



October 31, 2025

Greg Wanner
District Ranger, Zigzag District
Mt. Hood National Forest
c/o Christine Pyle, christine.pyle@usda.gov

RE: Basin Thinning Project Scoping Notice

Dear Mr. Wanner,

The Center for Biological Diversity submits the following comments on the Mt. Hood National Forest, Zigzag Ranger District's October 16, 2025 scoping notice for the Basin Thinning Project ("the project"). The October 16th notice states the Forest Service is reviewing the project under a categorical exclusion adopted from the Tennessee Valley Authority (the "TVA CE") earlier this year. As explained below, the Forest Service's adoption of the TVA CE was unlawful because it was finalized without meeting Administrative Procedure Act (APA) rulemaking requirements.¹ Due to these issues with the TVA CE adoption, the National Environmental Policy Act (NEPA) requires the Forest Service to prepare an environmental impact statement (EIS) or, at minimum, an environmental assessment (EA) for the project.

The APA requires that when an agency promulgates a rule: (1) a "notice of proposed rulemaking shall be published in the Federal Register"; (2) "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments" for the agency's consideration"; and, (3) the agency shall publish the final rule "not less than 30 days before its effective date."² The APA defines a "rule" as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."³ A categorical exclusion is an APA rule because, among other reasons, it codifies the agency's future assessment of the environmental significance of a particular project or category of projects, which defines the type of NEPA review—including, importantly, the level of public participation—the Forest Service will henceforth provide. This determination has substantial downstream consequences for the agency, project applicants, and the public.

When Congress enacted the APA, it made clear that exemptions from the APA "are not lightly to be presumed."⁴ Thus, a statutory provision that is enacted after the APA can only "supersede or modify" the APA "to the extent that it does so expressly."⁵ To create an exemption, Congress

¹ See 5 U.S.C. § 706(2)(D).

² *Id.* § 553(b) through (d).

³ *Id.* § 551(4).

⁴ *Marcello v. Bonds*, 349 U.S. 302, 310 (1955).

⁵ *Id.* § 559.

must either explicitly say the APA does not apply or “establish[] procedures so clearly different from those required by the APA that it must have intended to displace the norm.”⁶

The Forest Service published a notice on its website, dated May 12, 2025, that informed the public of its adoption of the TVA CE pursuant to Section 109 of NEPA.⁷ Section 109 was enacted after the APA and contains no express language of exemption.⁸ In addition, the procedures it lays out—consult with the originating agency about the exclusion, identify it for the public, and document its adoption—are not inconsistent with basic APA rulemaking requirements. In fact, Section 109 logically complements the procedures required by its APA counterpart. Thus, in the absence of an express exemption, the Forest Service must satisfy APA rulemaking requirements when it adopts another agency’s categorical exclusion, and the failure to do so when it adopted the TVA makes that action unlawful.⁹ The Forest Service therefore must prepare an EIS or an EA prior to taking further action related to the proposed Basin Thinning Project.

Thank you for your time and attention to these issues. Please feel free to reach out with any questions.

Sincerely,

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⁶ *Asiana Airlines v. FAA*, 134 F.3d 393, 397 (D.C. Cir. 1998).

⁷ See U.S. Forest Service, “Adoption of Categorical Exclusion Under Section 109 of the National Environmental Policy Act, 42 U.S.C. 4336c,” available at <https://www.fs.usda.gov/sites/default/files/05122025-Notice-to-adopt-timber-EO-CEs.pdf>.

⁸ 42 U.S.C. § 4336c.

⁹ 5 U.S.C. § 706(2)(D).