No. 07-463

In the Supreme Court of the United States

PRISCILLA SUMMERS, ET AL., PETITIONERS

v.

EARTH ISLAND INSTITUTE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Forest Service's promulgation of 36 C.F.R. 215.4(a) and 215.12(f), as distinct from the particular site-specific project to which those regulations were applied in this case, was a proper subject of judicial review.

2. Whether respondents established standing to bring this suit.

3. Whether respondents' challenge to 36 C.F.R. 215.4(a) and 215.12(f) remained ripe and was otherwise judicially cognizable after the timber sale to which the regulations had been applied was withdrawn, and respondents' challenges to that sale had been voluntarily dismissed with prejudice, pursuant to a settlement between the parties.

4. Whether the court of appeals erred in affirming the nationwide injunction issued by the district court.

PARTIES TO THE PROCEEDINGS

The following parties are petitioners in this Court: Priscilla Summers, District Ranger, Sequoia National Forest; United States Forest Service; Chuck Conner, Acting Secretary of Agriculture; and Abigail Kimbell, Chief of the United States Forest Service. Those parties or their predecessors in office were the appellants/cross-appellees in the court of appeals.[*]

The following parties are respondents in this Court and were appellees/cross-appellants in the court of appeals: Earth Island Institute; Sequoia Forestkeeper; Heartwood; Center for Biological Diversity; and Sierra Club.

[*] Priscilla Summers has replaced Nancy Ruthenbeck as District Ranger; Chuck Conner is now Acting Secretary of Agriculture, replacing former Secretary Mike Johanns; and Abigail Kimbell has replaced Dale Bosworth as Chief of the United States Forest Service.

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The Solicitor General, on behalf of Priscilla Summers, District Ranger, Sequoia National Forest, et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion of the court of appeals (App., *infra*, 1a-22a) is reported at 490 F.3d 687. The original opinion of the court of appeals is reported at 459 F.3d 954. The opinion of the district court declaring various regulatory provisions to be invalid (App., *infra*, 38a-67a) is reported at 376 F. Supp. 2d 994. Additional opinions of the district court (App., *infra*, 23a-28a, 29a-37a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 2006. The court of appeals issued an amended opinion and denied a petition for rehearing on June 8, 2007. On August 27, 2007, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including October 5, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following statutory and regulatory provisions are reproduced in the appendix to this petition: 5 U.S.C. 702, 703, 704, 706; Section 322(a) and (c) of the Forest Service Decisionmaking and Appeals Reform Act (ARA), Pub. L. No. 102-381, Tit. III, 106 Stat. 1419 (16 U.S.C. 1612 note); and 36 C.F.R. 215.4, 215.12.

STATEMENT

1. In 1992, Congress enacted the Forest Service Decisionmaking and Appeals Reform Act (ARA), Pub. L. No. 102-381, Tit. III, 106 Stat. 1419 (16 U.S.C. 1612 note). The ARA states that "the Secretary of Agriculture, acting through the Chief of the Forest Service, shall establish a notice and comment process for proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans * * * and shall modify the procedure for appeals of decisions concerning such projects." ARA § 322(a), 106 Stat. 1419. The ARA further provides:

> Not later than 45 days after the date of issuance of a decision of the Forest Service concerning actions referred to in subsection (a), a person who was involved in the public comment process under subsection (b)

> through submission of written or oral comments or by otherwise notifying the Forest Service of their interest in the proposed action may file an appeal.

ARA § 322(c), 106 Stat. 1419. The Forest Service has issued regulations that provide, in pertinent part, that the ARA's notice-and-comment and administrative-appeal requirements do not apply to projects whose expected environmental impacts are sufficiently slight that neither an environmental impact statement (EIS) nor an environmental assessment (EA) is required under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* See 36 C.F.R. 215.4(a), 215.12(f).

Respondents filed this suit in the Eastern District of California in December 2003, naming as defendants the Forest Service, the Secretary of Agriculture, and two individual Forest Service officials (petitioners in this Court). See Gov't C.A. E.R. 1. The first six claims for relief in respondents' complaint asserted various challenges to the legality of the Burnt Ridge Project, a proposed timber sale in the Sequoia National Forest in California. See *id.* at 14-26. The Seventh Claim for Relief alleged that

> [petitioners] have violated the ARA sections (a) and (c) by issuing regulations codified at 36 C.F.R. §§ 215.4(a) and 215.12(f) (2003), which exempt all decisions that are categorically excluded from NEPA analysis but which implement forest plans, from notice, comment, and appeal. By doing so, [petitioners] have taken a final agency action that is arbitrary, capricious, and not in accordance with law, and which should be set aside under the judicial review provision of the APA [Administrative Procedure Act], 5 U.S.C. § 702 *et seq.*

Id. at 26. The remaining eight claims for relief asserted APA challenges to other Forest Service regulations implementing the ARA. See *id.* at 27-30.

In March 2004, the Forest Service withdrew its prior decision to implement the Burnt Ridge Project. See Gov't C.A. E.R. 89. In July 2004, the parties to the instant suit entered into a partial settlement agreement. *Id.* at 89-92. The Forest Service agreed that it would "not reissue the Burnt Ridge Timber Sale without first preparing an [EIS] or [EA] for the project in accordance with NEPA." *Id.* at 90. Respondents in turn agreed to "dismiss with prejudice" their first six claims for relief, which challenged the legality of the Burnt Ridge Project. *Ibid.* Later that month, the district court approved the settlement, and respondents' challenges to the Burnt Ridge Project were accordingly dismissed. *Id.* at 92; see App., *infra*, 39a. Respondents thereafter pursued the suit as a direct facial challenge to the Forest Service regulations. See *id.* at 7a, 39a.

2. The district court held that at least one of the respondents (Heartwood) had standing to sue. The court relied solely on a declaration dated July 23, 2004, that was submitted by Jim Bensman, a resident of Illinois and an employee and member of Heartwood. See App., *infra*, 43a-44a, 68a, 77a. In that declaration, Bensman identified a number of National Forests he had visited in the past, and he expressed an intention to visit unidentified National Forests in Colorado, California, Indiana, and Oregon later that year. *Id.* at 69a-70a. He also alleged that he had previously commented on approximately 1000 Forest Service projects and that he had appealed (sometimes successfully) certain Forest Service decisions. *Id.* at 71a. He stated that after the regulations at issue here were implemented, there had been several projects that he had not been able to appeal. *Ibid.* The only examples he mentioned, however, were ap-

proximately 20 unidentified timber sales that had been proposed in the Allegheny National Forest in Pennsylvania, which Bensman said were "in places I have been before and want to go back and see again," and "[s]everal" of which had been approved. *Ibid.* Bensman did not state that he had concrete plans to visit the site of any such project in the near future. Nor did he allege that he planned to visit the immediate area of the Burnt Ridge Project (the only specific project challenged in the complaint) or that he would be injured by the project if it was carried out, and he did not list the Sequoia National Forest as one he had visited in the past. *Id.* at 69a.

The district court found Bensman's allegations sufficient to establish standing (App., *infra*, 43a-44a) and rejected the government's contention that Bensman was required to demonstrate actual or imminent injury from the Burnt Ridge Project itself:

> The Forest Service's contention that Bensman's affidavit is not concrete and particularized because it does not relate to a specific project in a California national forest is inapposite. This action challenges the regulations adopted by the Forest Service in response to the ARA—not a specific project in a specific national forest—and reference to a specific forest is not needed to ground the contention for purposes of showing injury in fact.

Id. at 44a. The court also held that respondents' claims were ripe for judicial review because "[t]he regulations are the Forest Service's definitive position on how to best implement the ARA and have been enforced on numerous occasions." *Id.* at 46a; see *id.* at 45a-47a.

On the merits, the district court struck down five aspects of the regulatory scheme, including 36 C.F.R. 215.4(a) and 215.12(f). App., *infra*, 49a-65a. The court subsequently issued a further order clarifying that its injunction applies nationwide. *Id.* at 29a, 31a-33a.

3. The court of appeals affirmed in part and remanded in part. App., *infra*, 1a-22a (amended opinion).

a. The court of appeals held that respondents had standing to sue. App., *infra*, 8a-11a. The court found that the allegations in the Bensman affidavit were sufficient to establish standing, on the theory that "Bensman's preclusion from participation in the appeals process may yield diminished recreational enjoyment of the national forests." *Id.* at 9a. The court of appeals also concluded that respondents had alleged sufficient "procedural injury" to demonstrate standing. *Ibid.* The court noted that respondents were "unable to appeal the Burnt Ridge Project because the Forest Service applied 36 C.F.R. § 215.12(f)," and concluded that "the loss of that right of administrative appeal is sufficient procedural injury in fact to support a challenge to the regulation." *Id.* at 10a.

b. The court of appeals held that respondents' challenges to most aspects of the regulatory scheme were unripe. See App., *infra*, 11a-15a. The court explained that, under this Court's precedents, a regulation is not ordinarily ripe for judicial review before it has been applied to a concrete factual setting. *Id.* at 12a-14a. The court stated that respondents had "established ripeness only with respect to 36 C.F.R. §§ 215.12(f) and 215.4(a)," which had been applied to the Burnt Ridge Project, the only project referred

to in the complaint. *Id.* at 14a.[1] With respect to those two regulations, the court stated:

> The parties' agreement to settle the Burnt Ridge Timber Sale dispute does not affect the ripeness of [respondents'] challenge to 36 C.F.R. §§ 215.12(f) and 215.4(a). The record remains sufficiently concrete to permit this court to review the application of the regulation to the project and to determine if the regulations as applied are consistent with the ARA.

Id. at 15a.

c. The court of appeals held that 36 C.F.R. 215.4(a) and 215.12(f) are inconsistent with the ARA and are therefore invalid. App., *infra*, 15a-20a. The court explained:

> The plain language of the ARA states that the Forest Service "shall" provide for administrative notice, comment and appeal. The statutory language does not refer to NEPA. The statute does not provide for any exclusions or exemptions from its requirement that the Forest Service provide notice, comment, and an administrative appeal for decisions implementing Forest Plans. Accordingly, 36 C.F.R. §§ 215.12(f) and 215.4(a) conflict with the plain language of the statute.

Id. at 18a.

d. The court of appeals upheld the district court's issuance of a nationwide injunction against enforcement of 36 C.F.R. 215.4(a) and 215.12(f). App., *infra*, 21a-22a. The court stated (see *id.* at 21a) that the nationwide scope of

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[1] By contrast, the court of appeals found that respondents "ha[d] not shown that the other challenged regulations were applied in the context of the Burnt Ridge Timber Sale or any other specific project. The record is speculative and incomplete with respect to the remaining regulations." App., *infra*, 14a-15a.

the injunction was "compelled by the text of" 5 U.S.C. 706(2)(A), which authorizes the court in an APA suit to "hold unlawful and set aside agency action, findings, and conclusions found to be * * * arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The court construed that provision to authorize the district court in this APA suit to "set aside" on a nationwide basis the regulatory provisions that the court had found to be invalid. See App., *infra*, 21a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit in this case recognized that respondents' challenge to the Forest Service regulations implementing the ARA were not ripe for judicial review before those regulations had been applied in the concrete setting of the Burnt Ridge Project, the only specific project challenged in this case. But the court held that respondents had standing even though they had not established any likelihood of injury from the Burnt Ridge Project; that respondents' suit remained justiciable even though that project had been withdrawn and respondents' challenge to it had been dismissed pursuant to their settlement with the government; and that respondents could proceed with a direct challenge to the regulations themselves divorced from a challenge to any specific project in which they had been applied. Those rulings are contrary to bedrock principles of justiciability established by this Court's decisions. In addition, the court of appeals affirmed the grant of a *nationwide* injunction against application of 36 C.F.R. 215.4(a) and 215.12(f), thereby precluding the government from applying those regulations to projects not before the court, including projects in other districts and circuits.

The court of appeals was led into these manifold errors as a result of its misidentification of the agency action that was the proper subject of judicial review. Contrary to the Ninth Circuit's understanding, the only reviewable "final agency action" in this APA suit was the Burnt Ridge Project, not the Forest Service regulations (36 C.F.R. 215.4(a), 215.12(f)) themselves.

The decision of the Ninth Circuit conflicts with decisions of this Court and of other courts of appeals, and it obscures the distinction between review under the APA and review under special statutory review provisions that authorize direct pre-enforcement challenges to agency regulations. By decoupling respondents' challenge to 36 C.F.R. 215.4(a) and 215.12(f) from their challenge to the Burnt Ridge Project, the decision below effects dramatic changes in the timing, context, and venue for challenges to administrative action under the APA, as well as a dramatic expansion of the relief that may be awarded in a successful suit.

A. The Agency Action Subject To Judicial Review In This Case Was The Burnt Ridge Project, Not The Forest Service Regulations Implementing The ARA

In *Lujan* v. *National Wildlife Federation*, 497 U.S. 871 (1990) (*NWF*), this Court explained:

> Under the terms of the APA, [a plaintiff] must direct its attack against some particular "agency action" that causes it harm. Some statutes permit broad regulations to serve as the "agency action," and thus to be the object of judicial review directly, even before the concrete effects normally required for APA review are felt. Absent such a provision, however, a regulation is not ordinarily considered the type of agency action "ripe" for judicial review under the APA until the scope of the controversy has been reduced to more manageable pro-

> portions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him. (The major exception, of course, is a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately. Such agency action is "ripe" for review at once, whether or not explicit statutory review apart from the APA is provided.)

Id. at 891.

Subsequent decisions of this Court are to the same effect. In *Reno* v. *Catholic Social Services, Inc.*, 509 U.S. 43 (1993) (*CSS*), the Court applied *NWF* in rejecting, as unripe, the plaintiffs' challenge to regulations issued by the Immigration and Naturalization Service. The Court in *CSS* explained that newly promulgated regulations may be ripe for judicial review outside the context of any particular affirmative application by the agency if the regulations "present[] plaintiffs with the immediate dilemma to choose between complying with newly imposed, disadvantageous restrictions and risking serious penalties for violation." *Id.* at 57 (citing, inter alia, *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 152-153 (1967)). The Court cited *NWF*, however, for the proposition that, if such a dilemma is absent, "a controversy concerning a regulation is not ordinarily ripe for review under the [APA] until the regulation has been applied to the claimant's situation by some concrete action." *Id.* at 58. Noting that the regulations at issue in *CSS* "impose[d] no penalties for violating any newly imposed restriction," *ibid.*, the Court held that the plaintiffs' challenge would not be ripe until the plaintiffs had taken the steps necessary to cause the regulations to be applied to their own applications for legalization, *id.* at 58-59. See also *National Park Hospitality Ass'n* v. *Department of the Interior*, 538 U.S. 803,

808-812 (2003) (*NPHA*); cf. *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 732-737 (1998) (holding that facial challenge to land and resource management plan for a particular National Forest was not ripe for judicial review, and that review should instead focus on the application of the plan's provisions to site-specific projects).

The regulations challenged in the instant case do not govern primary conduct or require any person outside the government "to adjust his conduct immediately." *NWF*, 497 U.S. at 891. They are instead *procedural* regulations that govern the Forest Service's own process for making decisions on individual site-specific projects. The court of appeals recognized that, under *NWF* and similar precedents, the challenged Forest Service regulations would not have been judicially reviewable before they were applied to the Burnt Ridge Project. See App., *infra*, 12a-14a. Indeed, the court held that respondents' challenge to regulatory provisions other than 36 C.F.R. 215.4(a) and 215.12(f) was not justiciable in this suit because respondents "ha[d] not shown that the other challenged regulations were applied in the context of the Burnt Ridge Timber Sale or any other specified project." App., *infra*, 14a; see *id.* at 22a (directing district court to vacate its injunction with respect to other aspects of the regulatory scheme). The court of appeals apparently concluded, however, that, once Sections 215.4(a) and 215.12(f) had been applied to a particular set of facts, the district court could engage in the same sort of direct review of the regulations qua regulations that would take place under the special statutory review provisions referred to in *NWF*.

The court of appeals' approach reflects a fundamental misunderstanding of the principles announced in *NWF* and in the subsequent decisions discussed above. Although the Court has described those principles under the rubric of

"ripeness," the applicable rules do not simply identify the *time* at which judicial review may take place, but rather reflect and define the "agency action" that is the proper *subject* of that review. Under the Court's decisions in *NWF* and subsequent cases, one of two special circumstances—*i.e.*, a special statutory provision authorizing direct review of agency regulations within a specified period after their promulgation, or a substantive rule requiring immediate adjustment of primary conduct under threat of serious penalties—is ordinarily required in order to "permit broad regulations to serve as the 'agency action' and thus to be the object of judicial review directly." 497 U.S. at 891.

Absent one of those circumstances, an agency regulation is not an independently reviewable agency action for purposes of 5 U.S.C. 704 and 706 *even after* the regulation has been applied in the course of making a site-specific decision. Rather, the agency action that is the proper focus of judicial review is the site-specific decision in which the regulation has been applied in a concrete context.[2] Insofar as

[2] The APA defines the term "agency action" to include "the whole or a part of an agency rule." 5 U.S.C. 551(13). Under that definition, 36 C.F.R. 215.4(a) and 215.12(f) are "agency actions." The APA does not authorize judicial review of *every* agency action, however, but only of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704. Except when a plaintiff challenges "a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately," *NWF*, 497 U.S. at 891, pre-enforcement review of agency rules is generally unavailable under Section 704 because judicial review of a later concrete *application* of a rule is an "adequate remedy" for any legal defect in the regulation. See *CSS*, 509 U.S. at 60-61; *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 165 (1967) (where non-compliance with an agency regula-

the legality or rationality of the site-specific decision turns on the validity of the regulation, the plaintiff in challenging the site-specific decision may assert that the regulation is contrary to the governing statute or is otherwise unlawful; but the agency action that the court ultimately upholds or sets aside is the site-specific decision rather than the regulation as such.[3]

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tion would result in only a minor sanction, which could then be challenged in court, "[s]uch review will provide an adequate forum for testing the regulation in a concrete situation").

Moreover, the declaratory and injunctive remedies respondents seek are equitable in nature, and the ripeness doctrine reflects the courts' traditional reluctance to apply them to administrative determinations where the criteria this Court has identified are not present. See *CSS*, 509 U.S. at 57; *Abbott Labs.*, 387 U.S. at 148; 5 U.S.C. 702 (right of judicial review under the APA does not affect "the power or duty of the court to dismiss any action or deny relief on any * * * appropriate * * * equitable ground").

[3] If a court of appeals holds that a site-specific agency action is unlawful because the regulation that purports to authorize it is contrary to a statute or otherwise invalid, the court's decision will be binding precedent in future judicial proceedings in that circuit, and it may as a practical matter restrict the agency's ability to invoke the regulation as a basis for future site-specific decisions within the circuit. To that extent, a plaintiff can legitimately seek and obtain a judicial ruling that will affect future agency decisions. Cf. *NWF*, 497 U.S. at 894 (explaining that judicial review of site-specific actions "may ultimately have the effect of requiring a regulation, a series of regulations, or even a whole 'program' to be revised by the agency in order to avoid the unlawful result that the court discerns"). That sort of indirect impact on future agency conduct, however, is simply a byproduct of ordinary stare decisis principles and the common practice of federal agencies, in conducting their activities within a particular judicial circuit, of following legal rules announced in the prior decisions of the relevant court of appeals. The procedure countenanced by the court of appeals in this case, under which a single district judge issued a nationwide injunction against application of 36 C.F.R. 215.4(a) and 215.12(f), raises

This conclusion is particularly compelling where, as here, the regulations at issue govern only the administrative procedures to be applied by the agency before rendering its decision on a site-specific project that in turn constitutes "final agency action" subject to judicial review. Whether the procedural regulations will have any impact in a particular instance cannot be known until the administrative proceedings on that project are completed, at which point the agency's application of the procedural regulation is merged into the agency's final decision on the merits. See 5 U.S.C. 704 ("A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on review of the final agency action."). In the context of this case, for example, the Forest Service's approval of a particular project might be entirely acceptable to respondents, or they might conclude that an administrative appeal, even if available, would not be worthwhile. It therefore is especially clear that regulations such as the ones at issue here are not ripe for judicial review until the agency has issued a final decision on a site-specific project in which the regulations have been applied, and they are not reviewable except as part of the agency's final decision on such a project. Thus, contrary to the Ninth Circuit's ruling, under *NWF*, *CSS*, and *NPHA*, the regulations at issue here are not reviewable qua regulations, independently of their application in connection with the agency's rendering of a final agency action that is itself the subject of judicial review. Because respondents consented to dismissal of the counts in their complaint concerning the only site-specific project challenged in the case (see pp. 20-24, *infra*), no ripe challenge to the regulations remained before the courts below.

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very different practical and doctrinal issues.

B. Respondents Failed To Establish Standing To Sue

In order to establish standing to sue in federal court, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Hein* v. *Freedom from Religion Found.*, 127 S. Ct. 2553, 2562 (2007) (quoting *Allen* v. *Wright*, 468 U.S. 737, 751 (1984)); see, *e.g.*, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990). The court of appeals in this case offered two alternative rationales for concluding that respondents had satisfied those requirements. See App., *infra*, 8a-11a. Each of those theories lacks merit.

1. As the district court recognized, the Bensman declaration, on which the court of appeals relied in finding that respondent Heartwood had established standing, did not allege any impairment of Bensman's own recreational activities resulting from the Burnt Ridge Project, the only specific project before the court. See App., *infra*, 44a; see also *id.* at 68a-77a (Bensman declaration); p. 5, *supra*. Accordingly, Heartwood lacked standing to bring the only ripe challenge that was before the courts below—the challenge to the Burnt Ridge Project. Moreover, neither the district court nor the court of appeals identified any other project that (1) was governed by the challenged regulations, (2) was the subject of a site-specific decision approving the project, and (3) would result in injury to Bensman or another of respondents' members who used the area affected by the project. Nevertheless, the court of appeals found standing because "Bensman's preclusion from participation in the appeals process may yield diminished recreational enjoyment of the national forests." App., *infra*, 9a.

As already explained, however, that broader challenge was not ripe. And the Bensman declaration would be insufficient to support standing for that broader challenge in any event. The court of appeals' generalized conclusion that preclusion of administrative appeals "may" yield diminished enjoyment of "the national forests" generally, without any allegations concerning the impact of a particular project on any of respondents' members who use the affected area, falls far short of the requirement in this Court's cases that, to satisfy Article III, injury must be both "concrete and particularized" and "actual or imminent." *Defenders of Wildlife*, 504 U.S. at 560; *NWF*, 497 U.S. at 891. Indeed, Bensman's declaration would have been insufficient to establish standing even if respondents had invoked a special statutory provision authorizing judicial review of the regulations qua regulations. Although respondents' standing in that circumstance would not depend on a showing of likely injury specifically from the Burnt Ridge Project, it still at least would have been necessary for respondents to show that the regulations would likely be applied to *some* specific project that, if consummated, would impair the enjoyment of the affected area by identifiable members. Bensman's declaration did not identify any such specific project.

That flaw in the court of appeals' analysis is particularly apparent, however, once it is understood that the reviewable agency action in this case was the Burnt Ridge Project itself rather than the challenged Forest Service regulations qua regulations. Under settled principles, respondents cannot establish standing to challenge the Burnt Ridge Project based on likely injury stemming from the application of 36 C.F.R. 215.4(a) and 215.12(f) in administrative proceedings concerning some *other* project. Any such injury would not be "fairly traceable" to the Burnt Ridge Project, and it would not be redressed by the relief that

would naturally follow from a successful challenge to that site-specific action—*i.e.*, an injunction or declaratory judgment providing that the Forest Service may not implement the Burnt Ridge Project without first utilizing notice-and-comment procedures and providing an opportunity for an administrative appeal. See *Allen*, 468 U.S. at 756-758; cf. *NWF*, 497 U.S. at 891 (holding that a regulation is ordinarily ripe for review under the APA when it has been applied "to the claimant's situation in a fashion that harms or threatens to harm him").

2. As an alternative rationale for standing, the court of appeals held that respondents had suffered a "procedural injury" because they "are precluded from appealing decisions like the Burnt Ridge Project, and that Project itself, under the" challenged regulations. App., *infra*, 10a. That theory of standing is also incorrect. Even if respondents had shown a likelihood that they would have submitted comments and filed an administrative appeal of the Burnt Ridge Project if those mechanisms had been available, the unavailability of those procedural avenues would not subject any of respondents' members to judicially cognizable injury unless the members had a tangible stake in the outcome of the agency's decision-making process. That tangible stake would depend in turn on a showing that the members' enjoyment of the affected area would be impaired if the Burnt Ridge Project were carried out. See *Defenders of Wildlife*, 504 U.S. at 572-573.

This Court has stated that a "person who has been accorded a procedural right *to protect his concrete interests* can assert that right without meeting all the normal standards for redressability and immediacy." *Defenders of Wildlife*, 504 U.S. at 572 n.7 (emphasis added). That principle does not assist respondents here. As the italicized language makes clear, a plaintiff who asserts the deprivation

of a procedural right still must demonstrate that he has a concrete stake in the substantive agency decision to which the relevant procedures pertain. See *id.* at 573 n.8 (explaining that a plaintiff can file suit to vindicate his procedural rights "so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing"). The concrete injury to the plaintiff that would result if the project were carried out would be redressed, at least for the time being, if the agency's decision is set aside for failure to comply with the required procedures. The normal requirement of redressability is relaxed only in the further sense that "one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an [EIS], even though he cannot establish with any certainty that the [EIS] will cause the license to be withheld or altered," and the requirement of immediacy is relaxed by allowing review "even though the dam will not be completed for many years." *Id.* at 572 n.7.

Thus, if respondents could demonstrate a likelihood of injury from the Burnt Ridge Project, they could challenge the Forest Service's failure to provide notice-and-comment and administrative-appeal procedures in connection with that timber sale. In those circumstances, respondents' claim to standing would not depend on proof that the Forest Service's use of the allegedly required procedures would have led the agency to rescind or modify the Burnt Ridge Project. See *Massachusetts* v. *EPA*, 127 S. Ct. 1438, 1453 (2007) ("A litigant who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered.") (brackets omitted) (quoting *Sugar Cane Growers Coop.* v. *Veneman*, 289 F.3d 89, 94 (D.C. Cir. 2002)). But respondents' inability to participate in notice-

and-comment and administrative-appeal procedures concerning the Burnt Ridge Project is not, *in and of itself*, a judicially cognizable "injury in fact." Rather, respondents must demonstrate a concrete stake in the *outcome* of the Forest Service's decision-making process. See *ibid.* (stating that a plaintiff who alleges the deprivation of a procedural right "has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider *the decision that allegedly harmed the litigant*") (emphasis added); *Winkelman* v. *Parma City Sch. Dist.*, 127 S. Ct. 1994, 2008 n.3 (2007) (Scalia, J., concurring in the judgment in part and dissenting in part) ("Under Article III, one does not have standing to challenge a procedural violation without having some concrete interest in the outcome of the proceeding to which the violation pertains.").

Other circuits have recognized that deprivation of a "procedural right" is insufficient, standing alone, to confer Article III standing. In *Bensman* v. *USFS*, 408 F.3d 945 (2005), the Seventh Circuit explained that, under *Defenders of Wildlife*, "unless the denial of a procedural right endanger[s] a separate substantive right of the plaintiff, a plaintiff may not invoke the federal judicial power to vindicate the denial of that procedural right." *Id.* at 952; see *id.* at 952-953. The court held in particular that the Forest Service's refusal to consider the merits of the plaintiffs' administrative appeals would subject the plaintiffs to judicially cognizable injury only if they could demonstrate concrete harm to themselves resulting from the specific projects that were the subject of those appeals. See *id.* at 953-963. The District of Columbia Circuit has similarly recognized that "[a] party has standing to challenge an agency's failure to abide by a procedural requirement only if the government act performed without the procedure in question will cause a distinct risk to a particularized interest of the plaintiff."

Fund Democracy, LLC v. *SEC*, 278 F.3d 21, 27 (2002); see, *e.g.*, *Animal Legal Def. Fund, Inc.* v. *Glickman*, 204 F.3d 229, 236 (2000) ("[S]tanding to raise a procedural injury requires that the procedural norm be one 'designed to protect some threatened concrete interest' of the plaintiff.") (quoting *Defenders of Wildlife*, 504 U.S. at 573 n.8). The Ninth Circuit's decision in the instant case, which held that respondents' inability to pursue an administrative appeal of the Burnt Ridge Project was itself a judicially cognizable "procedural injury," App., *infra*, 9a-10a, directly conflicts with those decisions of the Seventh and District of Columbia Circuits.

C. Respondents' Suit Became Non-Justiciable When They Settled Their Challenge To The Burnt Ridge Project

Respondents did not show at the outset of their suit that carrying out the Burnt Ridge Project was likely to impair enjoyment of the forest by any of their members, and they thereby failed to establish their standing to challenge that site-specific action. But even if respondents had established such standing at the outset, their challenge to that project was dismissed with prejudice and ceased to be justiciable well before the district court ruled on the merits in this case. In July 2004, while respondents' complaint was pending in the district court, the parties entered into a partial settlement of their dispute. The settlement provided for voluntary dismissal of the first six claims for relief in respondents' complaint, which asserted various challenges to the Burnt Ridge Project, in return for the Forest Service's commitment not to reauthorize the sale without first preparing an EIS or EA pursuant to NEPA. See Gov't

C.A. E.R. 90.[4] The district court accepted the settlement and incorporated it into an order of the court. See *id.* at 92.

Under 36 C.F.R. 215.4(a) and 215.12(f), the availability of notice-and-comment and administrative-appeal procedures depends on whether particular actions are subject to the requirement that an EIS or EA be prepared. Because the settlement embodies the Forest Service's commitment to prepare an EIS or EA before implementing the Burnt Ridge Project, it effectively ensures that the project will not go forward in the future without the notice-and-comment and administrative-appeal procedures that respondents contend are required by the ARA. Thus, with respect to the application of Sections 215.4(a) and 215.12(f) to the Burnt Ridge Project—the only specific project challenged in this case—the settlement provided respondents all the relief they sought.

Despite the parties' settlement of the Burnt Ridge Project dispute, the court of appeals held that respondents' challenge to 36 C.F.R. 215.4(a) and 215.12(f) remained jus-

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[4] Respondents' first five claims for relief alleged that the Forest Service had violated NEPA and had acted arbitrarily and capriciously by failing to perform sufficient environmental analysis in connection with the Burnt Ridge Project. See Gov't C.A. E.R. 19-25. Their sixth claim for relief alleged that the Burnt Ridge Project violated the National Forest Management Act of 1976, 16 U.S.C. 1600 *et seq.*, because the sale was inconsistent with the governing land management plan. See Gov't C.A. E.R. 25-26. Respondents' complaint did not include a specific claim for relief alleging that the Forest Service had violated the ARA by failing to provide notice-and-comment and administrative-appeal procedures in connection with the Burnt Ridge Project itself. Rather, respondents' challenge to 36 C.F.R. 215.4(a) and 215.12(f) was contained in their seventh claim for relief, which asserted a facial attack on the regulations themselves and identified the issuance of those regulations as the "final agency action" subject to review under the APA. See Gov't C.A. E.R. 26; pp. 3-4, *supra*.

ticiable. App., *infra*, 15a. The court stated that "[t]he record remains sufficiently concrete to permit this court to review the application of the regulation[s] to the project and to determine if the regulations as applied are consistent with the ARA." *Ibid.* But because the counts of respondents' complaint challenging the Burnt Ridge Project were *dismissed*, there was no longer any case before the court (much less a "Case or Controversy" in the Article III sense) in which the legality of the application of the regulations to that project could properly be adjudicated.

Under established mootness principles, moreover, a claim does not remain justiciable simply because the existing record is sufficient to allow an informed decision on the merits. Rather, the plaintiff must establish a *continuing concrete stake* in the outcome of the litigation in order to obtain relief in court. See, *e.g.*, *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000) ("The Constitution's case-or-controversy limitation on federal judicial authority, Art. III, § 2, underpins * * * [this Court's] mootness jurisprudence."); *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990) ("Article III denies federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them,'" and "[t]his case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate.") (quoting *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971)). Once the Forest Service withdrew the Burnt Ridge Project and agreed to prepare an EIS or EA with respect to any future implementation of the project (thereby triggering the availability of the notice, comment, and appeals procedures), respondents had no concrete practical stake in the question whether 36 C.F.R. 215.4(a)

and 215.12(f) could validly have been applied to that agency action.[5]

The court of appeals concluded that the settlement "does not affect the ripeness" of respondents' challenge. App., *infra*, 15a. But the settlement certainly *does* affect the justiciability of the only challenge that was even arguably ripe.[6] If respondents had invoked a statutory provision authorizing a direct challenge to the regulations within a specified period, the fact that *one* application of the rules had run its course would not be a barrier to the court's resolution of the suit, so long as respondents had established a likelihood of actual or imminent injury from future applications. But there is no such special statute in this case. Nor do 36 C.F.R. 215.4(a) and 215.12(f) constitute "substantive rule[s] which as a practical matter require[] the plaintiff to adjust his conduct immediately." *NWF*, 497 U.S. at 891. Respondents therefore cannot satisfy either of the conditions identified in *NWF* for judicial review of an agency regulation independent of any concrete application by the agency. See pp. 9-14, *supra*. Thus, even if respondents had established standing to challenge the Burnt Ridge Project, their lawsuit ceased to be justiciable when

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[5] In the settlement, the parties agreed that Counts 7-15 of respondents' complaint, which asserted facial challenges to various Forest Service regulations implementing the ARA, were "not affected by this settlement and that this settlement shall not deprive the Court of jurisdiction over these claims." Gov't C.A. E.R. 90. At the same time, the settlement preserved all of the government's defenses to those claims. *Id.* at 91.

[6] The settlement did affect ripeness in the sense that it should have made it particularly clear that the only challenge that was even arguably ripe was no longer before the court, and that the broader challenge to the regulations was now untethered to any concrete application or injury and so was manifestly unripe.

the dispute involving that project was settled and respondents' challenge to it was dismissed.

D. The Court Of Appeals Erred In Affirming The Nationwide Injunction Entered By The District Court

The district court concluded that its injunction should be given nationwide effect, on the ground that, "[a]lthough this action originally challenged the Burnt Ridge Project in California, the case evolved from challenging a specific project in a specific forest to challenging regulations, applicable nationwide, promulgated by the Forest Service." App., *infra*, 32a. That ruling too is wrong and conflicts with decisions of this Court and other courts of appeals.

1. a. The Ninth Circuit's decision authorizes a single district judge in a garden-variety APA suit to exercise the same broad power to vacate in their entirety agency regulations that Congress only rarely confers upon the District of Columbia Circuit, while freeing the plaintiff from the constraints (such as a specified appellate-court venue and a short filing period) that are characteristic of special judicial review provisions. See, *e.g.*, 42 U.S.C. 7607(b)(1) (petition for review of an Environmental Protection Agency regulation of nationwide applicability under the Clean Air Act must be filed in the District of Columbia Circuit within 60 days after the rule is published in the *Federal Register*). Moreover, a nationwide injunction, extending far beyond any projects the plaintiffs have standing to challenge, grants the same relief that would be available in a nationwide class action, but without the procedural prerequisites and protections mandated by Federal Rule of Civil Procedure 23, and without the prospect of nationwide preclusive effect in the government's *favor* if the named plaintiff loses on the merits.

The court of appeals' affirmance of the nationwide injunction against enforcement of 36 C.F.R. 215.4(a) and 215.12(f), like a number of its other errors, was premised on that court's erroneous view that the reviewable "agency action" in this case was the regulations themselves rather than the specific timber sale to which those rules had been applied. If the court had correctly identified the Burnt Ridge Project as the only "final agency action" properly subject to challenge, the appropriate relief (even if the case had remained live) could have extended no further than a declaratory judgment or injunction providing that the project could not go forward until the Forest Service had satisfied the requirements the court of appeals found to be imposed by the ARA.

The court of appeals' decision also effectively pretermits the usual process by which recurring legal issues involving the federal government may be relitigated in different circuits. In holding that nonmutual collateral estoppel should not apply against the United States, this Court has explained:

> A rule allowing nonmutual collateral estoppel against the government * * * would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari.

United States v. *Mendoza*, 464 U.S. 154, 160 (1984); see *id.* at 163 (explaining that the Court's preferred approach "will better allow thorough development of legal doctrine by allowing litigation in multiple forums").

The court of appeals' approach in this case reintroduces the same practical difficulties that this Court in *Mendoza* sought to avoid.[7] The Ninth Circuit's affirmance of the nationwide injunction has forced the government either to forgo implementation of 36 C.F.R. 215.4(a) and 215.12(f) altogether, or to seek this Court's review of the first court of appeals decision that has addressed the validity of those regulations.[8] Except where Congress has enacted a special

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[7] In support of its conclusion that the injunction in this case should be given nationwide effect, the district court quoted with evident approval the Third Circuit's statement that "in most situations, a far better approach for an administrative agency would be to accept the first ruling of a court of appeals on a particular point or else seek reversal in the Supreme Court or a statutory change by Congress. To shop in a number of courts of appeals in hopes of securing favorable decisions is not only wasteful of overtaxed appellate resources but dissipates agency energies as well." App., *infra*, 32a (quoting *Hi-Craft Clothing Co.* v. *NLRB*, 660 F.2d 910, 912 n.1 (3d Cir. 1981)). The Third Circuit's discussion in *Hi-Craft Clothing Co.* concerns the precedential effect of court of appeals decisions, not the proper scope of a district court injunction. In any event, it is clearly inconsistent with, and has been superseded by, this Court's intervening decision in *Mendoza*.

[8] The government has not petitioned for certiorari at this time on the merits question whether 36 C.F.R. 215.4(a) and 215.12(f) are consistent with the ARA. Respondents' current challenge to those regulations is non-justiciable, the nationwide injunction was in any event improper, and no other court of appeals has yet addressed the merits issue. Indeed, the Ninth Circuit's decision in this case, if left unreviewed, would prevent any other court of appeals from considering the question.

The analysis of the merits issue by the courts below, however, is seriously flawed. The ARA directs the agency to "establish a notice and comment process for proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans," ARA § 322(a), 106 Stat. 1419, and it provides a right of administrative appeal to any person who has participated in the public-comment process, ARA § 322(c), 106 Stat. 1419. The statute does not expressly state that the notice-and-comment and administrative-appeal

provision that authorizes a single lower court to vacate a regulation and resolve such questions on a nationwide basis, this Court's precedents make clear that the government should not be put to that choice.

b. The court of appeals apparently believed that a nationwide injunction was not only permitted, but *required*, in this case. In the court's view, such an injunction is compelled by the APA, because 5 U.S.C. 706 provides that "[t]he reviewing court shall * * * (2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." See App., *infra*, 21a. That reasoning is plainly incorrect. In the first place, as explained above, the final agency action that is the proper subject of judicial review in a case such as this is the agency decision approving a site-specific project, not the regulation itself. If the court finds that a regulation on which the agency relied in rendering that decision is unlawful (and that its application was not harmless error), the proper relief is for the court to hold the site-specific decision un-

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procedures must apply to *all* such projects, and Congress did not likely intend for the ARA's procedural requirements to apply inflexibly to *every* action, no matter how minor, that might be characterized as "implementing land and resource management plans." Indeed, the district court acknowledged that "[t]he ARA certainly permits exclusion of environmentally insignificant projects from the appeals process. For example, actions such as maintaining Forest Service buildings or mowing ranger station lawns need not be subject to the notice, comment, and appeal procedures." App., *infra*, 51a-52a; see Gov't C.A. E.R. 152-154. If the ARA permits the Forest Service to distinguish between environmentally significant and insignificant projects, and to exempt the latter from the notice-and-comment and administrative-appeal procedures mandated by the statute, nothing in the text or purposes of the ARA precludes the agency from incorporating the pre-existing distinction between projects that require an EIS or EA and those that do not.

lawful (*i.e.*, to "hold unlawful" the *relevant* "agency action") because it rests on the regulation the court found to be invalid, not to go beyond the confines of the case and invalidate the regulation in all of its potential applications to *other* site-specific decisions.

In any event, the provision in 5 U.S.C. 706(2) for a reviewing court to "hold unlawful and set aside" agency action does not mean that a court must enter an injunction that renders a regulation a nullity on a nationwide basis. Rather, the court should "set aside" the regulation only in the sense of putting it to one side and removing it from consideration as a lawful basis for sustaining the final agency action that the plaintiff challenges or the application of that action to the plaintiff. See *Webster's Third New International Dictionary of the English Language* 2077 (1993) ("set aside") (definition 1: "to put to one side: DISCARD"; definition 3: "to reject from consideration"). Furthermore, where, as here, no special statutory review provision applies, the proper form of proceeding under the APA is a suit for declaratory or injunctive relief. See 5 U.S.C. 703 (in the absence of a special statutory review procedure relevant to the subject matter, the form of proceeding under the APA is "any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction"); 5 U.S.C. 704. Declaratory and injunctive remedies are equitable and therefore discretionary in nature. See *CSS*, 509 U.S. at 57 (quoting *Abbott Labs.*, 387 U.S. at 148). Indeed, the APA's very reference to actions for "declaratory judgments" makes clear that *no* injunction—much less a nationwide injunction—is in any sense compelled by the APA when agency action is held unlawful. See H.R. Rep. No. 1980, 79th Cong, 2d Sess. 42 (1946) (referring to possibility of suits for declaratory relief to "de-

termine the validity or application of a rule or order"); see also S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945). Rather, equitable relief must be tailored to the particular final agency action and parties before the court.[9]

2. This Court has made clear that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979); see also *United States Dep't of Defense* v. *Meinhold*, 510 U.S. 939 (1993) (granting stay of Armed-Forces-wide injunction, except as to individual plaintiff). Similarly in a variety of contexts, other courts of appeals have recognized that the sort of categorical injunction issued by the district court in this case, which applies nationwide and without regard to particular applications of 36 C.F.R. 215.4(a) and 215.12(f) or to whether such applications are likely to injure respondents' members, is an inappropriate exercise of a court's equitable powers. See, *e.g.*, *Virginia Soc'y for Human Life, Inc.* v. *FEC*, 263 F.3d 379, 393 (4th Cir. 2001) (holding that nationwide injunction prohibiting application of challenged regulations to non-parties was inappropriate because, inter alia, "[t]he broad scope of the injunction has the effect of precluding other circuits from ruling on the" relevant legal question, in contravention of the principles announced by

[9] Accordingly, even where, unlike here, a regulation is ripe for pre-enforcement review because it governs primary conduct and would require a regulated party either to change its behavior immediately or to risk serious penalties, the regulation should be declared unlawful or enjoined only as to the party before the court. See, *e.g.*, *Virginia Soc'y for Human Life, Inc.* v. *FEC*, 263 F.3d 379, 392-394 (4th Cir. 2001). Cf. *Gonzales* v. *Carhart*, 127 S. Ct. 1610, 1639 (2007) (noting that "[a]s applied challenges are the basic building blocks of constitutional adjudication") (quoting Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1328 (2000)).

this Court in *Mendoza*); *Everhart* v. *Bowen*, 853 F.2d 1532, 1539 (10th Cir. 1988) ("Absent a class certification, the district court should not have treated the suit as a class action by granting statewide injunctive relief, and accordingly should have tailored its injunction to affect only those persons over whom it has power.") (citations, brackets, and internal quotation marks omitted), rev'd on other grounds *sub nom. Sullivan* v. *Everhart*, 494 U.S. 83 (1990); *Brown* v. *Trustees of Boston Univ.*, 891 F.2d 337, 361 (1st Cir. 1989) (holding injunction overbroad insofar as it extended beyond that necessary to redress the plaintiff's injury, and explaining that "[o]rdinarily, classwide relief * * * is appropriate only where there is a properly certified class"), cert. denied, 496 U.S. 937 (1990).

Moreover, the mode of proceeding approved by the court of appeals in this case is becoming commonplace in environmental litigation within the Ninth Circuit. See Order at 4, *Wilderness Soc'y* v. *Rey*, No. CV 03-119-M-DWM (D. Mont. Apr. 24, 2006) (nationwide injunction against another ARA regulation); *Forest Serv. Employees for Envtl. Ethics* v. *USFS*, 408 F. Supp. 2d 916, 921-922 (N.D. Cal. 2006) (allowing challenge to ARA regulation to proceed even after plaintiffs' challenge to specific timber project was dismissed as moot); *Washington Toxics Coalition* v. *United States Dep't of the Interior*, 457 F. Supp. 2d 1158, 1163-1164, 1170-1175, 1200-1201 (W.D. Wash. 2006) (adjudicating pre-enforcement challenge to regulations jointly promulgated by Fish and Wildlife Service and National Marine Fisheries Service, and enjoining agencies from implementing those rules, apparently on nationwide basis); *Citizens for Better Forestry* v. *USDA*, Nos. C 05-1144 PJH, C 04-4512 PJH, 2007 WL 1970096, at *19 (N.D. Cal. July 3, 2007) (issuing nationwide injunction against implementation of Forest Service planning regulations, in challenge

brought to regulations apart from any specific application to a project); Order at 5-6, *California ex rel. Lockyer* v. *USDA*, No. 3:05-cv-03508-EDL (N.D. Cal. Nov. 29, 2006) (confirming that earlier decision vacating Forest Service rule and reinstating prior agency regulation governing roadless areas in National Forests has nationwide effect).

Because the Ninth Circuit's decision in this case conflicts with decisions of this Court and other courts of appeals, and manifests a growing pattern within the Ninth Circuit, review is warranted as to the scope of injunctive relief, as well as standing, ripeness, and mootness as discussed above.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2007

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 05-16975, 05-17078

EARTH ISLAND INSTITUTE; SEQUOIA FORESTKEEPER, A CALIFORNIA NON-PROFIT CORPORATION; HEARTWOOD, AN INDIANA NON-PROFIT CORPORATION; CENTER FOR BIOLOGICAL DIVERSITY, A NEW MEXICO NON-PROFIT CORPORATION; SIERRA CLUB, PLAINTIFFS-APPELLEES

v.

NANCY RUTHENBECK;[*] UNITED STATES FOREST SERVICE; MIKE JOHANNS;[**] DALE BOSWORTH, DEFENDANTS-APPELLANTS

EARTH ISLAND INSTITUTE; SEQOUIA FORESTKEEPER, A CALIFORNIA NON-PROFIT CORPORATION; HEARTWOOD, AN INDIANA NON-PROFIT CORPORATION; CENTER FOR BIOLOGICAL DIVERSITY, A NEW MEXICO NON-PROFIT CORPORATON; SIERRA CLUB, PLAINTIFFS-APPELLANTS

v.

NANCY RUTHENBECK; UNITED STATES FOREST SERVICE; ANN M. VENEMAN; DALE BOSWORTH, DEFENDANTS-APPELLEES

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[*] Nancy Ruthenbeck is substituted for Del A. Pengilly pursuant to Fed. R. App. P. 43(c)(2).

[**] Mike Johanns is substituted for Ann M. Veneman pursuant to Fed. R. App. P. 43(c)(2).

Filed: Aug. 10, 2006
Amended: June 8, 2007

Before: MARY M. SCHROEDER, Chief Judge, SUSAN P. GRABER, Circuit Judge, and KEVIN THOMAS DUFFY,[***] Senior Judge.

ORDER

The panel has voted to deny the petition for rehearing. Chief Judge Schroeder and Judge Graber have voted to deny the petition for rehearing en banc, and Judge Duffy has so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

The petitions for rehearing and rehearing en banc are DENIED.

Plaintiffs-Appellees' motion for clarification with regard to the applicability of the opinion to both 36 C.F.R. §§ 215.12(f) and 215.4(a) and inapplicability of the opinion to 36 C.F.R. § 215.18(b)(1) is GRANTED.

The opinion at *Earth Island Institute v. Ruthenbeck*, 459 F.3d 954 (9th Cir. 2006), is amended and, in the interest of clarity, the attached amended opinion is substituted in its place.

No further petitions for rehearing or rehearing en banc may be filed.

[***] The Honorable Kevin Thomas Duffy, Senior Judge, United States District Court for the Southern District of New York, sitting by designation.

AMENDED OPINION

SCHROEDER, Chief Judge.

I. Overview

This is a government appeal from a district court judgment enjoining Forest Service regulations that govern review of decisions implementing forest plans, on the ground that the regulations were manifestly contrary to the governing statute. The Forest Service promulgated the challenged regulations pursuant to the Forest Service Decisionmaking and Appeals Reform Act ("ARA"), Pub. L. 102-381, tit. 111, § 322, 106 Stat. 1419 (1992) (codified at 16 U.S.C. § 1612 note). In a cross-appeal, the environmentalist plaintiffs Earth Island Institute et al. challenge the four regulations the district court held were valid. The statute pertains to procedures relating to public comment, notice, and administrative appeal of proposed forest management actions. The government raises standing and ripeness issues. We agree with the district court that plaintiffs have established standing. But because only two aspects of the regulations, 36 C.F.R. §§ 215.12(f) and 215.4(a) have actually been applied to a proposed project, we hold that only those regulations are ripe for review. We affirm the district court's judgment that 36 C.F.R. §§ 215.12(f) and 215.4 (a) conflict with the Appeals Reform Act and affirm the nationwide injunction barring their application. We remand the judgment and injunction with respect to the remaining regulations to the district court with instructions to vacate for lack of a controversy ripe for review.

II. Background

Plaintiffs, Earth Island Institute, Sequoia Forestkeeper, Heartwood, Inc., Center for Biological Diversity, and the Sierra Club (collectively "Earth Island") are non-profit environmental organizations. To establish their standing, plaintiffs rely on the declaration of Jim Bensman, an employee and member of Heartwood. According to his affidavit, Bensman has been using the National Forests for over 25 years, and has visited National Forests in California, including Klamath, Shasta, Six Rivers and Trinity.

Bensman declared that he planned to return to California in August 2004 and Oregon in October 2004. He asserted that his interest in the biological health of the forest, as well as his recreational interest, is harmed when development occurs in violation of law or policy. Bensman specifically stated that if an appeal option were available to him on projects that are categorically excluded from appeal, he would exercise that right of appeal. He also alleged personal and procedural injuries under each challenged regulation.

The defendant, the United States Forest Service, prior to 1992, provided a post-decision administrative appeals process, 36 C.F.R. pt. 217, for agency decisions documented in a "decision memo," "decision notice," or "record of decision." *See* 54 Fed. Reg. 3342 (Jan. 23, 1989); *Heartwood, Inc. v. U.S. Forest Serv.*, 316 F.3d 694, 696 (7th Cir. 2003). In March 1992, the Forest Service proposed a new regulation that would have eliminated post-decision administrative appeals for all decisions except those approving forest plans or amendments or revisions to forest plans. *See* 57 Fed. Reg. 10, 444 (Mar. 26, 1992). The 1992 proposal would have replaced post-decision administrative appeals with

pre-decision notice and comment procedures for proposed projects on which the Forest Service had completed an Environmental Assessment ("EA") and a finding of no significant impact ("FONSI"), in accordance with applicable provisions of the National Environmental Policy Act of 1969 ("NEPA"). Essentially, the proposal provided a categorical exclusion from notice, comment and appeal for projects the Forest Service deemed environmentally insignificant.

The 1992 proposal was greeted with considerable protest, and environmental groups decried the loss of administrative review. Congress, in response, enacted the ARA. Pub. L. No. 102-381, tit. III § 322, (codified at 16 U.S.C. § 1612 note). Among other things, the ARA required the Forest Service to establish an administrative appeals process with opportunity for notice and comment. The ARA provides in material part:

> (a) IN GENERAL.—In accordance with this section, the Secretary of Agriculture, acting through the Chief of the Forest Service, shall establish a notice and comment process for proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans developed under the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. § 1601 *et seq.*) and shall modify the procedure for appeals of decisions concerning such projects.

ARA § 322(a).

After a series of challenges to regulations promulgated pursuant to the ARA, *see Heartwood, Inc.*, 316 F.3d 694, the Forest Service reinstated the pre-1992 notice, comment and administrative appeal procedure as

an interim measure until the Forest Service issued a final regulation implementing the ARA. *See* 68 Fed. Reg. 33,582, 33,586. On June 4, 2003, the Forest Service published a final rule revising the notice, comment, and appeal procedures for "projects and activities implementing land and resource management plans on National Forest System lands." 68 Fed.Reg. at 33,582 (June 4, 2003) ("2003 Rule").

On June 5, 2003, the Forest Service published the final implementing procedures for National Environmental Policy Act Documentation Needed for Fire Management Activities ("Fire CE"), 68 Fed. Reg. 33,814-24 (2003) (codified at Forest Service Handbook 1909.15, ch. 30, § 31.2(10), (11)). This action created a new category of projects, fire rehabilitation activities on less than 4,200 acres, which could be excluded from EA and Environmental Impact Statement ("EIS") analysis, and exempted from notice, comment and appeal under the challenged regulations. Salvage timber sales of 250 acres or less ("Timber Sale CE") were also designated as categorical exclusions on July 29, 2003. 68 Fed. Reg. 44,598-608 (2003) (codified at Forest Service Handbook 1909.15, ch. 30, § 31.2(12), (13), (14)).

On September 8, 2003, the Forest Service issued its Burnt Ridge Project decision memo approving the timber sale and treatment of 238 acres of post-fire forest area. The Burnt Ridge Project timber sale proposal was prepared pursuant to the Sierra Nevada Forest Plan Amendment Record of Decision, stemming from the 2002 McNally fire. The Burnt Ridge Project area is located on the Hot Springs Ranger District of Sequoia National Forest, approximately 8 air miles from California Hot Springs, California. In the summer of 2002, a hu-

man-caused fire known as the McNally Fire burned approximately 150,000 acres of forest and chaparral primarily within the Sequoia National Forest. Between January and March 2003, the Sequoia National Forest sent out three scoping notices pursuant to NEPA, for three separate post-fire salvage logging projects. Each of the adjacent projects was planned as a result of the McNally fire, and proposed identical or highly similar logging prescriptions. The Burnt Ridge Project, as approved by the Forest Service decision memo, would have resulted in the logging of approximately 238 acres of burned forest for sale as timber. The decision memo applied the categorical exclusion provisions of 36 C.F.R. §§ 215.12(f) and 215.4(a). The decision expressly states that "this project is not subject to appeal because it involves projects or activities which are categorically excluded from documentation in an environmental impact statement or environmental assessment." Eventually, after this litigation was instituted, the parties settled that challenge and the Forest Service withdrew the Burnt Ridge Project.

On December 1, 2003, Earth Island filed a complaint against the Forest Service, challenging the 2003 Rule as applied to the Burnt Ridge Project, and bringing facial challenges to nine provisions of the 2003 Rule. The Burnt Ridge Project decision memo was issued under provisions which the Forest Service claim categorically exclude the project under the challenged regulations in this case from documentation in an EA or EIS, and thereby from administrative notice, comment, and appeal.

The district court invalidated five challenged regulations and upheld four regulations, *Earth Island v.*

Pengilly, 376 F. Supp. 2d 994 (E. D. Cal. 2005), and issued a nationwide injunction against the application of the invalid regulations. This appeal and cross-appeal followed.

III. Standing

Earth Island argues that plaintiffs in this case had standing on the basis of the personal and procedural injuries documented in the Bensman affidavit because their aesthetic interests in the national forests are harmed by the regulations and, more specifically, they contend that their procedural interests in participating in the administrative notice, comment, and appeal process are harmed. The government argues that plaintiffs have suffered no cognizable injury in fact with respect to the challenged regulations, because the regulations have not yet been applied.

To satisfy Article III standing requirements, a plaintiff must show that: (1) plaintiff has suffered "injury in fact" that is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

The parties do not dispute that an organizational plaintiff has standing to bring suit on behalf of its members "when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the

claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 181, 120 S. Ct. 693.

Aesthetic and environmental interests generally are cognizable injuries in fact, "[b]ut the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Sierra Club v. Morton*, 405 U.S. 727, 735-36, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972). An affiant's "some day" intentions to return to an area that will be affected by a project do not support a finding of "actual or imminent injury" unless the affiant has specific plans to return to the area. *Lujan v. Defenders of Wildlife*, 504 U.S. at 564, 112 S. Ct. 2130.

In this case, plaintiffs persuasively argue, and the district court properly concluded, that Bensman's preclusion from participation in the appeals process may yield diminished recreational enjoyment of the national forests.

Earth Island has also alleged sufficient procedural injury to support standing, relying on the argument that the ARA is a procedural statute giving rise to a procedural injury within the "zone of interests" Congress intended to protect. These are procedural regulations governing the opportunity for public comment. The ARA does not address any substantive Forest Service program and governs only the process. Procedural and informational injuries may be the basis for injury in fact for standing purposes. *See City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975) ("The procedural injury implicit in agency failure to prepare an EIS [is] the creation of a risk that serious environmental impacts will be overlooked is itself a sufficient 'injury in fact' to

support standing . . . ."). Because "'NEPA is essentially a procedural statute designed to ensure that environmental issues are given proper consideration in the decision making process,'" injury alleged to have occurred as a result of violating this procedural right confers standing. *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1514 (9th Cir. 1992) (quoting *Trustees for Alaska v. Hodel*, 806 F.2d 1378, 1382 (9th Cir. 1986)); *see also United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973); *Friends of the Earth v. U.S. Navy*, 841 F.2d 927, 931 (9th Cir. 1988) (noting that "[t]his court has long recognized that failure to follow procedures designed to ensure that the environmental consequences of a project are adequately evaluated is a sufficient injury in fact to support standing").

Earth Island was unable to appeal the Burnt Ridge Project because the Forest Service applied 36 C.F.R. § 215.12(f); the loss of that right of administrative appeal is sufficient procedural injury in fact to support a challenge to the regulation. Plaintiffs in this case are "injure[d] . . . in the sense contemplated by Congress," *Mumma,* 956 F.2d at 1516; because Plaintiffs are precluded from appealing decisions like the Burnt Ridge Project, and that Project itself, under the 2003 Rule. The ARA is entirely procedural, and Congress contemplated public involvement in the administrative notice, comment, and appeal process.

Plaintiffs have satisfied the remaining standing requirements. The deprivation of the procedural right of administrative notice, comment, and appeal is "fairly traceable" to the Forest Service's regulations. A favorable decision invalidating the regulation would redress

Earth Island's injury. Accordingly, Earth Island has established standing on the basis of both personal and procedural injury.

IV. Ripeness

The Forest Service argues that the challenges to the regulations are unripe because they have not yet been applied in a specific context and that this court should decline to decide the challenge where the record is incomplete. Earth Island argues that no further record development is needed because the challenged regulations are final agency action and present purely legal questions.

"The jurisdiction of federal courts is defined and limited by Article III of the Constitution. In terms relevant to the question for decision in this case, the judicial power of federal courts is constitutionally restricted to 'cases' and 'controversies.'" *Flast v. Cohen*, 392 U.S. 83, 94, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968). Courts must refrain from deciding abstract or hypothetical controversies and from rendering impermissible advisory opinions with respect to such controversies. *See id.* at 96, 88 S. Ct. 1942. "[A] federal court has neither the power to render advisory opinions nor to decide questions that cannot affect the rights of litigants in the case before them. Its judgments must resolve a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S. Ct. 2330, 45 L. Ed. 2d 272 (1975) (internal quotation marks omitted). An advisory opinion results if the court resolves a question of law that is not presented by the facts of the case. *See, e.g., In re*

Michaelson, 511 F.2d 882, 893 (9th Cir. 1975) ("[I]t would be constitutionally improper for us to reach this question since the issue lacks the necessary facts to make it concrete.").

Ripeness is a prudential doctrine intended, in part, to prevent judicial review of legal issues outside the limits of Article III cases and controversies. Plaintiffs rely on a selective reading of *Abbott Laboratories v. Gardner*, in which the Supreme Court established a presumption in favor of ripeness for regulations that constitute final agency action. 387 U.S. 136, 140, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967) (*overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977)). In that pre-enforcement challenge to FDA regulations, the Supreme Court held the regulations were ripe for review because the challenge presented a purely legal question: whether the FDA Commissioner had exceeded his rulemaking authority. The legal issue could be resolved on the record as it stood, without reference to more specific facts. *Abbott Laboratories* also established a two-part ripeness test: first, a reviewing court must ask if the issues are fit for judicial decision; and second, a reviewing court considers the hardship to the parties of withholding review. *Id.* at 149, 87 S. Ct. 1507.

We are persuaded by the Forest Service's reliance on *Toilet Goods Association, Inc. v. Gardner*, 387 U.S. 158, 87 S. Ct. 1520, 18 L. Ed. 2d 697 (1967), where the Supreme Court held that a pre-enforcement challenge to FDA regulations was premature. In that case, the petitioners challenged regulations authorized by the Color Additive Amendments that would allow the FDA Commissioner to revoke product certifications if the agency was not given free access to color additive formulas and

manufacturing facilities and processes. In *Toilet Goods*, the regulations were final agency action and the question presented was purely legal. *Id.* at 163, 87 S. Ct. 1520. Nonetheless, the Supreme Court held that the issues failed the first part of the *Abbott Laboratories* test. The issues were not fit for judicial decision because the regulations' effects were speculative and the record was incomplete. *Id.* at 163-64, 87 S. Ct. 1520. The Court also held under the second *Abbott Laboratories* inquiry that the challenge was unripe because the situation was not one "in which primary conduct [was] affected." *Id.* at 164.

The Supreme Court also emphasized the need for factual context in *Lujan v. National Wildlife Federation*, in which the Supreme Court emphasized the ripeness doctrine, stating that a regulation is ordinarily not ripe for review "until the scope of the controversy has been reduced to more manageable proportions, and *its factual components fleshed out, by some concrete action applying the regulation* to the claimant's situation in a fashion that harms or threatens to harm him." 497 U.S. 871, 891, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990) (emphasis added).

As the law of ripeness has evolved, the Supreme Court and circuit courts have repeatedly declined premature review. *See Nat'l Park Hospitality Ass'n v. Dep't*, 538 U.S. 803, 812, 123 S. Ct. 2026, 155 L. Ed. 2d 1017 (2003) (holding that although the question presented was purely legal and the rule constituted final action, further factual development would "significantly advance our ability to deal with the legal issues presented" so the matter was not ripe for judicial review); *Reno v. Catholic Soc. Servs.*, 509 U.S. 43, 113 S. Ct. 2485,

125 L. Ed. 2d 38 (1993) (agency rules that will apply at a later stage are not ripe for immediate judicial review); *see also Sabre, Inc. v. Dep't of Transp.*, 429 F.3d 1113 (D.C. Cir. 2005) (a purely legal claim may be less fit for judicial resolution when it is clear that a later as–applied challenge will present the court with a richer and more informative factual record); *Louisiana Envtl. Action Network v. EPA,* 172 F.3d 65 (D.C. Cir. 1999) (ripeness asks whether consideration of the issue would benefit from a more concrete setting); *Va. Soc'y for Human Life, Inc. v. Fed. Election Comm'n*, 263 F.3d 379 (4th Cir. 2001) (rationale of ripeness doctrine is to prevent courts from entangling themselves in abstract disagreements over administrative policies).

On this record, Earth Island has established ripeness only with respect to 36 C.F.R. §§ 215.12(f) and 215.4(a), which categorically exempt from appeal Forest Service actions that do not require an EA or EIS under NEPA. In their complaint, Earth Island alleges that "these new regulations" (the 2003 Rule) have been applied to decisions across the nation, including the Burnt Ridge Project. That is the only project specifically referenced in the complaint. However, only 36 C.F.R. §§ 215.12(f) and 215.4(a) were applied in the context of the Burnt Ridge Project. For that project, plaintiffs were unable to appeal the timber sale in the decision memo because the Forest Service had categorically excluded the project from administrative notice, comment, and appeal. Earth Island has not shown that the other challenged regulations were applied in the context of the Burnt Ridge Timber Sale or any other specified project. The record is speculative and incomplete with respect to the remaining regulations, so the issues are not fit for judicial decision under *Abbott Laboratories*. While Earth Island

has established sufficient injury for standing purposes, it has not shown the sort of injury that would require immediate review of the remaining regulations. There is not a sufficient "case or controversy" for us to review regulations not applied in the context of the record before this court.

The parties' agreement to settle the Burnt Ridge Timber Sale dispute does not affect the ripeness of Earth Island's challenge to 36 C.F.R. §§ 215.12(f) and 215.4(a). The record remains sufficiently concrete to permit this court to review the application of the regulation to the project and to determine if the regulations as applied are consistent with the ARA.

V. The Validity of 36 C.F.R. §§ 215.12(f) and 215.4(a)

The relevant statute provides:

> SEC. 322. FOREST SERVICE DECISIONMAKING AND APPEALS REFORM.
>
> (a) IN GENERAL.–In accordance with this section, the Secretary of Agriculture, acting through the Chief of the Forest Service, shall establish a notice and comment process for proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans developed under the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1601 *et seq.*) and shall modify the procedure for appeals of decisions concerning such projects.

Pub. L. 102-381 (codified at 16 U.S.C. § 1612 note). The Forest Service argues that the promulgation of 36 C.F.R. § 215.12(f), categorically excluding from appeal any agency decision that does not require an EA or EIS,

and 36 C.F.R. § 215.4(a), categorically excluding from notice and comment those same decisions, is the agency's reasonable interpretation of ambiguous portions of the ARA. Earth Island argues that the plain language of the statute requires an administrative notice, comment, and appeal process. In the alternative, Earth Island also argues that the legislative history of the ARA renders the challenged regulation manifestly contrary to the statute because the statute was passed in response to a proposal to eliminate the right to notice, comment, and an administrative appeal.

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) (hereinafter "*Chevron*"), the Supreme Court set forth the familiar two-step approach for courts to evaluate agency regulations promulgated pursuant to statute. First, courts must examine the statute itself to determine whether Congress has spoken directly to the precise question. *Id.* at 842, 104 S. Ct. 2778. If the intent of Congress is clear, that is the end of the inquiry because agencies (and courts reviewing their actions) must give effect to the unambiguously expressed intent of Congress. *Id.* at 842-43, 104 S. Ct. 2778. If an agency's regulation is in conflict with the plain language of the statute, reviewing courts do not owe deference to the agency's interpretation.

Second, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S. Ct. 2778. "In determining whether an agency's construction is permissible, the court considers whether Congress has explicitly instructed the agency to flesh out specific pro-

visions of the general legislation, or has impliedly left to the agency the task of developing standards to carry out the general policy of the statute." *Tovar v. U.S. Postal Serv.*, 3 F.3d 1271, 1276 (9th Cir. 1993). "When relevant statutes are silent on the salient question, we assume that Congress has implicitly left a void for an agency to fill. We must therefore defer to the agency's construction of its governing statutes, unless that construction is unreasonable." *Chevron*, 467 U.S. at 843-44, 104 S. Ct. 2778. Accordingly, "reasonableness" is the standard where courts review regulations under Chevron's second step.

Our first inquiry is whether Congress has spoken directly to the issue governed by 36 C.F.R. §§ 215.12(f) and 215.4(a). The ARA provides, in relevant part:

> In accordance with this section, the Secretary of Agriculture, acting through the Chief of the Forest Service, shall establish a notice and comment process for proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans developed under the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. § 1601 *et seq.*) and shall modify the procedure for appeals of decisions concerning such projects.

16 U.S.C. § 1612 note, § 322(a) (emphasis added). The regulations read, in relevant part: The following decisions and actions are not subject to appeal under this part, except as noted: . . . f) Decisions for actions that have been categorically excluded from documentation in an EA or EIS . . .

36 C.F.R. § 215.12(f). The procedures for legal notice (§ 215.5) and opportunity to comment (§ 215.6) do not apply to:

> (a) Projects and activities which are categorically excluded from documentation in an [EIS] or [EA] . . .

36 C.F.R. § 215.4(a).

The plain language of the ARA states that the Forest Service "shall" provide for administrative notice, comment, and appeal. The statutory language does not refer to NEPA. The statute does not provide for any exclusions or exemptions from its requirement that the Forest Service provide notice, comment, and an administrative appeal for decisions implementing Forest Plans. Accordingly, 36 C.F.R. §§ 215.12(f) and 215.4(a) conflict with the plain language of the statute.

Even if we could construe the statute as ambiguous, the regulation is invalid because it fails *Chevron's* second step:

> If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, 467 U.S. at 842-43, 104 S. Ct. 2778.

The Forest Service argues that the categorical exclusions are the result of the Secretary's reasonable construction of the statute to distinguish between agency actions requiring an EA or EIS and projects "that lack significant individual or cumulative environmental impacts." The Forest Service relies exclusively on its contention that the regulation warrants *Chevron* deference as a reasonable construction of the ARA, and argues that the district court erred in finding the categorical exclusion regulations "manifestly contrary" to the ARA.

Plaintiff Earth Island contends that the legislative history of the ARA clearly indicates that Congress did not intend to exclude timber sales and other actions from administrative notice, comment, and appeal simply because they are excluded from NEPA analysis. Earth Island argues that a number of other significant decisions implementing forest plans, including oil leasing, mining, and off-road vehicle use, were intended to be subject to such requirements under the ARA. Earth Island cites legislative history, including a conference report and a comment letter from Representative Richardson stating that "[w]e believe that the agency's recent proposal to eliminate appeals of timber sales, oil and gas leases, and other project level activities is a slap in the face of democratic values." 138 Cong. Rec. E2075-02, 1992 WL 157159 (July 2, 1992). Earth Island argues, and the district court concluded, that the ARA was passed in response to the proposed changes to the appeal process that would eliminate appeals for agency actions that previously required "decision documents" prior to 1992.

Earth Island's arguments are persuasive. Prior to 1992, the Forest Service notice, comment, and appeals

process applied to a range of agency actions and programs, including "timber sales, road and facility construction, range management and improvements, wildlife and fisheries habitat improvement measures, forest pest management activities, removal of certain minerals or mineral materials, land exchanges and acquisitions, and establishment or expansion of winter sports or other special recreational sites." 36 C.F.R. § 217.3(b) (1992). At a minimum, the categorical exclusion of timber sales from administrative notice, comment, and appeal is contrary to Congressional intent to provide such processes through the ARA. The ARA was passed in response to a proposal to eliminate appeals for decisions that would be categorically excluded from appeal, so the Forest Service's attempt to circumvent Congressional intent to preserve the administrative appeals process cannot be a permissible interpretation of the ARA. The Forest Service, to comply with the ARA, must promulgate regulations that preserve administrative appeals for any decisions subject to administrative appeal before the proposed changes in 1992. Had Congress wanted to categorically eliminate the right of notice, comment, and appeal for timber sales and other categorically excluded Forest Service actions, the ARA would not have been necessary.

The exemption of categorically excluded Forest Service actions from notice, comment, and administrative appeal is manifestly contrary to both the language and the purpose of the ARA. Therefore, 36 C.F.R. §§ 215.12 (f) and 36 C.F.R. 215.4(a) are invalid.

VI. Remaining Issues

On July 26, 2005 (following the district court's order of July 7, 2005), the Forest Service filed a Rule 60(b)(6)

motion for clarification or amendment of the court's order, asking that the injunction apply only to the Eastern District of California, and asking for prospective application only. On September 16, 2005, the district court clarified that the scope of the injunction was nationwide, precluding any enforcement and implementation of the invalidated regulations.

The district court further clarified that the injunction would apply only prospectively, to decisions made after the July 7, 2005 order date. The Forest Service challenges the geographic scope of the injunction on appeal.

The nationwide injunction, as applied to our decision to affirm the district court's invalidation of 36 C.F.R. §§ 215.12(f) and 215.4(a), is compelled by the text of the Administrative Procedure Act, which provides in relevant part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. *The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be-(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law* . . .

5 U.S.C. § 706 (emphasis added). The Ninth Circuit has set aside regulations that are not permissible interpretations of the governing statute, and we affirm the district court's decision to do so here. *See, e.g., NRDC v. EPA*, 966 F.2d 1292, 1304 (9th Cir. 1992) (vacating a

Clean Water Act rule); *Asarco v. EPA,* 616 F.2d 1153, 1162 (9th Cir. 1980) (vacating a Clean Air Act rule).

The district court did not abuse its discretion in issuing a nationwide injunction. We do not decide whether the district court properly enjoined enforcement of 36 C.F.R. § 215.18(b)(1), because the Forest Service did not appeal the district court's ruling as to that regulation. *See Erlin v. United States*, 364 F.3d 1127, 1130 (9th Cir. 2004). Our decision, however, vacates the district court's injunction order with respect to all other challenged regulations except 36 C.F.R. §§ 215.12(f) and 215.4(a). The nationwide injunction against enforcement of 36 C.F.R. §§ 215.12(f) and 215.4(a) is AFFIRMED.

VII. Conclusion

We AFFIRM the district court's invalidation of 36 C.F.R. §§ 215.12(f) and 215.4(a) and the nationwide injunction against their enforcement. We REMAND the judgment and injunction with respect to the remaining regulations, except 36 C.F.R. § 215.18(b)(1), to the district court with instructions to vacate for lack of a controversy ripe for review. The parties shall bear their own costs on appeal.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CIV F-03-6386 JKS

EARTH ISLAND INSTITUTE, A CALIFORNIA NON-PROFIT CORPORATION; SEQOUIA FORESTKEEPER, A CALIFORNIA NON-PROFIT CORPORATION; HEARTWOOD, AN INDIANA NON-PROFIT CORPORATION; CENTER FOR BIOLOGICAL DIVERSITY, A NEW MEXICO NON-PROFIT CORPORATION, AND SIERRA CLUB, A CALIFORNIA NON-PROFIT CORPORATION, PLAINTIFFS

v.

NANCY RUTHENBECK, IN HER CAPACITY AS DISTRICT RANGER,HOT SPRINGS RANGER DISTRICT,SEQOUIA NATIONAL FOREST; UNITED STATES FOREST SERVICE, AN AGENCY OF THE U.S. DEPARTMENT OF AGRICULTURE ; ANN VENEMAN, IN HER OFFICIAL CAPACITY AS SECRETARY OF AGRICULTURE; DALE BOSWORTH,IN HIS OFFICIAL CAPACITY AS CHIEF OF THE U.S. FOREST SERVICE, DEFENDANTS

Filed: Nov. 30, 2005

ORDER

SINGLETON, J.

Before the Court is Defendants' motion for stay pending appeal. Docket No. 94. Plaintiffs opposed the mo-

tion for stay and moved for clarification. Docket No. 95. The Court granted the motion for clarification and, in light of the clarification, requested further briefing regarding the hardships necessitating a stay pending appeal. Docket No. 98. The parties have filed the requested briefing and the matter is ripe for decision. Docket Nos. 100; 106.

DISCUSSION

The standard for a stay pending appeal is similar to the test for the issuance of preliminary injunctions. *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983). The test is a continuum, requiring the movant to show at one end, "both a probability of success on the merits and the possibility of irreparable injury," and at the other end, "that serious legal questions are raised and that the balance of hardships tips sharply in its favor." *Id.* (citations omitted). Under any formulation of the test, the movant "must demonstrate that there exists a significant threat of irreparable injury." *Oakland Tribune Inc. v. Chronicle Publ'n Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985). The Court has already determined that the Forest Service has not shown a probability of success on the merits but has raised substantial issues. Docket No. 98 at 3. The Forest Service must therefore demonstrate that the hardships it will face significantly outweigh the hardships Plaintiffs will suffer if stay is granted. *See Idaho Sporting Congress, Inc. v. Alexander*, 222 F.3d 562, 565 (9th Cir. 2000) ("'These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases.'" (quoting *Oakland Tribune Inc.*, 762 F.2d at 1376)).

I. Injury to the Forest Service

In support of its argument that it will suffer irreparable injury in the absence of a stay pending appeal the Forest Service describes several potential harms. With the re-implementation of the 1993 rule and the 2000 supplemental rule, categorical exclusion categories enacted since that time are, according to the Forest Service, in "regulatory limbo." Docket No. 100 at 2. These categories include such activities as prescribed burning, logging to reduce the risk of wildfire, and salvage logging of burned timber. According to the Forest Service, these projects are of critical importance to the safety of communities and the health of forests. The Forest Service is concerned that delaying projects aimed at reducing the risk of wildfires by subjecting them to notice, comment, and appeal procedures will imperil forests and nearby communities.

The Appeals Reform Act ("ARA") includes an automatic stay provision, which states:

> (e) STAY.—Unless the Chief of the Forest Service determines that an emergency situation exists with respect to a decision of the Forest Service, implementation of the decision shall be stayed during the period beginning on the date of the decision—
>
> (1) for 45 days, if an appeal is not filed, or
>
> (2) for an additional 15 days after the date of the disposition of an appeal under this section, if the agency action is deemed final under subsection (d)(4).

Pub. L. No. 102-381, Tit. III § 332(a), 106 Stat. 1419 (1992), codified at 16 U.S.C. § 1612 note (e). The Forest Service defines "emergency situation" as

> A situation on National Forest System (NFS) lands for which immediate implementation of all or part of a decision is necessary for relief from hazards threatening human health and safety or natural resources on those NFS or adjacent lands; or that would result in substantial loss of economic value to the Federal Government if implementation of the decision were delayed.

36 C.F.R. 215.2.

In the Court's July Order, the Forest Service's implementation of the emergency stay provisions of the ARA were upheld in part and invalidated in part. The Court upheld as permissible the inclusion of "substantial loss of economic value" in the definition of "emergency situation."

The Court found impermissible the Forest Service's delegation of emergency declaration authority to subordinates of the Chief of the Forest Service and also invalidated a provision that required notice of an appeal disposition to be sent to the appellant within the first five days of the fifteen-day stay period because the provision was not a "logical outgrowth" of the proposed rule. Docket No. 77 at 15-19.

The Forest Service has legitimate concerns regarding community and forest health and safety. The emergency stay provision is designed to allow the Forest Service to address these concerns as they arise. Via the emergency stay provision, the Forest Service has the authority to go forward with projects that are necessary

to avoid irreparable harm from forest fires or other serious problems.

II. Injury to Plaintiffs

Plaintiffs identify multiple potential irreparable harms that would befall them if stay pending appeal were granted. Plaintiffs' concerns are twofold. The first harm that they would suffer is denial of the opportunity to participate in Forest Service projects through notice, comment, and appeal procedures. Second, concomitant to the first concern, Plaintiffs fear that denial of the opportunity to participate could result in irreparable injury to the environment.

Plaintiffs' concerns regarding ability to participate in the notice, comment, and appeal procedures are significant. While in some instances these concerns could be abated by the ability to sue the Forest Service over specific projects, this is small comfort given the deferential standards courts often employ when evaluating agency decisions, and the potential for irreparable harm to the environment before and during a suit. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). As the Supreme Court has observed, "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of a long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor . . . protect[ing] the environment." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987); *see also Idaho Sporting Congress, Inc.*, 222 F.3d at 569 (quoting *Amoco*). On balance, the Forest Service's concerns regarding irreparable injury, in light of the emergency

stay provision, are outweighed by Plaintiffs' concerns about the inability to participate in decision making processes, and consequent potential harm to the environment.

IT IS THEREFORE ORDERED:

The Forest Service's motion for a stay pending appeal at Docket No. 94 is DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Case No. CIV F-03-6386 JKS

EARTH ISLAND INSTITUTE, A CALIFORNIA NON-PROFIT ORGANIZATION; SEQUOIA FORESTKEEPER, A CALIFORNIA NON-PROFIT ORGANIZATION; HEARTWOOD, AN INDIANA NON-PROFIT CORPORATION; CENTER FOR BIOLOGICAL DIVERSITY, A NEW MEXICO NON-PROFIT CORPORATION, AND SIERRA CLUB, A CALIFORNIA NON-PROFIT CORPORATION, PLAINTIFFS

v.

NANCY RUTHENBECK, IN HER CAPACITY AS DISTRICT RANGER, HOT SPRINGS RANGER DISTRICT, SEQUOIA NATIONAL FOREST; UNITED STATES FOREST SERVICE, AN AGENCY OF THE U.S. DEPARTMENT OF AGRICULTURE; ANN VENEMAN, IN HER OFFICIAL CAPACITY AS SECRETARY OF AGRICULTURE; DALE BOSWORTH, IN HIS OFFICIAL CAPACITY AS CHIEF OF THE U.S. FOREST SERVICE, DEFENDANTS

[Filed: Sept. 16, 2005]

ORDER

Two motions are presently before the Court. The first is Defendants' motion to clarify and amend judg-

ment. Docket No. 79. The second is Plaintiffs' motion to hold the Forest Service in contempt. The motions will be addressed in turn.

DISCUSSION

Order and judgment were entered in this case on July 7, 2005, upholding in part and striking in part the Forest Service's regulations governing notice, comment and appeal of agency decisions. Docket Nos. 77 ("July Order"); 78. The parameters of the regulations and the reasons for upholding or striking them are set out at length in the July Order and do not bear repeating here. The current dispute concerns the reach of the July Order, both geographically and temporally.

I. Defendants' Motion to Clarify and Amend Judgment

Defendants urge the Court to clarify the July Order in two regards. First, they seek a geographic limitation of the scope of the July Order to the Eastern District of California. Second, Defendants move for clarification that the July Order applies prospectively only.

Defendants move under Federal Rule of Civil Procedure 60(b)(6). The rule permits relief from a final judgment or order for "any reason justifying relief." This provision is "used sparingly as an equitable remedy to prevent manifest injustice." *United States* v. *Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993). Under Federal Rule of Civil Procedure 59(e), a motion to alter or amend a judgment must be filed no later than ten days after entry of the judgment. Relief beyond the ten-day window is sometimes available under Rule 60(b)(6), but only where extraordinary circumstances prevented a litigant from seeking earlier relief. *Id.*

Here it appears that the Forest Service became aware of the divergence between its understanding of the operation of the July Order and Plaintiffs' understanding after receiving a letter from Plaintiffs dated July 22, 2005. Because the Forest Service was apparently unaware of the lingering issues regarding the functioning and application of the July Order until receiving the letter several days after the ten day deadline passed, the 60(b)(6) motion appears to be the appropriate mechanism for clarification or amendment. The substantive issues presented by the 60(b)(6) motion are therefore addressed below.

A. Geographic Scope

The gravamen of Defendants' argument for limiting the scope of the July Order to the Eastern District of California is that the Government has an interest in obtaining multiple judicial interpretations of the issues resolved by the July Order. They argue that because of this interest, the Forest Service should be allowed to continue to enforce the regulations invalidated by the July Order in other districts within the Ninth Circuit, and in other circuits.

Agencies are sometimes allowed to confine a ruling of one court to that circuit and proceed with their conflicting interpretation of the law elsewhere. A federal agency is not, however, necessarily entitled to limit a ruling to the deciding court's immediate jurisdiction. In *Califano v. Yamasaki*, the Supreme Court held that a class action brought in federal district court need not necessarily be geographically limited. 442 U.S. 682, 702 (1979). The central concern in such a case is that the relief granted is not "more burdensome than necessary." *Id.* This principle stems from the basic

notion that relief should be narrowly tailored to address the specific harm shown. "On the other hand, [relief] is not necessarily made over-broad by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—*if such breadth is necessary to give prevailing parties the relief to which they are entitled. Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987). Where nationwide relief is not fashioned, the courts are left to address the agency circuit by circuit, until the issue reaches the Supreme Court. *See Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 912 n.1 (3d Cir. 1981) (suggesting "that in most situations, a far better approach for an administrative agency would be to accept the first ruling of a court of appeals on a particular point or else seek reversal in the Supreme Court or a statutory change by Congress. To shop in a number of courts of appeals in hopes of securing favorable decisions is not only wasteful of overtaxed appellate resources but dissipates agency energies as well. This shopping practice should be subjected to searching and critical review.").

The Court is sensitive to the Forest Service's interest in fully developing the legal issues implicated by the notice, comment, and appeal regulations. The issues are both factually and legally complex. However, in order to adequately redress the harm suffered by Plaintiffs, the invalidation of the Forest Service regulations as outlined in the July Order must reach beyond the borders of the Eastern District of California. Although this action originally challenged the Burnt Ridge Project in California, the case evolved from challenging a specific project in a specific forest to challenging regulations, applicable nationwide, promulgated by the Forest Service. As the Court explained in the July

Order, Plaintiffs "suffered actual injury due to the Forest Service's regulations implementing the ARA." Docket No. 77 at 4-5. The appropriate remedy, therefore, is to prevent such injury from occurring again by the operation of the invalidated regulations, be it in the Eastern District of California, another district within the Ninth Circuit, or anywhere else in the nation. Inasmuch as Defendants' motion to clarify or amend seeks to geographically confine the July Order, the motion will be denied.

B. Temporal Scope

Defendants' argue that the July Order should only apply to projects beginning after the issuance of the July Order. Retrospective application, they assert, is inappropriate because the Forest Service reasonably relied on the invalidated regulations and because reexamining projects begun under the now invalidated regulations that are not closed would be overly burdensome. Plaintiffs respond that judicial orders normally apply retrospectively and that the Court did not indicate an intent to stray from this precept. They further argue that the Forest Service has not demonstrated compelling circumstances justifying non-retroactive application.

Because it is instructive, the law of retroactivity is discussed below. In the interest of clarity, however, it is important to note as an initial matter that what is at issue here is the temporal scope of the July Order. Retroactivity as the term is generally used has dual functions of remedy and choice of law. When an appellate court issues a decision, the decision generally governs pending actions. This Court, of course, is not an appellate court, and its decisions are not accorded retroactive appli-

cation in the sense of choice of law. The Court may, however, fashion a remedy that applies retroactively to the parties before it. The question before the Court is whether such a remedy is appropriate in this case.

The law governing when a judicial decision applies only prospectively is not entirely clear. In *Chevron Oil Co. v. Huson* the Supreme Court announced a three-part framework for determining when exclusively prospective application is appropriate, and while the case has not been explicitly overruled, the framework has been called into question. *Compare* 404 U.S. 97, 106-107 (1971) (establishing three-part framework), *with Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97-98 (1993). *See also Miller v. County of Santa Cruz*, 39 F.3d 1030, 1035 (9th Cir. 1994) (noting that the *Harper* decision abandoned the *Chevron Oil* approach to determining prospective application in civil cases). The *Chevron Oil* framework is as follows: First, a decision applied non-retroactively should establish a new principle of law, either by overruling past precedent or by deciding an issue of first impression, the resolution of which was not clearly foreshadowed. Second, courts consider the purpose and effect of the rule and whether retroactive application would advance or retard the decision to be applied. Finally, courts weigh any inequitable results that might follow from retroactive application of the decision. *Chevron Oil Co.*, 404 U.S. at 106-107. The Court significantly reworked the final prong of the *Chevron Oil* analysis in *Harper*, stating that it is impermissible in both civil and criminal cases for "'the substantive law [to] shift and spring' according to 'the particular equities of [individual parties'] claims' of actual reliance on an old rule and of harm from a retroactive application of the new rule." *Harper*, 509 U.S. at

97 (citing *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 543 (1991) (opinion of Souter, J.)) (holding, "[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule"). Later, in *Reynoldsville Casket Co. v. Hyde*, the Supreme Court clarified that after *Harper*, *Chevron Oil* does not permit non-retroactive application based upon a party's reliance interests. 514 U.S. 749, 752-54 (1995). However, in *Ryder v. United States*, the Court noted "whatever the continuing validity of Chevron Oil after *Harper* and *Hyde,* there is not the sort of grave disruption or inequity involved in awarding retrospective relief to this petitioner." 515 U.S. 177, 184-85 (1995) (noting that only seven to ten cases were open on direct review that would be affected by retroactive application of the ruling). Presumably, therefore, while subsequent cases have chipped away at the final prong of *Chevron Oil*—weighing inequitable results flowing from retroactive application—some weighing of inequities remains a part of the analysis.

Here there is no doubt that the Forest Service relied on the regulations invalidated by the July Order. After *Harper* and *Hyde* such reliance is simply insufficient to preclude the retroactive application of judicial decisions. What is not insufficient, however, is the "grave disruption or inequity" that would follow from retroactive application of the July Order as part of the remedy designed by the Court. The invalidated regulations were promulgated over two years ago. In January of 2005, the Forest Service created a national database to

track projects that are likely to be documented in a decision memo, decision notice, or record of decision. Docket No. 79 (Decl. of Manning) at ¶ 3. According to the database, between January 1, 2005, and June 30, 2005, 1,090 decision memos authorizing categorically excluded projects were signed. *Id.* at ¶ 4. The database does not track how many of these authorizations are still pending. *Id.* From January 1, 2005, to July 1, 2005, the database shows that 3,377 proposed decisions were expected to be documented in decision memos and categorically excluded from documentation in an environmental impact statement or environmental assessment. *Id.* at ¶ 6. Simply culling from the tremendous volume of decisions made under the invalidated regulations those that are not final from those that are final would be a daunting task. Furthermore, because the July Order invalidated and severed regulations governing procedure, retrospective application would require not only that the old regulations not be employed, but also that regulations governing procedure for public involvement be enacted in the old regulations' stead before moving forward with pending projects. In short, a retroactive remedy would seem to plunge the Forest Service headlong into a crippling morass of confusion. The July Order, therefore, will apply to Forest Service projects and decisions post-dating the July 7, 2005, docketing of the July Order.

II. Plaintiffs' Motion for Contempt

Plaintiffs' argue that the Forest Service should be held in contempt for violating the July Order. They aver that the Forest Service directly violated the July Order by continuing to apply regulations set aside by the July Order. Further, they assert that even if Defendants' motion to amend and clarify is well founded, the Forest Service should still be held in contempt for applying invalidated regulations during the pendency of the motion.

On balance, it seems that contempt is not warranted at this time. To be clear, the Court fully intends to enforce its orders. Given the complexity of the issues involved in the July Order, as well as the issues that remained after the issuance of the July Order, however, it seems inappropriate to hold the Forest Service in contempt at this time.

IT IS THEREFORE ORDERED:

Defendants' motion to clarify and amend judgment at **Docket No. 79** is **GRANTED IN PART and DENIED IN PART**. The conclusions of the July Order will not be confined to the Eastern District of California or the Ninth Circuit. The July Order will be applied prospectively, as of July 7, 2005. Plaintiffs' motion for contempt at **Docket No. 81** is **DENIED.**

Dated at Anchorage, Alaska, this 16 day of September 2005.

/s/ JAMES K. SINGLETON
JAMES K. SINGLETON, JR.
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CIV F-03-6386 JKS

EARTH ISLAND INSTITUTE, A CALIFORNIA NON-PROFIT CORPORATION; SEQUOIA FORESTKEEPER, A CALIFORNIA NON-PROFIT CORPORATION; HEARTWOOD, AN INDIANA NON-PROFIT CORPORATION; CENTER FOR BIOLOGICAL DIVERSITY, A NEW MEXICO NON-PROFIT CORPORATION, AND SIERRA CLUB, A CALIFORNIA NON-PROFIT CORPORATION, PLAINTIFFS

v.

DEL PENGILLY, IN HIS CAPACITY AS DISTRICT RANGER, HOT SPRINGS RANGER DISTRICT, SEQUOIA NATIONAL FOREST; UNITED STATES FOREST SERVICE, AN AGENCY OF THE U.S. DEPARTMENT OF AGRICULTURE; ANN VENEMAN, IN HER OFFICIAL CAPACITY AS SECRETARY OF AGRICULTURE; DALE BOSWORTH, IN HIS OFFICIAL CAPACITY AS CHIEF OF THE U.S. FOREST SERVICE, DEFENDANTS

July 2, 2005

ORDER

SINGLETON, Senior District Judge.

Plaintiffs Earth Island Institute, *et al.,* present a facial challenge to the 2003 regulations promulgated by the United States Forest Service implementing the Forest Service Decision Making and Appeals Reform Act ("ARA"), Pub. L. No. 102-381, Tit. III § 332(a), 106 Stat. 1419 (1992), codified at 16 U.S.C. § 1612 note.[*] Plaintiffs argue that the regulations violate the ARA by improperly exempting certain Forest Service decisions from appeal, by exempting certain Forest Service decisions that are subject to appeal from the automatic stay provision of the ARA, and by limiting the public comment and appeals process required by the ARA. Docket Nos. 70 (Pls.' opening br.); 72 (Pls.' reply br.). The Forest Service disputes each of these contentions and argues that Plaintiffs lack standing and that this case is not ripe for decision. Docket No. 71 (Defs.' opp'n). The Court has jurisdiction. 28 U.S.C. § 1331.

Plaintiffs initially brought this suit to challenge the Burnt Ridge Project timber sale offered by the Forest Service and to challenge the Forest Service's regulations implementing the ARA. *See* Docket No. 75 (Pretrial order). The Court granted a preliminary injunction preventing the project and several months later approved a settlement regarding the project. *Id.* Thus, the Burnt Ridge timber sale is not at issue in this case. Only the challenges to the administrative appeal rules remain.

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[*] For the sake of brevity and clarity, further citations to the ARA will include only the specific number within the ARA, rather than the public law number and code section.

DISCUSSION

In 1992 the Forest Service sought to overhaul its review and appeal procedures. The Forest Service proposed replacing the administrative appeal process for project decisions with a predecision notice and comment period. In response, Congress passed the ARA. The ARA provides:

> In accordance with this section, the Secretary of Agriculture, acting through the Chief of the Forest Service, shall establish a notice and comment process for proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans . . . and shall modify the procedure for appeals of decisions concerning such projects.

Id. § (a). The ARA goes on to provide specific requirements for the notice, comment, and appeal process to be developed by the Forest Service. *Id.* § (b)-(e). Plaintiffs challenge the Forest Service's implementation of these specific requirements. However, before confronting the Forest Service regulations, several procedural matters must be addressed. Specifically, the Forest Service questions whether Plaintiffs have standing and whether the issues are ripe for decision. The Court will address these issues first to determine whether inquiry into the merits of the case is appropriate.

I. Standing

The Forest Service argues that Plaintiffs' claims should be dismissed because Plaintiffs lack standing. To satisfy Article III standing requirements a plaintiff must show that:

> (1) it has suffered "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). Pursuant to the Administrative Procedures Act ("APA"), 5 U.S.C. § 551, *et seq.*, plaintiffs seeking to establish standing must also demonstrate that the alleged injury is within the "zone of interests" sought to be protected by the statute allegedly violated. *Friends of the Earth v. United States Navy*, 841 F.2d 927, 932 (9th Cir. 1988). The zone of interests test disallows judicial review only where "the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* (quoting *Clarke* v. *Sec. Indus. Ass'n*, 479 U.S. 388, 399, 107 S. Ct. 750, 93 L. Ed. 2d 757 (1987)). "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Laidlaw Envtl. Servs.*, 528 U.S. at 181, 120 S. Ct. 693 (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977)).

In environmental cases, the relevant inquiry is whether a plaintiff has suffered injury, not whether the environment has been injured in fact. *Id.* A plaintiff does not demonstrate injury by alleging that "one of [the organization's] members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990). Statements that a plaintiff would use an area if not for the opposed action are not the equivalent of "speculative 'some day intentions' to visit endangered species halfway around the world" that the Supreme Court has held insufficient to establish injury in fact. *Laidlaw Envtl. Servs.*, 528 U.S. at 184, 120 S. Ct. 693 (quoting Defenders of *Wildlife*, 504 U.S. at 564, 112 S. Ct. 2130). Where a plaintiff or group of plaintiffs submits affidavits concerning direct effects to the affiant's "recreational, aesthetic, and economic interests," standing is appropriate. *Id.*

The Forest Service asserts that Plaintiffs lack standing because the member on whom standing is based, Jim Bensman of the Plaintiff organization Heartwood, has not made a showing sufficient for standing. Docket No. 71 at 10-11. It argues that Bensman has not shown injury in fact because his affidavit does not state with sufficient particularity his interest in national forests located in California. Further, it argues that any injury to Bensman's use and enjoyment of national forests by development is not "fairly traceable to the challenged action" of the Forest Service. *See Laidlaw Envtl. Servs*, 528 U.S. at 180, 120 S. Ct. 693.

In his declaration, Bensman states that he is a regular visitor to many of the country's national forests, including several located in California. Docket No. 70, Ex. A at ¶¶ 4-9. In addition to using and enjoying national forests, Bensman has "commented on [approximately] a thousand Forest Service projects." *Id.* at ¶ 13. Over the years he has also appealed decisions of the Forest Service and has, at times, been successful. *Id.* at ¶ 12. Since the promulgation of the new regulations, Bensman affies that he has not been able to appeal projects that he and Heartwood otherwise would have appealed. *Id.* at ¶ 14. Further, in August 2003 Bensman and Heartwood submitted comments on a Forest Service proposal. Not knowing whether his comments constituted "substantive comments" under the new regulations, Bensman submitted an addendum to his earlier comments identifying himself as "an interested and affected party for this project." *Id.* at ¶ 18. Later, Bensman and Heartwood filed an appeal of the project. The appeal was dismissed because, according to the Regional Forester, Bensman and Heartwood did not have "standing under the 2003 appeal regulations," and the "comments received during the Notice and Comment period [did] not meet the definition of substantive comments." *Id.* at ¶ 21.

Plaintiff Heartwood has established sufficient injury that is fairly traceable to the actions of the Forest Service in implementing the ARA through the affidavit of Bensman. Bensman has gone beyond speculative or conjectural injury and has demonstrated that he and Heartwood have suffered actual injury due to the Forest Service's regulations implementing the ARA. Standing in this case is an analytic step away from use and enjoyment of national forests. Any harm to Plaintiffs' use

and enjoyment comes from harm to the environment that in turn comes from being unable to effectively challenge Forest Service projects in national forests. The Forest Service's contention that Bensman's affidavit is not concrete and particularized because it does not relate to a specific project in a California national forest is inapposite. This action challenges the regulations adopted by the Forest Service in response to the ARA—not a specific project in a specific national forest—and reference to a specific forest is not needed to ground the contention for purposes of showing injury in fact. That Bensman and his organization have been precluded from appealing Forest Service projects that they would have appealed under the old regulations and that the projects have therefore gone forward and impaired Plaintiffs' use and enjoyment is fairly traceable sufficient injury to clear the standing hurdle. Cf. *City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975) ("The procedural injury implicit in agency failure to prepare an EIS the creation of a risk that serious environmental impacts will be overlooked is itself a sufficient 'injury in fact,' provided this injury is alleged by a plaintiff having a sufficient geographical nexus to the site of the challenged project that he might be expected to suffer whatever environmental consequences the project may have."). A favorable outcome in this case would redress Bensman's injury in that he would have a greater likelihood of stopping Forest Service projects that would impair his use and enjoyment of national forests through access to the administrative appeal process.

That the alleged injury is within the "zone of interests" sought to be protected by the ARA is also clear. *See United States Navy*, 841 F.2d at 932. Congress directed the Forest Service to give the "public adequate notice

and an opportunity to comment upon the formulation of standards, criteria, and guidelines applicable to Forest Service programs." 16 U.S.C. § 1612(a). The language of the statute demonstrates that Congress intended that the Forest Service establish procedures facilitating public involvement in Forest Service programs. The injuries alleged by the Plaintiffs—that they have been precluded from meaningful involvement in Forest Service project proposals—fall squarely within the ARA's zone of interest. Through the Heartwood organization member Bensman, Plaintiffs have standing under Article III and the APA to maintain this action.

II. Ripeness

The Forest Service argues that the Court should decline to adjudicate Plaintiffs' claims because the claims are not ripe for decision. Docket No. 71 at 8-9. Under the APA "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. "It is the imposition of an obligation or the fixing of a legal relationship that is the indicium of finality of the administrative process." *Getty Oil Co. v. Andrus*, 607 F.2d 253, 256 (9th Cir. 1979); *see also Mt. Adams Veneer* Co. *v. United States*, 896 F.2d 339, 343 (9th Cir. 1989) (outlining factors to consider in determining finality).

The finality requirement is designed to protect agencies from piecemeal appeals and to ensure that judicial review does not extend to hypothetical disputes. *See Nat'l Wildlife Fed'n v. Goldschmidt*, 677 F.2d 259, 263 (2d Cir. 1982). The finality requirement does not, however, preclude pre-enforcement review of agency regulations. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-

52, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977).

Here, there can be little doubt that the eight regulations challenged by Plaintiffs are "final" actions by the Forest Service for purposes of the APA. The regulations are the Forest Service's definitive position on how to best implement the ARA and have been enforced on numerous occasions. Further, the impact of the regulations on Plaintiffs are "sufficiently direct and immediate as to render the issue[s] appropriate for judicial review at this stage." *Abbott Labs.*, 387 U.S. at 152, 87 S. Ct. 1507. "There is no reason why the Court must wait until a[n] [organization] member loses his right to appeal before considering the validity of these regulations." *Nat'l Treasury Employees Union v. Cornelius*, 617 F. Supp. 365, 367 (D.D.C. 1985) (finding ripe for decision a challenge to the Office of Personnel Management's rules on appeal procedures).

The purpose of the finality requirement would not be served by disallowing a facial challenge in this context. Were the Court to rule that these regulations are not ripe for decision because they are being facially challenged, Plaintiffs could be faced with bringing multiple lawsuits in multiple jurisdictions in order to challenge the regulations as they are applied to specific projects-and the Forest Service faced with defending against them. This facial challenge promotes judicial economy and is sufficiently particular to avoid judicial foray into the hypothetical. Plaintiffs' challenge to the eight Forest Service regulations implementing the ARA is ripe for decision. The Court will therefore address the

merits of Plaintiffs' contentions regarding the challenged Forest Service regulations.

III. Standard of Review

Before reaching the merits, however, the Court must determine the appropriate level of deference to accord the Forest Service's determinations. The Supreme Court has instructed courts reviewing an agency's construction of a statute, such as the ARA, to apply a two-prong test. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Under *Chevron* the reviewing court must first examine the statute itself to determine whether Congress has spoken directly to the precise question. *Id.* at 842, 104 S. Ct. 2778. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43, 104 S. Ct. 2778. When, however, an agency's interpretation of a statute is in conflict with the plain language of the statute, reviewing courts should not defer to the agency's interpretation. *Downey v. Crabtree*, 100 F.3d 662, 666 (9th Cir. 1996) (quoting *Nat'l R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 417, 112 S. Ct. 1394, 118 L. Ed. 2d 52 (1992)).

Second, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S. Ct. 2778. "In determining whether an agency's construction is permissible, the court considers whether Congress has explicitly instructed the agency to flesh out specific provisions of the general legislation, or has impliedly left to the agency the task of developing stan-

dards to carry out the general policy of the statute." *Tovar v. United States Postal Serv.*, 3 F.3d 1271, 1276 (9th Cir. 1993).

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

Chevron, 467 U.S. at 843-44, 104 S. Ct. 2778; *see also Ass'n of Pub. Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1169 (9th Cir. 1997) ("When relevant statutes are silent on the salient question, we assume that Congress has implicitly left a void for an agency to fill. We must therefore defer to the agency's construction of its governing statutes, unless that construction is unreasonable.").

Plaintiffs argue that with the exception of two sections in the ARA, the language is plain and that therefore the Forest Service is not due any deference in its construction of the statute. As to the two sections that Plaintiffs concede are ambiguous, they argue that the Forest Service's decisions should not be viewed deferentially because: (1) agency interpretations of statutory provisions providing for review of agency decisions should not receive deference; and (2) the challenged rules are inconsistent with the agency's previous rules and therefore do not deserve deference. The Forest Service counters that Congress enacted the ARA with the intent that the Forest Service "fill in the gaps" and that under these circumstances the agency is due full Chevron deference.

Congress directed the Forest Service to develop regulations "establish[ing] procedures, including public hearings where appropriate, to give the Federal, State, and local governments and the public adequate notice and an opportunity to comment upon the formulation of standards, criteria, and guidelines applicable to Forest Service programs." 16 U.S.C. § 1612(a). The delegation of rule-making authority is shown by the Forest Service's "power to engage in adjudication or notice-and-comment rulemaking." *See United States v. Mead Corp.*, 533 U.S. 218, 227, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001). While the ARA provides some detail regarding the content of the regulations the Forest Service was to develop, it does not flesh out all of the particulars.

In such a case, the agency's promulgation of the statute through regulations is entitled to deference, and the reviewing court must determine if the agency's construction of the statute is "permissible." *See Chevron*, 467 U.S. at 843, 104 S. Ct. 2778. Thus the Forest Service's regulations must be upheld "unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844, 104 S. Ct. 2778.

IV. The Challenged Regulations

Plaintiffs challenge the validity of eight Forest Service regulations. They argue that: (1) the regulations categorically excluding certain decisions from National Environmental Policy Act ("NEPA") analysis are unlawfully exempted from appeal; (2) the regulation exempting decisions signed by the Secretary and Under Secretary of Agriculture from comment and appeal violates the APA; (3) the ARA does not allow the Forest Service to limit appeal standing to those who have filed

"substantive comments;" (4) the "most effective timing" provision for public comment violates the ARA; (5) the ARA does not permit the Forest Service to intentionally refuse to decide an appeal; (6) "emergency situations" may not be defined to include pure economic losses to the government; (7) the ARA does not permit regional foresters to make emergency stay exemption determinations; and (8) the regulations improperly shorten the stay period by five days. The claims are addressed in that order.

A. Appeal Exclusion for Decisions Exempt From Preparation of an EA or EIS Under NEPA

Plaintiffs argue that the Forest Service regulations found at 36 C.F.R. §§ 215.4(a) and 215.12(f) violate the ARA by exempting certain projects from appeal. The sections exempt projects for which NEPA does not require the preparation of an environmental assessment ("EA") or environmental impact statement ("EIS"). The Forest Service counters that Congress delegated authority to the Forest Service to determine which projects should and should not be subject to the notice, comment, and appeal process. The Forest Service has reasonably determined, so the argument goes, that projects that are insignificant enough to not require an EA or EIS under NEPA should not be subject to the notice, comment, and appeal process.

The Forest Service is required to subject "projects and activities implementing land resource management plans" to administrative appeal. 16 U.S.C. § 1612(a). Before the ARA was passed the Forest Service made the following subject to appeal:

> [P]rojects and activities for which decision documents are prepared, such as timber sales, road and facility construction, range management and improvements, wildlife and fisheries habitat improvement measures, forest pest management activities, removal of certain minerals or mineral materials, land exchanges and acquisitions, and establishment or expansion of winter sports or other special recreation sites.

36 C.F.R. § 217.3(b) (1992); 54 Fed. Reg. 3342, 3358 (Jan. 23, 1989). Pursuant to this regulation minor actions were approved without being subject to appeal. *See* 36 C.F.R. § 217.3(a)(1) (1992). Certain of these exemptions aligned with projects that would be exempt from an EIS or EA. *See* 57 Fed. Reg. 43180, 43208 (Sept. 18, 1992). However, certain projects that would not require an EIS or EA under NEPA were explicitly included as projects that would require a decision document and therefore be subject to the appeal process. 54 Fed. Reg. at 3358. Included among these were certain timber harvests. *Id.* Subsequently, the Forest Service proposed new rules that would exclude from the notice, comment, and appeal process "any proposed action not subject to environmental analysis and documentation in an Environmental Assessment[.]" 57 Fed. Reg. 10444, 10446 (March 26, 1992). In response to this and other Forest Service proposals, Congress enacted the ARA.

Under the *Chevron* analysis, the question presented is whether the Forest Service's construction of the ARA to permit the categorical exclusion of certain projects is a permissible reading of the statute. *See Chevron*, 467 U.S. at 843, 104 S. Ct. 2778. The ARA certainly permits exclusion of environmentally insignificant projects from the appeals process. For example, actions such as

maintaining Forest Service buildings or mowing ranger station lawns need not be subject to the notice, comment, and appeal procedures. 57 Fed. Reg. at 43208. Actions that concern "land and resource management plans," however, "shall" be subject to notice, comment and appeal procedures. ARA § (a). To read this plain language as allowing exclusion of timber harvests is to "read[ ] into the statute a drastic limitation that nowhere appears in the words Congress chose . . . ." *See Hercules, Inc. v. EPA*, 938 F.2d 276, 280 (D.C. Cir. 1991) (addressing the EPA's implementation of notice and covenant requirements imposed by CERCLA). By the Forest Service's own definition, "land and resource management plan[s]" are expected to contain "[b]road, programmatic direction for a forest, grassland, or prairie[ ]" including "identification of lands at the broad-scale . . . suitable for timber harvest." 67 Fed. Reg. 72,770, 72,773 (Dec. 6, 2002). Furthermore, the ARA was drafted in direct response to the Forest Service's 1992 proposal to eliminate such appeals. While the Forest Service is clearly not required to make every minor project it undertakes subject to the appeals process, it is required to delineate between major and minor projects in a way that gives permissible effect to the language of the ARA. The Forest Service rules codified at 36 C.F.R. §§ 215.4(a) and 215.12(f) are "manifestly contrary" to the ARA. *See Chevron*, 467 U.S. at 843, 104 S. Ct. 2778.

B. Exemption From Appeal of Decisions Signed by the Secretary or Under Secretary of Agriculture

The Forest Service appeals rules provide that project decisions that are signed directly by the Secretary or Undersecretary of Agriculture constitute the final ad-

ministrative determination by the Forest Service and are therefore not subject to the notice, comment, and appeal process. 36 C.F.R. § 215.20. The Forest Service argues that this is not contraindicated by the ARA because the ARA requires an appeals process for "proposed actions of the Forest Service," not for actions of the Secretary of Agriculture. *See* ARA § (a).

In *Wilderness Society* v. *Rey*, 180 F. Supp. 2d 1141 (D. Mont. 2002), a federal court squarely addressed this argument. *Id.* at 1147-48. The Rey court labeled the argument a "strained premise" based on the proposition that the Secretary and Undersecretary are not "employee[s] of the Forest Service." *Id.* at 1147. The court continued,

> [b]y its plain language, the [ARA] requires the Secretary to implement an appeal process for decisions of the Forest Service on proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans. Title 7 C.F.R. 2.12 allows the Secretary to exercise authority she has previously delegated, but it does not eliminate the statutory right to an appeal of a Forest Service decision codified in the [ARA]. The Secretary is required by statute to have an administrative appeal process; the regulation does not alleviate her statutory duty. Simply having the Undersecretary or Secretary sign a record of decision of the Forest Service does not diminish the fact that the record of decision is a decision of the Forest Service. To hold otherwise defies common sense.

Id. at 1148.

The Forest Service, like most government agencies, faces constant pressure to pare down administrative costs. The Court is sensitive to the challenges presented by such an endeavor. The Forest Service cannot, however, attempt to streamline its appeals process by creating an escape hatch that thwarts congressional intent. As the *Rey* court stated, "[t]he notion that a signature by the Undersecretary transforms the action from Forest Service business to the business of some other agency is mystical legal prestidigitation. The decision, not the signatory, is the operative fact for purposes of the [ARA]." *Id.* The Forest Service's reading of Congress's directive to provide an appeal process for decisions of the Forest Service as not including decisions signed directly by the Secretary or Undersecretary of Agriculture is not a permissible interpretation. *See Chevron*, 467 U.S. at 843, 104 S. Ct. 2778.

C. Persons who may File an Appeal

The ARA preserves the right of appeal to "a person who was involved in the public comment process under subsection (b) through submission of written or oral comments or by otherwise notifying the Forest Service of their interest in the proposed action." ARA § (c). The Forest Service implemented this provision of the ARA with the following regulation: "Individuals and organizations wishing to be eligible to appeal must provide . . . [s]pecific substantive comments . . . on the proposed action, along with supporting reasons that the Responsible Official should consider in reaching a decision." 36 C.F.R. § 215.6(a)(3). Plaintiffs argue that this language violates the ARA in two ways. First, they contend that the Forest Service impermissibly added

the requirement that comments be "substantive," rather than merely sufficient to have "notif[ied] the Forest Service of their interest in the proposed action." Second, Plaintiffs argue that the way the Forest Service has formulated the relevant time period for submission of "substantive" comments may run before any environmental assessment is available to the public.

Thus, Plaintiffs argue, a person may not become aware that they are an interested party until after the period for submission of substantive comments has passed. The Court will first address the time period for submission of comments before turning to the "substantive requirement."

1. Timing of Legal Notice of Comment Period

General notice of proposed rule making by agencies must include: "(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms of substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b). The APA does not mandate a minimum comment period nor does it specify when notice is optimally given. *See Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1484 (9th Cir. 1992).

The Forest Service regulations implementing the ARA provide that the Responsible Official shall "[d]etermine the most effective timing for publishing the legal notice of the proposed action and opportunity to comment." 36 C.F.R. § 215.5(a)(2). It is not feasible for the Forest Service to publish legal notice indefinitely or even for protracted periods of time. The timing provision is not an attempt to end-run the notice and comment require-

ments of the ARA and is a permissible reading of Congress's directive.

2. The "Substantive" Requirement

The Supreme Court has long recognized that agencies may impose a substantive threshold on those seeking to participate in proposed agency actions. *See Vt. Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519, 553-54, 98 S. Ct. 1197, 55 L. Ed. 2d 460 (1978). Administrative proceedings are not designed to be "a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that 'ought to be' considered." *Id.* Agencies have discretion to screen out "unjustified obstructionism" by requiring expressions of interest to be "sufficient to require reasonable minds to inquire further." *Id.* at 554, 98 S. Ct. 1197.

The Forest Service defines "substantive comments" as "[c]omments that are within the scope of the proposed action, are specific to the proposed action, have a direct relationship to the proposed action and include supporting reasons for the Responsible Official to consider." 36 C.F.R. § 215.2. The Forest Service has explained that the "substantive" requirement is intended to both streamline the notice and comment process and focus the attention of the Forest Service on helpful, pertinent comments

> Experience has shown that when comments are received that are not within the scope of the proposed action or are not specific to the proposed action, or do not include supporting reasons for concerns, they are not useful for consideration in project planning. The intent in requiring substantive com-

> ments is to obtain meaningful and useful information from individuals about their concerns and issues, and use it to enhance project analysis and project planning.

68 Fed. Reg. 33,582, 33,587 (June 4, 2003). The Forest Service's attempt to avoid wasting resources on "cryptic and obscure" matters and to focus instead on "meaningful and useful" comments is within the Agency's discretion and does not violate the precepts of the ARA. *See Vt. Yankee Nuclear Power*, 435 U.S. at 553-54, 98 S. Ct. 1197; 68 Fed. Reg. at 33,587. As this is a facial challenge, the exact parameters of what "substantive" means are not clear. Whether the Forest Service has imposed an unduly heavy burden on would be participants with the "substantive" requirement will have to be fleshed out in as-applied challenges. In the facial challenge context, the "substantive" requirement is a permissible reading of the ARA.

D. Affirmance Without Decision

Plaintiffs argue that the Forest Service has stripped the right of appeal out of the ARA by enacting 36 C.F.R. § 215.18(b). Docket No. 70 at 17. Under that provision, the Appeal Deciding Officer will either:

> (1) Issue a written appeal decision within 45 days following the end of the appeal-filing period, which affirms or reverses the Responsible Official's decision, either in whole or in part, and which may include instructions for further action . . . The Appeal Deciding Officer shall send a copy of the appeal decision to the appellant(s), the Appeal Reviewing Officer, and the Responsible Official within 5 days; or

> (2) Not issue an appeal decision and so notify the appellant(s) in writing that an appeal decision will not be issued and that the Responsible Official's decision constitutes the final agency action of the Department of Agriculture (§ 215.15(e)(2)). Notification shall be sent no sooner than 46 days nor later than 50 days following the end of the appeal—filing period.

36 C.F.R. § 215.18(b). The regulation further states that the "appeal disposition constitutes the final administrative determination of the Department of Agriculture." 36 C.F.R. § 215.18(c).

The ARA provides some detail on how appeals are to be dispatched. If an appeal is not disposed of through meetings with the appellant, an appeals review officer "review[s] the appeal and recommend[s] in writing, to the official responsible for deciding the appeal, the appropriate disposition of the appeal." ARA § (d)(2). The official responsible for deciding the appeal then makes the decision. *Id.* However, if the decision is not made within forty-five days, the ARA requires that "the decision on which the appeal is based . . . be deemed to be a final agency action for the purposes of [the APA]." *Id.* § (d)(4). Final agency action is, of course, judicially reviewable. *See* 5 U.S.C. § 704.

Plaintiffs argue that "not issu[ing] an appeal decision" essentially eviscerates the ARA by eliminating administrative appeals. Docket No. 70 at 17. The Court is not convinced. In this instance the Forest Service's implementing regulation is little more than a paraphrase of the relevant provisions of the ARA. Both provide that when an appeal decision is not timely it constitutes a summary affirmance of the decision made by the responsible official.

Compare ARA § (d)(4) ("[T]he decision on which the appeal is based shall be deemed to be a final agency action . . . "), with 36 C.F.R. § 215.18(b)(2) ("[T]he Responsible Official's decision constitutes the final agency action of the Department of Agriculture."). When such affirmance occurs, appellants may pursue the matter in federal court. The implementing regulation is virtually identical to the language of the ARA and is therefore a "permissible" reading of the statute. *See Chevron*, 467 U.S. at 843, 104 S. Ct. 2778.

E. Emergency Stay Provisions

Plaintiffs' next set of arguments relate to the Forest Service regulations implementing the automatic stay provision of the ARA. *See* Docket No. 70 at 18-22. The provision states:

> (e) STAY.—Unless the Chief of the Forest Service determines that an emergency situation exists with respect to a decision of the Forest Service, implementation of the decision shall be stayed during the period beginning on the date of the decision—
>
> > (1) for 45 days, if an appeal is not filed, or
> >
> > (2) for an additional 15 days after the date of the disposition of an appeal under this section, if the agency action is deemed final under subsection (d)(4).

ARA § (e). Plaintiffs argue that the Forest Service has impermissibly restricted this provision by: (1) defining "emergency situation" to include situations involving potential economic loss; (2) allowing regional foresters, rather than exclusively the Chief of the Forest Service,

to declare an emergency situation exemption from the stay provision; and (3) shortening the stay period by five days. *See* Docket No. 70 at 18-22. The arguments are addressed in order.

1. Emergency Situations and Economic Loss

The Forest Service defines "emergency situation" as

> A situation on National Forest System (NFS) lands for which immediate implementation of all or part of a decision is necessary for relief from hazards threatening human health and safety or natural resources on those NFS or adjacent lands; or that would result in substantial loss of economic value to the Federal Government if implementation of the decision were delayed.

36 C.F.R. 215.2. Plaintiffs argue that the inclusion of "substantial loss of economic value" in the definition of "emergency situation" is an attempt by the Forest Service to avoid the appeal process when it comes to salvage timber sales. The Forest Service responds that because "emergency situation" is not defined in the ARA, the Forest Service's definition must be upheld under *Chevron* because it is not "manifestly contrary to the statute" and that the provision was designed to avoid having to remove fire-damaged timber at taxpayer expense. *See* Docket No. 71 at 26-29.

The definition of an "emergency" is "an unforeseen combination of circumstances or the resulting state that calls for immediate action," or "an urgent need for assistance or relief." Merriam-Webster Online *available at* http://www.m-w.com. The position of the Forest Service that "substantial loss of economic value" "calls for

immediate action" is not an impermissible reading of the ARA. *See* Chevron, 467 U.S. at 843, 104 S. Ct. 2778.

2. Who May Declare an Emergency Situation

Plaintiffs' next argument relating to the emergency stay provisions of the ARA is that the Forest Service permits subordinates of the Chief of the Forest Service to declare emergency situations in contravention of the ARA. The Forest Service regulation reads in relevant part: "The Chief and the Associate Chief of the Forest Service are authorized to make the determination that an emergency situation (§ 215.2) exists, and they may delegate this authority only to the Deputy Chief for National Forest System and to the Regional Foresters." 36 C.F.R. § 215.10(a). This regulation expands the ARA's grant of authority from permitting "the Chief of the Forest Service [to] determine[ ] that an emergency situation exists." *See* ARA § (e).

Delegation of duties is often permitted in statutes. Where Congress does not specifically permit delegation or subdelegation, the purpose of the statute must be examined to determine if it is proper. *Assiniboine & Sioux Tribes v. Bd. of Oil & Gas Conservation*, 792 F.2d 782, 795 (9th Cir. 1986); *see also Inland Empire Public Lands Council v. Glickman*, 88 F.3d 697, 702 (9th Cir. 1996) (holding that the Secretary did not have to personally authorize every salvage timber sale pursuant to 16 U.S.C. § 1611 where the statute did not explicitly prohibit subdelegation). However, where a statute specifies delegation in one section but does not specify it in another, delegation authority cannot be imputed to the entire statute. *See Cudahy Packing Co. v. Holland*, 315 U.S. 357, 364, 62 S. Ct. 651, 86 L. Ed. 895 (1942) ("[I]t seems to us fairly inferable that the grant of authority

to delegate the power of inspection and the omission of authority to delegate the subpoena power shows a legislative intention to withhold the latter."); *see also United States v. Mango*, 199 F.3d 85, 91 (2d Cir. 1999) ("[S]pecific authority to subdelegate one power within a given piece of legislation may indicate that Congress did not intend to allow subdelegation of other powers . . . ").

In certain parts of the ARA Congress specifically permitted delegation. For example, an attempt at informal disposition of appeal is to be made by "a designated employee of the Forest Service," ARA § (d)(1)(A), and formal review of appeals is to be conducted by a "appeals review officer designated by the Chief of the Forest Service," *id.* § (d)(2). Furthermore, unlike *Inland Empire Public Lands Council*, the purpose of the ARA is not merely to "expedite [timber] sales." *See* 88 F.3d at 702. On the contrary, the ARA serves to guide the Forest Service in establishing procedures that facilitate public involvement in the "formulation of standards, criteria, and guidelines applicable to Forest Service programs." 16 U.S.C. § 1612(a). Given the specific authority to delegate certain duties in the ARA, the conspicuous absence of delegation elsewhere in the statute, and the purpose of the ARA as a whole, the Forest Service's regulation allowing delegation of the determination that an emergency situation exists is impermissible. *See Chevron*, 467 U.S. at 843, 104 S. Ct. 2778.

3. Shortening the Stay Period

Plaintiffs next argue that the Forest Service's rules implementing the emergency stay provisions of the ARA impermissibly shorten the fifteen-day stay period by five days. Docket No. 70 at 22. The ARA requires that

when an appeal is filed with respect to a decision of the Forest Service, the implementation of the decision will be stayed "for an additional 15 days after the date of the disposition of an appeal[.]" ARA § (e)(2). The Forest Service's rule states that "[t]he Appeal Deciding Officer shall send a copy of the appeal decision to the appellant(s), the Appeal Reviewing Officer, and the Responsible Official within five days[.]" 36 C.F.R. § 215.18(b)(1). Plaintiffs argue that waiting to send a copy of the decision for five days deprives appellants of one-third of the time they would otherwise have to take action to stop implementation of the decision. They further assert that the regulation was not subject to notice and comment and is not a "logical outgrowth" of any proposed rule. Docket No. 70 at 22. Because it is dispositive, the Court first addresses the procedural issue of whether or not the final regulation was a "logical outgrowth" of the proposed regulation.

Plaintiffs argue that the regulation should be invalidated on the procedural ground that the Forest Service did not submit the rule for notice and comment and that it is not the "logical outgrowth" of the proposed rule. *See Rybachek* v. *EPA*, 904 F.2d 1276, 1287-88 (9th Cir. 1990); *Small Refiner Lead Phase—Down Task Force* v. *EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983). Before promulgating rules, an agency must provide notice sufficient to "fairly apprise interested persons of the 'subjects and issues' before the Agency." *Natural Resources Defense Council, Inc. v. EPA*, 863 F.2d 1420, 1429 (9th Cir. 1988) ("*NRDC I*") (quoting *Natural Resources Defense Council, Inc. v. EPA*, 822 F.2d 104, 121 (D.C. Cir. 1987) ("*NRDC II*")); *see also* 5 U.S.C. § 553(b). This statutory requirement ensures public involvement in administrative rule making and "minimize[s] the dangers of

arbitrariness and inadequate information." *NRDC II*, 822 F.2d at 121.

Agencies do, however, have authority to promulgate rules that differ from the proposed rule on which the public was invited to comment. *See NRDC I*, 863 F.2d at 1429. A final rule that departs from a proposed rule must be a "logical outgrowth" of the proposed rule. *Id.* (citing *Small Refiner Lead*, 705 F.2d at 547). "The essential inquiry focuses on whether interested parties reasonably could have anticipated the final rulemaking from the draft[.]" *Id.* Furthermore, an agency "must *itself* provide notice of a regulatory proposal. Having failed to do so, it cannot bootstrap notice from a comment. The APA does not require comments to be entered on a public docket. Thus, notice necessarily must come—if at all—from the agency." *Small Refiner Lead*, 705 F.2d at 549.

The Forest Service's proposed rule apparently did not include any reference to the five-day mailing period, or any other period of time in which appellants would receive notice that a decision had been rendered.[**] The proposal did, however, draw comments regarding "when notification of an appeal decision occurs." 68 Fed. Reg. at 33,592. Presumably in response to the comment(s) expressing concern about when within the fifteen-day stay notice would occur, the Forest Service promulgated the five-day mailing rule. The Forest Service explained:

[**] Neither Plaintiffs nor the Forest Service cite or quote the proposed rule. However, there is not an issue of fact as to whether the proposal included an analogue to the five-day rule. Both parties agree that it did not. *See* Docket Nos. 70 at 22; 71 at 32-33; 72 at 22-24.

> Paragraph (b)(2) was added to ensure that appellants would be notified of the final agency action . . . To alleviate concerns about the timing between when an appeal decision is mailed to the appellant(s) and when implementation of the project begins, the final rule clarifies that an appeal decision (paragraph (b)(1)) must be sent within 5 days of its being rendered.

Id. The aim of the regulation is to avoid a situation where the appeal decision is not sent out, for example, for fourteen days, thereby effectively depriving an appellant of the opportunity to take further action within the stay period while not technically violating the statute. The regulation was apparently enacted with good intentions. However, due to the notice and comment requirements of the APA, the road to implementation of agency decisions is not paved with good intentions. The fact remains that the proposed regulation did not address the issue of when an appeal decision would be sent to appellants. Without any such mention in the proposal, interested parties could not reasonably anticipate the final rulemaking from the draft. *See NRDC I*, 863 F.2d at 1429. The Forest Service cannot "bootstrap" notice from the concerns expressed in insightful comments. *See Small Refiner Lead*, 705 F.2d at 549. While the Forest Service certainly has discretion to enact rules that differ from proposed rules, where, as here, the proposal makes no mention of an important component of the final rule enacted, the final rule is not the "logical outgrowth" of the proposal. *See Rybachek*, 904 F.2d at 1287-88; *Small Refiner Lead*, 705 F.2d at 547.

V. Remedy and Conclusion

Plaintiffs argue that the appropriate remedy in this case is to set aside the rules promulgated in 2003 in their entirety and to reinstate the rules previously in effect. Docket No. 73 at 25. The Forest Service counters that regulations found impermissible should be severed and the remaining regulations remain in effect. Docket No. 71 at 35. When some, but not all, portions of a regulation are deemed invalid the appropriate remedy may be to sever the invalid regulations. Severance is appropriate when (1) it will not impair the functioning of the rules as a whole, and (2) "there is no indication that the regulation would not have been passed but for [the severed portion's] inclusion." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294, 108 S. Ct. 1811, 100 L. Ed. 2d 313 (1988).

While the provisions determined to be impermissible in this Order are important components of the rules, their absence would not necessarily impair the functioning of the rules as a whole. Furthermore, there is no indication in the record that the Forest Service would not have promulgated the rules but for the invalidated portions. The impermissible regulations will therefore be severed, and the permissible regulations remain in place.

IT IS THEREFORE ORDERED:

The following regulations are invalid as stated in this Order and will be severed from the Forest Service regulations: 36 C.F.R. § 215.4(a) (excluding from notice and comment procedures projects and activities that are categorically excluded from documentation in an EIS or EA); 36 C.F.R. § 215.12(f) (excluding from appeal pro-

cedures decisions that have been excluded from documentation in an EIS or EA); 36 C.F.R. § 215.20(b) (exempting from notice, comment, and appeal procedures decisions signed directly by the Secretary); 36 C.F.R. § 215.10(a) (permitting delegation of the determination that an emergency situation exists); and 36 C.F.R. § 215.18(b)(1) (providing that an appeal decision will be sent to appellants five days after the decision is rendered).

APPENDIX E

COUNTY OF MADISON

SS.

STATE OF ILLINOIS

DECLARATION OF JIM BENSMAN

Under the penalty of perjury under the laws of the United States, I declare that I am at least 18 years of age and the following statements are true and correct to the best of my knowledge:

1. My name is Jim Bensman. I currently reside at 585 Grove Ave., Wood River, IL 62095.

2. I have been extensively involved in public participation activities on the Shawnee National Forest since 1983. I have also been involved in public participation activities on the Mark Twain National Forest for a similar amount of time. I have also been extensively involved in public participation activities on the Hoosier, Monongahela, National Forests of Alabama, Allegheny, Wayne, Jefferson, George Washington, and the Daniel Boone National Forests. I have also been involved in public participation activities on the Black Hills, Chugach, and Tongass National Forests.

3. I am a member of Heartwood and I am employed as Heartwood's Forest Watch Coordinator.

4. I have personally used about half the National Forests. I have used National Forests for outdoor recreation, camping, canoeing, rafting, orienteering, geocaching (*www.geocaching.com*) hiking, swimming, scientific study, photography, bird watching, plant identification, nature study, site seeing, solitude, and meetings. I

benefit from the overall ecological health of these intact forests, including the clean air and clean water which they provide, as well as from the rich biological diversity which is necessary to support human life. I also appreciate the complex interaction of species provided by intact forests. I have been using National Forests for at least 25 years.

5. I have visited the following seventy National Forests: Allegheny, PA;Arapaho, CO; Bankhead, AL; Big Horn, WY; Bitterroot, ID; Black Hulls, SD; Bridger Teton, WY; Chattahoochee, GA; Chequamegon, WI; Cherokee, TN; Chippewa, MN; Chugach, AK; Conecuh, AL; Custer, MT; Daniel Boone, KY; Fishlake, UT; Gallatin, MT; George Washington, VA; Grand Mesa, CO; Green Mountain, VT; Gunnison, CO; Hiawatha, MI; Hoosier, IN; Humboldt, NV; Huron, MI; Jefferson, VA; Klamath, CA; Manistee, MI; Manti-La Sal, NV; Mark Twain, MO; Medicine Bow, WY; Modoc, CA; Monongahela, WV; Mt. Baker, WA; Nezperce, ID; Nicolet, WI; Okanogan, WA; Olympic, WA; Ottowa, WI; Ouachatia, AR; Ozark, AR; Pike, CO; Pisgah, NC; Rio Grande, CO; Rogue River, OR; Roosevelt, CO; Routt, CO; San Isabell, CO; San Juan, CO; Shasta, CA; Shawnee, IL; Shoshone, WY; Siuslaw, OR; Six Rivers, CA; St. Francis, AR; Sumter, SC; Superior, MN; Talledega, AL; Targhee, ID; Tongass, AK; Trinity, CA; Uinta, UT; Umatilla, OR; Uncompahgre, CO; Walloma, OR; Wasatach-Cashe, UT; Wayne, OH; White River, CO; White Mountain, NH; and Whitman, OR.

6. Some of these National Forests, I have only visited once, and others such as the Shawnee and Mark Twain, I have visited hundreds of times. Most fall in between.

7. I plan to continue to use National Forests for recreation for the rest of my life (as long as I am able). I hope to some day visit every National Forest. I also plan to return to many of the National Forests I have visited.

8. So far this year I have made multiple trips to the Shawnee and Mark Twain National Forests. I have also been to the Hoosier, Daniel Boone, Jefferson, and George Washington.

9. I have a trip plan to Colorado in August in which I plan to backpack, geocache and hike in two National Forests. I also have a trip planned to California at the end of August in which I plan to visit some National Forests. In October I have trips to Oregon and Indiana planned in which I will visit National Forests.

10. I like to use natural appearing forests. I have been to many logged areas and seeing the damage from the logging upsets me. Off Road Vehicle use also harms my recreational use of the National Forests. I hate to go to areas where they are. They mess up the trails and make them difficult to walk on. I go to the National Forests for peace and quiet. The noise from the ORVs disturbs my peaceful enjoyment and scares away wildlife. I also worry about my safety when I am in an area with ORVs. Mining and Oil and Gas development also harms my enjoyment of the National Forests. I like to view natural forests and mined areas normally look devastated. One time I was hiking in the Allegheny National Forest in an area with lots of gas wells. The smell made me feel sick and it made my eyes water.

11. When development of National Forest lands occurs in violation of law or policy, my interests in the biological health of the forests, as well as my recreational

interests, are harmed. Further, I have informational interests in appeal decisions from the information they provide me even when not decided in my favor, and these interests are harmed when I am not permitted to appeal a decision, or the when the Forest Service refuses to issue a decision on an appeal.

12. Over the years I have won several appeals including many timber sales.

13. While I have probably commented on a thousand Forest Service projects, I cannot ever remember my comments having a major impact on the outcome or stopping the project. However, my appeals have stopped or significantly impacted many projects. Thus, my experience is that the meaningful public participation process is appeals.

14. The new regulations allow projects such as timber sales to be Categorically Excluded without appeals. Since these regulations have been implemented there have been several projects that I have not been able to appeal. For example, this year the Allegheny National Forest put out for scoping comments a series of about 20 timber sales that are being Categorically Excluded. Some of these sales are in places I have been before and want to go back and see again. Several of the projects have been approved. If these timber sales were subject to appeal, Heartwood and I would have appealed them.

15. The new rules exempt decisions by the Under-Secretary from appeal. If the Under-Secretary makes the decision, Heartwood and I cannot appeal. In 2001, we were denied the opportunity to comment on and appeal an unnamed project due to the Under-Secretary making the decision, even though the regulations at that time did not provide for it like they do now. The Forest

Service and Army did a land exchange that I and every other activist I knew objected to. The Army got 8,000 more acres in the exchange. We wanted a fair exchange. All the activists found out about this after the decision had already been made—someone (an activist, not the Forest Service) sent us a copy of the Federal Register notice. 66 FR 47448. The public was never given an opportunity to comment and the Forest Service never gave any public notice of the decision other than the Federal Register notice. Since the Under-Secretary made the decision, we were not able to appeal. The result was I now have 8,000 acres less of land I and other Heartwood members can use for recreation. We would have appealed it if we could.

16. The new regulations require substantive comments to file an appeal. I still am not clear on what the Forest Service considers a substantive comment. The Forest Service has not responded to my April 5, 2004, request to clarify what is required. It is attached (Attachment 1).

17. On August 29, 2003, Heartwood and I submitted these scoping comments on a Forest Service Proposal:

> Thank you for the opportunity to comment on the proposed Woodland Ecosystem Project. I am enclosing a copy of Citizens' Call for Ecological Forest Restoration. Please address the principles in this document and indicate in the Response to Comments how they are addressed.

18. When the Forest Service had the 30-day comment period on the Environmental Assessment, it appeared to me they were adequately addressing how the area was in pre-settlement times. I did not know anything that disputed the accuracy of what they said in their

Environmental Assessment. So I did not have any substantive comments to make. So on December 20, 2003, I wrote the Forest Service, "Also please note Heartwood and I are identifying ourselves as an interested and affected party for this project."

19. After the decision was made, someone who knew a lot more about the pre-settlement condition of the area than I did, showed me a copy of their comments. Their comments disputed the accuracy of what the EA stated about the pre-settlement condition. The comments called into question the wisdom of the project.

20. Heartwood and I felt those comments made a lot of sense and they convinced us the project needed to be changed to address them. On March 31, 2004, Heartwood and I filed an appeal of the project raising the issues contained in those comments.

21. On April 6, 2004, the Regional Forester dismissed our appeal stating, "Although you identify yourself as an 'interested and affected party' that does not give you standing under the 2003 appeal regulations. Your comments received during the Notice and Comment period do not meet the definition of substantive comments * * * Pursuant to 36 CFR 215.16(a)(5), I am dismissing your appeal and closing the record without a decision on the merits."

22. Another problem we face with the new regulations is that unlike the 2003 project just discussed, the Forest Service normally does not circulate a draft Environmental Assessment anymore. So far for the projects I have dealt with, the Forest Service generally circulates a 10-20 page scoping package for comments. Then a short time later they will circulated the scoping package with a few more pages for the 30-day comment period. Then

the Forest Service prepares about 100 pages of analysis that the public does not have an opportunity to comment on. In other instances the Forest Service only allows comments on a 10-20 page scoping package and then prepares the rest of the analysis with no opportunity for public comment.

23. The first problem with this is that it is hard to make comments that the Forest Service considers "substantive" with the little information you get in the comment period if it is not on a draft EA. When the Forest Service provides an draft EA, it is much easier to make substantive comments. The analysis one needs to make substantive comments on is mostly the hundred or so pages of analysis the Forest Service now normally does after we are required to make substantive comments. This makes it more difficult to assure we have standing to appeal.

24. Since almost all the analysis is now normally done after the public is required to submit "substantive" comments, there can easily be instances where we would be excluded from appealing due to not realizing there was a problem or issue we needed to make substantive comments since we were not able to see the analysis. For example, on the Mark Twain's Middle River Projects, the material indicated herbicides would be used. The information we were provided to make our substantive comments on, however, did not indicate what the herbicide was. The Forest Service only disclosed what herbicides would be used after we were required to make our substantive comments (i.e., it was in the 100 plus pages of analysis prepared after we had to make our substantive comments). It turned out that the Forest Service was using a really bad herbicide that we have

major concerns over. So we were not able to make any substantive comments about it. While we were able to make comments the Forest Service considered substantive, if the concern about that herbicide was the only concern we had, we would not have been able to make any substantive comments to enable use to appeal.

25. We appealed the Middle Rivers Project. One of the issues we raised was that the EA did not adequately address the use of the herbicide we objected to. The decision was withdrawn due to the inadequacy of the analysis on the use of herbicides. The decision has now been reissued with more analysis on herbicides. We still think this analysis is inadequate. If the Forest Service would have allowed us to comment on the analysis, we would not have had spent time doing a second appeal.

26. The new regulations allow the Forest Service to not issue an appeal decision. As mentioned above, appeals are generally the only meaningful public participation. If there is no decision, the main opportunity for meaningful input is lost.

27. Several years ago an "emergency" was declared on the Daniel Boone National Forest regarding the Daniel Boone National Forest Storm Salvage Project (*see* Attachment 2). An Associate Chief made the decision—it was basically a rubber stamp. Heartwood and others sued the Forest Service. The judge ruled the emergency declaration was arbitrary and capricious and that the Chief had to make the emergency determination. *Kentucky Heartwood , Inc. v. Worthington*, 125 F. Supp. 2d 839 (E.D. Ky. 2000).

28. After this ruling was made, the Chief reconsidered the previous determination. Attachment 2. Unlike the Associate Chief, the Chief carefully considered the re-

cord. The Chief ruled that 16 of the 20 areas the Associate Chief had granted a stay for did not qualify for an emergency. Several of these units had been included for economic reasons. The Chief did not declare an emergency for any of the stands that had been included for economic reasons. This shows how it is more likely to get a well considered decision from the Chief. So not having the Chief make the call, makes it less likely we will get a well thought out determination. This also demonstrates the harm that can occur when economic reasons are included for an emergency.

29. The new regulations shorten the time of the stay after an appeal decision has been made by allowing the Forest Service to wait 5 days before mailing the decision. It is very difficult to get into court quickly. Heartwood has a procedure we must go through to get a lawsuit approved. This takes time.

30. One time the Forest Service was trying to get a timber sale cut quickly. On August 21, 1997, the Forest Service denied my appeal on the Windstorm Salvage Sales. Working on nothing but getting a lawsuit and TRO filed, I was not able to get the documents prepared until the day the logging was to start: September 22, 1997. While I obtained a *ex parte* TRO that day, one logging truck of trees still got cut. I eventually obtained a Preliminary Injunction (*Bensmen v. United States*, 984 F. Supp. 1242 (W.D. Mo. (1997)) and the Forest Service withdrew the decisions.

31. The new regulations base the date an appeal is due on the date the legal notice is published in a local paper. Heartwood would have to subscribe to about 100 papers to receive all the notices necessary to determine when appeals are due. We cannot afford this and we could not

afford the infrastructure and staff it would take to handle subscribing to over 100 papers. Several times the Forest Service has told Heartwood and me the wrong day an appeal is due. We then filed the appeal when the Forest Service told us it was due, they dismissed our appeals as being untimely. If the Forest Service based the appeal decision on when the decision was made or if the Forest Service required posting the date of publication on the Internet, we would be able to determine when the appeal is due. With the way the appeal regulations are, we cannot determine when the appeals are due.

32. For all these reasons, the comment and appeal regulations cause harm to my and Heartwood's interests in protecting the National Forests, by restricting our right to appeal decisions of the Forest Service that cause harm to forests.

Respectfully submitted,

/s/ JIM BENSMAN
JIM BENSMAN
DATED: July 23, 2004
Wood River, IL

APPENDIX F

1. 5 U.S.C. 702 provides:

Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

2. 5 U.S.C. 703 provides:

Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject

matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

3. 5 U.S.C. 704 provides:

Actions Reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

4. 5 U.S.C. 706 provides:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5. The Forest Service Decisionmaking and Appeals Reform Act, Pub. L. No. 102-381, § 322 (a) and (c), 106 Stat. 1419 (16 U.S.C. 1612 note) provides:

SEC. 322. FOREST SERVICE DECISIONMAKING AND APPEALS REFORM.

(a) IN GENERAL.—In accordance with this section, the Secretary of Agriculture, acting through the Chief of the Forest Service, shall establish a notice and comment process for proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans developed under the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1601 et seq.) and shall modify the procedure for appeals of decisions concerning such projects.

* * * * *

(c) RIGHT TO APPEAL.—Not later than 45 days after the date of issuance of a decision of the Forest Service concerning actions referred to in subsection (a), a person who was involved in the public comment process under subsection (b) through submission of written or oral comments or by otherwise notifying the Forest Service of their interest in the proposed action may file an appeal.

* * * * *

6. 36 C.F.R. 215.4 provides:

Actions not subject to legal notice and opportunity to comment.

The procedures for legal notice (§ 215.5) and opportunity to comment (§ 215.6) do not apply to:

(a) Projects and activities which are categorically excluded from documentation in an environmental impact statement (EIS) or environmental assessment (EA) pursuant to FSH 1909.15, Chapter 30, section 31;

(b) Proposed amendments to, revision of, or adoption of land and resource management plans that are made separately from any proposed actions, and which are therefore subject to either the objection process of § 219.32 or the administrative appeal and review procedures of part 217 in effect prior to November 9, 2000 (*see* 36 CFR parts 200 to 299, Revised as of July 1, 2000);

(c) Projects and activities not subject to the provisions of the National Environmental Policy Act and the implementing regulations at 40 CFR parts 1500-1508 and the National Forest Management Act and the implementing regulations at 36 CFR part 219;

(d) Determinations by the Responsible Official, after consideration of new information or changed circumstances, that a revision of the EA is not required (1909.15, Chapter 10, section 18); and

(e) Rules promulgated in accordance with the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) or policies and procedures issued in the Forest Service Manual and Handbooks (part 216).

(f) Hazardous fuel reduction projects conducted under the provisions of section 105 of the HFRA, except as provided in part 218, subpart A, of this title.

7. 36 C.F.R. 215.12 provides:

Decisions and actions not subject to appeal.

The following decisions and actions are not subject to appeal under this part, except as noted:

(a) The amendment, revision, or adoption of a land and resource management plan that includes a project decision, except that the project portion of the decision is subject to this part. The amendment, revision, or adoption portion of a decision is subject to either the objection process of § 219.32 or the administrative appeal and review procedures of part 217 in effect prior to November 9, 2000 (*see* 36 CFR parts 200 to 299, Revised as of July 1, 2000);

(b) Determination, with documentation, that a new decision is not needed following supplementation of an environmental impact statement (EIS) or revision of an environmental assessment (EA) pursuant to FSH 1909.15, Chapter 10, section 18.

(c) Preliminary findings made during planning and/or analysis processes on a project or activity. Such findings are appealable only upon issuance of a decision document.

(d) Subsequent implementing actions that result from the initial project decision that was subject to appeal.

(e) Projects or activities for which notice of the proposed action and opportunity to comment is published (§ 215.5) and

(1) No substantive comments expressing concerns or only supportive comments are received during the comment period for a proposed action analyzed and documented in an EA (§ 215.6); or

(2) No substantive comments expressing concerns or only supportive comments are received during the comment period for a draft EIS (40 CFR 1502.19), and the Responsible Official's decision does not modify the preferred alternative identified in the draft EIS.

(f) Decisions for actions that have been categorically excluded from documentation in an EA or EIS pursuant to FSH 1909.15, Chapter 30, section 31.

(g) An amendment, revision, or adoption of a land and resource management plan that is made independent of a project or activity (subject to either the objection process of § 219.32 or the administrative appeal and review procedures of part 217 in effect prior to November 9, 2000 (*see* 36 CFR parts 200 to 299, Revised as of July 1, 2000)).

(h) Concurrences and recommendations to other Federal agencies.

(i) Hazardous fuel reduction projects conducted under provisions of the HFRA, as set out at part 218, subpart A, of this title.