

1 TRENT W. ORR, State Bar No. 77656
953 Clayton Street, No. 5
2 San Francisco, CA 94117
Tel. (415) 665-2185
3 Fax (415) 665-2592

4 TIMOTHY J. PRESO, *Pro Hac Vice*
Earthjustice
5 209 S. Willson Avenue
Bozeman, MT 59718
6 Tel. (406) 586-9699
Fax (406) 586-9695

7 MICHAEL T. LEAHY, *Pro Hac Vice*
8 Defenders of Wildlife
1130 17th Street, NW
9 Washington, DC 20036-4604
Tel. (202) 682-9400, ext. 263
10 Fax (202) 682-1331

11 *Counsel for Plaintiffs*

12
13 UNITED STATES DISTRICT COURT
14 FOR THE NORTHERN DISTRICT OF CALIFORNIA

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15 DEFENDERS OF WILDLIFE, SIERRA
16 CLUB, THE WILDERNESS SOCIETY, and
17 VERMONT NATURAL RESOURCES
COUNCIL,

18 Plaintiffs,

19 vs.

20 ANN VENEMAN, Secretary, U.S.
Department of Agriculture, in her official
21 capacity; DALE BOSWORTH, Chief, U.S.
Forest Service, in his official capacity; and
22 U.S. FOREST SERVICE,

23 Defendants.

Case No.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

**ADMINISTRATIVE PROCEDURE ACT
CASE**

24
25 **INTRODUCTION**

26 1. This case involves a "back-door" attempt by the U.S. Department of Agriculture to
27 rescind important regulatory protections for the 192-million-acre National Forest System through a
28 legislative rulemaking masquerading as an interpretative rule. Plaintiffs challenge a September 29,

COMPLAINT

E-filing

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NORTHERN DISTRICT OF CALIFORNIA

1 2004 rulemaking by which the defendants, who are officers and an agency of the Agriculture
2 Department, sought to eliminate numerous environmental protection requirements that implement
3 the National Forest Management Act (“NFMA”), 16 U.S.C. § 1600 et seq.

4 2. Since 1982, Forest Service NFMA regulations have imposed a number of important
5 protections for the natural environments of the various National Forests, including the bedrock
6 requirement for the Forest Service to manage fish and wildlife habitat in each administrative
7 planning unit of the National Forest System “to maintain viable populations of existing native and
8 desired non-native vertebrate species.” 36 C.F.R. § 219.19 (2000). This and related regulations
9 have operated for more than two decades to protect wildlife and their habitats in the National
10 Forests. The NFMA regulations impose an important check on National Forest management,
11 ensuring that the agency’s authorization of logging, oil and gas drilling, and other development
12 activities does not lead to the destruction of wildlife species and other sensitive environmental
13 resources.

14 3. However, in the years since the 1982 NFMA regulations were promulgated, the
15 Forest Service has repeatedly violated them, most particularly by failing in a number of instances to
16 take legally required steps to ensure that environmentally harmful activities do not push National
17 Forest wildlife populations past the point of viability. Despite a series of judicial decisions finding
18 the Forest Service in violation of the 1982 regulations, the agency generally has not attempted to
19 modify its activities to ensure compliance with the wildlife viability regulations. Instead, the Forest
20 Service has sought to repeal the regulatory requirements that it has violated.

21 4. To this end, when their efforts at wholesale revision of the NFMA regulations stalled
22 through administrative delays, the defendants promulgated the rule at issue in this case. The
23 challenged September 29, 2004 rule purports merely to clarify the defendants’ pre-existing
24 interpretation of their own regulations. In fact, the rule seeks to rescind the 1982 NFMA regulations
25 in their entirety, including the important wildlife viability guarantee.

26 5. Nevertheless, despite the sweeping legislative effect of the challenged September 29
27 rule, the defendants promulgated it without any public notice or opportunity for public comment.
28 The defendants sought to justify the omission of any public involvement by improperly

1 characterizing their action as an “interpretative rule” that is exempt from public notice and comment
2 requirements pursuant to the Administrative Procedure Act (“APA”). 5 U.S.C. § 553(b)(3)(A). The
3 challenged rule is not an interpretative rule. It is a legislative rule. By failing to comply with the
4 basic notice and comment requirements for a legislative rulemaking, the defendants violated the
5 APA.

6 **JURISDICTION, VENUE AND INTRADISTRICT ASSIGNMENT**

7 6. Plaintiffs bring this action pursuant to the APA, 5 U.S.C. § 551 et seq. This Court has
8 jurisdiction over plaintiffs’ claims pursuant to 28 U.S.C. § 1331 (federal question) and may issue a
9 declaratory judgment and further relief pursuant to 28 U.S.C. §§ 2201-02.

10 7. Venue lies in this judicial district pursuant to 28 U.S.C. § 1391(e) because plaintiff
11 Sierra Club is incorporated in this district and maintains its headquarters in San Francisco County.

12 8. Assignment to the San Francisco Division of this judicial district is proper because
13 plaintiff Sierra Club is incorporated and headquartered in San Francisco County. Civil L. R. 3-2(c),
14 (d).

15 **PARTIES**

16 9. Plaintiff Defenders of Wildlife (“Defenders”) is a non-profit conservation
17 organization founded in 1947 and based in Washington, D.C., with offices across the country.
18 Defenders has more than 480,000 members and supporters across the nation. Defenders is dedicated
19 to protecting and restoring all native wild animals and plants in their natural communities.

20 10. Plaintiff Sierra Club is a non-profit conservation organization founded in 1892, with
21 its headquarters in San Francisco, California, and more than 750,000 members nationwide. The
22 mission of the Sierra Club is: “To explore, enjoy and protect the wild places of the earth; to practice
23 and promote the responsible use of the earth’s ecosystems and resources; and to educate and enlist
24 humanity to protect and restore the quality of the natural and human environments.”

25 11. Plaintiff The Wilderness Society (“TWS”) is a non-profit environmental organization
26 founded in 1935, with its headquarters in Washington, D.C., 200,000 members, and eight regional
27 offices. TWS works to protect America’s wilderness and to develop a nationwide network of wild
28

1 lands through public education, scientific analysis, and advocacy. Protecting National Forest areas is
2 vital to achieving TWS's mission.

3 12. Plaintiff Vermont Natural Resources Council ("VNRC") is a non-profit conservation
4 organization founded in 1963, representing approximately 5,000 members who support the
5 protection and maintenance of the ecological health and integrity of Vermont's natural resources,
6 including the Green Mountain National Forest. Recovery of threatened and endangered species,
7 protection of wilderness and ecological reserves, and sustainable forestry are key conservation
8 components in VNRC's forest program.

9 13. Plaintiffs and their members use the lands in the National Forest System for
10 recreational, scientific, aesthetic, conservation and commercial purposes. Plaintiffs and their
11 members have a strong interest in the environmental protections afforded to National Forest lands by
12 the Forest Service's 1982 NFMA regulations, which defendants sought to rescind through the
13 rulemaking challenged in this case. In particular, plaintiffs and their members have a strong interest
14 in the 1982 NFMA regulations' guarantee that fish and wildlife habitat in the National Forest System
15 will be managed "to maintain viable populations of existing native and desired non-native vertebrate
16 species," 36 C.F.R. § 219.19, as plaintiffs and their members seek to view, study, hunt, and
17 otherwise enjoy wildlife and signs of the presence of wildlife, including rare, imperiled, and
18 sensitive wildlife species, in the National Forests. Plaintiffs also have a strong interest in the
19 population surveys for certain wildlife species on each National Forest that are required by the 1982
20 regulations, see id. § 219.19(a)(1), (6), as such surveys provide valuable information on wildlife
21 populations, trends, and the impact of forest management activities.

22 14. The above-described recreational, scientific, aesthetic, conservation, and commercial
23 interests of plaintiffs and their respective members have been, are being, and, unless the relief prayed
24 for in this complaint is granted, will continue to be adversely affected and irreparably injured by
25 defendants' violations of the APA, as described below. In particular, defendants' challenged action
26 injures plaintiffs and their members by eliminating substantive environmental requirements
27 governing site-specific projects and actions within the National Forest System. Further, defendants'
28 failure to comply with the APA's notice and comment procedure injures plaintiffs and their members

1 by denying plaintiffs and their members any opportunity to advocate for retention of the rescinded
2 substantive environmental requirements during the rulemaking process and by removing an essential
3 procedural safeguard that helps to ensure that government agencies are accountable and that their
4 decisions are reasoned rather than arbitrary. Plaintiffs have no adequate remedy at law.

5 15. Defendant Ann Veneman is the Secretary of the U.S. Department of Agriculture.
6 Defendant Veneman is sued in her official capacity.

7 16. Defendant Dale Bosworth is the Chief of the U.S. Forest Service, an agency within
8 the U.S. Department of Agriculture. Defendant Bosworth is sued in his official capacity.

9 17. Defendant U.S. Forest Service is an agency within the U.S. Department of
10 Agriculture that is charged with administration of the National Forest System.

11 **THE NATIONAL FOREST SYSTEM**

12 18. The 192-million-acre National Forest System encompasses approximately 8 percent
13 of the United States landscape and includes 155 National Forests and 22 National Grasslands in 42
14 states.

15 19. National Forests harbor much of the nation's biological diversity. They are home to
16 more than 3,000 species of birds, mammals, reptiles, fish, and amphibians, and more than 10,000
17 plant species, including 17 percent (more than 230) of federally endangered and threatened species,
18 and more than 2,000 species designated as sensitive. National Forests have significantly more intact
19 populations of rare species than any other system of public lands in the United States.

20 20. Importantly, National Forests also encompass a broad array of ecosystems and habitat
21 types, including large blocks of relatively unfragmented habitats that are critical to the continued
22 existence of many of the large mammals that still persist in the United States, including grizzly
23 bears, wolves, wolverines, lynx, elk, bighorn sheep, and others. Accordingly, preserving existing
24 wildlife populations in the National Forest System ensures preservation of some of the most rare and
25 revered wildlife species remaining in our nation.

26 **THE NATIONAL FOREST MANAGEMENT ACT**

27 21. Congress enacted the National Forest Management Act in 1976 to reform Forest
28 Service management of the National Forest System, primarily by requiring greater recognition of

1 non-timber resources, including wildlife, water, and soils; less clearcutting; and greater public
2 participation in National Forest management.

3 22. The NFMA implements its Forest Service reforms through a system of land
4 management planning for the National Forest System. The NFMA provides that “the Secretary shall
5 in accordance with the procedures set forth in section 553 of Title 5 promulgate regulations ... that
6 set out the process for the development and revision” of land management plans for the National
7 Forests. 16 U.S.C. § 1604(g).

8 23. The NFMA specifically requires regulations “specifying guidelines for land
9 management plans ... which ... provide for diversity of plant and animal communities based on the
10 suitability and capability of the specific land area in order to meet overall multiple-use objectives.”
11 Id. § 1604(g)(3)(B). The NFMA also requires regulations specifying guidelines for National Forest
12 land management plans that address a variety of other resource management issues. See id. §
13 1604(g)(3)(A), (C)-(F).

14 **THE 1982 NFMA REGULATIONS**

15 24. The Forest Service promulgated regulations pursuant to this NFMA statutory mandate
16 on September 30, 1982. See National Forest System Land and Resource Management Planning, 47
17 Fed. Reg. 43,026 (1982) (to be codified at 36 C.F.R. pt. 219). The 1982 NFMA regulations cover
18 five major areas of the National Forest planning process. First, they describe the content and role of
19 “regional guides,” which establish regional standards and guidelines for the nine regional divisions
20 of the National Forest System. See 36 C.F.R. §§ 219.4(b)(2), 219.9 (2000). Second, they establish a
21 process for developing local plans for individual administrative units of the National Forest System –
22 i.e., National Forests and National Grasslands. See id. § 219.12. Third, they establish guidelines for
23 determining where and how much logging can occur in the National Forest System. See id. §§
24 219.14, 219.16. Fourth, they state specific planning requirements for a variety of resources,
25 including wilderness, wildlife, grazing, recreation, minerals, water, and soil. See id. §§ 219.18-25.
26 Fifth, they establish “minimum specific management requirements” for logging and other activities.
27 See id. § 219.27.

1 25. The 1982 NFMA regulations establish numerous important environmental safeguards
2 for the National Forests. For example, they mandate 100-foot zones around riparian areas where the
3 Forest Service is prohibited from taking actions that harm water quality, and they establish general
4 size limitations on clearcuts. See id. § 219.27(d)(2), (e).

5 26. With respect to wildlife, the 1982 regulations establish a critical protection mandate
6 to implement the NFMA wildlife diversity requirement for the National Forest System. The drafters
7 of the 1982 regulations recognized that in order to sustain plant and animal communities in the
8 National Forests, the Forest Service must maintain the individual species that make up those
9 communities. The 1982 NFMA regulations therefore provide that “[f]ish and wildlife habitat shall
10 be managed to maintain viable populations of existing native and desired non-native vertebrate
11 species in the planning area.” Id. § 219.19; see also id. § 219.27(a)(6) (requiring Forest Service to
12 “[p]rovide for adequate fish and wildlife habitat to maintain viable populations of existing native
13 vertebrate species”). They define a “viable population” as “one which has the estimated numbers
14 and distribution of reproductive individuals to insure its continued existence is well distributed in the
15 planning area,” and specify that “habitat must be provided to support, at least, a minimum number of
16 reproductive individuals and that habitat must be well distributed so that those individuals can
17 interact with others in the planning area.” Id.

18 27. To implement the “viability” requirement, the 1982 NFMA regulations adopt a
19 “canary in the coal mine” approach. They provide for certain wildlife species to be selected by the
20 Forest Service and monitored as proxies for the health of broader wildlife populations. Monitoring
21 these proxy species enables the Forest Service to determine whether its management activities are
22 having adverse impacts on wildlife without the necessity of monitoring all species occupying the
23 forest. Specifically, the 1982 NFMA regulations provide that “certain vertebrate and/or invertebrate
24 species present in the area shall be identified and selected as management indicator species” based
25 upon a finding that “their population changes are believed to indicate the effects of management
26 activities.” Id. § 219.19(a)(1). The regulations further provide that “[p]opulation trends of the
27 management indicator species will be monitored and relationships to habitat changes determined.”
28 Id. § 219.19(a)(6).

1 November 9, 2000. See National Forest System Land and Resource Management Planning, 65 Fed.
2 Reg. 67,514 (2000) (to be codified at 36 C.F.R. pts. 217 and 219). The 2000 rulemaking established
3 detailed provisions for managing wildlife in the National Forests, including revisions to the wildlife
4 “viability” provision of the 1982 NFMA regulations.

5 32. However, the Forest Service’s 2000 NFMA rule included a transition provision, 36
6 C.F.R. § 219.35, addressing when the 2000 regulations, including their amendment to the wildlife
7 “viability” provision, would become effective. The Federal Register preamble to the 2000 rule made
8 clear that this transition provision was designed to “outline[] the process by which the Forest Service
9 will transition from the 1982 planning regulations.” 65 Fed. Reg. at 67,563. As to site-specific
10 Forest Service decisions, such as decisions to implement logging and other environmentally harmful
11 projects, the transition provision stated that “[s]ite-specific decisions made by the responsible
12 official 3 years from November 9, 2000 and afterward must be in conformance with the provisions
13 of this subpart.” Id. § 219.35(d). The Federal Register preamble discussion of this provision stated
14 that, “[f]or site-specific decisions, section 219.35(d) provides a three-year time period for transition
15 between the existing regulations and the new rule.” 65 Fed. Reg. at 67,563. Thus, under the 2000
16 NFMA rule, the 1982 NFMA regulations – including the 1982 wildlife “viability” requirement –
17 were to govern site-specific Forest Service decisions until November 9, 2003, when the agency
18 would transition to the 2000 NFMA rule to govern such decisions.

19 33. As it turned out, the 2000 NFMA regulations did not replace the 1982 NFMA
20 regulations on November 9, 2003 as the governing authority in effect for site-specific Forest Service
21 decisions. A new Executive Branch administration assumed control of the Forest Service after
22 publication of the 2000 NFMA rule. The new administration sought to craft its own new set of
23 NFMA regulations to replace the 2000 rule. On December 6, 2002, the Forest Service published the
24 new administration’s proposed NFMA regulations. See National Forest System Land and Resource
25 Management Planning, 67 Fed. Reg. 72,770 (2002) (to be codified at 36 C.F.R. pt. 219). Due to
26 significant controversy over the changes proposed in the 2002 draft, the House of Representatives
27 twice voted on bills that would have prohibited any funds from being spent to further develop the
28 draft, failing by narrow margins both times to halt further funding of the proposed NFMA rule

1 revision. Nevertheless, these 2002 draft NFMA regulations have never been finalized, nor has the
2 Forest Service set any schedule for finalizing them.

3 34. The Forest Service has relied upon its delay in finalizing the 2002 draft regulations to
4 extend the transition period set forth in the 2000 NFMA rule. Citing the pendency of the new
5 NFMA regulations and asserting concerns about implementing the 2000 NFMA regulations, the
6 Forest Service on September 10, 2003, published an interim final rule to extend the transition
7 timeline set forth in the 2000 rule. See National Forest System Land and Resource Management
8 Planning; Extension of Compliance Deadline for Site-Specific Projects, 68 Fed. Reg. 53,294 (2003)
9 (to be codified at 36 C.F.R. pt. 219). This interim rule provided that the transition period for site-
10 specific decisions, as set forth in 36 C.F.R. § 219.35(d) of the 2000 NFMA regulations, “is extended
11 from November 9, 2003, until the Department promulgates the final planning regulations published
12 as proposed on December 6, 2002 (67 FR 72770).” Id. at 53,297. This interim rule thus extended
13 indefinitely the period until new NFMA regulations would become effective to replace the 1982
14 NFMA regulations as the governing authority for site-specific decisions and eliminated any
15 possibility of ever applying the 2000 NFMA regulations to such decisions. Accordingly, because of
16 the interim rule, the 1982 NFMA regulations remained effective to govern site-specific Forest
17 Service decisions even after November 9, 2003.

18 **THE CHALLENGED RULEMAKING**

19 35. On September 29, 2004, the Forest Service attempted to rescind the 1982 regulations
20 as the governing authority in effect for site-specific Forest Service decisions. However, the agency
21 did not seek to make this significant regulatory change through the customary process of APA notice
22 and comment rulemaking, which would have provided the public with notice and an opportunity to
23 state its views on the agency’s attempt to eliminate longstanding NFMA environmental protection
24 regulations. Instead, the Forest Service sought to accomplish this regulatory change by
25 promulgating the purported “interpretative rule” challenged in this case. See National Forest System
26 Land and Resource Management Planning; Use of Best Available Science in Implementing Land
27 Management Plans, 69 Fed. Reg. 58,055 (2004) (to be codified at 36 C.F.R. pt. 219).

1 36. In the preamble to this rule, the Forest Service asserted that “[c]onsiderable
2 uncertainty has arisen regarding the impact of the 2000 planning rule and the transition provisions.”
3 Id. The agency acted to eliminate this alleged uncertainty by promulgating a rule stating that “[t]he
4 1982 rule is not in effect” with respect to site-specific Forest Service decisions. Id. at 58,057 (to be
5 codified at 36 C.F.R. § 219.35 App. B(2)). The Forest Service explained that “the provisions of the
6 1982 planning rule may continue to be used only for plan amendments and revisions upon election
7 of the responsible official.” Id. at 58,056. The agency made clear that this purported “interpretative
8 rule” specifically targeted the wildlife “viability” provision of the 1982 NFMA rules, stating that the
9 September 29 rulemaking was designed to address federal court decisions in which “population data
10 have been held to be required for management indicator species under the 1982 rules.” Id. The
11 September 29 “interpretative rule” asserted that the only remaining requirement governing site-
12 specific Forest Service decisions was a provision of the 2000 NFMA transition provision mandating
13 that “the responsible official must consider the best available science in implementing ... existing
14 plans.” Id. at 58,057 (to be codified at 36 C.F.R. § 219.35 App. B(1)).

15 37. Thus, through the September 29 rulemaking, the Forest Service sought to rescind the
16 1982 NFMA regulations as the governing authority in effect for site-specific Forest Service
17 decisions. In place of the 1982 rule’s strict requirement that “[f]ish and wildlife habitat shall be
18 managed to maintain viable populations of existing native and desired non-native vertebrate species
19 in the planning area,” 36 C.F.R. § 219.19, and its detailed monitoring procedures for implementing
20 this requirement, see, e.g., id. § 219.26, the September 29 rulemaking substituted a generalized
21 requirement for the Forest Service merely to “consider” – but not necessarily to follow or to apply –
22 the best available science. 69 Fed. Reg. at 58,057. The same is true of the other resource
23 management requirements of the 1982 NFMA regulations, such as riparian area protections and
24 limitations on clearcutting – i.e., the September 29 rulemaking replaced these explicit environmental
25 protection requirements with a limited duty for the Forest Service merely to consider the best
26 available science. The September 29 rulemaking is therefore inconsistent with, and in conflict with,
27 the NFMA, the 1982 NFMA rulemaking, the 2000 NFMA rulemaking, and the September 10, 2003
28 interim rulemaking.

