the Nelder Grove Project is one of these four projects
17 supposedly covered by a CE.

18 73. The Proposed Emergency Response and Decision Memo both state that 36 C.F.R.
19 § 220.4(b)(2) allows the Service to exclude the requirement in the Forest Service’s regulations at
20 36 C.F.R. § 220.6(e) to document the use of certain CEs in a decision memo prior to proceeding
21 with the underlying action. Justifying this use of 36 C.F.R. § 220.4(b)(2), the Proposed
22 Emergency Response states that these actions are not likely to have significant adverse
23 environmental impacts.

24 74. The Service did not consult with the CEQ about alternative arrangements for the
25 Project. The Decision Memo states that the decision approving the Project “is not an alternative
26 arrangement as defined by the Council on Environmental Quality in 40 CFR 1506.12.” As of the
27 filing of this Amended Complaint, the Service has not made public any NEPA documents relating
28 to the Project at Nelder Grove or the CE used for the project.

1 75. Because of this stark lack of publicly available information, on June 30, 2023,
2 Plaintiffs sent the Service a Freedom of Information Act (“FOIA”) request requesting specific
3 documents related to the Service’s activities in Nelder Grove. Among other things, Plaintiffs
4 requested any record identifying which CE the Service is using for the Giant Sequoia Response
5 Actions in Nelder Grove and any records reflecting analysis justifying the use of the CE in the
6 presence of extraordinary circumstances. On July 24, 2023, the Service asked Plaintiffs to
7 withdraw its FOIA request or, in the alternative, to substantially narrow its request. On July 31,
8 2023, rather than withdrawing the request, Plaintiffs requested the Service prioritize the
9 production of two categories of records, including any record identifying which CE the Service is
10 using for the Giant Sequoia Response Actions in Nelder Grove. Since then, the Service has
11 released some documents on August 14, 2023, and September 27, 2023. None of these released
12 documents identify which CE the Service is using for the Giant Sequoia Response Actions in
13 Nelder Grove.

14 76. Neither the Proposed Emergency Response nor the Decision Memo specify which
15 CE applies to the Nelder Grove Project. Nor does either document specify whether the agency
16 considered extraordinary circumstances that could disqualify the Project from being analyzed
17 under a CE. Neither document specifies whether any additional NEPA analysis will be prepared
18 for the Project in the future.

19 77. The Forest Service has not publicly identified its determination of which CE
20 applies to the Nelder Grove Project. Plaintiffs are not aware of any internal Forest Service records
21 identifying a CE that applies to the Nelder Grove Project. On information and belief, at the time
22 the Forest Service issued the July 2022 Decision Memo, the Service had not publicly or internally
23 documented which CE it has invoked to exempt its actions in the Nelder Grove Project from the
24 requirement to conduct further analysis and documentation in an EIS or an EA, 36 C.F.R.
25 § 220.6(a). On information and belief, in the over fifteen months between when the Forest
26 Service issued the July 2022 Decision Memo and the filing of this Amended Complaint, the
27 Forest Service has not publicly or internally documented which CE it has invoked for its actions
28 in the Nelder Grove Project. On information and belief, either the Forest Service has not yet

1 identified an applicable CE for the Nelder Grove Project or the Service is illegally and
2 intentionally withholding from the public and Plaintiffs any document or information that
3 identifies or determines the CE that the Service believes applies to the Nelder Grove Project.
4 Plaintiffs reserve the right to seek leave to further amend their complaint if and when the Forest
5 Service identifies which CE it has determined to apply to the Nelder Grove Project so that
6 Plaintiffs can challenge the applicability of that CE.

7 78. While the CE has not been identified, the project must fall under a CE identified
8 by 36 C.F.R. § 220.6(e), CEs for which a decision memo and supporting record are required, for
9 two reasons: First, because no CE identified by 36 C.F.R. § 220.6(d) covers the actions identified
10 by the Proposed Emergency Response or Decision Memo; and second, because the Service
11 specifically requested an exemption from the requirements of 36 C.F.R. § 220.6(e), requirements
12 that only apply to those CEs listed under § 220.6(e). Therefore, on information and belief, the
13 Service intends its actions under the Nelder Grove Project to be categorically exempted from
14 preparing an EA or an EIS under NEPA pursuant to a CE listed at 36 C.F.R. § 220.6(e).

15 79. The Service has not indicated plans to ever satisfy the requirements of 36 C.F.R. §
16 220.6(e) to prepare a decision memorandum and supporting record. On information and belief, as
17 of the time of the filing of this Amended Complaint, the Service has not prepared the NEPA
18 documentation required by the Service's regulations, including a decision memo and supporting
19 record. 36 C.F.R. § 220.6(e).

20 80. These 36 C.F.R. § 220.6(e) alternative arrangements for NEPA compliance
21 authorized by Defendant Moore are predicated on seven "associated conditions" also included in
22 the July 2022 Decision Memo. These conditions include the requirement that the Sierra National
23 Forest "initiate[s] public scoping and tribal engagement within 45 days of approved emergency
24 response actions."

25 81. On November 8, 2022, the Forest Service published a scoping notice for logging
26 activities claimed to protect Giant Sequoias in Nelder and McKinley Groves. This Scoping Notice
27 was published 109 days after the Defendant Moore signed the July 2022 Decision Memo and 71
28 days after the Forest Service published a Status of Implementation on August 29, 2022, stating

1 that it had begun to implement the Nelder Grove Project. This Scoping Notice states that it will
2 include the previously authorized Nelder Grove activities in its unspecified “environmental
3 analysis,” even though that work is already underway. The Scoping Notice does not include any
4 discussion of extraordinary circumstances such as the presence of Federally listed, proposed
5 Federally listed, proposed critical habitat, or Forest Service Sensitive Species, Nelder Grove’s
6 status as a historical area, or the scientific controversy around the proposed project activities due
7 to, for example, mortality of young sequoias from mechanical logging, or increased wildfire
8 severity as a result of such logging. As a result, the Scoping Notice fails to consider whether the
9 use of a CE is still appropriate in light of the potential significant impacts associated with these
10 circumstances. Going well beyond what was authorized by the July 2022 Decision Memo, the
11 activities listed in the Nelder Grove portion of the Scoping Notice include mechanically felling
12 both live and dead standing trees, tractor and grapple piling live or dead fuels, mastication,
13 helicopter yarding, and artificially reforesting an unspecified portion of the Nelder Grove Historic
14 Area—activities that were not authorized in the Proposed Emergency Response or the July 2022
15 Decision Memo. While the July 2022 Decision Memo arguably could be read to authorize some
16 mechanical “fuels reduction” activities in Nelder Grove, at a minimum it does not authorize any
17 treatments outside of the area immediately around live, mature Giant Sequoias in previously
18 unburned or moderately burned Giant Sequoia groves.

19 82. Mature Giant Sequoias are not considered at significant risk of being killed by
20 low- or moderate-severity fires. It is extremely unlikely that high-severity fires will burn in the
21 previously burned portions of Nelder Grove before 2027. Despite the low risk, the map attached
22 to the 2022 Scoping Notice depicts activities allegedly authorized by the July 2022 Decision
23 Memo in areas that burned in 2017, including in areas where no live Giant Sequoias are present.
24 The stated objective for the “emergency” is to protect living Giant Sequoias but the activities do
25 not align with the purported emergency.

26 83. Instead, the on-the-ground activities are killing naturally-regenerating young
27 sequoias in Nelder Grove, disrupting the objectives of the Proposed Emergency Response and
28 July 2022 Decision Memo. The activities conducted by the Forest Service in Fall 2022 involved

1 extensive mechanical felling and piling of trees outside of the area immediately around live,
2 mature Giant Sequoias, and these activities killed most of the post-fire naturally regenerating
3 giant sequoia saplings in the areas where such mechanical logging occurred. No such activities
4 were authorized by the July 2022 Decision Memo. Even abiding by the post hoc information
5 given in the August 2022 Email Update, these activities were not limited to hazard tree “felling”,
6 with no mechanical treatments, as promised.

7 84. The Nelder Grove Project is broken into three phases of actions. The first phase,
8 beginning August 15, 2022, and concluding early winter 2023, consisted of thinning and
9 treatments to reduce fuels within 100 feet of living Giant Sequoia Monarchs within the Grove.
10 The second phase as proposed includes logging, thinning, and treatments in areas burned at high
11 severity in the 2017 Railroad fire. Bids to complete the second phase of the project were solicited
12 in summer 2023 and, on information and belief, work on the second phase began in October
13 2023, over a year after the July 2022 Decision Memorandum was issued. The third phase will
14 consist of prescribed burning.

15 85. Even assuming that the Proposed Emergency Response and July 2022 Decision
16 Memo did include some of ongoing and forthcoming activities in Nelder Grove, no circumstances
17 present in Nelder Grove present an “emergency [] that make[] it necessary to take urgently
18 needed actions before preparing a NEPA analysis” for a CE. 36 C.F.R. § 220.4. The Service has
19 acknowledged the risk that high severity wildfire poses to mature Giant Sequoias in Nelder Grove
20 since at least 2013, when it published a Sierra National Forest assessment acknowledging that
21 “[w]ith little treatment in this grove and continued fire suppression, the trend is toward an
22 increasing threat to the grove from uncharacteristic wildfire which may even scorch fire resistant
23 redwood trees and would likely severely damage most of the white wood (non-redwood) trees in
24 the grove.”

25 86. Additionally, the reality of these risks was further emphasized when high severity
26 wildfires burned in Nelder Grove during the 2017 Railroad Fire, killing mature Giant Sequoias.
27 Following the Railroad Fire, the Service in 2018 began scoping, but never proceeded with, the
28 Railroad Restoration Project, which purportedly would have reduced long term fuel loading near

1 Nelder Grove. Most recently, the 2020 Castle Fire caused widespread mature Giant Sequoia
2 mortality. The Emergency Response Procedures note that in 2020 following the Castle Fire “the
3 agency began to understand what the extreme fuels buildup and drought could do to Giant
4 Sequoias.”

5 87. Neither in the Emergency Response Procedures nor the July 2022 Decision Memo
6 does the Service explain why July 2022 is when the situation in Nelder Grove became an
7 emergency.

8 88. The Proposed Emergency Response and the July 2022 Decision Memo claim
9 completing NEPA analysis will delay action by 9 to 12 months for the logging projects and that
10 lightning strikes could start a fire any day. This timeline is cited as a justification for requesting
11 and granting the Proposed Emergency Response. The Service also states that drought conditions,
12 increasing temperatures, and increasing wind intensity are all increasing the likelihood of high
13 severity wildfire. None of these conditions suddenly arose in 2022, and the winter of 2023 was
14 one of the biggest snowpacks in many decades.

15 89. Additionally, the Proposed Emergency Response and Decision Memo rely on
16 numerous false assertions and assumptions that create the appearance of an emergency and
17 facilitate the application of 36 C.F.R. § 220.4(b). These assertions and assumptions further ignore
18 scientific controversy indicating that the Nelder Grove Project has the potential to have a
19 significant impact on the environment.

20 90. The Forest Service states in the Proposed Emergency Response that 22% of all
21 mature Giant Sequoias in existence were killed by wildfires in 2020 and 2021—implying that
22 these wildfires killed 40.6% of all mature Giant Sequoias in their area. Comments submitted by
23 Plaintiffs to the Service in June 2023 show that the true mortality numbers are much closer to 8%
24 of all mature sequoias and 15.5% of mature sequoias within the 2020 and 2021 fire areas.

25 91. Although the Forest Service states in both the Proposed Emergency Response and
26 Decision Memo that prior to 2015, the last recorded evidence of extensive Giant Sequoia
27 mortality due to high severity fire occurred in 1297 A.D., this assertion is contradicted by
28 multiple studies conducted by the Forest Service, as well as other accounts describing high

1 severity fire in Giant Sequoia groves, and mature sequoia mortality, during the eighteenth,
2 nineteenth, and twentieth centuries.

3 92. Both the Proposed Emergency Response and the July 2022 Decision Memo rely
4 on the assumption that high-severity fire is the primary threat to giant sequoias, and that the
5 Nelder grove and other sequoia groves are best protected by ensuring a low-severity fire regime.
6 Multiple studies, including one released by the Forest Service, contradict this assumption and
7 make clear that Giant Sequoias rely on canopy-destroying disturbances, or moderate to high
8 severity fire, to reproduce. During the past century, as a result of the Forest Service's fire
9 suppression policies, there has been a massive failure of sequoia reproduction. This sterilization
10 will continue if the Forest Service implements the Nelder Grove Project, facilitating exclusively
11 low severity fire. Not only does high-severity fire facilitate Giant Sequoia reproduction, it also
12 causes Sequoias to grow much faster—potentially reaching mature diameters of four to five feet
13 in as little as 90 to 170 years.

14 93. Implicitly undermining these false assertions and assumptions in the Nelder Grove
15 Project documents, the new Sierra Forest Plan, published in May 2023, explicitly states that in its
16 desired conditions for Nelder Grove, “[f]ires burn primarily at low to moderate severity with
17 limited patches of high severity creating canopy gaps of variable sizes and shapes (generally less
18 than one-half acre) and bare mineral soil to promote sequoia regeneration.” As identified in the
19 November 8, 2022, Scoping Notice, recent wildfires have burned through Nelder Grove primarily
20 at low or moderate severity but also some high severity.

21 94. The Proposed Emergency Response and Decision Memo also overlook the
22 scientific controversy regarding the Forest Service's thinning of mature trees and conducting
23 post-fire logging ostensibly to achieve its goal of reducing risks to mature Giant Sequoias in
24 unburned and low- or moderate-severity burned portions of Sequoia Groves. On information and
25 belief, the Services has no pre-decisional documentation evidencing any consideration of this
26 scientific controversy.

27 95. A large and growing body of scientific evidence and opinion concludes that
28 logging, including commercial thinning and post-fire logging, makes wildfires spread faster

1 and/or burn more severely, and this puts nearby communities at greater risk.

2 96. It is very unlikely that an area will re-burn until about ten years following the
3 previous fire. Even when an area does re-burn less than nine years after the previous fire, there is
4 almost no potential for high-severity fire; rather, low-severity is most likely. Additionally, a re-
5 burn is more likely to be low severity when forest canopy cover is highest; commercial thinning
6 and post-fire logging increases the severity of re-burns.

7 97. The Service failed to address any of these recent scientific studies when designing
8 the Nelder Grove Project.

9 98. In the Proposed Emergency Response and the July 2022 Decision Memo, the
10 Service has also overlooked and failed to consider whether Nelder Grove contains “[r]esource
11 conditions that should be considered” when determining whether the Nelder Grove Project may
12 be categorically excluded from further analysis and documentation in an EIS or EA. 36 C.F.R. §
13 220.6(b)(1).

14 99. On May 15, 2020, the U.S. Fish and Wildlife Service (“FWS”) finalized a rule
15 designating the Pacific Fisher as an endangered species under the ESA, effective June 15, 2020.
16 85 Fed. Reg. 29532; 50 C.F.R. § 17, effective June 15, 2020. The Pacific Fisher’s proposed
17 critical habitat encompasses the entirety of Nelder Grove and the Nelder Grove Project area. *See*
18 86 Fed. Reg. 57773 (Oct. 19, 2021); 87 Fed. Reg. 66987 (Nov. 7, 2022).

19 100. Records dating back to at least 2015 demonstrate the presence of Pacific Fisher in
20 Nelder Grove. The Forest Service was aware of the presence or likely presence of Pacific Fisher
21 within Nelder Grove at the time the July 2022 Decision Memo was issued. The Service is aware
22 that Pacific Fisher currently reside in Nelder Grove. At least two known Pacific Fisher dens are
23 located within areas in Nelder Grove which were burned in the 2017 Railroad Fire.

24 101. On February 23, 2023, FWS issued a proposed rule, proposing to list the Sierra
25 Nevada distinct population segment of the California Spotted Owl as threatened under the ESA.
26 88 Fed. Reg. 11600 (2023). This proposal to list the California Spotted Owl was issued pursuant
27 to a stipulated settlement agreement, approved November 30, 2021, where the Service’s 2019 12-
28 month finding that listing the spotted owl was not warranted, 84 Fed. Reg. 60371, was

1 challenged. *See* 88 Fed. Reg. 11600, 11602.

2 102. The Spotted Owl is a listed species under the ESA. The Forest Service was aware
3 of the presence or likely presence of Spotted Owl within Nelder Grove at the time the July 2022
4 Decision Memo was issued.

5 103. Nelder Grove is suitable habitat for two terrestrial Forest Service Sensitive Species
6 that have been sighted in the Project area: the Great Gray Owl and the Northern Goshawk. Nelder
7 Grove is also suitable habitat for two plant Forest Service Sensitive Species that have been
8 sighted in the Project area: the Mountain Lady's Slipper and the Western Waterfan.

9 104. Thus, Defendants were aware, at the time the 2022 Request for Emergency
10 Authorization and July 2022 Decision Memo were issued, of the presence of listed species,
11 proposed listed species, and Forest Service Sensitive Species within Nelder Grove. Defendants
12 were aware at the time of the July 2022 Decision Memo that the entire project area is within the
13 proposed critical habitat for the Pacific Fisher.

14 105. The Forest Service was also aware of at least 23 known cultural resources,
15 including historic and prehistoric sites, within Nelder Grove. These sites may be considered either
16 "American Indian . . . cultural sites," 36 C.F.R. § 220.6(b)(1)(vi), or "archaeological sites, or
17 prehistoric properties or areas," *id.* 220.6(b)(1)(vii).

18 106. Neither the Proposed Emergency Response nor the July 2022 Decision Memo
19 mention the presence of Pacific Fisher, Spotted Owls, or other listed species. Neither the
20 Proposed Emergency Response nor the July 2022 Decision Memo mention the existence of a
21 proposed critical habitat for a listed species, the Pacific Fisher, which encompasses the entirety of
22 Nelder Grove. Plaintiffs are not aware of any pre-decisional documentation of the Service's
23 consideration of the presence of these "Federally listed threatened or endangered species" or
24 "species proposed for Federal listing or proposed critical habitat," 36 C.F.R. § 220.6(b), as
25 "[r]esource conditions that should be considered in determining whether extraordinary
26 circumstances related to a proposed action warrant further analysis." 36 C.F.R. § 220.6(b)(1). On
27 information and belief, Plaintiffs allege that Defendants failed to consider whether the presence of
28 these federally listed species and proposed critical habitat warrant further analysis. On

1 information and belief, Defendants failed to consider whether the presence of listed species, or
2 the existence of a proposed critical habitat encompassing the entire project area, posed
3 extraordinary circumstances to preclude the applicability of a CE to the Nelder Grove Project. On
4 information and belief, the Services has no pre-decisional documentation evidencing any
5 consideration of listed species or critical habitat in evaluating the Nelder Grove project.

6 107. In February 2023, Defendants prepared a Biological Assessment (“BA”) for phase
7 2 of the Nelder Grove Project. The BA is not publicly available. Plaintiffs received this BA in
8 response to their June 30th FOIA request. This BA found that Phase 2 of the project may affect
9 the listed species of Pacific Fisher and Spotted Owl. This BA demonstrates that the Nelder Grove
10 Project may affect Pacific Fisher and Spotted Owl.

11 108. Therefore, the Service cannot support its determination that an emergency exists in
12 Nelder Grove that warrants the intensive project activities currently being implemented. The
13 Service also cannot support its determination that its use of 36 C.F.R. § 220.4(b)(2) is justified
14 because the Service has not shown that the Nelder Grove project will not have significant effects,
15 instead, the project will likely have significant effects.

16 CLAIMS FOR RELIEF

17 Violations of NEPA, CEQ Regulations, Forest Service Regulations, NFMA, and APA

18 CLAIM ONE

19 (Failure to Conduct Environmental Review of Unauthorized Project Activities)

20 109. Plaintiffs reallege and incorporate by reference all preceding paragraphs into the
21 claim set forth below.

22 110. To satisfy NEPA, for all proposed major federal actions a federal agency must
23 either complete an EIS or EA to evaluate the environmental impacts of a proposed action, or it
24 must demonstrate that the proposed action is categorically excluded from additional NEPA
25 review under an approved CE.

26 111. Similarly, NFMA requires that all Forest Service activities are consistent with the
27 overarching Land and Resource Management Plan. Both the 1991 Sierra Forest Plan, which was
28 in effect when the Proposed Emergency Response was authorized in the Decision Memo, and the

1 2023 Sierra Forest Plan, published in May 2023, require the Forest Service to analyze projects
2 under NEPA's procedures before acting.

3 112. The CEQ's NEPA regulations require an agency to prepare an EA for proposed
4 actions that are not likely to have significant effects or for which the significance of the effects
5 are unknown. 40 C.F.R. § 1501.5(a). Alternatively, if an agency has previously determined that
6 the proposed action falls into a category of actions that do not have significant impacts, then it
7 may apply a CE. *Id.* § 1501.4.

8 113. Absent alternatives arrangements made in response to an emergency situation, the
9 CEQ's NEPA regulations prohibit any major federal action from taking place prior to the action
10 agency publishing a FONSI or record of decision demonstrating compliance with these
11 requirements. *Id.* § 1506.1. The Service's regulation for emergency responses, 36 C.F.R. §
12 220.4(b)(2), limits the scope of the alternative arrangements for NEPA compliance to those
13 emergency actions that are proposed when the responsible official requests alternative
14 arrangements. The Forest Service Chief authorizing alternative arrangements can only anticipate
15 the potential environmental impacts of those actions that are proposed when the decision
16 document is signed. *See id.* Similarly, an agency cannot use a CE to exclude multiple phases of a
17 project from environmental review when it does not itself understand the parameters of those
18 phases or its timetable for completing those phases. Rather, an agency's application of a CE is
19 limited to the project activities that are defined with enough specificity when that CE invoked to
20 thoroughly anticipate whether the activities fall within the predetermined category of actions that
21 normally do not have a significant effect on the human environment and whether there are any
22 extraordinary circumstances in which a normally excluded action may have significant effect. *See*
23 40 C.F.R. § 1501.4.

24 114. The Forest Service has failed to comply, and is unlawfully withholding its
25 compliance, with both NEPA and NFMA by taking actions in Nelder Grove that were not
26 authorized by the alternative arrangements granted by July 2022 Decision Memo and without any
27 other prior documentation or authorization.

28 115. As the July 2022 Decision Memo plainly limits actions to the areas immediately

1 around live and mature Giant Sequoias, these unauthorized actions include at a minimum any
2 actions taken in portions of Nelder Grove that experienced high severity fire in 2017, which killed
3 all mature Giant Sequoias in those areas, and which now have abundant sequoia seedling and
4 sapling reproduction. These actions in these areas include mechanically logging and removing
5 hazard trees, mechanically logging and removing other live trees up to 20 inches in diameter,
6 mechanically logging and removing of snags, tractor and grapple piling, mastication, helicopter
7 yarding and the artificial planting of Giant Sequoias. Additionally, the July 2022 Decision Memo
8 does not explicitly authorize—and thus does not consider the environmental impacts of—any of
9 the aforementioned mechanical logging in the areas of Nelder Grove that are not immediately
10 around live, mature Giant Sequoias. These unauthorized actions are included in the November 8,
11 2022, Scoping Notice, but that document alone does not satisfy NEPA and NFMA’s procedural
12 requirements. In the August 2022 Email Update, the Service acknowledged that it had not yet
13 planned any phases of the Nelder Grove Project beyond Phase One—which it specified did not
14 including mechanical logging—implying that it could not have possibly included the potential
15 environmental impacts of these phases in the alternative arrangements that the July 2022 Decision
16 Memo authorized.

17 116. Therefore, the Forest Service’s decision to move forward with Project activities
18 outside of the scope of the July 2022 Decision Memo without first satisfying NEPA’s procedural
19 requirements was agency action unlawfully withheld and an agency action that was without
20 observance of procedure required by NEPA and NFMA, and thus in violation of the APA, 5
21 U.S.C. §§ 706(1), (2)(d).

22 **CLAIM TWO**

23 **(Illegal Use of 36 C.F.R. § 220.4(b)(2) by: (1) Making an Arbitrary and Capricious**
24 **Emergency Determination and (2) Failing to Identify Potential Significant Impacts**
25 **Requiring Additional NEPA Analysis)**

26 117. Plaintiffs reallege and incorporate by reference all preceding paragraphs into the
27 counts set forth below.
28

COUNT ONE

**(Arbitrary and Capricious Emergency Determination Under 36 C.F.R. § 220.4(b)(2)
Allowing for Urgently Needed Emergency Response Actions)**

118. The Forest Service’s NEPA regulations allowing for alternative arrangements for NEPA compliance are limited to situations where the responsible official determines that “an emergency exists that makes it necessary to take urgently needed actions before preparing a NEPA analysis.” 36 C.F.R. § 220.4(b). “Emergency” is a term generally defined as “unforeseen combination of circumstances or the resulting state that calls for immediate action.” USFS National Environmental Policy Act Procedures, 73 Fed. Reg. 43084, 43087–88 (July 24, 2008) (codified at 36 CFR Part 220) (citing Webster’s Third New International Dictionary Of The English Language (1961) and Merriam-Webster’s Collegiate Dictionary (11th ed. 2004)).

119. Such an emergency does not exist in Nelder Grove because the Service has publicly acknowledged the threats that high severity fire poses to the mature Giant Sequoias in Nelder Grove since at least 2013. Now that Giant Sequoia groves have predictably begun to burn with greater frequency, the Service cannot assert—two years after the most severe of these recent fires—that the current circumstances are unforeseen and necessitate circumventing NEPA’s procedures.

120. The Proposed Emergency Response and the July 2022 Decision Memo state that granting the Proposed Emergency Response will expedite project implementation by 9 to 12 months by allowing the project to proceed prior to completion of NEPA documentation. These documents justify the emergency by claiming that lightning strikes could start a fire any day within this period, purportedly justifying the need for immediate action. But neither the timeline to complete NEPA documentation, particularly the expedited process for completing documentation for a CE, nor the possibility of lightning strikes are unforeseen—the defining feature of an emergency. The Service would have needed to fulfill its NEPA obligations regardless of when it addressed the fuel loads in the Giant Sequoia groves and the risk of lightning strikes starting a wildfire is not so much greater now, or in the summer of 2022, so as to suddenly constitute an emergency. While the Service may be correct in stating that drought

1 conditions, increasing temperatures, and increasing wind intensity are all increasing the likelihood
2 of high severity wildfire, none of these factors suddenly arose in the past year as to create an
3 unforeseen situation. Particularly in Nelder Grove, the moderate- and high-severity wildfire of the
4 Railroad Fire that burned through the grove in 2017 has actually lessened the likelihood of high
5 severity wildfire in the immediate future by reducing fuel loads; even the Forest Service's own
6 July 2022 Decision Memo admits that unburned groves are at the greatest risk of fire.

7 121. In addition to raising the timeline for NEPA compliance and the risk of lightning
8 strikes, the Service also relies on numerous false assertions to support its conclusion that an
9 emergency exists. Specifically, the Service contradicts recent scientific studies and overstates the
10 percentage of mature Giant Sequoias that were killed in recent wildfires, drastically understates
11 the frequency of high severity fire in the past millennium, misrepresents Giant Sequoias need for
12 moderate and high severity fire to regenerate, and overexaggerates the potential for high severity
13 fire in the recently burned Giant Sequoia groves—particularly in the first nine years following a
14 fire.

15 122. Therefore, the Service's determination that the present circumstances constitute an
16 emergency in Nelder Grove was arbitrary and capricious and in violation of its own regulations
17 and thus the APA, 5 U.S.C. § 706(2)(A). The Service's authorization of activities in Nelder
18 Grove without prior NEPA documentation based on such a non-existent emergency was also
19 arbitrary and capricious and in and in violation of its own regulations and thus the APA. *Id.* If an
20 emergency does not exist, then the Forest Service must halt project implementation until it
21 prepares appropriate NEPA documentation. *See* 40 C.F.R. § 1506.1, and by continuing to
22 implement the Nelder Grove Project as if an emergency exists, the Service is unlawfully
23 withholding its compliance with NEPA in violation of the APA, 5 U.S.C. § 706(1).

24 **COUNT TWO**

25 **(Illegal Failure to Identify Potential Significant Impacts Under 36 C.F.R. § 220.4(b)(2) and** 26 **Perform Requisite NEPA Analysis)**

27 123. The Forest Service justifies using 36 C.F.R. § 220.4(b)(2) for the alleged
28 emergency present in Nelder Grove by claiming the actions it is undertaking in Nelder Grove are

1 covered by a CE, 36 C.F.R. § 220.6(e). By the plain language of the Service’s regulations, the
2 Service may only invoke the emergency response at issue here, 36 C.F.R. § 220.4(b)(2), for those
3 actions that are unlikely to have a significant effect on the environment—either because the
4 action is covered by a CE or because the agency prepares or would prepare an EA and FONSI for
5 the action. Both the CEQ’s regulations and the Forest Service’s NEPA regulations foreclose the
6 use of a CE when there are extraordinary circumstances in which a normally excluded action may
7 have a significant effect. *See* 40 C.F.R. §§ 1501.4, 1507.3(e)(2)(ii); 36 C.F.R. § 220.6(b)(1).

8 124. The Service has arbitrarily and capriciously invoked 36 C.F.R. § 220.4(b)(2) to
9 justify the emergency alternative arrangements to NEPA in Nelder Grove because it failed to
10 contemporaneously explain why a CE applies to the Nelder Grove project and why extraordinary
11 circumstances do not apply to its actions to preclude the use of a CE.

12 125. In the twelve months since the Service granted the emergency actions in Nelder
13 Grove through the July 2022 Decision Memo the Service has never shown any consideration that
14 extraordinary circumstances are not present to preclude the use of a CE. Resource conditions in
15 Nelder Grove require that the Service should have at least considered extraordinary circumstances
16 when considering whether a CE covers the actions of the Nelder Grove Project. *See* 36 C.F.R. §
17 220.6(b)–(c).

18 126. Under the Forest Service’s regulations, the presence of “historic properties or
19 areas” is a resource condition that the agency must consider in order to determine whether
20 extraordinary circumstances preclude the use of a CE. 36 C.F.R. § 220.6(b)(1)(vii). The Service
21 must also consider whether “Federally listed threatened or endangered species” or “proposed
22 critical habitat,” or “Forest Service Sensitive Species,” *Id.* § 220.6(b)(i), or “American Indians . . .
23 religious or cultural sites,” *Id.* § 220.6(b)(vi) warrant further analysis in an EA or an EIS.
24 Additionally, the Service must address whether there is scientific controversy regarding the
25 potential effects on any of these resource conditions that constitute extraordinary circumstances.

26 127. Here, there is no evidence that the Forest Service considered any resource
27 conditions, *id.* § 220.6(b), or scientific controversy before relying on an unnamed CE to
28 rationalize the use of alternative arrangement procedures in 36 C.F.R. § 220.4(b)(2). These

1 extraordinary circumstances include historical areas, resource conditions in Nelder Grove,
2 including the presence of Federally listed species, proposed critical habitat, or Forest Service
3 Sensitive Species, Nelder Grove’s status as a historical area, and the scientific controversy
4 surrounding the proposed activities.

5 128. First, the Service has recognized the importance of treating Nelder Grove with
6 exceptional care since it published the Sierra Forest Plan in 1991, which designated Nelder Grove
7 as a “historical area,” required the development of a “detailed long-term implementable strategy”
8 specific to Nelder Grove, and prohibited any activities other than the logging of human hazard
9 trees until this strategy was finalized. In line with this guidance, the Service’s own Sierra National
10 Forest Assessment stated in 2013 that Nelder Grove has “unique circumstances” and noted that it
11 had not been subject to vegetation treatment since the mid-1990s.

12 129. Second, multiple species present in Nelder Grove amount to resource conditions
13 that the Service must consider when determining whether extraordinary circumstances apply. 36
14 C.F.R. § 220.6(b)(1)(i). The Service was required to consider at least the following species and
15 habitats: the Pacific Fisher, a Federally listed endangered species, and the proposed habitat of the
16 Pacific Fisher encompassing Nelder Grove; the California Spotted Owl, a proposed Federally
17 listed threatened species; the Great Gray Owl, the Norther Goshawk, the Mountain Lady’s
18 Slipper, and the Western Waterfan, Forest Service Sensitive Species.

19 130. Third, multiple sites within Nelder Grove amount to either “American Indians . . .
20 religious or cultural sites” or “[a]rchaological sites, or historic properties or areas.” 36 C.F.R.
21 § 220.6(b)(1)(vi)–(vii)

22 131. Fourth, there is scientific controversy regarding the potential effects of the Forest
23 Service’s project activities on Nelder Grove that precludes the use of a CE by indicating that the
24 project may have significant effects. In addition to the false assertions referenced under Count
25 One which demonstrate controversy, the Service also suggests in its project documents that
26 removing large living trees, standing dead trees, and thinning smaller trees will reduce the
27 likelihood of high severity wildfire. However, numerous studies and even a Ninth Circuit court
28 opinion has recognized that this this type of fuels reduction does not necessarily reduce wildfire

1 risks and often increases them. Multiple studies have even found a positive correlation between
2 the number of trees removed from a forest and the intensity of wildfire in that forest. Particularly
3 in the context of post-fire logging, which the Service is undertaking in the portions of Nelder
4 Grove that burned in the 2017 Railroad Fire, recent scientific studies also demonstrate this
5 logging increases the intensity of subsequent wildfire, in addition to eliminating many of the
6 ecological benefits associated with wildfires.

7 132. Without addressing extraordinary circumstances, the Service improperly
8 determined that the Project is unlikely to have any significant impacts in its Proposed Emergency
9 Response, stating that the proposed actions “are not likely to have significant adverse
10 environmental impacts.” However, both beneficial and adverse effects must be considered when
11 determining whether an action may have a significant impact. 40 C.F.R. § 1501.3. While the
12 Service makes the unsupported assertion that the Project activities described in the July 2022
13 Decision Memo and the Proposed Emergency Response will reduce the likelihood and effects of
14 high severity wildfire before it occurs in previously unburned or moderately burned Giant
15 Sequoia groves, even this outcome would constitute a significant impact on Nelder Grove that
16 requires an EIS. Even if the Service asserts that “fuels reduction treatments” are going to have an
17 overall positive impact on Nelder Grove by reducing the imminent threat from severe wildfire—a
18 conclusion that the Service does not support in either the July 2022 Decision Memo or the
19 Emergency Response Procedures—it still must analyze this significant impact in an EIS.

20 133. The Service should have, at the very least, considered whether extraordinary
21 circumstances foreclose its use of a CE for the Nelder Grove Project in the November 2022
22 Scoping Notice. Even if a CE validly covers the actions in Nelder Grove authorized by the July
23 2022 decision memo, the Service should have scoped the CE in the November 2022 Scoping
24 Notice and considered extraordinary circumstances at that time. *See* 36 C.F.R. § 220.6(c). The
25 July 2022 Decision Memo stated the Service would publish scoping for the projects “within 45
26 days of approved emergency response actions,” yet the Service waited over double that time, 109
27 days, to publish the eventual November 2022 Scoping Notice, violating the “Associated
28 Conditions” listed alongside the Washington Office’s decision to grant the emergency

1 authorization under 36 C.F.R. 220.4(b)(2). This procedurally and substantively inadequate
2 scoping notice does not satisfy the conditions that the July 2022 Decision Memo imposes on its
3 alternative arrangements for the Nelder Grove Project CE and thus prohibits the Forest Service
4 from implementing project activities in accordance with those alternative arrangements.

5 134. Therefore, the Forest Service's decision to authorize the Nelder Grove Project to
6 proceed under 36 C.F.R. § 220.4(b)(2) without first completing NEPA documentation was
7 arbitrary, capricious, and in violation of NEPA and thus the APA, 5 U.S.C. § 706(2)(A), because
8 the Service has failed to show that the Nelder Grove Project is unlikely to have any significant
9 effects on the environment.

10 135. If, pursuant to Claim Two, Count One, an emergency does not exist to justify
11 invoking 36 C.F.R. § 220.4(b), the Service must prepare all NEPA analysis for the project. Given
12 the aforementioned hands-off management previously employed in Nelder Grove, its historic
13 significance, the scientific controversy surrounding the use of logging to reduce wildfire risks in
14 both unburned and burned groves, and the scientific controversy related to young sequoia
15 mortality from mechanical logging, any action now undertaken may—and likely will—have
16 significant impacts and thus cannot be excluded from NEPA analysis under a CE. Because the
17 extraordinary circumstances present in Nelder Grove preclude the use of a CE to cover the actions
18 of the Nelder Grove Project, the Service must prepare an EIS. In the alternative, the Service's
19 failure to prepare NEPA documentation violates the APA because it constitutes agency action
20 unlawfully withheld. 5 U.S.C. § 706(1).

21 136. If, in the alternative to Claim Two, Count One, an emergency does exist in Nelder
22 Grove to justify invoking 36 C.F.R. § 220.4(b), the Service has failed to show that its actions will
23 not cause significant impacts and so it acted arbitrarily and capriciously and in violation of the
24 APA, 5 U.S.C. § 706(2)(A), when it failed to follow 36 C.F.R. § 220.4(b)(3) and consult with the
25 CEQ about alternative arrangements to comply with NEPA. In the alternative, if an emergency
26 does exist in Nelder Grove to justify invoking 36 C.F.R. § 220.4(b), the Service violated and
27 continues to violate NEPA and the APA, 5 U.S.C. § 706(1), by failing to prepare an adequate
28 scoping notice with a properly scoped CE addressing extraordinary circumstances.

CLAIM THREE

**(As-Applied, the Service’s Emergency Regulation Violates NEPA and the CEQ’s
Implementing Regulations)**

137. Plaintiffs reallege and incorporate by reference all preceding paragraphs into the counts set forth below.

COUNT ONE

**(Failure to Comply with CEQ Regulations authorizing agency actions in emergency
circumstances, 40 C.F.R. § 1506.12.)**

138. The CEQ’s regulations and their interpretations of NEPA are entitled to substantial deference. Although agencies other than the CEQ may adopt their own NEPA regulations to improve agency efficiency and ensure compliance with NEPA’s mandates, all agency procedures must comply with the CEQ’s regulations. 40 C.F.R. § 1507.3€.

139. When there are “emergency circumstances” that make it necessary for an agency to take actions that are likely to have a significant environmental impact, the agency may consult with the CEQ to make “alternative arrangements” for NEPA compliance. 40 C.F.R. § 1506.12. These alternative arrangements are limited “to actions necessary to control the immediate impacts of the emergency.” *Id.* NEPA, as interpreted by the CEQ’s regulations, does not contain any waivers from its procedural requirements.

140. As applied here, the Forest Service’s NEPA regulations allow for intra-agency “alternative arrangements” that exempt the logging in Nelder Grove from the CEQ’s NEPA procedures. *See* 36 C.F.R. § 220.4(b)(2). This use of these regulations here does not comply with the CEQ’s regulations, and therefore NEPA, for at least three reasons.

141. First, in 40 C.F.R. § 1506.12, the CEQ does not interpret NEPA to allow for intra-agency alternative arrangements for NEPA compliance. The Forest Service regulations that borrow this use of alternative arrangements, 36 C.F.R. § 220.4(b), similarly don’t allow for intra-agency alternative arrangements. Rather, the Service’s regulations for alternative arrangements require consultation with the CEQ. 36 C.F.R. § 220.4(b)(3). Therefore, any use of the Service’s regulations in this respect violates NEPA because the Forest Service did not consult with the CEQ

1 to develop alternative arrangements.

2 142. Second, in 40 C.F.R. § 1506.12, the CEQ does not interpret NEPA to allow for
3 actions to be excluded entirely from compliance with NEPA. In the July 2022 Decision Memo,
4 the Service entirely excluded the Nelder Grove Project from the requirement in 36 C.F.R.
5 § 220.6(e) to publish a Decision Memo for certain CEs. To comply with the CEQ's regulations in
6 40 C.F.R. § 1506.12, the Service was required to develop alternative arrangements for
7 environmental review, rather than circumvent NEPA's procedures entirely. The July 2022
8 Decision Memo justified its grant of the emergency actions in part because it would expedite the
9 actions by nine to twelve months by allowing the agency's actions to proceed prior to completing
10 NEPA documentation. Twelve months after the July 2022 Decision Memo was published, the
11 Service has still not completed any documentation required by 36 C.F.R. § 220.6(e) and has
12 indicated it does not plan to do so.

13 143. Third, in 40 C.F.R. § 1506.12, the CEQ limits the use of alternative arrangements
14 actions taken in response to emergency circumstances that are necessary to control the immediate
15 impacts of the emergency. Here, the Service did not limit its use of alternative arrangements
16 according to the CEQ's interpretation of NEPA. Instead, it has ambiguously defined and belatedly
17 redefined the project to include a suite of activities, such as mechanically logging and removing
18 hazard trees, mechanically logging and removing live and dead trees, and conducting such
19 activities in portions of Nelder Grove that previously burned in the 2017 Railroad Fire, all of
20 which are not necessary to control the alleged emergency of high severity fire with regard to live,
21 mature sequoias in unburned or moderately burned mature Giant Sequoia groves.

22 144. For the aforementioned reasons, 36 C.F.R. § 220.4(b) violates NEPA as applied to
23 the Nelder Grove Project. This application of 36 C.F.R. § 220.4(b) is arbitrary, capricious, and
24 not in accordance with NEPA as interpreted by the CEQ and thus violates the APA, 5 U.S.C. §
25 706(2)(A), and its continuing application violates NEPA and the APA, 5 U.S.C. § 706(1).

26 **COUNT TWO**

27 **(Arbitrary and capricious failure to identify and document a categorical exclusion)**

28 145. CEs are specifically identified actions which the agency has determined do not

1 typically have a significant effect on the environment. 40 C.F.R. § 1501.4(a). The Forest Service
2 authorizes two distinct types of CEs: those “for which a project or case file and decision memo
3 are not required,” but may be prepared, 36 C.F.R. § 220.6(d), and those “for which a project or
4 case file and decision memo are required,” *id.* § 220.6(e). The agency should only use a CE where
5 the agency “*determines* that a categorical exclusion identified in its agency NEPA procedures
6 covers a proposed action.” *See* 40 C.F.R. § 1501.4(b)(1) (emphasis added).

7 146. One requirement for those CEs requiring a file and decision memo is to document
8 which CE applies: decision memos “must include” certain content, including listing the CE
9 invoked. *Id.* § 220.6(f)(2)(i).

10 147. The Forest Service’s emergency regulations purport to allow for “alternative
11 arrangements for NEPA compliance,” if the Service finds the scope of an emergency necessitates
12 emergency action must be undertaken prior to preparing NEPA documentation, including
13 documentation associated with a CE. *Id.* § 220.4(b)(2). All Forest Service actions, including those
14 taken pursuant to an emergency, must undergo scoping. *Id.* 36 C.F.R. § 220.4(e).

15 148. The Service has produced multiple NEPA-related documents for the Nelder Grove
16 Project, including the July 2022 Decision Memo and the November 2022 Scoping Notice. No
17 publicly available document, including these NEPA documents, has identified which CE applies
18 to the actions in Nelder Grove project. On information and belief, either no document evidences
19 the Service’s determination of which CE covers the actions related to the Nelder Grove project, or
20 the Service is intentionally withholding from the public and plaintiffs any document that does
21 indicate such a determination.

22 149. While the CE has not been identified, the project must fall under a CE identified
23 by 36 C.F.R. § 220.6(e), CEs for which a decision memo and supporting record are required,
24 because, among other reasons, the Service specifically requested an exemption from the
25 requirements of 36 C.F.R. § 220.6(e), requirements that only apply to those CEs listed under §
26 220.6(e). On information and belief, the Forest Service invoked a CE, *id.* §220.6(e), without
27 documenting, publicly or internally, what specific CE applies.

28 150. By invoking a CE which would normally require documentation of that CE, yet

1 failing to identify that CE, the Service acted arbitrarily and capriciously and in violation of the
2 APA, 5 U.S.C. § 706(2)(A), when it invoked a CE without identifying that CE, first in the July
3 2022 Decision Memo and again in the November 2022 Scoping Notice. The Service's continuing
4 failure to identify or determine which CE validly applies is also agency action unlawfully
5 withheld in violation of 5 U.S.C. § 706(1).

6 **CLAIM FOUR**

7 **(Violations of NFMA)**

8 151. Plaintiffs reallege and incorporate by reference all preceding paragraphs into the
9 counts set forth below.

10 **COUNT ONE**

11 **(Failure to Comply with 1991 Sierra Forest Plan, NFMA, and APA)**

12 152. Under NFMA, all projects must be consistent with the governing land
13 management plan. 16 U.S.C. § 1604(i). The Emergency Response Procedures approved by the
14 July 2022 Decision Memo claims the proposed actions are consistent with applicable forest plans.

15 153. The 1991 Sierra Forest Plan prohibits removing any trees from Nelder Grove,
16 other than human hazard trees, until the Forest Service develops and approves the requisite
17 detailed long-term implementation strategy for Nelder Grove. The 1991 Sierra Forest Plan
18 requires the implementation strategy to be consistent with the best scientific information available
19 and that any proposed activities in Nelder Grove will provide for aesthetic, recreational,
20 ecological, and scientific values.

21 154. Here, the Service has not demonstrated in either the Proposed Emergency
22 Response, the July 2022 Decision Memo, or the November 2022 Scoping Notice that it produced
23 a long-term implementation strategy for Nelder Grove or that the activities authorized in the
24 Nelder Grove Project comply with any strategy that does exist.

25 155. The Forest Service is not limiting itself to only human hazard trees as it is logging
26 and removing small and large live and dead standing trees in Nelder Grove, in direct
27 contravention of the 1991 Sierra Forest Plan's prohibition on such activities.

28 156. Therefore, by not following the 1991 Sierra Forest Plan, the Forest Service has

1 violated NFMA, and thus violated the APA, 5 U.S.C. §§ 706(1), (2)(d).

2 **COUNT TWO**

3 **(Failure to Comply with 2023 Sierra Forest Plan, NFMA, and APA)**

4 157. The aforementioned claims demonstrate that the Forest Service has not satisfied its
5 statutory and regulatory duties in preparing and implementing the Nelder Grove Project. As the
6 Forest Service has begun to implement this Project in violation of law, it must now halt that
7 implementation and comply with NFMA by redesigning the Nelder Grove Project in compliance
8 with the now operative 2023 Sierra Forest Plan. This plan took effect on June 26, 2023, which is
9 30 days after it was published in the Federal Register on May 26, 2023.

10 158. Specifically, the Service cannot log in the portions of Nelder Grove that recently
11 burned in moderate and high severity wildfires because these activities will not achieve the
12 Desired Condition of allowing Giant Sequoias to successfully regenerate. Currently, the Service
13 is killing the Giant Sequoias that regenerated as a result of the Railroad Fire by logging in that
14 portion of Nelder Grove.

15 159. Additionally, the 2023 Forest Plan prohibits the Service from taking actions
16 around living large and old sequoias in Nelder Grove beyond removing litter and duff within two
17 feet and small trees within six feet that will compromise the ecological function of Giant Sequoia
18 groves. Giant Sequoias require moderate and high intensity fire to successfully regenerate.
19 Entirely removing the potential of any such fires in Nelder Grove will perpetuate the massive
20 failure of Sequoia reproduction that the Service caused by excluding moderate and high severity
21 fire from Giant Sequoia groves in the twentieth century.

22 160. Any such actions taken after June 26, 2023, are in violation of the 2023 Sierra
23 Forest Plan, NFMA, and the APA, 5 U.S.C. §§ 706(1), (2)(d).

24 **PRAYER FOR RELIEF**

25 WHEREFORE, Plaintiffs respectfully request that the Court:

26 A. Declare that the Nelder Grove Project activities that were not authorized in the
27 July 2022 Decision Memo, but are currently being implemented, are agency action “without
28 observance of procedure required by law” or “not in accordance with law” in violation of NEPA,

1 NFMA, and the APA, 5 U.S.C. § 706(2)(A) and (D), and are agency actions unlawfully withheld
2 in violation of the APA, 5 U.S.C. § 706(1);

3 B. Declare that the Forest Service’s July 2022 Decision Memo as-applied to the
4 ongoing and future actions in Nelder Grove violates 36 C.F.R. § 220.4(b)(2) and is arbitrary,
5 capricious, an abuse of discretion, and/or not in accordance with the law under the APA, 5 U.S.C.
6 § 706(2)(A), or in the alternative declare that the Service’s use of 36 C.F.R. § 220.4(b)(2), not 36
7 C.F.R. § 220.4(b)(3), with respect to Nelder Grove is agency action “without observance of
8 procedure required by law” in violation of 5 U.S.C. § 706(2)(d);

9 C. Declare that the Forest Service’s failure to prepare an EIS, or in the alternative,
10 publish a properly scoped CE analyzing extraordinary circumstances for the ongoing and future
11 actions in Nelder Grove was both agency action unlawfully withheld, 5 U.S.C. § 706(1) as well as
12 arbitrary, capricious, and in violation of NEPA, 5 U.S.C. § 706(2)(A);

13 D. Declare that as-applied by the Forest Service with respect to the ongoing and
14 future actions in Nelder Grove, 36 C.F.R. § 220.4(b)(2) violates NEPA and the APA;

15 E. Declare that the ongoing and future actions in Nelder Grove do not comply with
16 both the 1991 and 2023 Sierra Forest Plans and thus violate NFMA and the APA;

17 F. Require the Forest Service to publicly identify and determine which CE
18 supposedly applies to the Nelder Grove Project;

19 G. Partially vacate and set aside the portions of the July 2022 Decision Memo
20 authorizing actions in Nelder Grove as illegal agency action under the APA;

21 H. Preliminarily and permanently enjoin the Forest Service from implementing both
22 the Nelder Grove Project activities described in the July 2022 Decision Memo and those activities
23 described in the November 2022 Scoping Notice until it has complied with NEPA, NFMA, the
24 CEQ’s regulations, and its own regulations;

25 I. Enter appropriate injunctive relief to ensure that Defendants comply with NEPA
26 and NFMA, and specifically to ensure that Defendants and their agents take no further actions
27 toward proceeding with the challenged Nelder Grove Project until they have complied with
28 NEPA and NFMA;

1 J. Award Plaintiffs Earth Island Institute and Sequoia ForestKeeper their reasonable
2 costs, litigation expenses, and attorneys' fees associated with this litigation pursuant to the Equal
3 Access to Justice Act, 28 U.S.C. § 2412 *et seq.*; and

4 K. Grant such further relief as the Court deems just and proper.

5
6 Respectfully submitted on this 6th day of November, 2023.

7
8 /s/Thomas Buchele
9 Thomas Buchele, CA Bar No. 129657
10 Earthrise Law Center
11 Lewis & Clark Law School
12 10101 S Terwilliger Blvd.
13 Portland OR 97219-7799
14 Tel: 503-768-6736
15 Fax: 503-768-6642
16 Email: tbuchele@lclark.edu

17 Rachel M. Fazio, CA Bar No. 187580
18 John Muir Project of the Earth Island Institute
19 P.O. Box 897
20 Ridgecrest, CA 92314
21 Tel: 530-273-9290
22 Email: rachelmfazio@gmail.com

23
24
25
26
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28 *Attorneys for Plaintiffs*