Case No. 22-16483

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EARTH ISLAND INSTITUTE,
Plaintiff – Appellant,

v.

CICELY MULDOON, in her official capacity as Superintendent of Yosemite National Park; UNITED STATES NATIONAL PARK SERVICE, an agency of the United States Department of the Interior; UNITED STATES DEPARTMENT OF THE INTERIOR,
Defendants – Appellees.

REPLY BRIEF OF PLAINTIFF-APPELLANT

PRELIMINARY INJUNCTION APPEAL FROM THE SEPTEMBER 22, 2022, ORDER OF THE DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

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INTRODUCTION

Appellant Earth Island Institute ("EII") completely agrees with Appellees (collectively "NPS") that protecting Yosemite National Park (the "Park") and its residents, workers, and visitors from the risks presented by severe wildfires is of critical importance. The significance of this issue, and of addressing it correctly and with adequate public input, is precisely why EII filed this lawsuit and sought a narrowly tailored preliminary injunction. The National Environmental Policy Act's ("NEPA") public analysis and disclosure requirements ensure that agency actions are properly informed and proposed activities that may exacerbate issues can be vetted and avoided. Here, rather than preparing a public and contemporaneous assessment of the Wawona Road Projects' and the Yosemite Valley Projects' (collectively "Projects") impacts, NPS instead chose to document its decisions in non-public and conclusory Categorical Exclusion ("CE") Packages. As EII explains below, NPS's invocation of the unusual CE-B.1 to authorize these Projects, which by its terms requires site-specific analysis of impacts, violates NEPA's requirements and is flatly inconsistent with the overarching goals of NEPA.

In a declaration submitted below, Defendant Cicely Muldoon explained that she asked her staff to prepare "substantive declarations … to explain the work we have done under [NEPA] before implementing our fire management plan." 3-ER-

581. Muldoon thus at least suggests that NPS's contemporaneous documentation was insufficient.[1] Indeed, although NPS's decisions purport to be implementing its 2004 Fire Management Plan ("FMP"), as amended in 2017, and claim to tier to that FMP, the CE Packages themselves do not cite specifically any portion of the FMP, and even NPS's post-decisional declarations and briefs cannot cite to any page in that "comprehensive" FMP which analyzes the site-specific impacts of the Project activities.

EII properly objected to NPS's use of these post-decisional declarations as its primary evidence of NEPA compliance. NPS now argues that its post-decisional "NEPA analysis," even if procedurally incorrect, is "harmless error" because EII "does not contest" the sufficiency of this tardy NEPA analysis. Dkt. 30 at 28–29, 57–58. To the contrary, EII very clearly objected to both the manner in which this analysis was presented and its substance, by repeatedly pointing to recent science disputing the efficacy of NPS's chosen methods. Specifically, EII challenges the controversial logging methods NPS uses in the Projects, citing this Court's decision in *Bark v. U.S. Forest Service*, which found that there was significant scientific controversy about supposedly reducing the severity of future fires by

[1] Significantly, Muldoon does not state that such declarations were necessary because NPS had insufficient time to gather its actual, contemporaneous NEPA analysis, as NPS now argues in its Response Brief. *See* Dkt. 30 at 46.

logging large trees and thereby opening the forest canopy. 958 F.3d 865, 870–71 (9th Cir. 2020). Such scientifically controversial logging methods, which tend to increase fire severity, constitute an extraordinary circumstance that precludes the use of CE-B.1.

Nevertheless, recognizing the need for NPS to immediately move forward with some fire control measures, EII seeks only narrowly tailored preliminary and final relief focused on stopping the most harmful, scientifically controversial, uncertain, and unvetted aspects of the Projects (such as extensive commercial thinning outside of the Community and Infrastructure Protection Strategy ("CIPS") units and logging of live trees over 12" in diameter within Merced Grove) while allowing NPS to move forward with the most uncontroversial and effective aspects of the two Projects which are consistent with the Park's own 2017 FMP (such as prescribed burning and thinning within the CIPS units and thinning smaller trees within Merced Grove).

EII will suffer permanent, irreparable harm if NPS's illegal and likely counter-productive logging is allowed to proceed. EII's permanent harm must be weighed against any harm caused by the temporary delay of an injunction to these Projects that will take NPS multiple years to implement, and NPS admits it is not implementing the Projects' actions simultaneously. *See* 2-ER-112–14. Thus, the limited injunction EII seeks against the most controversial and permanent actions

at issue will not prevent NPS from implementing other, critical aspects of each Project or from completing either Project in a timely manner. EII's limited injunction allows NPS to mitigate any risks from possible future fires by completing the important and un-enjoined portions of each Project, and such future fires are not currently "imminent" considering the very wet winter weather and elevated snowpack. Under such circumstances, EII's certain irreparable harm outweighs the more speculative and mitigated risk from future fires during the relatively short time the injunction would be in place while EII's legal claims are fully resolved.

ARGUMENT

I. EII is likely to succeed on the merits.

A. NPS violated NEPA by failing to prepare an EA or EIS, or to identify an appropriate CE excluding the project actions from NEPA review.

NPS argues that three separate categories – the FMP, the CE Packages, and the post-decisional declarations – independently provide sufficient contemporaneous, site-specific analysis to demonstrate that NPS properly invoked CE-B.1. *See* Dkt. 30 at 32–52. None of these documents contain the requisite analysis to demonstrate that the Projects are "changes or amendments to an approved plan" which will have "no or only minimal environmental impact" within the terms of CE-B.1. 4-ER-920.

1. The Projects are not "changes or amendments to an approved plan" because they implement, rather than amend, the programmatic FMP.

The Projects are not "changes or amendments to an approved plan." NPS's characterization of the Projects as "proceeding with FMP-authorized works subject to minor deviations" does not establish that the Projects amend the programmatic FMP. Dkt. 30 at 32. Simply calling an activity a "deviation" does not transmute it into an amendment. For example, the Projects do not *amend* the FMP to allow removal of trees up to 20" in diameter in sequoia groves in future projects. Rather, the Project activities merely *implement* certain guidance from the programmatic FMP through specific, on-the-ground actions without changing the FMP itself. *See* Dkt. 22 at 29 n.3 (discussing example of prior proper application of CE-B.1).[2]

NPS improperly argues that the Projects are "changes or amendments" by relying upon an irrelevant sentence in *Sauk Prairie Conservation Alliance v. U.S. Department of Interior*, 944 F.3d 664 (7th Cir. 2019). NPS argues that "the Seventh Circuit plainly understood the applicability of [CE] B-1 to turn on whether an activity was…or was not…'consistent with' the underlying park plan's aims."

[2] NPS's argument for why the Fuels CE is irrelevant misses the point. Dkt. 30 at 36–37. The point is that the Fuels CE was previously available to authorize this type of on-the-ground fire management work. 43 C.F.R. § 46.210(k). Dkt. 22 at 28–29. NPS now attempts to shoe-horn this type of work into CE-B.1 with the Fuels CE having been found to be procedurally deficient.

Dkt. 30 at 33. However, that "consistent with" standard in *Sauk Prairie* has nothing to do with the court's analysis of the NEPA claims and instead pertained only to the Property Act claim. *Sauk Prairie*, 944 F.3d at 666; *see also* discussion at Dkt. 22 at 41–42.

2. Even if the Projects could constitute "changes or amendments to an approved plan," NPS failed to demonstrate that those changes or amendments would have "no or only minimal environmental impact."

CE-B.1 necessarily requires site-specific analysis of the proposed activities' impacts to determine whether activities will have "no or only minimal environmental impact." *See Sauk Prairie*, 944 F.3d at 675–78 (finding NPS properly used CE-B.1 based on a detailed analysis of the site-specific impacts). Notably, NPS previously admitted CE-B.1 is unusual in nature and requires a site-specific analysis of Project activities. 2-ER-81–82.

i. The FMP is not a comprehensive programmatic impact statement capable of establishing that the Projects will have "no or only minimal environmental impact."

To be comprehensive and "obviate [] the need for a subsequent site-specific or project-specific impact statement[,]" a programmatic environmental impact statement ("EIS") must contain an analysis of site-specific impacts of on-the-ground actions. *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 783 (9th Cir. 2006). Notably, a programmatic EIS is not comprehensive where there are new environmental impacts not previously considered. *See id.*; *see also Ctr. for*

Biological Diversity v. Bureau of Land Mgmt., 937 F.Supp.2d 1140, 1157 (N.D. Cal. 2013) (programmatic EIS non-comprehensive because scale of activity had increased).

The FMP is not a comprehensive programmatic EIS and does not contain sufficient site-specific analysis to determine whether the Projects will have "no or only minimal environmental impact." NPS argues that the FMP is comprehensive because it selects "'particular areas of the Park' and 'particular [] roads' for fire-management activities." Dkt. 30 at 34. However, the mere pre-selection of areas for potential future activity and the separate authorization of various forms of activities does not render a programmatic EIS comprehensive. Like the programmatic, non-comprehensive U.S. Forest Service land management plan at issue in *Ohio Forestry Association v. Sierra Club*, 523 U.S. 726, 729–30 (1998), the FMP does not identify *which technique* should be utilized in *which area*, determine when that should occur, or analyze what the resulting impacts on that area would be. Additionally, the FMP cannot be comprehensive because there are new environmental impacts not considered in the FMP, such as impacts from the new authorization of thinning of trees up to 20", or the expansion of road corridors.

The FMP is directly analogous to the purely programmatic plan at issue in *Friends of Yosemite Valley v. Norton*, 194 F.Supp.2d 1066 (E.D. Cal. 2002). Just as here, the plan in that case categorized the Park by zones and authorized specific

types of uses in each zone. *Friends of Yosemite Valley*, 194 F.Supp.2d at 1077. In that case, NPS argued that the plan was "designed only for guidance for future site-specific projects, rather than for currently implementing such projects." *Id.* at 1079. Similarly, here, the FMP did not directly authorize either of the Projects and did not consider the site-specific impacts of the Projects.

ii. The CE Packages do not sufficiently analyze whether the Projects will have "no or only minimal environmental impact."

NPS's CE documentation fails to provide sufficient analysis to demonstrate that the Projects will have "no or only minimal environmental impact." NPS attempts to distract from this fact by claiming that the "[CE] Packages document, for example, that the Service evaluated impacts to 29 different resources." Dkt. 30 at 39. As evidenced by the CE Packages, this "evaluation" consists of only a few conclusory sentences for each resource considered. 4-ER-832–36, 865–868. The CE Packages are devoid of actual impact *analysis*.

While brief documentation will suffice for CEs in certain circumstances, there must still be sufficient documentation to justify the use of the CE. *See California v. Norton*, 311 F.3d 1162, 1175–77 (9th Cir. 2002); *Alaska Ctr. for Envt. v. U.S. Forest Serv.*, 189 F.3d 851, 859 (9th Cir. 1999) ("When an agency decides to proceed with an action in the absence of an EA or EIS, the agency must adequately explain its decision[.]"). The unusual nature of CE-B.1 requires more

detail than traditionally needed in "abbreviated categorical exclusion procedures." Dkt. 30 at 41.[3, 4]

iii. NPS cannot supplant its lack of analysis with post-decisional declarations to prove the Projects will have "no or only minimal environmental impact."

NEPA requires contemporaneous analysis of environmental impacts at the time of agency decision-making to ensure that the agency adequately considered those impacts and to allow the public access to that analysis and the ability to play a role in the implementation of the decision. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349–50 (1989); 40 C.F.R. § 1500.1(a). The public cannot access and review an analysis that an agency keeps secret or prepares only after it is sued. Therefore, NPS's post-decisional explanations "frustrate the fundamental purpose of NEPA[.]" *Norton*, 311 F.3d at 1175.

Moreover, NPS never moved to supplement the record with the post-decisional declarations. *See* 8-ER-2132–39. Rather, NPS simply began citing to declarations in the merits section of its initial responsive brief. In response, EII

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[3] NPS's citation to *Mountain Communities for Fire Safety v. Elliott*, 25 F.4th 667 (9th Cir. 2022) is inapposite. Dkt. 30 at 41. *Elliott* involved an entirely different CE which does not implicate the additional analysis required by CE-B.1. *Elliott*, 25 F.4th at 680.

[4] NPS also cites *Sauk Prairie* and argues that short explanations in prescribed forms can satisfy NEPA. Dkt. 30 at 40. As EII has discussed, this case is clearly distinguishable from *Sauk Prairie*. Dkt. 22 at 42.

immediately moved to strike all references to post-decisional declarations in the merits sections of NPS's briefing. 2-ER-271–73.

Even if the declarations were properly offered, they fail to fit within the narrow exceptions for supplementation. Supplementation is only proper in four "narrowly construed circumstances." *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 603 (9th Cir. 2014). NPS argues that the post-decisional declarations fall within the circumstance where "supplementation is necessary to determine if the agency has considered all factors and explained its decision[.]" *Id.*; Dkt. 30 at 42–43. However, NPS's reasons for including the post-decisional declarations are contradictory and have little to do with the "relevant factors" exception.

First, NPS claims that "the Park Service [did] not have time to compile the full administrative record[,]" and therefore the declarations should be considered. Dkt. 30 at 46. This reasoning lacks factual basis. NPS declarant Muldoon's explanations for why the declarations were drafted say nothing about a lack of time to collect contemporaneous documents. 3-ER-581. In any case, NPS had more than sufficient time to gather contemporaneous documentation. NPS has been on notice since May 2022, when EII filed its first FOIA request, 4-ER-815–816, or at least since mid-June 2022, when EII initiated this suit, that the documentation surrounding Project decision-making would be at issue. Prior to filing its

preliminary injunction responsive brief in late July 2022, rather than spending its time collecting contemporaneous records, NPS chose instead to draft multiple, lengthy post-decisional declarations to use in place of any existing pre-decisional analysis.

Second, NPS inconsistently argues that supplementation is warranted because the agency did not "fully document the breadth of its analysis in contemporaneous paperwork." Dkt. 30 at 45.[5] Under this rationale, NPS is not using the post-decisional declarations to prove that NPS considered all relevant factors. Rather, NPS is using the declarations to provide the completely missing contemporaneous analysis of Project impacts, thus stretching the narrow exception to swallow the contemporaneous documentation rule.

Forest Service Employees for Environmental Ethics v. U.S. Forest Service, 796 Fed. App'x 390 (9th Cir. 2020) demonstrates the difference between this case and a case where there is proper record supplementation to evaluate whether the agency considered all relevant factors. In that case, the district court admitted declarations that discussed the agency's consideration of the use of private lands.

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[5] NPS attempts to argue that contemporaneous documentation is not required here because "public comment and disclosure obligations…do not apply in the context of categorical exclusions." Dkt. 30 at 43–44. However, contemporaneous analysis is also required for CEs, *Norton*, 311 F.3d at 1175, and 40 C.F.R. § 1500.1(a)'s requirement that the public be informed regarding the agency's decision-making process contains no exception for CEs.

796 Fed. App'x at 391. On appeal, this Court found that the existing administrative record before supplementation contained numerous references to how the agency considered and rejected the use of private lands. *Id.* at 392. Based on those numerous references, this Court found that the declarations were truly supplementing the record rather than *taking the place of* the required contemporaneous documentation. *Id.* Here, in contrast, the CE Packages contain no mention of the subject matter expert convention, the engagement of scientists to survey resources, or the dozens of citations to scientific sources, many post-dating the 2004 FMP, that appear in NPS's post-decisional declarations. *Compare* 4-ER-857–77 *with* 4-ER-765-812.[6]

Even if admissible, NPS's post-decisional declarations would not be sufficient to comply with NEPA. NPS repeatedly asserts that EII has not argued that the declarations would still be insufficient to satisfy NEPA if properly before the court. Dkt. 30 at 38, 42, 47–48, 51. To the contrary, EII has repeatedly challenged the declarations' scientific and factual bases. *See, e.g.*, 2-ER-43, 47 ("I write this declaration to respond to some factual and scientific inaccuracies in Mr.

[6] *City of L.A. v. Dickson*, 2021 WL 2850586 (9th Cir. July 8, 2021), which NPS fails to identify as an unpublished, non-binding decision, also does not establish that post-decisional declarations can supplement the record to demonstrate compliance with NEPA. *City of L.A.* held that documents which postdated the agency decision "cannot constitute the FAA's NEPA review." 2021 WL 2850586 at *3–4.

Dickman's third declaration, as well as statements with no supporting evidence offered and to document the contrary science that undermines some of his basic assumptions."); 2-ER-146 (discussing lack of evidence for statements in the declarations); 2-ER-252–53 (citing multiple declarations that directly question the efficacy and scientific validity of the fire management efforts discussed therein); 2-ER-296–97 (discussing problems with the science used in the declarations); 2-ER-200 n.3 (noting missing analysis); 2-ER-205 (citing EII's controverting scientific declarations). Additionally, even if the post-decisional declarations provided the missing analysis, which EII contests, the post-decisional declarations are still insufficient under NEPA because they were not available to the public when the decisions were made.

NPS attempts to rely on inapplicable hearsay caselaw to argue that the district court had the discretion to consider the declarations here, given that "[t]he Institute chose to seek preliminary relief on an expedited schedule." Dkt. 30 at 46. As mentioned previously, NPS had many months to produce contemporaneous documentation consistent with the post-decisional declarations. NPS does not cite any legal authority for the proposition that a preliminary injunction proceeding justifies the use of a defendant's extra-record evidence regarding the legal merits. In two of the cases cited by NPS for its argument, the courts considered otherwise inadmissible hearsay evidence offered by the plaintiff seeking the preliminary

injunction to show and prevent irreparable harm to the plaintiff. *Johnson v. Couturier*, 572 F.3d 1067, 1083 (9th Cir. 2009); *Flynt Distributing Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984). The only other case cited by NPS merely discusses how preliminary injunctions involve less procedure and evidence than permanent injunctions. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). None of these cases stand for the proposition propounded by NPS – that an expedited preliminary injunction allows the defendant to use post-decisional declarations to prove compliance with NEPA.

B. Even if the Projects fit within a CE, NPS violated NEPA by failing to evaluate how extraordinary circumstances preclude the use of a CE.

Extraordinary circumstances exist which preclude the use of a CE because the Projects involve highly controversial environmental effects. 43 C.F.R § 46.215(c). The substantial scientific dispute involves the environmental effect of the Projects, including whether the proposed logging activities will "reduce high-severity wildfires[.]"[7] 3-ER-467. NPS views the thinning of conifers up to 20" in diameter, standing dead trees, and removing dead and down trees as a reduction of fuels that may otherwise increase fire severity. 2-ER-103. EII, by contrast, believes recent published science finds that reduction of canopy cover and removal of

[7] NPS also failed to address the extraordinary circumstance of potential significant impacts to ESA-listed species. 43 C.F.R. § 46.215(h); *see* Dkt. 22 at 43 n.8 *and* the discussion *infra* Section I.D.

surface biomass may actually increase the risk of fire "by increasing sunlight exposure to the forest floor, drying vegetation, promoting understory growth, and increasing wind speeds." 2-ER-296, 288–89.[8]

The controversy and evidence presented here are similar to the controversy raised and evidence presented in *Bark v. U.S. Forest Service*, where this Court found that significant scientific controversy existed. 958 F.3d at 870–71. *Bark* found significant scientific controversy where the plaintiff-appellant raised scientific evidence that "reducing fuels does not consistently prevent large forest fires, and seldom significantly reduces the outcomes of these large fires," including citing numerous studies finding that "fuel reduction" increases fire severity in some instances. *Id.* at 870–71. The purpose, process, and subject of controversy in *Bark* were all very similar to the current case. The science referenced in *Bark* is not limited to "variable density thinning," and attempting to limit *Bark's* relevance to that technique is not consistent with the actual discussion in that opinion. *Id.* The result – the effect – is the same: the removal of biomass, reduced canopy cover, and increased solar radiation may increase fire severity instead of reducing it.[9] EII

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[8] One of NPS's own declarants admitted that thinning which reduces canopy cover can increase fire severity. 4-ER-684.

[9] In *Bark* the agency prepared an EA and the plaintiff was able to submit comments and supporting scientific evidence demonstrating the controversy. *Id.* at 869–70. Here, in contrast, NPS approved the Projects under a CE which precluded public knowledge of the Projects and the ability to submit comments and opposing scientific evidence.

has presented evidence that casts doubt upon NPS's conclusions in a manner almost identical to the scientific controversy in *Bark*. *See* 2-ER-288–89, 298; 8-ER-1917–18.

NPS was aware of the highly controversial environmental effects of the proposed treatments prescribed in the Projects but failed to acknowledge this controversy in the Projects' CE documentation. *See* Dkt. 22 at 44; 2-ER-224–25; 4-ER-832, 864. By extension, NPS failed to explain why it may use a CE despite the existence of an extraordinary circumstance. 40 C.F.R § 1501.4; 43 C.F.R § 46.205(c)(1); *Jones v. Gordon,* 792 F.2d 821, 828 (9th Cir. 1986).

NPS attempts to frame EII's concerns as opposition to "a fire-management approach that was approved – after extensive environmental analysis – decades ago." Dkt. 30 at 56. Not so. Both EII and the NPS declarants cite very recent science that post-date the 2004 FMP and create the current scientific controversy. *See* 2-ER-43–59; 2-ER-99–112, 114–21. NPS further claims that EII has not raised specific controversy regarding whether certain specific proposed actions create "defensible space." *See* Dkt. 30 at 56. The controversy raised subsumes these specific matters. Even if it did not, EII is not required to point to controversy under

every stone to establish the existence of highly controversial environmental effects posed by Project elements.[10]

C. NPS violated NEPA by tiering within a CE decision, for unanalyzed actions, and without following any procedural requirements.

The CEQ's NEPA-implementing regulations identify only two situations in which tiering is appropriate, both of which involve tiering to and/or from an EIS or an environmental assessment ("EA"). 40 C.F.R. § 1501.11(c).[11] This indicates that CEs may neither tier nor be tiered to. *See* Dkt. 22 at 46–48; 8-ER-1993–94; 2-ER-226–36. The purpose of tiering is to "eliminate repetitive discussions of the same issues" while still properly documenting the appropriate analysis required by NEPA. 40 C.F.R. § 1501.11(a). CEs, however, are "categories of actions that have been *predetermined not to involve significant environmental impacts, and therefore require no further agency analysis* absent extraordinary circumstances." *Safari Club Int'l v. Haaland,* 31 F.4th 1157, 1179 (9th Cir. 2022) (emphasis added); 40 C.F.R. § 1508.1(d). Thus, for a CE there should be no need to "eliminate repetitive discussions" because no additional analysis should be

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[10] NPS failed to address EII's arguments that the district court abused its discretion in holding that mitigation measures negate the existence of scientific controversy and thus has waived any objection to it. *See* Dkt. 22 at 45–46.

[11] NPS implies that there may be some mechanism, other than tiering, which may otherwise allow agencies to rely on analysis not contained within the challenged NEPA documents themselves but provides no regulatory authority supporting this. Dkt. 30 at 53.

necessary. Even if CEs may tier, an agency must follow necessary tiering procedures. To allow otherwise would defeat one of NEPA's overarching purposes – keeping the public informed. 40 C.F.R. § 1500.1(a).

Here, NPS claims to use tiering to support its CE documentation, 4-ER-829, 4-ER-861, but failed to specifically indicate what analysis was being tiered *to*. *See generally* 4-ER-824–46, 4-ER-857–77. Instead, it merely makes general references to the FMP and Merced River Plan as a whole, documents that are each hundreds of pages long, and one of which was not publicly available at the time of the decision. *See* 2-ER-228; 4-ER-816–17. Absent such specificity and availability, the documentary act of tiering is rendered useless, and, as a result, the reviewing public has no idea what prior analysis is being relied upon.

NPS again argues that *Center for Biological Diversity v. Salazar* permits an agency to rely on prior NEPA analysis when using a CE, Dkt. 30 at 53–55, but that case is distinguishable in at least three relevant ways. First, the agency in *Salazar* never claimed to tier in the first place, 706 F.3d 1085, 1097–98 (9th Cir. 2013), while here NPS explicitly claims to tier. 4-ER-829; 4-ER-861. Second, the permitted "prior analysis" in *Salazar* was related to the evaluation of extraordinary circumstances, 706 F.3d at 1097–98, whereas here NPS attempts to tier to analysis regarding the very applicability of CE-B.1. Third, *Salazar* only addressed the applicability of the CEQ NEPA tiering and incorporation by reference regulations

to EAs and EISs, *Id.* at 1096–98, whereas here EII also challenges NPS's failure to adhere to the DOI NEPA-implementing regulations regarding tiering and incorporation by reference. Dkt. 7-1 at 26; Dkt. 14-1 at 28. Those DOI regulations, 43 C.F.R. §§ 46.135, 46.140, were not addressed in *Salazar* and thus their application is not limited to EAs and EISs.

For example, under the DOI NEPA regulations, prior analysis may be tiered to "[w]here the impacts of the narrower action are *identified and analyzed* in the broader NEPA document," 43 C.F.R. § 46.140(a) (emphasis added), and to incorporate by reference the agency must, among other things, include "citations of specific information or analysis from other source documents … includ[ing] the pertinent page numbers or other relevant identifying information." 43 C.F.R. § 46.135(b). These provisions are both common-sense – without requiring an agency to show its work by adequately identifying the analysis it claims to rely upon, it is impossible to confirm that supporting analysis actually exists. NPS's CE documentation violated both provisions.

Allowing an agency to tier for CE documentation without identifying the specific analysis tiered to allows an agency to act first and develop a post-hoc rationale later – which is exactly what has occurred here. The CE Packages offer no specificity about which sections or pages of the FMP purportedly support its conclusions. 4-ER-824–46; 4-ER-857–77. The first Dickman Declaration made

repeated references to the FMP but included no page-specific citations. 4-ER-765–812. It is only at this late stage before this Court that NPS has begun to provide some specific citations that would allow reviewers to identify and evaluate the alleged analysis relied upon to approve the Projects. *See* Dkt. 30 at 19–21, 39, 48–52.[12]

D. NPS violated NEPA's "hard look" requirement by failing to provide site-specific analysis of Project impacts.

NPS failed to take a "hard look" at impacts from the thinning of trees up to 20" in Merced Grove. NPS erroneously contends that the mere explanation of the supposed need for removing 20" trees suffices as site-specific Project impacts analysis. Dkt. 30 at 47–48. But the fact that NPS claims, without supporting evidence, that "'[t]ree density far surpasses the on the ground conditions' present in 2004" does not explain all the impacts of thinning trees up to 20" in Merced Grove. *See* Dkt. 30 at 47. Even the Dickman declarations fail to provide site-specific analysis for the impacts of thinning up to 20" in Merced Grove. *See* Dkt. 30 at 48 (citing 4-ER-788–89; 4-ER-784–87); Dkt. 22 at 54 Dickman's second declaration offers another explanation for logging larger trees, addressing "ladder fuels," but as EII's proposed sur-response noted, his explanation fails to mention,

[12] Even then, the analysis pointed to does not provide site-specific analysis of impacts from the Projects. *See* discussion *supra* Section I.A.2.

much less address, a contradictory FMP provision that offers a way to address ladder fuels without cutting down large trees. 2-ER-145–46.

NPS also failed to take a "hard look" at impacts on the Pacific Fisher. First, the FMP contains no site-specific analysis of fisher impacts along road corridors or in the Merced Grove. Instead, the FMP broadly looked at fisher impacts from the authorized fire management work across the Park. *See* 6-ER-1500–02. Because the FMP did not analyze the site-specific impacts of the selected fire management work, the FMP cannot suffice for NPS's "hard look" analysis. Second, the analysis present in the Fish & Wildlife Service's ("FWS") consultation letters consists almost entirely of mitigation measures. *See* SER-20, 26 ("Disturbance will be minimized by following a limited operating period to protect denning fisher in all areas overlapping with potential fisher denning habitat…[t]he proposed project will retain the most important habitat features for the fisher…"). A discussion of mitigation does not equate to a discussion of impacts. Further, the FWS's "not likely to adversely affect the fisher" *conclusion* does not equate to a *discussion* of impacts. *See Neighbors of Cuddy Mtn. v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998). Even if the post-decisional declarations could be considered, most of the declarations fail to provide a site-specific analysis for the impacts on the

fisher in Project areas. *See* 4-ER-789–90 (merely discussing project planning forums).[13]

E. NPS's failure to comply with NEPA is not mere harmless error.

To determine whether an agency committed harmless error, courts observe "whether the error caused the agency not to be fully aware of the environmental consequences of the proposed action, thereby precluding informed decisionmaking and public participation, or otherwise materially affected the substance of the agency's decision." *Idaho Wool Growers Ass'n v. Vilsack*, 816 F.3d 1095, 1104 (9th Cir. 2016). In *Idaho Wool Growers Ass'n* , the plaintiff contended that consultation should have occurred to convey information regarding the uncertainties of disease transmission. *Id.* However, because that same information was offered to the agency, was reflected in the relevant NEPA documentation, and was considered by the public through notice and comment, the court found the failure to consult was a harmless error. *Id.* at 1104–05. Here, in contrast, the challenged analysis is not reflected in the relevant NEPA documentation and was not available to the public. This is not just a case in which NPS's NEPA

[13] NPS's Thompson declaration addresses some site-specific impacts and in doing so it actually demonstrates exactly the sort of site-specific analysis that should have been prepared contemporaneously and included within the CE Packages. 3-ER-536–37 (discussing potential Project impacts on the fishers). However, this declaration, as with the others, contains no contemporaneous documentation that evidences that it is more than just a post hoc rationalization.

documents "look[ed] somewhat different in form[.]" *See Save Our Heritage, Inc. v. FAA*, 269 F.3d 49, 62 (1st Cir. 2001). This is a case in which NPS failed to make its analysis of two significant Projects available to the public and failed to include that analysis in its NEPA documentation. Such failures cannot constitute harmless error.

II. EII will suffer irreparable environmental, aesthetic, and procedural harm in the absence of an injunction.

As the district court correctly recognized, EII is likely to suffer irreparable harm in the absence of an injunction. EII's members' declarations establish that the Projects "would negatively affect the wildlife viewing opportunities in the area, [and] will harm EII's aesthetic, professional, and recreational use and enjoyment of Yosemite Valley." 1-ER-10–11; SER-10 (district court reaffirming its holdings on irreparable harm). NPS makes much of the fact that the Projects are not "logging" in "undisturbed" natural areas. Dkt. 30 at 59. First, even if true, NPS cites no authority indicating that on these facts EII will not suffer irreparable harm absent an injunction. Second, NPS misconstrues the term "undisturbed state" and this Court's related findings of irreparable harm. For purposes of showing irreparable harm, "undisturbed" refers to the state of the forest before the challenged activity occurs. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1129, 1135 (9th Cir. 2011) ("*AWR*") (logging smaller, burned trees establishes irreparable harm). In *League of Wilderness Defenders/Blue Mountains Biodiversity Project v.*

Connaughton, this Court acknowledged that it had previously granted injunctions in cases involving small trees and in areas that have previously been logged. 752 F.3d 755, 764–65 (9th Cir. 2014). The mere fact that trees are present at allegedly "unnatural" quantities does not negate EII's irreparable harm.[14]

III. The risks caused by future severe wildfire while EII's limited and temporary injunction is in place do not outweigh EII's certain irreparable harm.

Both the district court's opinion and NPS's responsive brief make essentially the same error – they both fail to distinguish between risks caused by failing to complete the Projects within any required implementation timeframes and the risks created by temporary delays in implementing certain aspects of the Projects. *See, e.g.*, 1-ER-17; Dkt. 30 at 63. Only the latter risks are relevant here when balancing the equities. The CE Packages themselves contain no implementation schedules or deadlines and do not prioritize certain Project actions over others. However, the

[14] NPS also argues that EII's "declarations are not specific enough to establish an interest in the specific project areas. *Cf. Summers v. Earth Island Inst.*, 555 U.S. 488, 495 (2009)." Dkt. 30 at 61. This argument was never presented to the district court and thus was waived. *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999). Even if the argument was not waived, *Summers,* a case about Article III standing, is readily distinguishable. *See* Dkt. 16-1 at 15. Unlike in *Summers,* 555 U.S. at 45, here, EII's members' declarations establish that their ability to utilize the specific Project areas' forest would be inhibited by the Projects' extensive changes to the forest structure. 8-ER-1916, 1920–21; 8-ER-1909 (describing Jennifer Mamola's concerns that "I will *no longer utilize these portions* of the Yosemite area for recreational purposes…The size of the trees I witnessed being logged…cannot be replaced within my lifetime[.]") (emphasis added).

2017 FMP prioritizes and emphasizes the important public-safety implications of activities within CIPS units, 2-ER-237**,** which is why EII does not seek a temporary injunction against actions, including logging, within those areas.[15] NPS's latest declaration suggests that the Projects' funding sources require that the Wawona Road Project be completed in 2025 and the Yosemite Valley Project be completed in 2026. 2-ER-113–14, ¶ 24.[16] NPS has offered no evidence that EII's requested limited temporary injunction against commercial logging along park roads outside the CIPS units and logging trees over 12" in diameter within Merced Grove, which would likely be in place for less than a year, would delay completion of these Projects by 2025 and 2026, respectively.

Indeed, NPS's declarants explained that it is not implementing all aspects of the Projects simultaneously. Instead, NPS works on the individual pieces of each Project sequentially, focusing on or completing one part before moving on to the next. *See* 2-ER-174, ¶ 9. NPS inaccurately argues that EII's requested narrowly-

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[15] NPS's assertion that the FMP's 2017 amendments are "not relevant to this appeal," Dkt. 30 at 19 n.2, could not be more wrong. As EII has repeatedly explained, EII has tailored its limited requested injunction based on the priorities and fire control actions established by the 2017 amendments. 2-ER-201; Dkt. 22 at 60.

[16] NPS's declarant himself equivocates and states this is only his "understanding," and offers his "understanding" to correct an error in his prior declaration regarding this issue. 2-ER-113–14, ¶ 24. NPS has been unable, or at least unwilling, to offer definitive evidence regarding the required or projected completion dates for these Projects.

tailored injunction will render NPS unable to complete or implement the Projects, an error this Court has warned against when balancing the equities. *See AWR*, 632 F.3d at 1137–38. If EII's limited injunction is granted, NPS can, and undoubtedly will, continue to implement non-enjoined Project actions such as logging and other mitigation within the CIPS units and the removal of hazard trees. This would allow NPS, if it ultimately prevails on the merits, to likely complete both Projects on schedule and mitigate any risks created by temporary delays in implementing its planned commercial thinning outside the CIPS units.

NPS cannot establish that there will be unacceptable risks if EII's temporary injunction is granted and it cannot complete the enjoined thinning in 2023, as opposed to 2024 or 2025. Although NPS's declarant claimed EII's requested injunction would delay logging along Park roads outside the CIPS units during the fall of 2022, *see* 2-ER-175, ¶ 12, elsewhere he testifies such logging would only occur *after* NPS has completed logging within Merced Grove and if snowfall is below normal. 2-ER-174, ¶ 9; 2-ER-175, ¶ 12. Of course, we now know neither of those things happened. *See* Dkt. 30 at 27. Ultimately, NPS has offered no evidence, in the form of a pre-litigation implementation plan or schedule, that the commercial roadside logging needed, or was intended, to be completed any time before 2025. Indeed, NPS does not dispute EII's unrebutted evidence that before EII filed its lawsuit, NPS did not prioritize the roadside logging during the

Projects' initial ten months when it completed only about 10% of the Wawona Road Project and almost none of its roadside logging. 2-ER-275–76.

In the Merced Grove, NPS defeated EII's request for an injunction and an injunction pending appeal to enjoin logging trees over 12" in diameter by claiming it needed to complete thinning of trees up to 20" in diameter during the fall/winter of 2022 in order for prescribed burning to occur in the fall of 2023. *See* 2-ER-174–75, ¶ 11; 2-ER-112–13, ¶ 21. EII argued in response that NPS's own testimony and implementation history showed that NPS would likely not complete its desired Merced Grove logging last fall. Dkt. 14-1 at 33–35. NPS now admits EII was correct but insists it nevertheless can both burn and log in the Grove this coming fall. Dkt. 30 at 27. But NPS's declarant previously insisted NPS could not both log and burn in the Grove during the fall of 2023. 2-ER-174–75, ¶ 11. NPS should not be rewarded for its inconsistent and self-serving arguments. EII has already been irreparably harmed by NPS being allowed to log in the Grove this past fall even though it was almost certain NPS would not eliminate the risks it insisted would be addressed by doing so.

Moreover, this Court should take judicial notice of the undisputable record rain and snowfall that has occurred in California this winter, thereby likely significantly reducing the risks of severe wildfires during 2023 when EII's

requested temporary injunction would be in place.[17] Absent clear evidence of such current imminent risk, and considering the fact NPS can still mitigate those risks by thinning small trees under 12", *Connaughton*'s holding that undisputed permanent irreparable harm from the logging of large trees outweighs the risks from temporary delay is controlling here. 752 F.3d at 766. [18, 19]

NPS's argument that EII's request for an injunction is somehow undermined by the unavailability of vacatur after merits issues are fully resolved, Dkt. 30 at 58, is premature, meritless, and waived because it was not raised below. NPS ignores that EII only requests partial vacatur. 8-ER-2047. NPS's citation to *350 Montana v. Haaland*, 50 F.4th 1254, 1273 (9th Cir. 2022) is misleading. Far from supporting no vacatur for NEPA violations, this Court found the plaintiff's argument for vacatur to be "well taken," but remanded for additional factual development regarding the issue. *Id.*

Finally, regarding the district court's improper refusal to allow EII to respond to NPS's lengthy, entirely new evidence in its Sur-reply, *see* Dkt. 22 at

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[17] *See Special Edition Drought Status Update for the Western United States*, https://www.drought.gov/drought-status-updates/special-edition-drought-status-update-western-united-states-2023-01-24 (last visited Jan. 26, 2023).

[18] NPS's reliance on *Wildwest Institute v. Bull*, Dkt. 30 at 62, is misplaced. That case involved a statute that does not apply here and that changed the usually applicable equitable rules regarding injunctions. 472 F.3d 587, 592 (9th Cir. 2006).

[19] As EII already explained, *see* Dkt. 16-1 at 18, NPS's final "public interest" argument based on alleged congressional priorities, Dkt. 30 at 70, is meritless and was waived.

66–67, NPS seriously misconstrues this Court's holding in *Provenz v. Miller,* 102 F.3d 1478, 1483 (9th Cir. 1996). That case protects a litigant's right to *respond* to new evidence offered for the first time in a reply and is in no way limited to situations where the proposed response is itself new evidence. *Id*.

CONCLUSION

For the above reasons, this Court should reverse the district court's denial of EII's Motion for Preliminary Injunction, EII's Motion to Strike, and EII's Proposed Sur-Response. This Court should also order the district court to enter an injunction consistent with EII's Motion, 8-ER-2005–08, as modified by EII's Proposed Sur-Response, 2-ER-147–48.

Respectfully submitted this 26th day of January 2023.

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FOR THE NINTH CIRCUIT

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