

APPEAL TO THE FOREST SUPERVISOR,
UMATILLA NATIONAL FOREST,
USDA FOREST SERVICE, PACIFIC NORTHWEST REGION,
OF A DECISION OF THE DISTRICT RANGER OF THE
HEPPNER RANGER DISTRICT,
UMATILLA NATIONAL FOREST

OREGON CHAPTER SIERRA CLUB

APPELLANT,

vs.

THOMAS E. MAFERA, DISTRICT RANGER,
HEPPNER RANGER DISTRICT,
UMATILLA NATIONAL FOREST

DECIDING OFFICIAL

In Re: Appeal of the Decision Memo and
Categorical Exclusion for the Monument
Fire Salvage Recovery Project, USDA
Forest Service, Heppner Ranger District,
Umatilla National Forest

APPELLANTS' NOTICE OF APPEAL,
REQUEST FOR RELIEF, AND
STATEMENT OF REASONS

DATED THIS 8th DAY OF AUGUST 2008

NOTICE OF APPEAL

On June 25, 2008 Umatilla National Forest, Heppner District Ranger Thomas E. Mafera signed a Decision Memo and Categorical Exclusion for the Monument Fire Salvage Recovery timber sale project, authorizing post-fire salvage logging operations of dead and dying trees on 186 acres of the Monument Complex fire area, in Grant County, Oregon.

Notice is hereby given, pursuant to 36 C.F.R. § 215, that the below listed organization is appealing the decision of the District Ranger to approve and implement the Monument Fire Salvage Recovery Project Decision Memo and Categorical Exclusion.

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The District Ranger's decision of June 25, 2008 is in error and not in accordance with the National Forest Management Act (NFMA), the National Environmental Policy Act (NEPA), the Clean Water Act (CWA), the Endangered Species Act (ESA), the Migratory Bird Treaty Act (MBTA), the MUSYA, and these statutes' implementing regulations, and the amended Umatilla National Forest Land Resource Management Plan.

The Appellants have a specific interest in this project, indicated by our comments throughout the planning process and continued involvement in management of the Umatilla National Forest. Appellants have standing to appeal the District Ranger's decision according to 36 C.F.R. § 215.13(a) because of our submission of substantive comments throughout the planning process and the adverse impacts to our members interests that would result from the implementation of this postfire logging project.

The proposed post-fire salvage logging directly and significantly affects the members and volunteers of the Oregon Chapter Sierra Club. Sierra Club members regularly use and enjoy the public lands and natural resources in the Umatilla National Forest, including the project area, for hiking, camping, recreation, wildlife observation, birding, salmonid waterway observation, and ecological and native botanical study. Implementation of the proposed post-fire logging project will degrade wildlife habitat and irreparably harm the ecological integrity of this recovering postfire forest area, significantly impairing post-fire ecological recovery in and around the area, adversely affecting the Appellants' ability to continue the above-listed activities, and restricting the Appellants' use and enjoyment of the area in which the Monument Fire Salvage Recovery Project is located. Appellants have a long-standing and well-documented interest in the management of this area.

REQUESTED RELIEF

1. That the Decision Memo and Categorical Exclusion for the Monument Fire Salvage Recovery Project in the Umatilla National Forest be withdrawn;

2. That this project be modified to meet the objections presented in Appellants' Statement of Reasons, including but not limited to:
 - In accord with scientific recommendations for postfire forest management, retain all trees alive or dead >20" diameter breast height (dbh);
 - Eliminate or significantly modify all post-fire commercial logging in the Monument Complex Fire area, bringing the project into compliance with post-fire scientific ecological management recommendations;
 - Eliminate commercial logging and "temporary" road construction within the Turner Mountain and Happy Jack undeveloped, uninventoried roadless areas;
 - Eliminate all commercial logging with any potential to directly or indirectly contribute additional sedimentation to 303(d) listed Big Wall Creek and/or Indian Creek, and upstream tributaries and slopes of these water quality impaired salmonid watersystems;
 - Require only light on the land (8 lbs per square inch maximum) ground equipment within the project area, and require additional proactive measures to protect soil integrity and ground vegetation;
 - Require effective proactive measures be incorporated to prevent the spread or introduction of exotic invasive plants within or adjacent to the project area;
 - Prepare an environmental analysis to address restoration needs in the project area, including a full range of ecologically sound, scientifically based, action alternatives.
 - Conduct a public NEPA analysis process for this project that meets the full requirements of federal environmental policy laws (NEPA, NFMA, CWA, MBTA, and ESA) and the Umatilla National Forest Land Resource Management Plan as amended.

3. That this project be revised in such a way that is consistent with the National Forest Management Act (NFMA), the National Environmental Policy Act (NEPA), Clean Water Act (CWA), the Migratory Bird treaty Act (MBTA), the Endangered Species Act (ESA), and the Umatilla NF LRMP as amended.

Statement of Reasons

I. The use of a Categorical Exclusion is legally improper and deficient for this proposed project.

A. CE's may not be used when the size and scope of a project will result in significant impacts to the environment. The Monument Complex fires burned 53,548 acres total, with 19,761 acres on Forest Service lands, 21,393 acres on BLM lands, 30 acres on Oregon State lands, and 12,364 acres on private lands. The Forest Service is proposing to log 186 acres to salvage "dead and dying trees." It is not clear from the notice and decision whether additional roadside hazard tree logging will or already has occurred across some or all of the roaded burned forest areas in the Monument fire complex area. BLM management is primarily focused on repairing fences and controlling exotic invasive plant populations and spread, especially in staging areas and ground disturbed by fire suppression actions. It is also unclear from the decision or notice whether cumulative impacts from private lands logging and management in the Monument Complex Fire area have occurred. BLM has disclosed that private lands postfire logging has occurred in Township 7 South, Range 28 East, sections 27 and 34, encompassing portions of

Birch and Cabin Creeks, including their confluence and the confluence with the North Fork John Day River. Whether other private lands logging has or will occur cannot be ascertained from the decision or notice due to the lack of such disclosures or assessments. The fire itself resulted in significant impacts across the 53,548 acres burned. Federal environmental policy law prohibits the Forest Service from segmenting impacts resulting from the proposed logging on Forest Service lands separately from the cumulative connected impacts resulting from the fire itself and other management and logging actions elsewhere in the Monument Complex fire area. Together, these management actions and overall fire impacts represent significant impacts upon the environment across tens of thousands of acres in the greater Monument Complex fire project area, legally requiring that an Environmental Analysis NEPA process be conducted for this proposed project, prohibiting the use of a CE.

- B.** CE's may not be used for projects where there exists significant public and scientific controversy, and where expert scientific advice clearly shows the project will result in significant adverse impacts. Peer reviewed credible scientific research strongly recommends against post-fire salvage logging. The Beschta Report, including recent updates by its authors, and the Donato Study, as well as additional scientific research, clearly document numerous significant irreparable harms to the environment resulting from commercial logging in post-fire areas. Federal law requires that CE's not be misused to circumvent compliance with NEPA's most basic tenets.
- C.** While the agency's limitation of postfire logging to 186 acres instead of a much larger scale postfire logging project is appreciated, all management projects are required under the NEPA to be based in sound science and expert advice. Regardless of project size, short-term timber economics objectives cannot supercede scientific recommendations for postfire forest ecosystem management. Instead of incorporating scientific recommendations as a core foundation of the Monument Project's actions, the agency has in effect subverted the NEPA process, utilizing an arbitrary and capricious economically contrived purpose and need to limit developed actions to only commercial logging. The agency then uses this contrived purpose and need to eliminate from any consideration scientifically based environmentally beneficial restoration actions instead of, or in combination with more scientifically sound limited logging. As a result, both the public and the decision-maker are deprived of the consideration of ecologically and scientifically sound management options. Postfire logging is scientifically controversial at best, with the majority of scientific research recommending strongly against commercial logging, limiting logging actions to those within ecological parameters. The peer-reviewed updated Beschta report recommends the following concerning scientifically acceptable postfire management:

Recommendations:

- Salvage logging should leave at least 50% of standing dead trees in each diameter class;
- No harvest of live trees within burn perimeters;
- No harvest of dead trees >51cm dbh or older than 150 years;
- No logging in late successional forests;
- Salvage logging can increase the potential future fire intensity and rate of spread of these sites over the short-term;

- Even where salvage logging occurred in winter over approximately 60 cm of snow, logged areas had significantly lower understory biomass, species richness, species diversity, growth, and survival of both tree and shrub species;
- Logging can have detrimental effects on the microhabitats of organisms associated with recovery;
- Logging may be suitable where accelerated soil erosion and increased soil compaction are unlikely to occur and where there will be no impairment of hydrologic and soil biological integrity;
- Helicopter logging and cable yarding systems (particularly those providing full suspension) that use existing roads and landings also may be appropriate in some areas;
- Salvage logging should be prohibited on sensitive sites, including riparian areas, moderately or severely burned areas, fragile soils, steep slopes, roadless areas, watersheds where sedimentation is already a problem, where significant impacts to early successional vegetation may occur, and sites where accelerated surface erosion or accelerated mass soil erosion are likely to occur;
- The construction and reconstruction of roads and landings is not consistent with postfire ecosystem restoration;

The logging planned in the Monument Project fails to incorporate, disclose, or explain to the public and the decision maker why, many of the above recommendations have been ignored and violated by this project. The authorized logging would: remove most trees above 51cm dbh and/or older than 150 years throughout the logging units; authorizes road construction into undeveloped burned areas; log over 50% of the trees in each diameter class; log live burned trees with green needles <21" dbh; disturb sensitive burned forest soils above critical salmonid watersystems – eventually loosened sediment makes its way over time downslope into area waterways, which are already listed as water quality impaired for sedimentation; and initiate logging actions that fail to incorporate other above recommendations. Among other issues, NEPA requires the agency to disclose pertinent science and environmental concerns to the public and decision-maker, and to disclose why a selected action has been chosen if it is contrary to sound science and expert advice. In this case, the agency has misused the CE process to craft an arbitrary and capricious decision while avoiding its NEPA process, analysis, and disclosure responsibilities. The decision as such must be withdrawn, the project halted, and a new NEPA process conducted.

- D.** The agency's legally noncompliant misuse of timber economics as the only developed option in the Monument Fire Project effectively eliminated scientifically reasonable, environmentally preferable action alternatives; predisposing the decision-maker towards the only action developed, based entirely upon a combination of timber economics and a misuse of both the Decision Memo/Categorical Exclusion NEPA process, and a scientifically and economically unwarranted Emergency Status Determination. This decision and process violates the core tenets of the NEPA:
- 1) Directing that actions not harm the environment: "NEPA, CEQ Regulation part 1500 - Purpose Policy and Mandate" "Sec. 1500.1 Purpose. (c) Ultimately, of course, it is not better documents, but better decision that count. NEPA's purpose is not to generate paperwork - even excellent paperwork - but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore,

and enhance the environment. These regulations provide the direction to achieve this purpose."

- 2) Directing the agency to develop and analyze a reasonable range of alternatives that avoid or minimize environmental harms: "Sec. 1502 (e) Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment;" and "Sec. 1502 (f) Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment."
- 3) Additional NEPA directions on the range of alternatives: "Sec. 1502.14 Alternatives including the proposed action. This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (Sec. 1502.15) and the Environmental Consequences (Sec. 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall: (a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated."
- 4) And finally, the very core of NEPA - Congressional intent and directives to "prevent or eliminate damage to the environment" From "The National Environmental Policy Act of 1969; Purpose Sec. 2 [42 USC § 4321]. The purposes of this Act are: (a) To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality."
“(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may –
 - i. 1. fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
 - ii. 2. assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
 - iii. 3. attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
 - iv. 4. preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;
 - v. 5. achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
 - vi. 6. enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.”

“(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.”

Clearly, the Monument Decision Memo, CE, and ESD themselves, in combination, and the lack of any scientific foundation for this environmentally harmful postfire logging project, serves as perhaps the best evidence that the Umatilla National Forest Monument Project fails to begin to meet these most basic NEPA requirements. While agency officials may erroneously believe that NEPA doesn't require the agency to develop or choose the best ecologically and scientifically sound actions, NEPA clearly requires the agency to utilize expert advice and high quality science in developing a legally sound purpose and need, and to develop a range of reasonable “actions that protect, restore, and enhance the environment” (CEQ 1500 §1501.1(c)). NEPA's core directives require the development of reasonable alternatives that “identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions” culminating in an overriding directive about the agency's responsibility “to contribute to the preservation and enhancement of the environment.” Clearly the Monument Project Decision Memo, CE, and ESD fail the requirements of the NEPA, necessitating that this decision be withdrawn and a new legally compliant NEPA analysis process be conducted that develops a full range of environmentally beneficial, scientifically based, legally compliant action alternatives.

In accord with NEPA, environmental policy laws, federal judicial caselaw, and agency directives, CE's may only be used when it is clear a project adheres to sound scientific recommendations, will not irretrievably harm the environment, and where there exists general public consensus favorable to the project's goals and methods. The Monument Fire Salvage Recovery Project however, approves post-fire logging in contravention to the clear recommendations of peer-reviewed science. It approves controversial post-fire logging and road construction in an undeveloped unroaded area, which is antithetical to the scientific consensus on the ecological importance of undeveloped unroaded areas (which are rare across the eastside forest ecosystems). It approves logging in recovering postfire forests, without requisite analysis or exploration of scientifically sound alternatives, despite widespread scientific and public opposition to management myopically focused upon timber economics above ecological imperatives.

Merely parroting FS handbook rules – out of context - permitting projects less than 250 acres to proceed, fails to acknowledge these other clear requirements and Congressional intentions directing CE use. Additionally, NEPA requires cumulative impacts be accurately disclosed and assessed. The Monument Complex Fire burned over 50,000 acres, irretrievably impacting the environment of the greater Monument area forests and natural ecosystems. The proposed action, logging 186 acres on USFS lands, accompanied by additional undisclosed logging, management, and fire suppression actions on USFS, BLM, and private lands in the same fire area, which are all part of the entirety of the 53,548 acre burned cumulative impacts area. As such, the additional impacts of the planned logging further compound the impacts of the fire itself. Together, area management projects and actions, and the fire itself, far exceed the 250 acre limit. Environmentally, on a fire landscape scale these cumulative connected actions are inextricably intertwined ecologically, regardless of differing management including private lands authority and independence. As such, the Monument Fire Project may not be arbitrarily and capriciously segmented and diminished piecemeal as if there would only be a total of 186 acres impacted across the landscape. The District Ranger's decision as such is arbitrary and capricious and not in accordance with the requirements of federal environmental policy laws mandating public lands projects be based upon expert advice, accurate site-specific conditions, and high quality science. Given the expert scientific

advice against implementing commercial logging in post-fire areas, well-documented known adverse impacts of post-fire logging, emphatic conservation community unity against such logging, public interests in protecting and restoring public lands ecosystems, and the requirements of federal environmental policy laws, the agency must conduct an Environmental Analysis NEPA process for this proposed project.

The notice states that “there is a need to salvage harvest as rapidly as practicable before decay and other wood deterioration occurs to maximize potential economic benefits.” However, federal policy laws, judicial rulings, Forest Service policy, and credible science mandate that projects in burned areas must also address restoration needs.

No mention is made of scientific research, including the Donato Study, concerning adverse harms from logging to naturally regenerating tree seedlings and recovering native species vegetation. Similarly, while logging has documented detrimental impacts to natural regeneration, the decision fails to address assisting natural regeneration processes where needed by replanting trees. The agency also fails to address harmful impacts to diverse native species vegetative recovery from the planned logging. The decision makes no provision for the planting of native vegetative species, and fails to disclose or assess if native vegetation is already recovering naturally, and would be harmed by logging.

The decision fails entirely to address invasive exotic plant: no mention is made whether invasive plant populations already exist in the project area or whether these may be further spread by the planned logging. However, our volunteer surveys and BLM have both confirmed the presence of invasive non-native plants in the Monument Complex fire area. Indeed, among BLM’s main focus of management actions in the fire area are efforts to prevent and control the spread and introduction of invasive exotic plants. The Umatilla National Forest, by failing to even address this issue while authorizing postfire logging ground disturbing actions, is working counter to BLM’s proactive invasive plant prevention and control efforts, with a high probability of increasing the spread and abundance of existing and new populations of exotic invasive plants in the fire area as a result if the Monument Fire Project is implemented. Additionally, the applicability and effectiveness of the agency’s best management practices and mitigations regarding preventing the introduction and spread of invasive exotic plants is not addressed either, though it is well known that the spread of invasive plants is exacerbated by post-fire logging and soil disturbance, and that mitigations have limited effectiveness at best in preventing further spread and introduction of invasive plants.

This project needs to be redesigned to comply with postfire scientific recommendations for postfire forest ecosystems, with interagency recovery objectives and efforts, and with federal environmental policy law requirements and the restoration needs of the area.

Other legal requirements that FS CE's have been held to are below. The Decision Memo fails to comply with these CE requirements:

1. The Forest Service must use fuel models and fire behavior data to document reduced fire severity. It is not enough to either ignore fuels issues resulting from logging slash, or to claim logging will reduce fuel loading, in responding to the general contention of a lack in empirical evidence showing fuels reduction will result in reduced fire severity. The USFS failed to address any post-fire restoration or fuels issues, and as their sale leaves in place all small diameter fire-risk fuels while opening the area to increased solar exposure, soil compaction, loss of moisture retention and increased peak flow runoff - it would likely increase fire risks – in violation of CE requirements and NEPA disclosure mandates.
2. Categorically excluded projects must document why a particular category was selected. *In this case, the decision-maker choose category 13 by merely stating this*

category was chosen instead of others “because the Forest Service did a post-implementation review of similar projects along with past, present, and reasonably foreseeable future actions, and the responsible officials found that the individual and cumulative effects of the projects reviewed were not significant in the NEPA context.” While apparently tiering this selection to other projects elsewhere, the decision fails to provide any explanation why this category is applicable to the Monument fire project or the area’s site-specific conditions and concerns. It fails to provide any rationale why this category was more appropriate than category 6 (timber stand improvement) or category 10 (hazardous fuels reduction), or without addressing more ecological project design to meet the requirements of either category 6 or 10 – or both. Responsibility given to agency decision-makers requires more than simply stating: “I made this decision because others made similar decisions in other unidentified areas before me.” If this were the case, a sorcerer’s apprentice flood of identical “analysis” copies and decisions could wreak havoc with our nation’s public lands; violating among other NEPA requirements provisions that projects be based upon site-specific analysis, conditions, and needs.

3. Ninth Circuit cases such as *Alaska Center for the Env. and California v. Norton*, that require agencies to provide contemporaneous documentation explaining their reliance on a particular CE, explaining accurately why there will be no significant impacts, and credibly explaining that there are no extraordinary circumstances that will be affected, etc.
4. "NEPA imposes a procedural requirement that an agency must contemplate the environmental impacts of its actions." *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998); see U.S.C. § 4332. "NEPA 'ensures that the agency . . . will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger [public] audience.'" *Id.*, quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b).
5. NEPA establishes three "categories" of agency action. See generally, *Edmonds Institute v. Babbitt*, 42 F. Supp. 2d 1, 18 (D.D.C. 1999). First, proposals that normally require an EIS should immediately trigger preparation of an EIS. 40 C.F.R. § 1501.4(a). Second, the agency may designate types of actions that normally do not require the preparation of an EIS and can be "categorically excluded." 40 C.F.R. § 1508.4. If a proposed action fits within a categorical exclusion, NEPA review is not necessary unless "extraordinary circumstances" exist. *Id.* Third, any action that does not fall into the first or second category should be evaluated in an EA, which must analyze whether impacts from the proposed action may be significant and, therefore, require an EIS. 40 C.F.R. § 1501.4(b). It is clear as noted herein that this action has "extraordinary circumstances."
6. Pursuant to NEPA, the Forest Service may only rely on a categorical exclusion for projects that will not significantly impact the environment and where there are no "extraordinary circumstances." 40 C.F.R. § 1508.4. For any proposal which it proposes to categorically exclude from NEPA, the Forest Service is therefore required to allow "public scoping" in order to disclose its proposal to the public, and to provide the public with an opportunity to identify why the exclusion may be inappropriate *before* the proposed project is allowed to proceed. (FSH 1909.15, Chapter 30.3(3) ("Scoping is required on all proposed actions, including those that would appear to be categorically

excluded."); *id.*, p. 8 (FSH 1909.15, Chapter 31.12 ("The following categories . . . may be categorically excluded from documentation in an EIS or an EA *unless scoping indicates extraordinary circumstances*") (emphasis added); *Alaska Center for the Environment v. U.S. Forest Service*, 189 F.3d 851, 858 (9th Cir. 1999) ("The Forest Service conducts scoping for 'all proposed actions, including those that would appear to be categorically excluded'", quoting FSH, 1909.15, 30.2(3). "If extraordinary circumstances having an effect on [the] environment *are revealed during scoping*, then the Forest Service conducts an EA." *Alaska Center*, 189 F.3d at 858 (emphasis added).¹

7. And as noted in a similar CE case: "The Forest Service also violated NEPA by failing to prepare findings and sufficiently explain its decision to rely on a categorical exclusion for these road reconstruction projects, as opposed to preparing an EA or EIS. As explained by the Ninth Circuit in *Alaska Center for the Environment*, "[w]hen an agency decides to proceed with an action in the absence of an EA or EIS, the agency must adequately explain its decision." 189 F.3d at 859. The agency cannot avoid its NEPA obligations merely by asserting that the project will have insignificant environmental impacts, but instead must provide "a convincing statement of reasons why potential effects are insignificant." *Id.*, quoting *The Steamboaters v. FERC*, 759 F.2d 1382, 1393 (9th Cir. 1985). This statement of reasons allows the reviewing court to determine whether the agency's decision "was based on a consideration of the relevant factors and whether there has been clear error of judgment." *Id.*, quoting *Marsh v. ONRC*, 490 U.S. 360, 378 (1989)." Again, the evidence herein irrefutably establishes that there has – at best – been a "clear error of judgment" and an EA is necessary.
8. This case is therefore similar to *California v. Norton*, where the agency did not prepare sufficient environmental documentation regarding its challenged decision. 311 F.3d 1162, 1175 (9th Cir. 2002). As in *Norton*, the Forest Service in this case cannot "point to any documentation in the record that would suggest that it made a categorical exclusion determination *at the time the [road projects] were approved.*" *Id.* (emphasis added).² As recognized by the Ninth Circuit, a reviewing court is unable to determine whether the application of a categorical exclusion is arbitrary and capricious "where there is no contemporaneous documentation to show that the agency considered the environmental consequences of its action and decided to apply a categorical exclusion to the facts of a particular decision." *Id.* at 1176.³ Moreover, an agency's post hoc invocation of a categorical exclusion -- as the Forest Service is relying on in this case -- "does not provide assurance that the agency actually considered the environmental effects of its action before the decision was made." *Id.*; *Edmonds Institute v. Babbitt*, 42 F. Supp. 2d 1, 18 (D.D.C. 1999) ("[A] post hoc assertion of a CE during litigation, unsupported by any evidence in the administrative record or elsewhere that such a determination was made at the appropriate time, cannot justify a failure to prepare either an EA or an EIS.").⁴

II. The Agency must address cumulative impacts to the environment in a NEPA analysis process.

A. Aquatic resources: The project area contains upper tributaries to the North Fork John Day River salmonid watersystem. The decision discloses the project area contains habitat for ESA threatened listed steelhead trout and sensitive listed redband trout. Despite the presence of extraordinary circumstances arising from the presence of these and other ESA listed species, and absent any NEPA EA or EIS analysis, the agency arbitrarily concludes that the project is not likely to adversely affect steelhead, while it may impact habitat and individuals for redband trout, but is 'not likely' to contribute to a

downward trend for this species. This conclusion and decision is contrary to NEPA process and requirements. The presence of these species necessitates appropriate analysis before such a conclusion may reasonably be arrived at and a decision legally issued. CE's by their nature exclude such analysis, and as such have been misused to facilitate this ecologically harmful, scientifically unsound, legally non-compliant arbitrary and capricious decision approving the Monument Fire logging. While the agency states that NOAA was consulted in arriving at this decision, it fails to disclose how NOAA's review and concurrence is even possible given the lack of site-specific environmental analysis for this project?

Freedom Of Information Act Request:

Consequently, pursuant to the Freedom Of Information Act, we herein request copies of all of the agency's correspondence and communication to and from NOAA regarding this project.

Similarly, the decision memo and previous scoping notice fail to address the cumulative adverse impacts to ESA listed aquatic species and species of concern populations, habitat, and resources downstream of the project area resulting from the proposed logging, road hauling, temporary road construction, road "improvements," stream crossings, and any associated instream work, in combination with other management actions within and adjacent to the fire area, and with the impacts of the fire itself. Proposed riparian buffers fail to comply with INFISH standards, in violation of the amended Malheur LRMP. The decision fails to address cumulative impacts from Monument Project logging and the fire itself, including increased seasonal peak flows, loss of moisture retention, increased sedimentation, airborne dusts, road runoff, and increased water temperatures – all of which are known to harm water quality and fisheries. The decision also fails to address how such a project can be authorized in an area where waterways are listed by the state of Oregon as Water Quality Limited, or to update the factors that lead to the state's 303(d) listing by assessing the likely additional adverse cumulative impacts to water quality occurring in the area post-fire. New NEPA analysis for this project must address, analyze, and disclose this pertinent information, and meaningful informed consultation with NOAA must be initiated by the agency before a decision may legally be reached.

B. Terrestrial and Avian Wildlife Species: The Umatilla is home to far ranging wildlife species, including wolverine, lynx, potential returning wolves, as well as raptors including eagles, goshawks, and avian species including numerous neotropical migrant birds as well as various bats. Additionally, territorial home and foraging range may exist in the project for other native wildlife species such as cavity nesters including black-backed, Lewis's, northern three-toed, white-headed, pileated, and other woodpeckers, native songbirds, American marten, and other species of concern. The decision fails to adequately address the likely adverse cumulative impacts to these numerous diverse species resulting from the proposed logging in conjunction with fire impacts, fire suppression actions, private lands logging and management, BLM management actions, and other area management activities.

It is well known that wolverine have a winter range of over 150 square miles. Wolverine are threatened listed by the State of Oregon, and are a regionally sensitive species. Wolves are a far-ranging ESA listed species that may be present in the project area, as disclosed in the Decision Memo. Lynx, which may be present are not acknowledged as such by the agency. As the decision notice discloses that wolverine and wolves may be present in the greater area, absent additional analysis the conclusion that this project will not impact either wolves or wolverine fails NEPA's reasonableness requirements.

It also appears that the agency relies upon a double standard with regard to aquatic and terrestrial listed ESA species, consulting with NOAA concerning aquatic species but failing to consult with USFWS concerning wolves, lynx, or wolverine. This double standard lead to potentially harmful decisions to these and other ESA listed species, and must be corrected in a new legally complaint NEPA process for this project.

Additionally, the similar unsubstantiated dismissal of impacts to post-fire dependent cavity excavators and nesters, such as regionally and Oregon State sensitive listed black-backed woodpeckers and other species of concern (Lewis's woodpecker, white-headed woodpecker, pileated woodpecker, neotropical migrant birds, etc.), absent responsible recent thorough surveys, is arbitrary and capricious and in violation of NEPA's accuracy and expert requirements. Further the proposed logging would have adverse impacts to numerous neotropical and native species of birds (in violation of the MBTA), and arboreal and ground denning mammals, including bats, flying squirrels and others. Absent seasonal nesting period restrictions prohibiting logging during this period, the project would likely violate the MBTA by directly causing mortality to nesting and fledgling birds. The decision memo fails to adequately disclose or address these significant issues. In the absence of a reasonable and accurate assessment of likely cumulative impacts to these and other species of concern, and disclosure in a NEPA process, the agency may not proceed with the proposed logging project.

III. Additional Issues:

- A. The decision memo fails to meaningfully address effective provisions for dealing with logging slash and landing piles. It fails to address significant harm to soils from possible burning of such piles, whether intentionally to dispose of excess woody buildup or as a result of possible future area fires. Leaving piles and debris in place increases and unnaturally concentrates area fuel loads. Burning piles and concentrated debris results in sterilizing and destroying the soil microbial communities that functioning forests depend upon. Landing piles must be kept small and located in non-ecologically sensitive areas to avoid irreparable adverse impacts. Adhering to scientific recommendations for postfire logging, removing only medium and smaller diameter dead trees, has the additional beneficial result that slash piles and landing decks are smaller with less adverse impacts.
- B. Agency research has noted if logging is done under winter conditions, impacts to soils are less harmful. However, the decision makes no provisions for that logging be done under winter conditions, and fails to explain why this recommendation has been ignored other than a perceived "need" to remove trees as quickly as possible, sacrificing environmental integrity to timber economics.
- C. Logging slash is known to be the cause of many severe fires. The decision fails to address this issue adequately.
- D. The decision fails to disclose or address livestock grazing plans and related cumulative impacts in the area. Have provisions and fences to exclude livestock been implemented? The memo fails to address this issue, and fails to address the cumulative impacts of this project combined with the fire and past, current?, and future livestock grazing.

IV. Moving Towards Scientifically and Ecologically Sound Projects:

Management activities within the Monument fire area are of significant concern to our organization. First, while seriously disagreeing with the commercial logging foundation and focus of the proposed project, it is appreciated that the agency has reigned in the potential extent of the proposed logging from the extent of postfire logging excesses proposed in its recent past. Limiting the acreage logged, refraining from logging on steep slopes, and in riparian areas represents significant beginning steps evidencing logging restraint. However, the project's main motivation and focus remains commercial logging in contravention to all credible scientific recommendations for management actions in post-fire forest ecosystems. Restraint that still inflicts adverse ecological harms, even though lessened, incrementally still degrades our remaining public forests and salmonid waterways. The focus of the Monument Fire Project evidences a wide agency-management chasm from an understanding of what truly constitutes scientifically and legally sound ecological restoration. The project decision represents a

systemic failure to disclose and meaningfully utilize credible scientific research. In myopically focusing upon logging, the agency has again failed to develop a science-based post-fire restoration project that honors the public's and the land's best interests and needs. The decision is a strong example of how inappropriately employing a CE to evade NEPA analysis and disclosures violates agency integrity, accepted scientific understanding, and the needs of the land, public, and imperiled wildlife.

Post fire landscapes have significantly different management needs than unburned green forest ecosystems. The decision would authorize commercial timber harvest that is not consistent with credible post-fire ecology scientific research. NEPA requires proposed projects be based upon expert advice and accurate high quality science. NEPA mandates full disclosure of scientific research and recommendations pertinent to the proposed actions, enabling meaningful public participation and a well informed legally and ecologically sound decision. The decision and management actions fail to meet the most elemental standards of the NEPA, fail to be based upon or even disclose any applicable science, emphasize irretrievable resource extraction that would further degrade the project area, fail to address cumulative impacts, present erroneous information coupled with serious disclosure omissions, fail to meet the legal and ethical requirements for a CE, and as such the Decision Memo represents an arbitrary and capricious decision in contravention to federal environmental policy laws.

It is clear from the decision that our organizations' previous comments – except as evidenced in the reduced scope of acres planned for logging - have been largely ignored, as the project's primary purpose remains the recovery of the economic value of “dead and dying” trees. The agency also has ignored our expressed requests for complying with the NEPA and conducting at a minimum an EA for this project. Instead the agency issued a CE decision memo, exempting logging in post-fire forest habitat from compliance with NEPA analysis requirements (with the project even including building roads into and logging within unroaded, undeveloped areas!). We again strongly reiterate that this project must first conduct the requisite minimum NEPA Environmental Analysis (EA).

V. The Need to Conduct an EA & Develop Restoration-Based Alternatives

The presence of scientific and public controversy – including significant recommendations against the proposed logging and the absence of any supporting scientific rationale for the “need” for such logging, the failure of the agency to disclose or meaningfully address these issues, the potential for adverse impacts to listed wildlife species and their habitat, irreparable harms forever changing the integrity of the area's forests and undeveloped/unroaded areas, extensive cumulative impacts, and other related issues all preclude the agency from issuing a CE for this project. At a minimum, an EA must be conducted which responsibly discloses and addresses the above pertinent issues and information. The agency must develop a full range of scientifically sound restoration alternatives that meet the ecological, wildlife, and recovery goals that are essential for this area.

VI. Snag Numbers Fail to Meet Scientific Recommendations

The decision fails to give any indication of whether retained snags will be the largest available, with the most potential to remain standing the longest, or otherwise – or disclose who will make these selections. The notice fails to state how snag levels were arrived at? Further, the notice fails to disclose that scientific recommendations call for retaining optimum levels of snags – especially where habitat is deficient and/or where species of concern exist. The project area habitat is severely burned – significantly reducing forest canopy and cover. Black-backed, northern tree-toed, Lewis', white-headed, pileated, and other woodpeckers may utilize some portions of the project area, with some of these species Oregon State or USFS regionally listed as sensitive. Scientific research on meeting recovery goals for listed species and species of concern recommend that snag levels be maintained at optimum levels. Evelyn Bull's research,

as well as other applicable snag research recommends a range of from 4 to 17 large snags per acre in green forest habitat. Recommendations in impaired habitat such as that within post-fire areas are of necessity far higher to provide for the habitat needs of snag dependent species. Higher levels also help provide essential shade to the forest floor, protecting soils, and helping retain moisture. Beschta scientists recommend leaving all trees greater than 51 centimeters diameter, and half of all other tree diameter size classes. The excessive logging proposed will degrade wildlife habitat, harm soils, result in loss of moisture retention, increase solar exposure, increase peak flows and resultant sedimentation and erosion to 303(d) listed salmonid waterways, and overall jeopardize the regeneration, forest recovery, and species of concern and listed species recovery objectives and goals in the greater project area. This project must be analyzed in an EA and these issues must be responsibly addressed.

VII. Conclusion:

Towards Resolution, Restoration, Sustainability & Ecological Recovery: If the agency were to comply with ecological post-fire scientific recommendations, and optimum recommended wildlife habitat requirements, and conduct a project that:

1. Retained all snags over 15 to 21 inches and above;
2. Did not construct any new, reconstructed, or temporary roads;
3. implemented PACFISH/INFISH buffers or greater buffers around all riparian areas;
4. Retained all scorched “dying” - but still alive - trees with green needles over 15” dbh;
5. did not conduct any logging on steep slopes;
6. employed only mechanical yarding equipment that is light on the land, with minimal soil disturbance, removing only smaller diameter trees and most small diameter logging slash fuels;
7. prohibited logging operations during nesting and fledging periods for avian species;
8. and included other ecologically protective measures and mitigations as appropriate;

It is possible that some limited commercial removal of small diameter fire-killed trees (not including any “likely to die trees”) could be implemented in the Forest Service portions of the Monument Fire area. If, contrary to scientific and ecological recommendations, the agency proposed to conduct more intensive logging operations a NEPA environmental analysis process is required before a legal decision may be reached. Our organizations herein restate our willingness to work towards resolution on the appeal issues herein, including NEPA analysis, with the agency. Unfortunately for the ecological integrity of the Monument Fire area, and for the ethical and legal integrity of the Umatilla NF, it is probable that the agency’s misuse of a CE and ESD for this ecologically harmful timber sale has or will soon result in irreparable harms to the area. As such, we file this appeal even though the issues and legal concerns herein may be deemed “moot” by the agency’s actions, as future management projects and direction must of necessity begin to address and responsibly incorporate these strong issues and concerns. We look forward to discussing this project further with responsible agency officials. We also plan to document the project’s impacts, should it be too late to halt this legally deficient timber sale, engaging in long-term public education and advocacy to better ensure the protection of our public lands – the natural heritage of us all and the generations yet to come.

For the Natural Heritage of us all,

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