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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

FOREST SERVICE EMPLOYEES
FOR ENVIRONMENTAL ETHICS,

Plaintiff,

v.

UNITED STATES FOREST
SERVICE, and UNITED STATES
DEPARTMENT OF AGRICULTURE,

Defendants.

NO: 2:16-CV-0293-TOR

ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are Plaintiff Forest Service Employees for Environment Ethics' Motion for Summary Judgment (ECF No. 14) and Motion for Judicial Notice (ECF No. 17); Defendants United States Forest Service and the United States Department of Agriculture's Cross-Motion for Summary Judgment (ECF No. 22); and Lake Wenatchee Fire & Rescue's Motion for Leave to File *Amicus Curiae* Brief (ECF No. 26). The motions were submitted for consideration

1 without oral argument. The Court has reviewed the motions and the record, and is
2 fully informed.

3 For the reasons discussed below, Defendants' Motion for Summary
4 Judgment (ECF No. 22) is **GRANTED** and Plaintiff's Motion for Summary
5 Judgment (ECF No. 14) is **DENIED**. Plaintiff's Motion for Judicial Notice (ECF
6 No. 17) is **DENIED AS MOOT**, as the untimely submitted documents are
7 immaterial to the Order. Lake Wenatchee Fire & Rescue's Motion for Leave to
8 File *Amicus Curiae* Brief (ECF No. 26) is **DENIED**.

9 BACKGROUND¹

10 The instant suit arises out of the Forest Service's attempt to stop the
11 "Wolverine Fire." The Wolverine Fire was ignited by lightning on June 29, 2015,
12 on a ridgetop in the Chelan Ranger District of the Okanogan-Wenatchee National
13 Forest, in Chelan County, Washington. ECF No. 23 at 2, ¶ 1. The conditions were
14 such that fighting the fire directly was not feasible, and firefighters were
15 withdrawn from the area due to risk of injury. ECF No. 23 at 2, ¶¶ 2-3. The fire
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17 ¹ The underlying facts are not disputed. The crux of Plaintiff's complaint
18 relates to the underlying regulations, not the propriety of the community protection
19 line, so the facts are merely recited for context, but are ultimately immaterial to the
20 disposition of the case.

1 quickly grew in severity and complexity—by August 16, 2015 the fire was
2 approximately 40,500 acres in size (over 63 square miles), and then grew to 62,000
3 acres (nearly 100 square miles) by August 27, 2015. ECF No. 23 at 4, ¶¶ 13, 18.

4 The Forest Service first two attempts to contain the fire were unsuccessful,
5 as the fire escaped both containment lines on August 1 and August 17, 2015. ECF
6 No. 23 at 3-4, ¶¶ 10, 14. From August 17 through August 31, 2015, the fire spread
7 south at a rate of one to three miles per day. ECF No. 23 at 4, ¶ 15. By the end of
8 August, the Incident Management Team assigned to the fire, after considering the
9 lack of natural barriers, extreme fuel loading, absence of adequate safety zones,
10 and severity of the fire, decided a Community Protection Line (CPL) was
11 necessary in order to protect life, property, and resources. ECF No. 23 at 4, ¶ 20.

12 On August 30, 2015 the Forest Service began constructing the CPL,
13 describing the CPL as an approximately 20-mile long contingency line consisting
14 of a roughly 300 foot wide thinning of vegetation to “allow safe and efficient
15 firefighting with a good chance of stopping forward spread of the fire.” See ECF
16 No. 23 at 5, ¶¶ 22-24. The CPL project was near completion when the Forest
17 Service halted construction after rain showers slowed the fire. See ECF No. 23 at
18 6, ¶¶ 29-33.

19 Plaintiff Forest Service Employees for Environmental Ethics initiated this
20 suit against Defendants United States Forest Service and United States Department

1 of Agriculture on August 16, 2016—well after the construction of the CPL—
2 complaining that the CPL was constructed without complying with the National
3 Environmental Protection Act (NEPA). The parties filed cross-motions for
4 summary judgment on this issue, and these motions are now before the Court.

5 STANDARD OF REVIEW

6 A movant is entitled to summary judgment if “there is no genuine dispute as
7 to any material fact and the movant is entitled to judgment as a matter of law.”
8 Fed. R. Civ. P. 56(a). A fact is “material” if it might affect the outcome of the suit
9 under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
10 (1986). An issue is “genuine” where the evidence is such that a reasonable jury
11 could find in favor of the non-moving party. *Id.* The moving party bears the
12 “burden of establishing the nonexistence of a ‘genuine issue.’” *Celotex Corp. v.*
13 *Catrett*, 477 U.S. 317, 330 (1986). “This burden has two distinct components: an
14 initial burden of production, which shifts to the nonmoving party if satisfied by the
15 moving party; and an ultimate burden of persuasion, which always remains on the
16 moving party.” *Id.*

17 Only admissible evidence may be considered. *Orr v. Bank of America, NT*
18 *& SA*, 285 F.3d 764 (9th Cir. 2002). Per Rule 56(c), the parties must support
19 assertions by: “citing to particular parts of the record” or “showing that the
20 materials cited do not establish the absence or presence of a genuine dispute, or

1 that an adverse party cannot produce admissible evidence to support the fact.” The
2 nonmoving party may not defeat a properly supported motion with mere
3 allegations or denials in the pleadings, *Liberty Lobby*, 477 U.S. at 248, or by
4 providing a mere “scintilla of evidence[,]” *id.* at 252.

5 Although courts generally must view the facts and justifiable inferences in
6 favor of the nonmoving party, *id.*, courts have more leeway when the case will not
7 be sent to a jury:

8 [W]here the ultimate fact in dispute is destined for decision by the court
9 rather than by a jury, there is no reason why the court and the parties should
10 go through the motions of a trial if the court will eventually end up deciding
11 on the same record. However, just as the procedural shortcut must not be
12 disfavored, courts must not rush to dispose summarily of cases—especially
novel, complex, or otherwise difficult cases of public importance—unless it
is clear that more complete factual development could not possibly alter the
outcome and that the credibility of the witnesses’ statements or testimony is
not at issue.

13 *TransWorld Airlines, Inc. v. Am. Coupon Exch., Inc.*, 913 F.2d 676, 684-85 (9th
14 Cir. 1990).

15 DISCUSSION

16 Plaintiff’s Motion for Summary Judgment (ECF No. 14) seeks redress under
17 the Administrative Procedures Act (APA). Plaintiff asserts: (1) Defendants
18 violated the procedural requirements of the National Environmental Policy Act
19 (NEPA) in constructing the CPL, reasoning NEPA does not have a “waiver” for
20 emergency actions and the Forest Service did not seek “alternative arrangements”

1 as is required for emergency actions; and (2) even if 36 C.F.R. § 220.4(b)—the
2 regulation purporting to allow the Forest Service to take emergency actions—
3 satisfies the “alternative arrangement” requirement under NEPA, the Forest
4 Service did not follow the procedural requirements of said regulation. ECF No. 14
5 at 2-3. Plaintiff does not raise any specific complaint about the propriety of the
6 CPL otherwise, such as whether the decision to construct the CPL was arbitrary.²

7 As discussed below, the Forest Service satisfied NEPA, which allows for
8 “alternative arrangements” in cases of emergencies, because 36 C.F.R. § 220.4(b)
9 fulfills the “alternative arrangement” requirement and the Forest Service complied
10 with the required procedures. Accordingly, Defendants are entitled to summary
11 judgment.

12 I. 36 C.F.R. § 220.4(b) Complies with NEPA

13 Plaintiff’s argument that Defendants violated the procedural requirements of
14 NEPA in constructing the CPL is two-fold: (1) Plaintiff argues there is no
15 exception for emergencies; and (2) even if there is an exception, the Forest Service
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18 ² Defendant argues the case is moot and barred by the statute of limitations.

19 The Court need not address these issues because it is granting Defendants’ Motion
20 for Summary Judgment on other grounds.

1 failed to pursue “alternative arrangements” as required by regulation. Plaintiff’s
2 arguments fail.

3 NEPA requires all agencies of the Federal Government to consider the
4 environmental impact and file public reports relaying such before taking major
5 federal actions significantly affecting the quality of the human environment “to the
6 fullest extent possible[.]” 42 U.S.C. § 4332.

7 When the Government conducts an activity, “NEPA itself does not mandate
8 particular results.” Instead, NEPA imposes only procedural requirements to
9 “ensur[e] that the agency, in reaching its decision, will have available, and
will carefully consider, detailed information concerning significant
environmental impacts.”

10 *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 23 (2008) (internal citations
11 omitted; bracket in original). According to the Supreme Court:

12 NEPA has twin aims. First, it “places upon an agency the obligation to
13 consider every significant aspect of the environmental impact of a proposed
14 action.” Second, it ensures that the agency will inform the public that it has
15 indeed considered environmental concerns in its decisionmaking process.
16 Congress in enacting NEPA, however, did not require agencies to elevate
17 environmental concerns over other appropriate considerations. Rather, it
required only that the agency take a “hard look” at the environmental
consequences before taking a major action. The role of the courts is simply
to ensure that the agency has adequately considered and disclosed the
environmental impact of its actions and that its decision is not arbitrary or
capricious.

18 *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97–98
19 (1983) (internal citations omitted).

20 //

1 A. NEPA allows for “alternative arrangements” in cases of emergency

2 Plaintiff argues: “Just as NEPA contains no national security exception, it
3 also does not waive ‘emergency’ federal action[s].” ECF No. 14 at 11-12 (citing
4 *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1035 (9th Cir. 2006)).
5 However, even if not characterized as a waiver, NEPA allows an agency to make
6 alternative arrangements in emergency situations without complying with the
7 ordinary, burdensome reporting requirements.

8 “The Council of Environmental Quality (CEQ), established by NEPA with
9 authority to issue regulations interpreting it, has promulgated regulations to guide
10 federal agencies in determining what actions are subject to that statutory
11 requirement.” *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 757 (2004).

12 Pertinent to this case, CEQ promulgated the following regulation allowing for
13 agencies to make alternative arrangements when facing an emergency:

14 Where emergency circumstances make it necessary to take an action with
15 significant environmental impact without observing the provisions of these
16 regulations, the Federal agency taking the action should consult with the
17 Council about alternative arrangements. Agencies and the Council will limit
18 such arrangements to actions necessary to control the immediate impacts of
19 the emergency.

20 40 C.F.R. § 1506.11. “CEQ’s interpretation of NEPA is entitled to substantial
deference.” *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).

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1 Plaintiff does not directly challenge the propriety of the regulation³, and there
2 is nothing to suggest 40 C.F.R. § 1506.11 is invalid or *ultra vires*. Rather, the
3 regulation puts substance to the notion that it may not be possible to fully comply
4 with NEPA, as NEPA contemplates. *Compare* 42 U.S.C. § 4332 (mandate to
5 comply with NEPA “to the fullest extent possible”), *with* 40 C.F.R. § 1506.11
6 (specifically recognizing “emergency situations” may “make it necessary to take
7 an action . . . without observing the provision . . .”). This aligns with common
8 sense—complying with burdensome reporting in the face of an emergency is
9 generally not feasible or prudent. *See* <https://energy.gov/lpo/nepa-faqs> (“The
10 average timeline for an environmental assessment is generally six to nine months,
11 and for an environmental impact statement around 18-24 months.”).

12 B. 36 C.F.R. § 220.4(b) fulfills “alternative arrangement” requirement

13 Plaintiff recognizes an agency may follow “alternative arrangements” in
14 emergency situations, but complains that “the Forest Service did not avail itself of
15 that process here.” ECF No. 14 at 8. The Forest Service argues 36 C.F.R. §
16 220.4(b) fulfills the alternative arrangement requirement. The Forest Service is
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18 ³ Plaintiff recognizes “NEPA’s implementing regulation[], 40 CFR § 1506.11,
19 [allows] for ‘alternative arrangements’ for agency actions taken in response to
20 emergencies[.]” ECF No. 14 at 8.

1 correct. The relevant portion of the regulation states:

2 (b) Emergency responses. When the responsible official determines that an
3 emergency exists that makes it necessary to take urgently needed actions
4 before preparing a NEPA analysis and any required documentation in
accordance with the provisions in §§ 220.5, 220.6, and 220.7 of this part,
then the following provisions apply.

5 (1) The responsible official may take actions necessary to control the
6 immediate impacts of the emergency and are urgently needed to
7 mitigate harm to life, property, or important natural or cultural
8 resources. When taking such actions, the responsible official shall
take into account the probable environmental consequences of the
emergency action and mitigate foreseeable adverse environmental
effects to the extent practical.

9 36 C.F.R. § 220.4(b)(1). The Forest Service must otherwise consult with the CEQ
10 for any action not described in paragraph (b)(1). 36 C.F.R. § 220.4(b)(2)-(3).

11 Of special import, the CEQ formally approved 36 C.F.R. § 220.4(b) as
12 complying with NEPA. ECF No. 22 at 23; *see* R6330 (CEQ formally
13 acknowledging 36 C.F.R. § 220.4 complies with NEPA). NEPA established the
14 CEQ in part, “to review and appraise the various programs and activities of the
15 Federal Government . . . for the purpose of determining the extent to which such
16 programs and activities are contributing to the achievement of [NEPA’s
17 policies]” 42 U.S.C. § 4344. “CEQ’s interpretation of NEPA is entitled to
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1 substantial deference.”⁴ *Andrus v. Sierra Club*, 442 U.S. at 347.

2 Plaintiff argues⁵ that “CEQ cannot ‘grant broad-sweeping exceptions to the
3 EIS process for routine agency activity[,]’” reasoning that doing so “directly
4 conflicts and subverts NEPA’s directive that agencies comply with their NEPA
5 duties ‘to the fullest extent possible.’” ECF No. 24 at 7-8 (quoting *Nat. Res. Def.
6 Council v. Winter*, 527 F.Supp.2d 1216, 1231 (C.D. Cal. 2008)).

7 First, contrary to Plaintiff’s contentions, there is nothing routine—*i.e.* there
8 is no regular or repeated procedure—about fighting individual fires that create an
9 emergency situation, as each fire is accompanied by its own unique complexities
10 and dangers. This is much different than in *Winter*, where the underlying action
11 was a routine military training exercise planned in advance. *Nat. Res. Def. Council
12 v. Winter*, 527 F. Supp. 2d at 1228. Importantly, the regulation does not exempt
13 non-emergency wildfire prevention actions, and the regulation is limited to actions
14 necessary to protect life, property, and important resources. 36 C.F.R. §
15 220.4(b)(1).

16
17 ⁴ Plaintiff argues the Court should not give the CEQ letter deference. ECF
18 No. 24 at 9. Irrespective, the Court agrees with the conclusion in the letter.

19 ⁵ Plaintiff’s argument references 40 C.F.R. § 1506.11, but the argument is
20 directed toward 36 C.F.R. §220.4(b). *See* ECF No. 24 at 7-9.

1 Second, the procedures implemented under 40 C.F.R. § 1506.11 and 36
2 C.F.R. § 220.4(b) do not subvert NEPA’s directive that all agencies comply with
3 NEPA “to the fullest extent possible.” Importantly, the regulations only apply in
4 emergency situations—exigent circumstances make compliance not possible or
5 feasible so the regulations compliment, rather than contradict, NEPA. Further, the
6 purpose of NEPA is to require a “hard look”⁶ at the environmental impact. 36
7 C.F.R. § 220.4(b) complies with this by requiring—even for an emergency—“the
8 responsible official [to] take into account the probable environmental
9 consequences of the emergency action and mitigate foreseeable adverse
10 environmental effects to the extent practical.” 36 C.F.R. § 220.4(b).

11 Moreover, 36 C.F.R. § 220.4(b) complies with the bounds established under
12 40 C.F.R. § 1506.11, which limits the use of “alternative arrangements” to the
13 “actions necessary to control the immediate impacts of the emergency.” 40 C.F.R.
14 § 1506.11. The Forest Service regulation falls neatly within this boundary because
15 officials may only “take actions necessary to control the immediate impacts of the
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17 ⁶ In reviewing NEPA compliance, the “court’s role is to ensure that the
18 agency has taken a ‘hard look’ at environmental consequences.” *Columbia Basin*
19 *Land Prot. Ass’n v. Schlesinger*, 643 F.2d 585, 592 (9th Cir. 1981) (quoting *Kleppe*
20 *v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)).

1 emergency and are urgently needed to mitigate harm to life, property, or important
2 natural or cultural resources” 36 C.F.R. § 220.4(b). Any other action requires
3 the Forest Service to go through the CEQ. *See* 36 C.F.R. § 220.4(b)(2)-(3).

4 In sum, 36 C.F.R. § 220.4(b) is a prospective, successful attempt to delineate
5 the alternative arrangements required to comply with NEPA. Notably, this is not
6 the only one of its kind, despite Plaintiff’s contention otherwise.⁷

7 II. Forest Service complied with 36 C.F.R. § 220.4

8 Under 36 C.F.R. § 220.4(b), the Forest Service may circumvent the
9 traditional NEPA process if: (1) a “responsible official” determines “an emergency
10 exists that makes it necessary to take urgently needed actions before preparing a
11 NEPA analysis[.]” and (2) the action is “necessary to control the immediate
12 impacts of the emergency and are urgently needed to mitigate harm to life,
13 property, or important natural or cultural resources[.]” When taking such actions,
14 the “responsible official [must] take into account the probable environmental
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17 ⁷ *See, e.g.*, 33 C.F.R. § 230.8 (U.S. Army Corps of Engineers), 43 C.F.R.
18 § 46.150 (U.S. Department of the Interior); 7 C.F.R. § 1970.18 (Rural Business
19 Cooperative Service, the Rural Utility Services, and the Rural Housing Service,
20 and 32 C.F.R. § 989.34 (U.S. Air Force).

1 consequences of the emergency action and mitigate foreseeable adverse
2 environmental effects to the extent practical.” 36 C.F.R. § 220.4(b).

3 Plaintiff argues that the Forest Service did not comply with 36 C.F.R.
4 § 220.4(b) because there was no declaration of an emergency and fires do not
5 create emergencies. ECF No. 14 at 14-17. Plaintiff does not otherwise challenge
6 the Forest Service’s compliance with 36 C.F.R. § 220.4(b).⁸

7 Defendants have demonstrated that the responsible official⁹ determined an
8 emergency existed. ECF No. 22 at 11 (citing ECF No. 22-1). Defendants assert-
9 and support with an uncontested affidavit—that:

10 The Forest Service’s responsible official appropriately determined that an
11 emergency existed requiring urgently needed action. The Forest Supervisor,
12 Michael R. Williams, was the responsible official who determined that the
13 severity, location, and forecasted growth of the fire constituted an
14 emergency that made it necessary to take urgently needed action.

14 ⁸ Plaintiff’s complaint focuses on the procedure, not the substance, required
15 for constructing the CPL. ECF No. 24 at 11 (“While there are substantial
16 questions that could be raised about the wisdom and credibility of the Forest
17 Service’s CPL logging decision . . . those matters [are] not at issue in this
18 litigation.”).

19 ⁹ The responsible official is “[t]he Agency employee who has the authority to
20 make and implement a decision on a proposed action.” 36 C.F.R. § 220.3.

1 ECF No 22 at 11. Plaintiff has not rebutted this contention, but merely
2 complains—without citations—that the declaration is insufficient since the
3 determination was not in the administrative record. *See* ECF No. 24. This bare
4 complaint, without citation, is insufficient to question Defendant’s assertion.
5 *Liberty Lobby*, 477 U.S. at 248 (the nonmoving party may not defeat a properly
6 supported motion with mere allegations or denials in the pleadings).

7 Plaintiff also argues that a wildfire in Central and Eastern Washington does
8 not fall under the “common sense, dictionary definition of emergency.” ECF No.
9 14 at 3. Plaintiff reasons that such fires are certain and are thus not unforeseen.
10 ECF No. 14 at 14. Plaintiff’s argument that a wildfire is not an emergency is
11 without merit and contrary to common sense. Just because wildfires are common
12 and their general existence is foreseeable, the danger created by any specific
13 wildfire is not so foreseeable and can create an emergency situation with little or
14 no forewarning. For example, in this case, the Wolverine Fire was started by
15 lightning and spread quickly. The fire moved as fast as three miles per day, was
16 threatening several communities, and had breached two containment lines. This
17 clearly constitutes an emergency.

18 III. **Proposed *Amicus Curiae* Brief**

19 The Court has broad discretion to grant or refuse a prospective *amicus*
20 participation. *See Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982),

1 *abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995). *Amicus*
2 may be either impartial individuals or interested parties. *See Funbus Sys., Inc. v.*
3 *Cal. Pub. Utils. Comm'n*, 801 F.2d 1120, 1125 (9th Cir. 1986). In deciding
4 whether to grant leave to file an *amicus* brief, courts should consider whether the
5 briefing “supplement[s] the efforts of counsel, and draw[s] the court’s attention to
6 law that escaped consideration.” *Miller-Wohl Co., Inc. v. Comm’r of Labor &*
7 *Indus. Mont.*, 694 F.2d 203, 204 (9th Cir. 1982). “An *amicus* brief should
8 normally be allowed when . . . the *amicus* has an interest in some other case that
9 may be affected by the decision in the present case, or when the *amicus* has unique
10 information or perspective that can help the court beyond the help that the lawyers
11 for the parties are able to provide. . . . Otherwise, leave to file an *amicus curiae*
12 brief should be denied.” *Cnty. Ass’n for Restoration of Env’t (CARE) v. DeRuyter*
13 *Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999) (internal citations
14 omitted).

15 Lake Wenatchee Fire & Rescue’s brief and accompanying declaration offer
16 no additional legal, or other substantive information or perspective that has not
17 already been represented to the Court in this matter of administrative review. As
18 such, while the Court appreciates the position represented by the Lake Wenatchee
19 Fire & Rescue, that position is fully represented in Defendants’ briefing, and the
20 motion for leave to file is denied.

1 CONCLUSION

2 Defendants have demonstrated there is no genuine issue of material fact and
3 Plaintiff's claim fails as a matter of law.

4 **ACCORDINGLY, IT IS HEREBY ORDERED:**

- 5 1. Defendants' Motion for Summary Judgment (ECF No. 22) is
6 **GRANTED.**
- 7 2. Plaintiff's Motion for Summary Judgment (ECF No. 14) is **DENIED.**
- 8 3. Plaintiff's Motion for Judicial Notice (ECF No. 17) is **DENIED AS**
9 **MOOT.**
- 10 4. Lake Wenatchee Fire & Rescue's Motion for Leave to File *Amicus*
11 *Curiae* Brief (ECF No. 26) is **DENIED.**

12 The District Court Executive is hereby directed to enter this Order and
13 Judgment accordingly, furnish copies to counsel, and **CLOSE** the file.

14 **DATED** July 11, 2017.



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Thomas O. Rice
THOMAS O. RICE
Chief United States District Judge