

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CITIZENS FOR BETTER FORESTRY, et al.,
Plaintiffs,
v.
U.S. DEPARTMENT OF AGRICULTURE, et
al.,
Defendants.

No. C 08-1927 CW

ORDER GRANTING
PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT
AND DENYING
DEFENDANTS' CROSS-
MOTION FOR SUMMARY
JUDGMENT

_____ /

Plaintiffs Citizens for Better Forestry, et al. (collectively, Citizens) charge Defendants United States Department of Agriculture (USDA), et al. with failing to adhere to procedures required by the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA) when they promulgated regulations that govern the development of management plans for forests within the National Forest System. The parties now cross-move for summary judgment. The matter was heard on April 2, 2009. Having considered oral argument and all of the papers submitted by the parties, the Court grants Citizens' motion and denies the USDA's cross-motion.

BACKGROUND

The National Forest System includes approximately 193 million

1 acres of land and is administered by the U.S. Forest Service, an
2 agency within the USDA. In 1976, Congress enacted the National
3 Forest Management Act (NFMA) to reform management of the National
4 Forests. The Act established a three-tiered regulatory approach to
5 forest management, with different tiers existing at the national,
6 regional and local levels.

7 At the highest level, the NFMA requires the USDA to promulgate
8 national uniform regulations that govern the development and
9 revision of regional and local plans. 16 U.S.C. § 1604(g).

10 These regulations mandate the compliance of lower-level
11 plans with the National Environmental Policy Act of 1969,
12 42 U.S.C. §§ 4321-4370f ("NEPA"), specifically setting
13 forth the circumstances that require preparation of an
14 Environmental Impact Statement ("EIS"). 16 U.S.C.
15 § 1604(g)(1). In addition, they set broad guidelines (to
16 be followed when preparing regional and site-specific
17 plans) regarding plant and animal species conservation,
18 timber management, and water management. Id.
19 § 1604(g)(3).

20 Citizens for Better Forestry v. U.S. Dep't of Agric. (Citizens I),
21 341 F.3d 961, 965 (9th Cir. 2003). The USDA's 2008 revision of
22 these regulations, which are also known as the "plan development
23 rule," is at issue in the present lawsuit.

24 The second tier of National Forest regulation consists of land
25 resource management plans (LRMPs), also known as forest plans,
26 which apply to large "units" of the forest system. 16 U.S.C.
27 § 1604(a).

28 These plans operate like zoning ordinances, defining
broadly the uses allowed in various forest regions,
setting goals and limits on various uses (from logging to
road construction), but do not directly compel specific
actions, such as cutting of trees in a particular area or
construction of a specific road. The content and
promulgation of these plans must comply with the plan
development rule.

Citizens I, 341 F.3d at 966.

1 The third-tier of regulation consists of "site-specific"
2 plans. These plans "are prepared to effect specific, on-the-ground
3 actions" and "must be consistent with both sets of higher-level
4 rules." Id. (citing 16 U.S.C. § 1604(i)).

5 The USDA promulgated the first plan development rule in 1979
6 and amended it in 1982. The 1982 Rule imposed a number of
7 substantive requirements on LRMPs and site-specific plans:

8 This Rule required that "[f]ish and wildlife habitat
9 shall be managed to maintain viable populations
10 [thereof]," further defining a "viable" population as
11 "one which has the estimated numbers and distribution of
12 reproductive individuals to insure its continued
13 existence is well distributed in the [relevant] area."
14 See National Forest System Land and Resource Management
15 Planning, 47 Fed. Reg. 43,026, 43,048 (Sept. 30, 1982)
16 (amending 36 C.F.R. part 219). In addition, the 1982
17 Rule required the development of so-called "regional
18 guides," which "provide[d] standards and guidelines for
19 addressing major issues and management concerns which
20 need to be considered at the regional level to facilitate
21 forest planning." See id. at 43,042 (revising 36 C.F.R.
22 § 219.8-.9). Furthermore, the Rule contained "minimum
23 specific management requirements," setting forth
24 mandatory directives which all regional LRMPs must
25 follow, and specific, quantifiable baselines below which
26 no LRMP or site-specific plan can fall. See id. at
27 43,050 (creating 36 C.F.R. § 219.27). These requirements
28 included, inter alia, establishment of 100-foot buffers
around bodies of water and specific limits on
tree-cutting. See id.

Citizens I, 341 F.3d at 966 (alterations in original).

21 Under NEPA, federal agencies must issue an EIS in connection
22 with all "major Federal actions significantly affecting the quality
23 of the human environment." 42 U.S.C. § 4332(2)(C). "In certain
24 circumstances, where it is not clear whether a full EIS is
25 required, agencies prepare a more concise Environmental Assessment
26 [(EA)] to evaluate preliminarily the need to prepare a full EIS."
27 Citizens I, 341 F.3d at 966 n.2 (citing 40 C.F.R. § 1501.4(b)-(c)).

28 In 2000, the USDA amended the 1982 Rule. The USDA did not

1 prepare an EIS in connection with the 2000 Rule, but it did prepare
2 an EA. The EA found that the amendment had no significant impact
3 on the environment. Id. at 967.

4 The 2000 Rule modified its predecessor in a number of ways:

5 First, it relaxed the species "viability" requirement by
6 providing that "[p]lan decisions affecting species
7 diversity must provide for ecological conditions that
8 . . . provide a high likelihood that those conditions are
9 capable of supporting over time the viability of . . .
10 species well distributed throughout their ranges within
11 the plan area." National Forest System Land and Resource
12 Management Planning, 65 Fed. Reg. 67,514, 67,575 (Nov. 9,
13 2000) (amending 36 C.F.R. § 219.20(b)(2)) (emphasis
14 added). The 1982 Rule had more stringently required that
15 the USDA "insure" continued species existence. 47 Fed.
16 Reg. at 43,038. The 2000 Rule also eliminated the
17 requirement of developing and issuing "regional guides"
18 to maintain regional consistency in forest management.
19 See 65 Fed. Reg. at 67,527. It further eliminated many
20 of the "minimum specific management requirements." For
21 example, in comments submitted in response to the draft
22 2000 Rule, the Environmental Protection Agency ("EPA")
23 observed that "while [the 1982 Rule] contain[s] specific
24 limits on clear cutting [of trees], the proposed [2000
25 Rule] would require only that individual forest plans
26 'provide standards and guidelines for timber harvest and
27 regeneration methods,'" and asked "[h]ow will the
28 proposed [2000 Rule] ensure requirements necessary for
sustainability?"

Finally, the 2000 Plan Development Rule eliminated the
post-decision appeal process of 36 C.F.R. pt. 217, and
replaced it with a pre-decision "objection" process. 65
Fed. Reg. at 67,568 (removing 36 C.F.R. pt. 217); id. at
67,578 79 (creating 36 C.F.R. § 219.32). Under this new
process, members of the public wishing to object to an
amendment or revision of an LRMP have 30 days from the
date an EIS is made available to do so. See id. Thus,
this process can occur before the finalization of the
planned amendment if the EIS is published more than 30
days before the amended LRMP becomes final.

Citizens I, 341 F.3d at 967-68 (alterations in original).

Citizens and other environmental groups sued the USDA,
challenging the substance of the 2000 Rule as contrary to the
provisions of the NFMA and alleging that, in promulgating the Rule,
the agency failed to adhere to procedures mandated by NEPA and the

1 ESA. After the lawsuit was filed, the USDA announced its intention
2 to revise the new rule. The parties agreed to stay Citizens'
3 substantive challenges, but proceeded with the procedural
4 challenges. The district court granted summary judgment against
5 Citizens on the procedural claims, finding that they were not
6 justiciable for lack of standing and ripeness. The Ninth Circuit
7 reversed the district court on appeal in Citizens I and remanded
8 the case for further proceedings. Citizens I was dismissed
9 pursuant to stipulation after remand.

10 In 2002, the USDA proposed amending the 2000 Rule. In its
11 notice of proposed rulemaking, it found that, "[although the 2000
12 rule was intended to simplify and streamline the development and
13 amendment of land and resource management plans, . . . the 2000
14 rule [was] neither straightforward nor easy to implement" and "did
15 not clarify the programmatic nature of land and resource management
16 planning." National Forest System Land and Resource Management
17 Planning, 67 Fed. Reg. 72,770, 72,770 (Dec. 6, 2002). The proposed
18 rule purported to retain "many of the basic concepts in the 2000
19 rule, namely sustainability, public involvement and collaboration,
20 use of science, and monitoring and evaluation," but "attempted to
21 substantially improve these aspects of the 2000 rule by eliminating
22 unnecessary procedural detail, clarifying intended results, and
23 streamlining procedural requirements consistent with agency
24 staffing, funding, and skill levels." Id. at 72772.

25 The USDA did not publish the final version of the rule it
26 proposed in 2002 until 2005. National Forest System Land
27 Management Planning, 70 Fed. Reg. 1023 (Jan. 5, 2005). It did not
28 conduct an EIS or an EA, asserting that the rule fell within a

1 previously declared "categorical exclusion" to NEPA's requirements.
2 A categorical exclusion is "a category of actions which do not
3 individually or cumulatively have a significant effect on the human
4 environment and which have been found to have no such effect in
5 procedures adopted by a Federal agency . . . and for which,
6 therefore, neither an environmental assessment nor an environmental
7 impact statement is required." 40 C.F.R. § 1508.4. In the USDA's
8 view, the 2005 Rule fell within an existing categorical exclusion
9 that applied to "rules, regulations, or policies to establish
10 Service-wide administrative procedures, program processes, or
11 instruction." 70 Fed. Reg. at 1054. In addition, the USDA did not
12 consult with the Fish and Wildlife Service (FWS) or the National
13 Marine Fisheries Service (NMFS) to determine whether the 2005 rule
14 would have an adverse effect on any endangered or threatened
15 species.

16 Citizens and other environmental groups again sued the USDA,
17 claiming procedural violations of NEPA and the ESA. In Citizens
18 for Better Forestry v. United States Department of Agriculture
19 (Citizens II), 481 F. Supp. 2d 1059 (N.D. Cal. 2007), the district
20 court granted summary judgment in part against the USDA, finding
21 that: 1) the agency had violated the Administrative Procedure Act
22 by promulgating the 2005 Rule -- a self-described "paradigm shift"
23 from earlier rules, including the rule proposed in 2002 -- without
24 first providing notice of the changes and allowing the public to
25 submit comments; 2) the agency had violated NEPA by applying the
26 categorical exclusion and failing to prepare either an EA or an
27 EIS; 3) the agency had violated the ESA by failing to engage in
28 consultations with other federal agencies or to publish a

1 biological assessment (BA). The court enjoined the USDA from
2 putting the 2005 rule into effect until the agency complied with
3 these statutes.

4 In 2007, the USDA re-published the 2005 rule along with a
5 draft EIS and sought public comment. National Forest System Land
6 Management Planning, 72 Fed. Reg. 48,514 (Aug. 23, 2007). The
7 agency published the final version of the EIS and the rule in 2008.
8 National Forest System Land Management Planning, 73 Fed. Reg.
9 21,468 (April 21, 2008). The final version differs in some
10 respects from the proposal, but adheres to the same basic approach
11 to forest plan development. The EIS was undertaken in an effort to
12 comply with the district court's decision in Citizens II and
13 concluded, as the USDA had concluded previously, that the proposed
14 rule would have no direct or indirect impact on the environment
15 because the rule was programmatic in nature and did not, in itself,
16 effect any predictable changes in the management of specific
17 National Forest sites. In an effort to comply with the ESA, the
18 USDA also published a BA in connection with the rule's
19 promulgation. The BA concluded, similarly to the EIS, that the
20 Rule would not have a direct or indirect effect on species
21 protected by the Act.

22 Citizens and other environmental groups now challenge the 2008
23 Rule. They assert that, although the USDA prepared an EIS and a BA
24 in connection with the 2008 Rule, the agency nonetheless violated
25 NEPA and the ESA because the EIS and BA simply repeated the
26 agency's previous erroneous finding that the 2005 Rule would have
27 no effect on the environment or protected species.

28

LEGAL STANDARD

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir. 1987).

The moving party bears the burden of showing that there is no material factual dispute. Therefore, the court must regard as true the opposing party's evidence, if it is supported by affidavits or other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815 F.2d at 1289. The court must draw all reasonable inferences in favor of the party against whom summary judgment is sought. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991).

Material facts which would preclude entry of summary judgment are those which, under applicable substantive law, may affect the outcome of the case. The substantive law will identify which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Where the moving party does not bear the burden of proof on an issue at trial, the moving party may discharge its burden of production by either of two methods:

The moving party may produce evidence negating an essential element of the nonmoving party's case, or, after suitable discovery, the moving party may show that the nonmoving party does not have enough evidence of an essential element of its claim or defense to carry its

1 ultimate burden of persuasion at trial.

2 Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos., Inc., 210 F.3d
3 1099, 1106 (9th Cir. 2000).

4 If the moving party discharges its burden by showing an
5 absence of evidence to support an essential element of a claim or
6 defense, it is not required to produce evidence showing the absence
7 of a material fact on such issues, or to support its motion with
8 evidence negating the non-moving party's claim. Id.; see also
9 Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990); Bhan v.
10 NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991). If the
11 moving party shows an absence of evidence to support the non-moving
12 party's case, the burden then shifts to the non-moving party to
13 produce "specific evidence, through affidavits or admissible
14 discovery material, to show that the dispute exists." Bhan, 929
15 F.2d at 1409.

16 If the moving party discharges its burden by negating an
17 essential element of the non-moving party's claim or defense, it
18 must produce affirmative evidence of such negation. Nissan, 210
19 F.3d at 1105. If the moving party produces such evidence, the
20 burden then shifts to the non-moving party to produce specific
21 evidence to show that a dispute of material fact exists. Id.

22 If the moving party does not meet its initial burden of
23 production by either method, the non-moving party is under no
24 obligation to offer any evidence in support of its opposition. Id.
25 This is true even though the non-moving party bears the ultimate
26 burden of persuasion at trial. Id. at 1107.

27 Where the moving party bears the burden of proof on an issue
28 at trial, it must, in order to discharge its burden of showing that

1 no genuine issue of material fact remains, make a prima facie
2 showing in support of its position on that issue. UA Local 343 v.
3 Nor-Cal Plumbing, Inc., 48 F.3d 1465, 1471 (9th Cir. 1994). That
4 is, the moving party must present evidence that, if uncontroverted
5 at trial, would entitle it to prevail on that issue. Id. Once it
6 has done so, the non-moving party must set forth specific facts
7 controverting the moving party's prima facie case. UA Local 343,
8 48 F.3d at 1471. The non-moving party's "burden of contradicting
9 [the moving party's] evidence is not negligible." Id. This
10 standard does not change merely because resolution of the relevant
11 issue is "highly fact specific." Id.

12 DISCUSSION

13 I. Standing and Ripeness

14 Article III of the Constitution limits the jurisdiction of the
15 federal courts to "cases" and "controversies." In order to satisfy
16 the "case or controversy" requirement, a plaintiff must show that:
17 "(1) he or she has suffered an injury in fact that is concrete and
18 particularized, and actual or imminent; (2) the injury is fairly
19 traceable to the challenged conduct; and (3) the injury is likely
20 to be redressed by a favorable court decision." Salmon Spawning &
21 Recovery Alliance v. Gutierrez, 545 F.3d 1220, 1225 (9th Cir.
22 2008). "Article III standing requires an injury that is actual or
23 imminent, not conjectural or hypothetical." Cole v. Oroville Union
24 High Sch. Dist., 228 F.3d 1092, 1100 (9th Cir. 2000) (internal
25 quotation marks omitted).

26 As noted above, in Citizens I, the Ninth Circuit held that
27 Citizens had standing to assert claims identical in all relevant
28 respects to those here. The court observed that, when the injury

1 complained of is the government's failure to follow prescribed
2 procedures, the plaintiff "must show that the procedures in
3 question are designed to protect some threatened concrete interest
4 of his that is the ultimate basis of his standing." 341 F.3d at
5 969 (quoting Public Citizen v. Dep't of Transp., 316 F.3d 1002,
6 1015 (9th Cir. 2003)). The "concrete interest" test requires "a
7 geographic nexus between the individual asserting the claim and the
8 location suffering an environmental impact." Id. at 971 (quoting
9 Public Citizen, 316 F.3d at 1015). The Ninth Circuit found that
10 Citizens had satisfied this requirement:

11 They have properly alleged, and supported with numerous
12 affidavits covering a vast range of national forests
13 around the country, that their members use and enjoy
14 national forests, where they observe nature and wildlife.
15 The Supreme Court has held that environmental plaintiffs
adequately allege injury in fact when they aver that they
use the affected area and are persons for whom the
aesthetic and recreational values of the area will be
lessened by the challenged activity.

16 Citizens need not assert that any specific injury will
17 occur in any specific national forest that their members
18 visit. The asserted injury is that environmental
19 consequences might be overlooked as a result of
20 deficiencies in the government's analysis under
21 environmental statutes. Were we to agree with the
22 district court that a NEPA plaintiff's standing depends
on "proof" that the challenged federal project will have
particular environmental effects, we would in essence be
requiring that the plaintiff conduct the same
environmental investigation that he seeks in his suit to
compel the agency to undertake.

23 Id. at 971-72 (citations and internal quotation marks omitted).

24 The Ninth Circuit also noted that environmental plaintiffs
25 asserting a procedural injury "can establish standing without
26 meeting all the normal standards for immediacy." Id. at 972
27 (internal quotation marks and ellipsis omitted). Instead, they
28 need only "establish the reasonable probability of the challenged

1 action's threat to their concrete interest." Id. (internal
2 quotation marks and brackets omitted). The court found that
3 Citizens had demonstrated a reasonable probability that its
4 members' "concrete interest in enjoying the national forests" would
5 be injured because the 2000 Rule eliminated some of the explicit
6 requirements that were contained in the 1982 rule. In so finding,
7 the court rejected the USDA's argument that, because the rule only
8 controlled the development of LRMPs and site-specific plans, and
9 did not have any direct effect on the environment itself, there was
10 an "insufficient connection between the asserted procedural injury
11 and the concrete interests at stake." Id. at 973. The court
12 reasoned that "[e]ven components of the 2000 Rule that apply
13 indirectly to site-specific plans will (with reasonable
14 probability) influence for the worse the environmental safeguards
15 in LRMPs promulgated thereunder, which in turn will likely result
16 in less environmental safeguards at the site-specific plan level."
17 Id. at 975.

18 If Citizens I is still good law, it would compel the
19 conclusion that Citizens has standing to sue in the present case.
20 The USDA, however, argues that Citizens I was implicitly overruled
21 by a recent decision of the United State Supreme Court, Summers v.
22 Earth Island Institute, ___ U.S. ___, 129 S. Ct. 1142 (2009). As
23 the Ninth Circuit has held, district courts must not follow circuit
24 court precedent where a subsequent Supreme Court decision has
25 "undercut the theory or reasoning underlying the prior circuit
26 precedent in such a way that the cases are clearly irreconcilable."
27 Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003).

28 Summers involved a challenge to Forest Service regulations

1 implementing the Forest Service Decisionmaking and Appeals Reform
2 Act of 1992 (ARA). The ARA requires the Forest Service "to
3 establish a notice, comment and appeal process for proposed actions
4 of the Forest Service concerning projects and activities
5 implementing land and resource management plans." Summers, 129 S.
6 Ct. at 1147 (internal quotation marks omitted). The implementing
7 regulations provided that certain of the ARA's procedures would not
8 be applied to some types of projects. Specifically, projects that
9 the Forest Service considered categorically excluded from NEPA's
10 requirement to file an EIS or an EA would not be required to comply
11 with the ARA's notice and comment procedures, see 36 C.F.R.
12 § 215.4(a), or the ARA's appeal procedures, see 36 C.F.R.
13 § 215.12(f). "Later amendments to the Forest Service's manual of
14 implementing procedures, adopted by rule after notice and comment,
15 provided that fire-rehabilitation activities on areas of less than
16 4,200 acres, and salvage-timber sales of 250 acres or less, did not
17 cause a significant environmental impact and thus would be
18 categorically exempt from the requirement to file an EIS or EA.
19 This had the effect of excluding these projects from the notice,
20 comment, and appeal process." Summers, 129 S. Ct. at 1147.

21 Following a fire in Sequoia National Forest, the Forest
22 Service announced its decision to undertake the Burnt Ridge
23 Project, a salvage sale of timber on 238 acres of forest land
24 damaged by the fire. Pursuant to its categorical exclusion, the
25 Service "did not provide notice in a form consistent with the
26 Appeals Reform Act, did not provide a period of public comment, and
27 did not make an appeal process available." Id. at 1148. Earth
28 Island Institute sued, challenging 36 C.F.R. §§ 215.4(a) and

1 215.12(f). In addition to these two regulations, Earth Island
2 Institute challenged six other Forest Service regulations that were
3 not applied to the Burnt Ridge Project.

4 After the district court granted a preliminary injunction, the
5 parties settled their dispute over the Burnt Ridge Project. Earth
6 Island Institute nonetheless proceeded with its claims, seeking a
7 ruling invalidating the two regulations that had been applied to
8 the project as well as the six regulations that had not. The
9 district court found that Earth Island Institute had standing to
10 challenge the regulations and that its claims were ripe for review.
11 The court invalidated five of the eight regulations, including the
12 two that had been applied to the Burnt Ridge Project, and entered a
13 nationwide injunction against their application.

14 On appeal, the Ninth Circuit found that Earth Island Institute
15 had standing to sue because it had suffered a procedural injury:

16 Earth Island was unable to appeal the Burnt Ridge Project
17 because the Forest Service applied 36 C.F.R. § 215.12(f);
18 the loss of that right of administrative appeal is
19 sufficient procedural injury in fact to support a
20 challenge to the regulation. Plaintiffs in this case are
21 "injure[d] ... in the sense contemplated by Congress,"
22 Idaho Conservation League v. Mumma, 956 F.2d 1508, 1516
(9th Cir. 1992); 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.

23 Earth Island Institute v. Ruthenbeck, 490 F.3d 687, 694 (9th Cir.
24 2007). The court's discussion of standing referred only to
25 § 215.12(f), which had the effect of eliminating Earth Island
26 Institute's right to appeal the Burnt Ridge Project. It did not
27 address, as a separate matter, the issue of standing with respect
28 to Earth Island Institute's challenge to § 215.12(a), which had the

1 effect of exempting the Burnt Ridge Project from the ARA's ordinary
2 notice and comment procedures. Nor did the court specifically
3 address standing with respect to Earth Island Institute's challenge
4 to the six regulations that had not been applied to the project.

5 The Ninth Circuit also discussed the issue of ripeness. It
6 found that, because §§ 215.4(a) and 215.12(f) had been applied to
7 the Burnt Ridge Project, these regulations were ripe for review.
8 In the court's view, the parties' agreement to settle the Burnt
9 Ridge timber sale dispute did "not affect the ripeness of Earth
10 Island's challenge to 36 C.F.R. §§ 215.12(f) and 215.4(a)" because
11 the record remained "sufficiently concrete to permit this court to
12 review the application of the regulation to the project and to
13 determine if the regulations as applied are consistent with the
14 ARA." Id. at 696. As for the other regulations, the court held
15 that Earth Island's challenge was not ripe:

16 Earth Island has not shown that the other challenged
17 regulations were applied in the context of the Burnt
18 Ridge Timber Sale or any other specified project. The
19 record is speculative and incomplete with respect to the
20 remaining regulations, so the issues are not fit for
21 judicial decision While Earth Island has
22 established sufficient injury for standing purposes, it
23 has not shown the sort of injury that would require
24 immediate review of the remaining regulations. There is
25 not a sufficient "case or controversy" for us to review
26 regulations not applied in the context of the record
27 before this court.

28 Id.

The Ninth Circuit went on to affirm the district court's
invalidation of §§ 215.4(a) and 215.12(f). It remanded the
judgment and injunction with respect to the remaining regulations
with instructions to vacate for "lack of a controversy ripe for
review." Id. at 699.

1 The Supreme Court reversed the Ninth Circuit on the issue of
2 standing, holding that the settlement of the dispute over the Burnt
3 Ridge Project deprived Earth Island Institute of standing because
4 the organization was no longer suing on the basis of an injury
5 resulting from application of the challenged regulations in a
6 specific context:

7 Respondents have identified no other application of the
8 invalidated regulations that threatens imminent and
9 concrete harm to the interests of their members. The
10 only . . . affidavit relied on was that of Jim Bensman.
11 He asserted, first, that he had suffered injury in the
12 past from development on Forest Service land. That does
not suffice for several reasons: because it was not tied
to application of the challenged regulations, because it
does not identify any particular site, and because it
relates to past injury rather than imminent future injury
that is sought to be enjoined.

13 Bensman's affidavit further asserts that he has visited
14 many National Forests and plans to visit several unnamed
15 National Forests in the future. Respondents describe
16 this as a mere failure to "provide the name of each
17 timber sale that affected Bensman's interests." It is
18 much more (or much less) than that. It is a failure to
19 allege that any particular timber sale or other project
20 claimed to be unlawfully subject to the regulations will
21 impede a specific and concrete plan of Bensman's to enjoy
22 the National Forests. The National Forests occupy more
23 than 190 million acres, an area larger than Texas. There
24 may be a chance, but is hardly a likelihood, that
25 Bensman's wanderings will bring him to a parcel about to
26 be affected by a project unlawfully subject to the
27 regulations. Indeed, without further specification it is
impossible to tell which projects are (in respondents'
view) unlawfully subject to the regulations. . . . [W]e
are asked to assume not only that Bensman will stumble
across a project tract unlawfully subject to the
regulations, but also that the tract is about to be
developed by the Forest Service in a way that harms his
recreational interests, and that he would have commented
on the project but for the regulation. Accepting an
intention to visit the National Forests as adequate to
confer standing to challenge any Government action
affecting any portion of those forests would be
tantamount to eliminating the requirement of concrete,
particularized injury in fact.

28 Summers, 129 S. Ct. at 1150-51 (citations omitted; emphasis in

1 original).

2 The Court further addressed the issue of procedural injury:

3 Respondents argue that they have standing to bring their
4 challenge because they have suffered procedural injury,
5 namely that they have been denied the ability to file
6 comments on some Forest Service actions and will continue
7 to be so denied. But deprivation of a procedural right
8 without some concrete interest that is affected by the
9 deprivation -- a procedural right in vacuo -- is
10 insufficient to create Article III standing. Only a
11 person who has been accorded a procedural right to
12 protect his concrete interests can assert that right
13 without meeting all the normal standards for
14 redressability and immediacy. Respondents alleged such
15 injury in their challenge to the Burnt Ridge Project,
16 claiming that but for the allegedly unlawful abridged
17 procedures they would have been able to oppose the
18 project that threatened to impinge on their concrete
19 plans to observe nature in that specific area. But Burnt
20 Ridge is now off the table.

21 Id. at 1151 (citation and internal quotation marks omitted;
22 emphasis in original).

23 Having concluded that Earth Island Institute lacked standing
24 to challenge §§ 215.4(a) and 215.12(f), the Supreme Court did not
25 reach the question of whether the regulations were ripe for review.
26 The Court affirmed the dismissal, which Earth Island Institute had
27 not appealed, of the six regulations that were not applied to the
28 Burnt Ridge Project.

The USDA asserts that, like Earth Island Institute, Citizens
challenges a regulation with broad application that has not been
applied in a particular context and thus has not given rise to any
cognizable injury. It argues that Citizens may not challenge any
procedural infirmities underlying the 2008 Rule except in
connection with a challenge to a site-specific plan approved under
a LRMP that was developed or revised pursuant to the Rule.

The Court is bound to follow the Ninth Circuit's decision in

1 Citizens I unless Summers is clearly irreconcilable with that
2 decision. And, as Citizens points out, the challenge at issue in
3 Summers is distinguishable in important respects from the challenge
4 at issue here and in Citizens I. Summers involved a substantive
5 challenge to regulations that exempted certain projects from
6 procedural requirements that would ordinarily apply. The
7 plaintiffs in Summers could not possibly suffer the procedural
8 injury that was the basis of their standing until the regulations
9 were actually applied to specific projects. Once the dispute over
10 the Burnt Ridge Project was settled, the Summers plaintiffs were
11 left with a hypothetical future procedural injury that was
12 insufficient to confer standing. In contrast, the present case
13 involves a challenge, not to the substance of any particular
14 regulation, but to the Forest Service's failure to follow proper
15 procedures when promulgating the 2008 Rule. Citizens has already
16 suffered the procedural injury that forms the basis of its
17 standing; it was injured by the USDA's failure to take a hard look
18 at the environmental consequences of its action. Unlike in
19 Summers, where the injury was the deprivation of Earth Island
20 Institute's opportunity to provide comments on and subsequently
21 appeal a specific decision, here the injury will not become more
22 concrete when the Rule is applied to an LRMP or a site-specific
23 plan.

24 Furthermore, Citizens' numerous detailed declarations
25 demonstrate that its members have future plans to visit
26 specifically identified sites within the National Forest System in
27 the future. The Ninth Circuit found in Citizens I that such
28 declarations are sufficient to establish that the members have a

1 concrete interest in the aesthetic and recreational value of the
2 National Forest System -- an interest that is jeopardized by the
3 procedural injury they have suffered. The declarations here are
4 not lacking in specificity, as was the declaration in Summers.

5 It is true that the Summers Court's discussion of procedural
6 injury could be interpreted as prohibiting a challenge based on
7 such an injury unless the plaintiff has concrete plans to visit a
8 specific site that faces the threat of imminent harm as a direct
9 result of the regulation tainted by procedural defects. However,
10 it is not clear that the Supreme Court intended for such a rule to
11 apply when, as here, the procedural injury in question will never
12 be directly linked to a site-specific project. The overarching
13 nature of the plan development rule makes it impossible to link the
14 procedural injury at issue here to any particular site-specific
15 project, whether now or in the future. Waiting to adjudicate the
16 validity of the Rule until an LRMP is revised under it and a site-
17 specific plan is later approved under that LRMP would not present
18 the court with any greater a "case or controversy" with respect to
19 the already-completed procedural violation than exists today.

20 Rather, such an approach would insulate the procedural injury from
21 judicial review altogether. If Citizens is forced to delay seeking
22 redress for its procedural injury until a site-specific plan is
23 approved under a revised LRMP, it would face a statute of
24 limitations defense. The government might also argue that the
25 procedural injury is not sufficiently tied to the project to confer
26 standing. Moreover, it would be a waste of the government's
27 resources if it were to revise an LRMP and approve a site-specific
28 plan, only to have both declared invalid because the 2008 Rule

1 pursuant to which the LRMP was created was procedurally defective.

2 Although Summers casts doubt upon whether the Ninth Circuit's
3 holding in Citizens I with respect to standing continues in force,
4 the Court cannot conclude that the two cases are clearly
5 irreconcilable. Accordingly, the Court adheres to Citizens I and
6 finds that Citizens has standing to assert its claims. In
7 addition, Summers did not reach the issue of ripeness and thus did
8 not disturb the Ninth Circuit's holding in Citizens I that
9 Citizens' procedural challenges to the 2000 Rule were ripe for
10 review. The present case is indistinguishable from Citizens I with
11 respect to this issue, and the Court therefore concludes that
12 Citizens' procedural challenges are ripe for review.

13 II. NEPA Claim

14 "NEPA requires agencies to take a 'hard look' at the
15 environmental consequences of their actions by preparing an EIS for
16 each 'major Federal action significantly affecting the quality of
17 the human environment.'" The Lands Council v. McNair, 537 F.3d
18 981, 1000-01 (9th Cir. 2008) (quoting 42 U.S.C. § 4332(C)). "The
19 EIS must 'provide [a] full and fair discussion of significant
20 environmental impacts' so as to 'inform decisionmakers and the
21 public of the reasonable alternatives which would avoid or minimize
22 adverse impacts or enhance the quality of the human environment.'" Id.
23 at 1001 (quoting 40 C.F.R. § 1502.1). The EIS must discuss:

- 24 (i) the environmental impact of the proposed action,
25 (ii) any adverse environmental effects which cannot be
26 avoided should the proposal be implemented,
27 (iii) alternatives to the proposed action,
28 (iv) the relationship between local short-term uses of
man's environment and the maintenance and enhancement of

1 long-term productivity, and

2 (v) any irreversible and irretrievable commitments of
3 resources which would be involved in the proposed action
should it be implemented.

4 42 U.S.C. § 4332(C).

5 Although the USDA maintains that it prepared a thorough EIS
6 prior to promulgating the 2008 Rule, the EIS does not actually
7 analyze the environmental effects of implementing the Rule.
8 Instead, the EIS repetitively insists -- as the USDA insists in
9 connection with the present motion and has insisted since Citizens
10 I -- that the Rule will have no effect on the environment because
11 it merely sets out the process for developing and revising LRMPs
12 and is removed from any foreseeable action that might affect the
13 environment. This position was rejected in Citizens I and Citizens
14 II, and the Court adheres to the reasoning set out in those
15 decisions.

16 The 2008 Rule eliminates or modifies standards that applied to
17 all LRMPs and site-specific plans. For example, the 2008 Rule does
18 not require that LRMPs and site-specific plans "insure" the
19 viability of existing vertebrate species, as the 1982 Rule did, or
20 even provide a "high likelihood" of viability, as the 2000 Rule
21 did. Instead, the 2008 Rule states a goal of providing a
22 "framework to contribute to sustaining native ecological systems by
23 providing appropriate ecological conditions to support diversity of
24 native plant and animal species in the plan area." 36 C.F.R.
25 § 219.10(b). Although the EIS discusses the differences between
26 the various standards, it fails to acknowledge the effect of
27 eliminating the viability requirement. According to the EIS
28 itself, the requirement was not incorporated in the 2008 Rule

1 because of the practical difficulty of complying with it. It is
2 disingenuous for the USDA now to maintain that it has no idea what
3 might happen if it is no longer required to comply with the
4 requirement. As the Ninth Circuit found, the "USDA's argument
5 . . . that there is no reason to believe that lower environmental
6 safeguards at the national programmatic level will result in lower
7 environmental standards at the site-specific level [] suggests that
8 it conceives of plan development rules merely as exercises in
9 paper-pushing." Citizens I, 341 F.3d at 975. At the very least,
10 the EIS must discuss instances where the USDA has found the
11 viability requirement to be difficult to implement and analyze the
12 impact of no longer having to ensure species viability in those
13 instances. The same is true with the rest of the EIS chapter
14 entitled "Affected Environment and Environmental Consequences."
15 The EIS discusses the differences between the identified
16 alternatives and explains why the USDA prefers Alternative M, but
17 it does not actually discuss the environmental consequences of
18 eliminating the specific protections that are provided in previous
19 plan development rules.

20 Because the EIS does not evaluate the environmental impacts of
21 the 2008 Rule, it does not comply with NEPA's requirements.

22 III. ESA Claim

23 Section 7 of the ESA requires federal agencies to "insure that
24 any action authorized, funded, or carried out by such agency . . .
25 is not likely to jeopardize the continued existence of any
26 endangered species or threatened species or result in the
27 destruction or adverse modification of habitat of such species."
28 16 U.S.C. § 1536(a)(2). It requires agencies to consult with the

1 FWS or NMFS in connection with any action that "may affect" an
2 endangered or threatened species. 50 C.F.R. § 402.14(a). Citizens
3 II explains the consultation process:

4 [T]he agency contemplating action must request
5 information from the appropriate federal consulting
6 agency . . . regarding whether any species which is
7 listed or proposed to be listed may be present in the
8 area of such proposed action. [¶] If so, and if the
9 action constitutes a "major construction activity," then
10 the agency is required to produce a biological assessment
11 (or "BA") in accordance with ESA for the purpose of
12 identifying any endangered species or threatened species
13 which is likely to be affected by such action. . . . If
14 the biological assessment concludes that there are no
15 listed species or critical habitat present that are
16 likely to be adversely affected, and the wildlife agency
17 confers, then formal consultation is not required.
18 However, if the biological assessment concludes that
19 listed species are in fact likely to be adversely
20 affected, the agency then must ordinarily enter into
21 formal consultation with the wildlife service.

22

23 Where a proposed action "may affect" endangered and
24 threatened species, but the agency desires to avoid the
25 lengthy and costly process of formal consultation, it may
26 first initiate informal consultation. Informal
27 consultation, which includes all discussions,
28 correspondence, etc., between the agency and the wildlife
service, may serve as a precursor to formal consultation.
However, if informal consultation results in a finding of
no effect, then the consultation process is terminated,
and no further action is required. If informal
consultation results in a finding, though, that the
action is likely to adversely affect listed species or
habitat, then subsequent formal consultation is required.

Formal consultation requires the wildlife agency to
produce a "biological opinion" that evaluates the nature
and extent of the proposed action's effect on the listed
species and that, if necessary, posits reasonable and
prudent alternatives to the proposed action.

481 F. Supp. 2d at 1091-92 (internal quotation marks and citations
omitted). The court in Citizens II found that the USDA had failed
to comply with the ESA's consultation requirement because the 2005
Rule "may affect" endangered or threatened species, but the USDA

1 did not prepare a BA or engage in consultation of any kind with the
2 FWS or NMFS.

3 The USDA argues that it has complied with the ESA because it
4 engaged in informal consultations with the wildlife agencies and
5 prepared a BA. Because, in the USDA's view, the BA reasonably
6 concluded that the 2008 Rule would have no effect on endangered or
7 threatened species, the USDA was not required to obtain the
8 wildlife agencies' concurrence or enter into formal consultations.

9 The Citizens II court found that the 2005 Rule "may affect"
10 endangered and threatened species. The 2008 Rule "may affect"
11 those species for the same reasons. In order to avoid having to
12 enter into formal consultations with the wildlife agencies, the
13 USDA was thus required either to prepare a BA concluding that the
14 Rule was not likely to have an effect and to obtain the agencies'
15 concurrence therewith, see 50 C.F.R. § 402.12(k)(1), or to engage
16 in informal consultations that resulted in a determination, "with
17 the written concurrence" of the agencies, that the Rule was not
18 likely to have an effect, see 50 C.F.R. § 402.13(a). It is
19 undisputed that the USDA did not submit its BA to the FWS or NMFS
20 for their concurrence. And although the USDA engaged in
21 correspondence with the wildlife agencies before it completed its
22 BA, it is also undisputed that the agencies did not issue a written
23 concurrence with the USDA's finding that the 2008 Rule would have
24 no effect on endangered species. Although an agency may be excused
25 from the ESA's consultation requirements if it concludes that its
26 proposed action will have "no effect" on protected species (as
27 opposed to concluding that is "unlikely to affect" protected
28 species), see Sw. Ctr. for Biological Diversity v. U.S. Forest

1 Serv., 100 F.3d 1443, 1447-48 (9th Cir. 1996), two courts have
2 rejected USDA's argument that the programmatic nature of the plan
3 development rule necessarily means that it will have no effect on
4 the environment or protected species. The USDA has simply copied
5 those rejected legal arguments in a new document and called it a
6 "Biological Assessment." This is not sufficient to satisfy the
7 ESA's requirements.

8 IV. Remedy

9 "Under the APA, the normal remedy for an unlawful agency
10 action is to 'set aside' the action. In other words, a court
11 should vacate the agency's action and remand to the agency to act
12 in compliance with its statutory obligations." Se. Alaska
13 Conservation Council v. U.S. Army Corps of Eng'rs, 486 F.3d 638,
14 654 (9th Cir. 2007), rev'd on other grounds, Coeur Alaska, Inc. v.
15 Se. Alaska Conservation Council, ___ U.S. ___, 2009 WL 1738643
16 (2009) (citation and internal quotation marks omitted).
17 Accordingly, the Court vacates the 2008 Rule, enjoins the USDA from
18 further implementing it and remands it to the USDA for further
19 proceedings.

20 "The effect of invalidating an agency rule is to reinstate the
21 rule previously in force." Paulsen v. Daniels, 413 F.3d 999, 1008
22 (9th Cir. 2005). It appears that the 2000 Rule was in force before
23 the 2008 Rule was promulgated.¹ However, the USDA has expressed in
24 the past its view that the 2000 Rule is unworkable in practice.
25 Accordingly, the agency may choose whether to reinstate the 2000

26
27 ¹Although the 2000 Rule was challenged in Citizens I, because
28 the USDA announced in 2002 its intent to supersede the 2000 Rule,
the challenge was dropped before the validity of the 2000 Rule had
been adjudicated.

1 Rule or, instead, to reinstate the 1982 Rule.

2 CONCLUSION

3 For the foregoing reasons, Citizens' motion for summary
4 judgment (Docket No. 40) is GRANTED and the USDA's cross-motion for
5 summary judgment (Docket No. 41) is DENIED. The 2008 Rule is
6 VACATED and REMANDED to the USDA for further proceedings consistent
7 with this order. The clerk shall enter judgment and close the
8 file.

9 IT IS SO ORDERED.

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11 Dated: 6/30/09



CLAUDIA WILKEN
United States District Judge

United States District Court
For the Northern District of California