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15
16 UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
17 SAN FRANCISCO DIVISION
18

19 DEFENDERS OF WILDLIFE, SIERRA CLUB,)
THE WILDERNESS SOCIETY, and)
20 VERMONT NATURAL RESOURCES)
COUNCIL,)
21)
Plaintiffs,)
22)
vs.)
23)
MIKE JOHANNNS, Secretary, U.S. Department)
24 of Agriculture, in his official capacity; DALE)
BOSWORTH, Chief, U.S. Forest Service, in his)
25 official capacity; and U.S. FOREST SERVICE,)
26)
Defendants.)

Case No. 04-4512 PJH

FIRST SUPPLEMENTAL COMPLAINT
FOR DECLARATORY AND INJUNCTIVE
RELIEF

1 Forest Service has repeatedly violated them, most particularly by failing in a number of instances to
2 take legally required steps to ensure that environmentally harmful activities do not push National
3 Forest wildlife populations past the point of viability. Despite a series of judicial decisions finding
4 the Forest Service in violation of the 1982 regulations, the agency generally has not attempted to
5 modify its actions to ensure compliance with the wildlife viability regulations. Instead, the Forest
6 Service under the current administration has sought to repeal all of the resource standards in the
7 1982 regulations through a radical revision of those rules that does not comport with the NFMA.

8 4. When their efforts at such revision were slowed by administrative delays, the
9 defendants promulgated the first of the two related rulemakings at issue in this case. The challenged
10 September 29, 2004 rule purports merely to clarify a pre-existing interpretation of defendants' own
11 regulations while, in fact, it seeks to rescind the 1982 NFMA Regulations in their entirety as these
12 apply to site-specific Forest Service decisions. Despite the sweeping legislative effect of this rule,
13 the defendants promulgated it without any public notice or opportunity for comment, disguising it as
14 an "interpretative rule" exempt from the public notice and comment requirements of the
15 Administrative Procedure Act ("APA"). 5 U.S.C. § 553(b)(3)(A). But the challenged rule is not
16 interpretative; it is legislative. By failing to comply with the basic notice and comment requirements
17 for a legislative rulemaking, the defendants violated the APA.

18 5. The second rulemaking challenged in this case is the final rule revising the NFMA
19 Regulations in a manner that strips them of virtually all of the resource protection standards that the
20 NFMA expressly requires these regulations to provide. This rule was announced on December 22,
21 2004, and published in the January 5, 2005 Federal Register; it is referred to herein as the "2005
22 NFMA Rule." This rule violates the letter and spirit of the NFMA by systematically removing from
23 the regulations the very standards that the act demands.

24 6. Further, the 2005 NFMA Rule violates the APA by varying so significantly and
25 unforeseeably from the proposed rule published for public comment in 2002 that it would have to be
26 renoticed for further comment before it could be lawfully adopted. By the defendants' own
27 characterization, the 2005 NFMA Rule marks a "paradigm shift" in NFMA forest planning, and, in
28 contrast to the proposed rule presented to the public, it deletes all NFMA-required resource

1 standards from the regulations; introduces a novel, unexplained “environmental management
2 system” that is to play a central role in National Forest planning; and eliminates the requirement that
3 plans for each unit of the National Forest System be consistent with the best available science. The
4 final rule further violates the APA by abandoning the scientifically-based species viability
5 requirement of the 1982 NFMA Regulations without providing any scientific support for doing so.
6 Finally, defendants violated the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et*
7 *seq.*, by failing to prepare an environmental impact statement on the 2005 NFMA Rule, despite the
8 far-reaching environmental impacts that this abandonment of environmentally protective standards
9 will have on National Forests across the country.

10 **JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT**

11 7. Plaintiffs bring this action pursuant to the APA, 5 U.S.C. §§ 701-706. This Court has
12 jurisdiction over plaintiffs’ claims pursuant to 28 U.S.C. § 1331 (federal question) and may issue a
13 declaratory judgment and further relief pursuant to 28 U.S.C. §§ 2201-02.

14 8. Venue lies in this judicial district pursuant to 28 U.S.C. § 1391(e) because plaintiff
15 Sierra Club is incorporated in this district and maintains its headquarters in the County of San
16 Francisco. Moreover, more than 1.5 million acres of National Forest lands lie within the Northern
17 District of California.

18 9. Assignment to the San Francisco Division of this judicial district is proper because
19 plaintiff Sierra Club is incorporated and headquartered in the County of San Francisco. Civil L. R.
20 3-2(c), (d).

21 **PARTIES**

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

26 11. Plaintiff Sierra Club is a non-profit conservation organization founded in 1892, with
27 headquarters in San Francisco, California, and more than 750,000 members nationwide. The
28 mission of the Sierra Club is: “To explore, enjoy and protect the wild places of the earth; to practice

1 and promote the responsible use of the earth's ecosystems and resources; and to educate and enlist
2 humanity to protect and restore the quality of the natural and human environments.”

3 12. Plaintiff The Wilderness Society (“TWS”) is a non-profit environmental organization
4 founded in 1935, with its headquarters in Washington, D.C., approximately 200,000 members, and
5 eight regional offices. TWS works to protect America's wilderness and to develop a nationwide
6 network of wild lands through public education, scientific analysis, and advocacy. Protecting
7 National Forest areas is vital to achieving TWS's mission.

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

14 14. Plaintiffs and their members use the lands in the National Forest System for
15 recreational, scientific, aesthetic, conservation, and commercial purposes. Plaintiffs and their
16 members have a strong interest in the environmental protections afforded to National Forest lands by
17 the NFMA and by the Forest Service's 1982 NFMA Regulations, which regulations defendants have
18 sought to rescind and replace through the rulemakings challenged in this case. This strong interest
19 includes an interest in those provisions of the 1982 NFMA Regulations containing standards that,
20 among other things, require the NFMA-required plan for each unit of the National Forest System
21 (“Forest Plan”) to provide for maintaining viable populations of existing native and desired non-
22 native vertebrate species (former 36 C.F.R. § 219.19 (1982) (the 1982 NFMA Regulations will be
23 cited hereafter as “1982 § 219. __”)); restrict timber harvest to areas where it will not cause
24 irreversible damage to land and water resources and where trees can be adequately replanted (1982
25 §§ 219.14, 219.27(b)); and restrict the use of clearcutting and other even-aged harvest systems (1982
26 § 219.27(c)). Plaintiffs and their members seek to view, study, hunt, fish, and otherwise enjoy
27 wildlife and signs of the presence of wildlife, including rare, imperiled, and sensitive wildlife
28 species, in the National Forests; to benefit from healthy National Forest watersheds, which they use

1 and rely upon for drinking water, swimming, fishing, boating, aesthetic appreciation, and other
2 activities; to observe and study trees and other National Forest plant life, and to gather fruits, nuts,
3 and other wild plant materials as permitted in the National Forests; and to enjoy the natural scenery
4 of the National Forests. The removal of all resource protection standards from the 2005 NFMA Rule
5 threatens plaintiffs' and their members' interests in all of these uses of and benefits from
6 ecologically healthy National Forests. Plaintiffs also have a strong interest in the population surveys
7 for certain wildlife species on each National Forest that are required by the 1982 regulations (*see*
8 1982 § 219.19(a)(1), (6)), as such surveys provide valuable information on wildlife populations,
9 trends, and the impact of forest management activities. Further, plaintiffs and their members have a
10 procedural interest in influencing national forest management through participation in the
11 development of meaningful, substantive forest plans as prescribed by the NFMA.

12 15. The above-described recreational, scientific, aesthetic, conservation, consumptive,
13 participatory, and commercial interests of plaintiffs and their respective members have been, are
14 being, and, unless the relief prayed for in this complaint is granted, will continue to be adversely
15 affected and irreparably injured by defendants' violations of the NFMA, APA, and NEPA, as
16 described below. In particular, defendants' challenged actions injure plaintiffs and their members by
17 eliminating substantive, enforceable environmental requirements of the NFMA Regulations
18 mandated by the NFMA that govern both the formulation of Forest Plans and site-specific projects
19 and actions within the National Forest System. Plaintiffs' and their members' procedural interest in
20 participating in the development, amendment and revision of Forest Plans is injured by the 2005
21 NFMA Rule's rendering public input effectively meaningless by converting Forest Plans into
22 documents largely irrelevant to forest management activities on the ground and by allowing any
23 Forest Plan guidance developed with public involvement to be readily changed or modified to
24 accommodate inconsistent timber sales and other projects.

25 16. Defendants' failure to comply with the APA's notice and comment procedures with
26 respect to the 2005 NFMA Rule injures plaintiffs and their members by denying them any
27 opportunity to comment upon and advocate against that rulemaking's wholesale elimination of
28 virtually all standards and guidelines required by the NFMA from the NFMA Regulations, as well as

1 upon its adoption of an undescribed environmental management system for all National Forests and
2 its abandonment of the requirement that all Forest Plans must be consistent with the best available
3 science, all of which appeared for the first time in the 2005 NFMA Rule and were not foreseeable
4 from the Proposed Rule. Defendants' failure to comply with the APA's notice and comment
5 procedures with respect to the September 29, 2004 rulemaking injures plaintiffs and their members
6 by denying them any opportunity to comment upon the far-reaching effects of that rule and to
7 advocate through a formal rulemaking process for retention of the substantive environmental
8 requirements it rescinds. Defendants' failure to comply with the APA's notice and comment
9 procedures for either rulemaking further injures plaintiffs and their members by removing essential
10 procedural safeguards that help to ensure that government agencies are accountable and that their
11 decisions are reasoned rather than arbitrary. Defendants' failure to document any scientific studies,
12 data, or other scientific basis for the abandonment of the longstanding species viability approach to
13 preserving wildlife diversity on the National Forests, which approach was itself based on extensive
14 scientific input, injures plaintiffs' and their members' interest in obtaining information critical to
15 making informed comment on the abandonment of this diversity-protection approach. This lack of
16 documentation further injures plaintiffs' and their members' procedural interests by violating the
17 APA's essential procedural safeguard that an agency must offer a rational basis for its rulemaking
18 and cannot proceed in an arbitrary and capricious manner.

19 17. Defendants' failure to comply with NEPA in the promulgation of the 2005 NFMA
20 Rule injures plaintiffs and their members by denying them the information that NEPA requires about
21 the potential environmental impacts — direct, indirect, and cumulative with other forest
22 management regulations and proposals — of the 2005 NFMA Rule, about environmentally superior
23 alternatives to that rule, and about mitigation measures available to address any significant impacts
24 identified; by denying them any opportunity to comment on this information in draft form, as
25 required by NEPA; and by denying them the procedural safeguards embodied in NEPA to ensure
26 that government agencies carefully consider the environmental consequences of a proposed action,
27 environmentally superior alternatives to that action, and appropriate mitigation measures prior to
28 granting any project approval.

1 18. Plaintiffs have no adequate remedy at law to address any of the foregoing injuries to
2 their interests.

3 19. Defendant Mike Johanns is the Secretary of the U.S. Department of Agriculture.
4 Defendant Johanns is sued in his official capacity.

5 20. Defendant Dale Bosworth is the Chief of the U.S. Forest Service, an agency within
6 the U.S. Department of Agriculture. Defendant Bosworth is sued in his official capacity.

7 21. Defendant U.S. Forest Service is an agency within the U.S. Department of
8 Agriculture that is charged with administration of the National Forest System.

9 **THE NATIONAL FOREST SYSTEM**

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

13 23. The National Forest System provides many natural assets for the use and enjoyment
14 of all Americans and visitors from around the globe. Stretching from the Pacific to the Atlantic,
15 from Alaska in the north to Puerto Rico in the south, with units in all but eight of the fifty states, the
16 National Forest System contains a spectacular array of landscapes, including boreal forests, remnants
17 of the prairie grasslands that once carpeted the interior of the continent, temperate and tropical rain
18 forests, towering mountain ranges, eastern hardwood forests, and bald cypress swamps, among many
19 others. These natural landscapes are used and enjoyed by millions of visitors every year for
20 sightseeing, hiking, wildlife observation, winter sports, mountaineering, camping, biking,
21 picnicking, and numerous other activities.

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

27 25. Importantly, National Forests also encompass a broad array of ecosystems and habitat
28 types, including large blocks of relatively unfragmented habitats that are critical to the continued

1 existence of many of the large mammals that still persist in the United States, including grizzly
2 bears, wolves, wolverines, lynx, elk, and bighorn sheep. Accordingly, preserving existing wildlife
3 populations in the National Forest System ensures preservation of some of the most rare and revered
4 wildlife species remaining in our nation.

5 26. The headwaters of many of the nation’s rivers are located within the National Forest
6 System, and the water that National Forest watersheds provide is critical to drinking water supplies
7 for many communities, fisheries, and domestic, agricultural, and industrial uses. National Forest
8 streams, rivers, ponds, and lakes also provide a popular source of recreation, including boating,
9 swimming, fishing, and aesthetic enjoyment.

10 **THE NATIONAL FOREST MANAGEMENT ACT**

11 27. Congress enacted the National Forest Management Act in 1976 to reform Forest
12 Service management of the National Forest System, primarily by requiring greater recognition of
13 non-timber resources, including wildlife, water, and soils; by constraining the use of clearcutting;
14 and by requiring greater opportunities for public participation in National Forest management.

15 28. The NFMA implements its Forest Service reforms through a system of land
16 management planning for the National Forest System. The NFMA provides that “the Secretary shall
17 in accordance with the procedures set forth in section 553 of Title 5, promulgate regulations . . . that
18 set out the process for the development and revision” of land management plans for the National
19 Forests (termed “Forest Plans” in this complaint) and further set out “the guidelines and standards
20 prescribed by this subsection.” 16 U.S.C. § 1604(g).

21 29. The NFMA specifically requires the promulgation of regulations specifying
22 guidelines for Forest Plans that address a variety of specific resource management issues. 16 U.S.C.
23 § 1604(g)(3). Among the explicit mandates of this subsection of the NFMA are regulations
24 specifying guidelines that provide for the diversity of plant and animal communities in each National
25 Forest (§ 1604(g)(3)(B)); that restrict timber harvesting to avoid irreversible damage to soils, slopes,
26 and watersheds and detrimental changes to waterways, wetlands, and riparian areas (§
27 1604(g)(3)(E)); that restrict the use of clearcutting and other even-aged timber harvest methods (*i.e.*,
28 harvest methods that result in a replacement stand of trees of identical age) and limit the size and

1 regulate the shape of areas harvested by even-aged methods (§ 1604(g)(3)(F)); and that require the
2 identification of the suitability of National Forest lands for resource management (§ 1604(g)(2)(A)).
3 The regulations that the NFMA requires regarding National Forest land management planning are
4 referred to generically throughout this complaint as the “NFMA Regulations;” versions of these
5 regulations that have been adopted or proposed over the years are individually identified.

6 **THE 1982 NFMA REGULATIONS**

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

20 31. The 1982 NFMA Regulations were promulgated based on the recommendations of an
21 appointed Committee of Scientists, specifically mandated by the NFMA. 16 U.S.C. § 1604(h). The
22 Committee of Scientists, made up of members from outside the Forest Service who were experts in
23 various sciences relevant to National Forest resources, convened a series of public meetings across
24 the country. On the basis of their collective expertise and the public input received, the Committee
25 of Scientists made recommendations to the Forest Service regarding the appropriate content of the
26 NFMA Regulations.

27 32. The 1982 NFMA Regulations establish numerous important environmental
28 safeguards for the National Forests. For example, they mandate 100-foot buffer zones around

1 riparian areas where the Forest Service is prohibited from taking actions that harm water quality
2 (1982 § 219.27(e)), establish maximum size limitations on clearcuts (*id.* § 219.27(d)(2)), and provide
3 detailed standards for identifying National Forest lands not suitable for timber production (*id.* §
4 219.14).

5 33. With respect to wildlife, the 1982 NFMA Regulations establish a critical protection
6 mandate to implement the NFMA diversity requirement for the National Forest System. The
7 drafters of the 1982 regulations recognized that in order to sustain plant and animal communities in
8 the 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.* § 219.19.

18 34. 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 and of the
21 specific ecosystems these species inhabit. Monitoring these proxy species enables the Forest Service
22 to determine whether its management activities are having adverse impacts on wildlife and
23 ecosystems without the necessity of monitoring all species occupying the forest. Specifically, the
24 1982 NFMA Regulations provide that “certain vertebrate and/or invertebrate species present in the
25 area shall be identified and selected as management indicator species” based upon a finding that
26 “their population changes are believed to indicate the effects of management activities.” *Id.*
27 § 219.19(a)(1). The regulations further provide that “[p]opulation trends of the management
28 indicator species will be monitored and relationships to habitat changes determined.” *Id.*

1 § 219.19(a)(6). The wildlife viability and management indicator species rules are second only to the
2 Endangered Species Act, (“ESA”), 16 U.S.C. § 1531 *et seq.*, in their importance as a federal
3 protection for species conservation and are an important complement to the ESA in that they help
4 identify and correct species declines before the emergency measures of the ESA are needed.

5 35. However, since adopting the 1982 NFMA Regulations, the Forest Service frequently
6 has failed to comply with them, particularly with respect to the regulatory requirement that the
7 agency obtain data necessary to determine population trends of management indicator species and
8 their relationships to habitat changes caused by National Forest management activities. As a result,
9 numerous federal courts have invalidated decisions by the Forest Service to undertake site-specific
10 logging and other environmentally harmful projects in the National Forests. *See, e.g., The Land*
11 *Council v. Powell*, 379 F.3d 738 (9th Cir. 2004), *amended* 2005 U.S. App. LEXIS 1153 (9th Cir.
12 2005); *Utah Environmental Congress v. Bosworth*, 372 F.3d 1219 (10th Cir. 2004); *Idaho Sporting*
13 *Congress v. Rittenhouse*, 305 F.3d 957 (9th Cir. 2002); *Sierra Club v. Martin*, 168 F.3d 1, 7 (11th
14 Cir. 1999); *Forest Guardians v. U.S. Forest Service*, 180 F. Supp. 2d 1273 (D.N.M. 2001); *Utah*
15 *Environmental Congress v. Zieroth*, 190 F. Supp. 2d 1265 (D. Utah 2002).

16 36. Thus, the wildlife “viability” requirement has acted as a significant check upon the
17 Forest Service when the agency has attempted to implement environmentally harmful projects
18 without taking the basic steps required by the 1982 NFMA Regulations to ensure that its actions are
19 not pushing resident wildlife populations past the point of viability.

20 **THE 2000 NFMA RULE AND 2002 PROPOSED RULE**

21 37. Since promulgation of the 1982 NFMA Regulations, the Forest Service has initiated
22 several attempts to revise them. All such attempts were abandoned due to controversy until, in late
23 1997, then-Secretary of Agriculture Dan Glickman convened a new independent Committee of
24 Scientists, as expressly authorized by the NFMA, to provide guidance to the Forest Service on how
25 to revise and update the NFMA Regulations. 16 U.S.C. § 1604(h)(1). Like the earlier Committee of
26 Scientists, this group convened a series of meetings across the country in 1998 to invite public
27 participation in their deliberations. In March 1999, the Committee provided the Forest Service a
28 193-page set of recommendations regarding potential revisions to the NFMA regulations. Taking

1 the Committee of Scientists' recommendations into account, the Forest Service published a proposed
2 rule revising the NFMA regulations on October 5, 1999 (64 Fed. Reg. 54,074) and adopted a final
3 rule on November 9, 2000 ("2000 NFMA Rule"). *See* National Forest System Land and Resource
4 Management Planning, 65 Fed. Reg. 67,514 (to be codified at 36 C.F.R. pts. 217 and 219). The
5 2000 NFMA Rule established detailed provisions for managing wildlife and other resources in the
6 National Forests, including revisions to the wildlife "viability" provision of the 1982 NFMA
7 Regulations that retained the species viability approach.

8 38. The 2000 NFMA Rule included a transition provision, 36 C.F.R. § 219.35, addressing
9 when the 2000 regulations would become effective and unequivocally establishing that the 1982
10 NFMA Regulations would remain in effect until they did. The Federal Register preamble to the
11 2000 rule made clear that this transition provision was designed to "outline[] the process by which
12 the Forest Service will transition from the 1982 planning regulations." 65 Fed. Reg. at 67,563
13 (Nov. 9, 2000). As to site-specific Forest Service decisions, such as decisions to implement logging
14 and other environmentally harmful projects, the transition provision stated that "[s]ite-specific
15 decisions made by the responsible official 3 years from November 9, 2000 and afterward must be in
16 conformance with the provisions of this subpart." *Id.* § 219.35(d). The Federal Register preamble
17 discussion of this provision stated that, "[f]or site-specific decisions, section 219.35(d) provides a
18 three-year time period for transition between the existing regulations and the new rule." 65 Fed.
19 Reg. at 67,563 (Nov. 9, 2000). Thus, under the 2000 NFMA Rule, the 1982 NFMA Regulations
20 were to govern site-specific Forest Service decisions until November 9, 2003, at which time the
21 2000 NFMA Rule would henceforth govern such decisions.

22 39. But as matters turned out, the 2000 NFMA Rule was never allowed to replace the
23 1982 NFMA Regulations at all. A new Executive Branch administration assumed control of the
24 Forest Service shortly after publication of the 2000 NFMA Rule. The new administration decided to
25 craft its own new set of NFMA Regulations to replace the 2000 rule. On May 17, 2001, then-
26 Secretary of Agriculture Anne Veneman postponed the effective date upon which the 2000 NFMA
27 Rule would apply to the amendment or revision of land management plans, observing that this
28 postponement would allow the Forest Service to review the regulations and determine whether any

1 adjustments to the regulations were necessary in light of allegedly difficult-to-implement provisions.
2 *See* 66 Fed. Reg. 27,552-54 (to be codified at 36 C.F.R. 219.35(b)). On May 20, 2002, the
3 Department of Agriculture published an “interim final rule” in the Federal Register that provided
4 that, until revised NFMA Regulations were promulgated, Forest Service officials could continue to
5 conduct Forest Plan amendments or revisions under the 1982 Planning Regulations if they so chose,
6 rather than under the 2000 NFMA Rule. 67 Fed. Reg. 35,431-34.

7 40. On December 6, 2002, the Forest Service published the new administration’s
8 proposed NFMA regulations, a significant revision of the 2000 NFMA Rule (“Proposed Rule”). *See*
9 National Forest System Land and Resource Management Planning, 67 Fed. Reg. 72,770 (to be
10 codified at 36 C.F.R. pt. 219). At no time prior to proposing the significant revisions encompassed
11 by the Proposed Rule did the administration appoint a new Committee of Scientists or formally
12 consult with the previous committee, nor did it do so during the remainder of the protracted
13 rulemaking process. Public comment on the Proposed Rule was open through April 7, 2003. *Id.*; 68
14 Fed. Reg. 10420 (Mar. 5, 2003). The potential environmental impacts of the Proposed Rule were
15 not analyzed pursuant to the National Environmental Policy Act (“NEPA”), 42 U.S.C §§ 4321 *et*
16 *seq.*, based on an assertion that the promulgation of these regulations could be categorically excluded
17 from NEPA review. 67 Fed. Reg. 72,793 (Dec. 6, 2002). The Forest Service set no schedule for
18 publishing a final rule, and, as detailed below, over two years passed after the publication of the
19 Proposed Rule before final NFMA regulations were announced and published.

20 41. The Forest Service relied upon its delay in finalizing the 2002 draft regulations to
21 extend the November 9, 2003 date by which the 2000 NFMA Rule was to go into effect with regard
22 to site-specific projects (their effective date with regard to Forest Plans had already been indefinitely
23 extended, as discussed above). Citing the pendency of the new NFMA regulations and asserting
24 concerns about implementing the 2000 NFMA regulations, the Forest Service on September 10,
25 2003, published an interim final rule to extend the transition timeline set forth in the 2000 rule. *See*
26 National Forest System Land and Resource Management Planning; Extension of Compliance
27 Deadline for Site-Specific Projects, 68 Fed. Reg. 53,294 (to be codified at 36 C.F.R. pt. 219). This
28 interim rule provided that the transition period for site-specific decisions, as set forth in 36 C.F.R. §

1 219.35(d) of the 2000 NFMA Rule, “is extended from November 9, 2003, until the Department
2 promulgates the final planning regulations published as proposed on December 6, 2002 (67 Fed.
3 Reg. 72770).” *Id.* at 53,297. This interim rule thus extended until a new set of NFMA Regulations
4 was adopted the transition period during which the 1982 NFMA Regulations would continue to
5 apply to site-specific decisions and eliminated any possibility of ever applying the 2000 NFMA
6 regulations to such decisions. Accordingly, because of the interim rule, the 1982 NFMA
7 Regulations remained effective to govern site-specific Forest Service decisions even after November
8 9, 2003.

9 THE “INTERPRETATIVE RULE”

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

19 43. In the preamble to this rule, the Forest Service asserted that “[c]onsiderable
20 uncertainty has arisen regarding the impact of the 2000 planning rule and the transition provisions.”
21 *Id.* The agency acted to eliminate this alleged uncertainty by promulgating a rule stating that “[t]he
22 1982 rule is not in effect” with respect to site-specific Forest Service decisions. *Id.* at 58,057 (to be
23 codified at 36 C.F.R. § 219.35 App. B(2)). The Forest Service explained that “the provisions of the
24 1982 planning rule may continue to be used only for plan amendments and revisions upon election
25 of the responsible official.” *Id.* at 58,056. The agency made clear that this purported “interpretative
26 rule” specifically targeted the wildlife “viability” provision of the 1982 NFMA rules, stating that the
27 September 29 rulemaking was designed to address federal court decisions in which “population data
28 have been held to be required for management indicator species under the 1982 rules.” *Id.* The

1 September 29 “interpretative rule” asserted that the only remaining requirement governing site-
2 specific Forest Service decisions was a provision of the 2000 NFMA Rule’s transition provision
3 mandating that “the responsible official must consider the best available science in implementing ...
4 existing plans.” *Id.* at 58,057 (to be codified at 36 C.F.R. § 219.35 App. B(1)).

5 44. Thus, through the September 29 rulemaking, the Forest Service sought to rescind the
6 1982 NFMA Regulations as the governing authority in effect for site-specific Forest Service
7 decisions. In place of the 1982 rule’s strict requirement that “[f]ish and wildlife habitat shall be
8 managed to maintain viable populations of existing native and desired non-native vertebrate species
9 in the planning area,” (1982 § 219.19), and its detailed monitoring procedures for implementing this
10 requirement (*see, e.g., id.* § 219.26), the September 29 rulemaking substituted a generalized
11 requirement for the Forest Service merely to “consider” — but not necessarily to follow or to apply
12 — the best available science. 69 Fed. Reg. 58,057. The same is true of the other resource
13 management requirements of the 1982 NFMA Regulations, such as riparian area protections and
14 limitations on clearcutting — *i.e.*, the September 29 rulemaking replaced these explicit
15 environmental protection requirements with a limited duty for the Forest Service merely to consider
16 the best available science. The September 29 rulemaking is therefore inconsistent with, and in
17 conflict with, the NFMA, the 1982 NFMA Regulations, the 2000 NFMA Rule, and the
18 September 10, 2003 interim rulemaking.

19 45. The Forest Service did not involve the public in the promulgation of its September 29
20 rulemaking. Instead, the Forest Service asserted that “[t]his rulemaking consists of an interpretative
21 rule and is issued by the Department to advise the public of the Department’s preexisting
22 construction of one of the rules it administers — that is, 36 C.F.R. 219.35.” *Id.* at 58,056. The
23 agency stated that, “under 5 U.S.C. 553(b)(3)(A), this rulemaking is exempt from the notice and
24 comment requirements of the Administrative Procedure Act, and pursuant to 5 U.S.C. 553(d)(2), this
25 rule is effective immediately upon publication in the Federal Register.” *Id.* Accordingly, the public
26 obtained no notice of the Forest Service’s intentions, nor any opportunity to submit comments on the
27 agency’s action, as it sought to rescind fundamental regulatory protections for wildlife and other
28 resources in the National Forests that have been in place for more than two decades.

THE 2005 NFMA RULE

1
2 46. On December 22, 2004, more than two years after publication of the proposed rule,
3 the Forest Service announced the completion of a final rule for National Forest System Land
4 Management Planning pursuant to the NFMA (“2005 NFMA Rule”). This rule, along with related
5 materials, was published in the Federal Register January 5, 2005. *See* National Forest System Land
6 and Resource Management Planning; Removal of 2000 Planning Rule; National Environmental
7 Policy Act Documentation Needed for Developing, Revising, or Amending Land Management
8 Plans; Categorical Exclusion; Final Rules and Notice, 70 Fed. Reg. 1021-66. The material published
9 in the Federal Register included a final rule rescinding the 2000 NFMA Rule by removing it from 36
10 C.F.R. part 219, subpart A, with a stated effective date of January 5, 2005 (70 Fed. Reg. 1022-23);
11 the final 2005 NFMA Rule, also with a stated effective date of January 5, 2005, and a lengthy
12 preamble to the new regulations (70 Fed. Reg. 1023-61; NFMA regulations to be codified at 36
13 C.F.R. pt. 219, subpt. A); and a proposed categorical exclusion from the requirements of the
14 National Environmental Policy Act for the future development, revision, or amendment of Forest
15 Plans (70 Fed. Reg. 1062-66; proposed for inclusion in Forest Service Handbook 1909.15, Chap.
16 30).

17 47. Despite the publication of the 2005 NFMA Rule, the September 29, 2004 rule
18 continues to have regulatory effect. The transition provision of the 2005 Rule, 36 C.F.R. § 219.14,
19 creates a three-year transition period during which the 1982 NFMA Regulations can continue to be
20 used for certain plan developments, revisions, and amendments but is silent on the question of what
21 rules are in effect for site-specific Forest Service decisions pending a full transition to the new rule.
22 Moreover, the September 29 rule retains regulatory effect because it sought retroactively to rescind
23 application of the 1982 NFMA Regulations to projects implemented since May 17, 2001 (the date
24 the transition period of the 2000 NFMA Rule was first extended), including projects that are still
25 being challenged or implemented.

26 48. The 2005 NFMA Rule differs substantially from the 2002 Proposed Rule upon which
27 public comment was sought in a variety of ways that the public could not have foreseen from the
28 content of the Proposed Rule. The 2002 Proposed Rule contained 23 sections occupying 12 pages of

1 the Federal Register (67 Fed. Reg. 72,795-72,806 (Dec. 6, 2002)), while the 2005 NFMA Rule
2 consists of 16 sections occupying 7 pages of the Federal Register (70 Fed. Reg. 1,055-61 (Jan. 5,
3 2005)). This significant reduction in the length and content of the NFMA Regulations from proposal
4 to final form is in large part due to the removal of virtually every substantive, enforceable standard
5 that had been included in the Proposed Rule. While the Proposed Rule was characterized in its
6 preamble material as an “adjustment” to the 2000 NFMA Rule that retained many aspects of
7 those regulations, the preamble materials to the 2005 NFMA Rule characterize the final
8 regulations as a “paradigm shift” in National Forest land management planning.

9 **Elimination of NFMA-Required Standards**

10 49. The chief characteristic of the paradigm shift embodied in the 2005 NFMA Rule is
11 the elimination from the NFMA Regulations of enforceable standards concerning the required
12 content of land management plans for the National Forests, including the elimination of a whole
13 series of standards that the NFMA itself requires be included in these regulations. The NFMA
14 requires that “the Secretary shall . . . promulgate regulations . . . that set out . . . the guidelines and
15 standards prescribed by this subsection.” 16 U.S.C. § 1604(g). In deleting the NFMA-mandated and
16 other standards from the regulations, the 2005 NFMA Rule eliminates the very word “standard”
17 from what remains of the Proposed Rule. The Forest Plans that the NFMA requires be drafted,
18 revised, and amended in accordance with the NFMA Regulations are repeatedly characterized in the
19 2005 NFMA Rule’s preamble materials as “strategic” and “aspirational,” rather than
20 “prescriptive,” despite the fact that the NFMA explicitly prescribes a series of resource protection
21 standards that must be included in the NFMA Regulations and reflected in the Forest Plans
22 formulated pursuant to those regulations. The 2005 NFMA Rule consigns the NFMA resource
23 protection standards, required to be included in the NFMA regulations, to future Forest Service
24 directives to be included in the Forest Service’s Manual and Handbook, which courts have
25 frequently determined are not judicially enforceable (*see, e.g., Western Radio Services v. Espy*, 79
26 F.3d 896, 901 (9th Cir. 1996)). 36 C.F.R. § 219.12(b)(2) (Forest Service Chief to include in agency
27 directives “procedures to ensure that plans include the resource management guidelines required by
28 16 U.S.C. 1604(g)(3)”). Directives are also not as accessible to the public as regulations in the Code

1 of Federal Regulations and are more easily altered at the discretion of the Forest Service. Section
2 1604(g)(3) expressly provides that: “The [NFMA R]egulations shall include . . . specifying
3 guidelines for land management plans” to effectuate the extensive set of resource management
4 requirements set forth in § 1604(g)(3). Especially given this clear statutory mandate, the public
5 could not possibly have foreseen that the Forest Service would publish a final rule that deleted all of
6 the standards that were presented in the Proposed Rule for public comment, in the process
7 eliminating from the NFMA Regulations standards expressly required by the NFMA to be included
8 in those regulations.

9 50. The standards that the NFMA requires be provided in the planning regulations, that
10 were included in the Proposed Rule, but that are wholly missing from the 2005 NFMA Rule,
11 encompass the most fundamental environmental protection requirements that Congress sought to
12 impose through the enactment of the NFMA. These standards include, but are not limited to:

13 a. standards to insure that timber will be harvested from National Forests only
14 where soil, slope, and watershed conditions will not be irreversibly damaged; where there is
15 assurance that such lands can be adequately restocked with trees within five years; where protection
16 is provided to all bodies of water from detrimental changes in temperature, blockages of water
17 courses, and deposits of sediment that timber harvests would otherwise cause; and where the
18 harvesting system to be used is not selected primarily because it will give the greatest dollar return
19 or the greatest output of timber. 16 U.S.C. § 1604(g)(3)(E). In the Proposed Rule, § 219.16(a)
20 required the identification of lands not suitable for timber production and provided some standards
21 by which this identification would be made, including some of the standards required in §
22 1604(g)(3)(E). Others of the (g)(3)(E) standards were included in the requirements of Proposed
23 Rule § 219.4(a)(3). In the final 2005 NFMA Rule, Proposed Rule § 219.16(a) is redesignated as §
24 219.12(a)(2), but all NFMA-required standards have been removed from that subsection. Proposed
25 Rule § 219.4 has been incorporated into §§ 219.7 and 219.12 of the final rule, but all of the §
26 1604(g)(3)(E) standards it contained have been deleted as well. 2005 NFMA Rule § 219.12(b)(2)
27 expressly defers promulgation of all of the § 1604(g)(3) standards to future Forest Service internal
28 directives.

1 b. standards to insure that clearcutting and other harvest methods designed to
2 produce even-aged stands of trees will be used only where, for clearcutting, it is determined to be the
3 optimum method and, for other even-aged harvest methods, these are determined to be appropriate to
4 meet the objectives and requirements of the relevant Forest Plan; where interdisciplinary review has
5 been conducted and environmental and other impacts have been assessed; where cuts are shaped and
6 blended with the natural terrain; where maximum size limits for timber cuts are established
7 according to geographic area, forest type, or other suitable classification; and where all even-aged
8 cuts are conducted consistent with the protection of natural resources and the regeneration of timber.
9 16 U.S.C. § 1604(g)(3)(F). In the Proposed Rule, these standards are set forth in § 219.4(a)(3),
10 “Standards,” and include specific maximum acreage limits for openings created by timber harvest in
11 various identified forest types across the nation. Proposed Rule § 219.4(a)(3)(ii). According to the
12 preambulatory material for the 2005 NFMA Rule, that provision of the Proposed Rule is incorporated
13 into §§ 219.7 and 219.12 of the final rule. However, neither of these provisions of the new rule
14 contains any of the standards regarding even-aged timber harvest. Instead, § 219.12(b)(2) expressly
15 defers all (g)(3)-required standards to future Forest Service internal directives.

16 c. standards to “provide for the diversity of plant and animal communities based
17 on the suitability and capability of the specific land area in order to meet overall multiple-use
18 objectives. . . .” 16 U.S.C. § 1604(g)(3)(B). The Proposed Rule provided two options to meet the
19 requirements of § 1604(g)(3)(B). Proposed Rule § 219.13(b), Option 1 and Option 2. While
20 numerous commentors on the Proposed Rule, including the plaintiffs herein, criticized both options
21 for abandoning the species viability approach and being far too dependent on the discretion of the
22 Responsible Official preparing a given Forest Plan, both options at least provided guidelines in some
23 detail regarding the requirement to provide for the diversity of plant and animal communities. In
24 stark contrast, the 2005 NFMA Rule, which moves the provision regarding biological diversity to
25 § 219.10(b), provides no meaningful guidance whatsoever. *In toto*, it simply states a vague and
26 standardless “overall goal,” calls upon Forest Plan components to “establish a framework to provide
27 the characteristics of ecosystem diversity,” gives the Responsible Official wholly discretionary
28 authority whether to address concerns over any individual species in decline, and leaves all specific

1 requirements regarding providing for diversity of plant and animal communities to future Forest
2 Service internal directives.

3 51. The 2005 NFMA Rule violates additional requirements of the NFMA, including but
4 not limited to:

5 a. the requirement that all actions on national forests must be consistent with that
6 forest's Forest Plan. The NFMA states “[r]esource plans and permits, contracts, and other
7 instruments for the use and occupancy of National Forest System lands shall be consistent with the
8 land management plans.” 16 U.S.C. § 1604(i); *see also* 16 U.S.C. § 1601(d)(1) (forestlands in
9 National Forest System shall be maintained “in accordance with land management plans.”). The
10 1982 regulations implemented the NFMA consistency mandate as follows: Forest Supervisors “shall
11 ensure that . . . all outstanding and future permits, contracts, cooperative agreements, and other
12 instruments for occupancy and use of affected lands are consistent with the plan.” 1982 § 219.10(e)
13 (1982). The 2000 regulations reaffirmed the NFMA consistency mandate by requiring that “all site-
14 specific decisions, including authorized uses of land, must be consistent with the applicable plan.”
15 Former 36 C.F.R. 219.10 (2000). The 2005 NFMA Rule tries to avoid this statutory requirement —
16 designed to make forest plans meaningful and enforceable — by allowing projects that are
17 inconsistent with forest plans to proceed without modification: “If [a] . . . use, project, or activity is
18 not consistent with the applicable plan, the Responsible Official may . . . amend the plan
19 contemporaneously with the approval of the project or activity so that it will be consistent with the
20 plan as amended. The amendment may be limited to apply only to the project or activity.”
21 36 C.F.R. § 219.8(e).

22 b. the requirement that all plan amendments be made with public participation
23 and that amendments that could result in significant change be made through public participation
24 similar to that required for plan development and revision. 16 U.S.C. § 1604(f)(4). The 2005 NFMA
25 Rule allows very significant changes to Forest Plans — changes to the monitoring program and the
26 projected level of logging — to be made without any public participation, by defining them as
27 “administrative corrections.” 36 C.F.R. § 219.7(b)(3), (4). At the same time, the 2005 NFMA Rule
28 purports to make monitoring a vital component of forest planning, as it has always been under prior

1 NFMA Regulations. Moreover, the amount of logging that is allowed on a National Forest under a
2 Forest Plan is one of the central features of that plan, one of the most direct sources of environmental
3 impacts in a plan, and one of the features of the plan that attracts the greatest interest from the public
4 and from commercial enterprises. The NFMA makes logging and logging levels a central feature of
5 Forest Plans. *See, e.g.*, 16 U.S.C. § 1604(e)(2) (Secretary must assure forest plans “determine forest
6 management systems, harvesting levels, and procedures. . .”). Redefining the monitoring program
7 or level of logging on a forest are not mere administrative changes but significant changes to the
8 Forest Plan requiring public participation.

9 **Abandonment of the Species Viability Approach to Protecting Diversity**

10 52. Subsection 219.10(b) of the final rule abandons the species viability approach
11 embodied in the 1982 NFMA Regulations and in the 2000 NFMA Rule (*see* § 219.20(b)(2), 65 Fed.
12 Reg. 67,575 (Nov. 9, 2000)), each of which was based on the work and recommendations of an
13 NFMA-authorized Committee of Scientists. As described in detail in paragraphs 33 and 34, *supra*,
14 the species viability approach of the 1982 NFMA Regulations required that the Forest Service
15 formulate and implement Forest Plans, and manage National Forests pursuant to those plans, so as to
16 maintain viable populations of existing vertebrate species in the planning area and provided detailed
17 guidance for implementing and monitoring the viability requirement. 1982 § 219.19. The 2000
18 NFMA Rule maintained this focus on maintaining the viability of species. Former 36 C.F.R. §
19 219.20(b)(2). The 2005 NFMA Rule, which provides no meaningful guidance whatsoever on
20 maintaining wildlife diversity in forest planning, abandons any requirement to protect species
21 viability and identifies ecosystem diversity as “the primary means by which a plan contributes to
22 sustaining ecological systems.” 36 C.F.R. § 219.10(b)(1). Any focus on species-level diversity is
23 left wholly to the discretion of the Responsible Official and is expressly limited to endangered
24 species, species-of-concern, and species-of-interest, rather than all existing vertebrate species. *Id.* §
25 219.10(b)(2). Neither the preambulatory materials on the Proposed Rule nor those on the 2005 NFMA
26 Rule offer any scientific studies, data, or other scientific basis to justify this abandonment of the
27 biological-science-based viability approach that was based on extensive input from independent
28 Committees of Scientists and that has been in place for over twenty years to implement the NFMA’s

1 diversity requirement.

2 **New Requirement for “Environmental Management Systems”**

3 53. Another significant change from the 2002 Proposed Rule that first appeared in the
4 2005 NFMA Rule is its inclusion of a requirement that every National Forest adopt an
5 “environmental management system” (“EMS”). *See* 70 Fed. Reg. 1056 (Jan. 5, 2005), § 219.5,
6 “Environmental management systems.” Neither this requirement nor the term “environmental
7 management system” appears in the 2002 Proposed Rule, earlier versions of the NFMA Regulations,
8 or the NFMA itself. The 2005 NFMA Rule, however, makes each National Forest’s EMS a
9 fundamental part of its forest planning process. Section 219.5 of the 2005 NFMA Rule requires that
10 all future forest plans, plan revisions, and plan amendments must be completed in accordance with
11 the EMS and further requires that each National Forest’s EMS must conform to a “consensus
12 standard” developed by an entity called the International Organization for Standardization.

13 54. However, § 219.5 offers no comprehensible explanation of the nature or content of an
14 EMS prepared according to this standard. Instead, it merely identifies a website,
15 <http://webstore.ansi.org/ansidocstore/default.asp>, where the consensus standard that describes,
16 and outlines the elements of, an EMS is purportedly available. 36 C.F.R. § 219.5(b). A visit to that
17 website demonstrates that a member of the public can obtain information about the EMS standard
18 only by purchasing it for \$81. Section 219.5(c) provides that procedures to ensure that appropriate
19 EMSs are in place for the National Forests are to be provided by the Chief of the Forest Service in
20 future directives. No member of the public who read and commented upon the Proposed Rule could
21 possibly have foreseen the inclusion of the EMS as a central requirement of the NFMA Regulations.
22 Moreover, no member of the public could even begin to understand what an EMS conforming to
23 consensus standard “ISO 14001” is from reading the 2005 NFMA Rule that adopts it as a key feature
24 of National Forest planning.

25 55. A further troubling aspect of Defendants’ adoption of the EMS in the 2005 NFMA
26 Rule is that it appears to be intended as a *de facto* replacement for the rigorous analysis of the
27 environmental impacts of Forest Plans required by NEPA. The NFMA specifically requires that
28 Forest Plans comply with NEPA. 16 U.S.C. § 1604(g)(1). NEPA requires a formal statement on the

1 environmental impact of all major federal actions significantly affecting the quality of the human
2 environment, 42 U.S.C. § 4332(c), specifically including the adoption of formal plans and guidance
3 documents. 40 C.F.R. § 1508.18(b). All previous NFMA regulations have recognized the significant
4 impact Forest Plans have on the environment and required an EIS on each Forest Plan prior to
5 approval. *See* 1982 § 219.10(b); former 36 C.F.R. § 219.9(d) (2000). In the 2005 NFMA Rule, on
6 the other hand, defendants propose to allow Forest Plans to be “categorically excluded” from NEPA
7 analysis on the grounds that these plans have no environmental effects. 36 C.F.R. § 219.4, Notice of
8 proposed National Environmental Policy Act implementing procedures; request for comment, 70
9 Fed. Reg. 1062-1066 (Jan. 5, 2005) (to be included in Forest Service Handbook 1909.15 Chapters
10 30.3, 31.2, 32.2). This proposal, if adopted, would violate NEPA’s requirement that federal actions
11 with significant environmental effects be analyzed and would be a gross abuse of NEPA’s
12 “categorical exclusion” regulation, which allows agencies to exempt from NEPA analysis actions
13 which they have verified have no significant environmental impacts. *See* 40 C.F.R. § 1508.4;
14 40 C.F.R. § 1507.3. In lieu of rigorous NEPA analysis of environmental effects, defendants offer a
15 standardless EMS process, without providing any rational basis for departing from more than 20
16 years of regulatory history requiring an EIS on Forest Plans.

17 **Abandonment of Requirement of Plan Consistency with**
18 **Best Available Science**

19 56. The Proposed Rule provided that: “Decisions embodied in a plan must be consistent
20 with the best available science.” Proposed Rule § 219.14. The preambulatory material to the
21 Proposed Rule regarding § 219.14 focused on the means by which such consistency was to be
22 achieved and documented in the planning record. Both the responses to public comments offered in
23 the preamble to the 2005 NFMA Rule and in the supplemental response to other public comments on
24 the Proposed Rule available at the Forest Service’s website indicate that all of the comment on
25 Proposed Rule § 219.14 addressed the sufficiency of the means of achieving and documenting
26 consistency with the best available science. No comments are reported that questioned the
27 requirement that decisions in Forest Plans be consistent with the best available science. Yet, in §
28 219.11 of the final rule, this requirement is abandoned, replaced by a requirement that the

1 Responsible Official merely need “take into account” the best available science. The preambulatory
2 material about § 219.11 candidly admits that the phrase “consistent with” was replaced by “take into
3 account” because the latter term makes clear that science is “just one source of information” to be
4 used in planning. 70 Fed. Reg. 1048. This abandonment of the requirement that plans to manage the
5 natural resources of our National Forests be consistent with the best available science is not a result
6 that a member of the public could reasonably have foreseen from the Proposed Rule or its preamble,
7 nor did it result from public reaction to the Proposed Rule.

8 **Conclusion**

9 57. In sum, the 2005 NFMA Rule strips the NFMA Regulations of virtually all standards
10 to protect and guide the management of the National Forest System, whether those presented in the
11 2002 Proposed Rule or those of the 1982 NFMA Regulations, which have served the Forest Service
12 and the public well for over two decades. This elimination of enforceable standards from the NFMA
13 Regulations defies the clear mandate of the NFMA that the Forest Service create regulations that
14 contain a series of specified resource protective standards as the key vehicle for implementing the
15 reforms embodied in the act. At the same time, by introducing major, unforeseeable changes to the
16 NFMA Regulations for the first time in the final 2005 rule, by abandoning important provisions of
17 the 1982 NFMA Regulations without adequate support in the record, and by failing to perform an
18 EIS on the consequences of the substantially altered NFMA Regulations, defendants have effectively
19 denied the public a meaningful role in this extremely important process, in violation of the APA and
20 NEPA.

21 **CLAIMS FOR RELIEF**

22 **FIRST CLAIM FOR RELIEF**

23 **Violation of APA:** 24 **Failure to Provide Notice and Comment on “Interpretative Rule”**

25 58. Plaintiffs re-allege, as if fully set forth herein, each and every allegation contained in
26 the preceding paragraphs.

27 59. The Administrative Procedure Act requires federal agencies to provide public notice
28 of, and an opportunity for public comment on, all legislative rules. *See* 5 U.S.C. § 553.

1 60. Defendants failed to provide public notice of, or an opportunity for public comment
2 on, their September 29, 2004 rulemaking.

3 61. Defendants sought to exempt themselves from the APA's public notice and comment
4 requirements by improperly characterizing the September 29, 2004 rulemaking as an interpretative
5 rule. However, the September 29, 2004 rulemaking was legislative, not interpretative. The
6 September 29 rule amended the agency's 2000 NFMA Rule (as modified by the September 10,
7 2003, interim rule), which established the 1982 NFMA Regulations as the governing authority in
8 effect for site-specific Forest Service decisions until new NFMA regulations were promulgated. The
9 September 29 rulemaking sought to rescind the 1982 NFMA Regulations as the governing authority
10 in effect for such site-specific Forest Service decisions. Because the September 29 rulemaking
11 amended a prior legislative rule, the September 29 rule is itself legislative in nature.

12 62. The September 29 rule continues to have regulatory effect despite the promulgation
13 of the 2005 NFMA Rule because the transition provision of the 2005 Rule, 36 C.F.R. § 219.14,
14 creates a three-year transition period during which the 1982 NFMA Regulations can continue to be
15 used for certain plan developments, revisions, and amendments and is silent on the question of what
16 rules are in effect for site-specific Forest Service decisions pending a full transition to the new rule.
17 The September 29 rule also retains vitality because it retroactively rescinds application of the 1982
18 NFMA Regulations to projects implemented since May 17, 2001 (the date the transition period of
19 the 2000 NFMA Rule was first extended), including projects that are still being challenged or
20 implemented.

21 63. Defendants' September 29, 2004 rulemaking therefore violates the Administrative
22 Procedure Act and is arbitrary, capricious, an abuse of discretion, not in accordance with law, and
23 enacted without observance of procedure required by law within the meaning of the APA, 5 U.S.C.
24 § 706(2).

1 **SECOND CLAIM FOR RELIEF**

2 **Violations of NFMA and APA:**
3 **Failure to Include Required Resource Standards in the**
4 **NFMA Regulations**

5 64. Plaintiffs re-allege, as if fully set forth herein, each and every allegation contained in
6 the preceding paragraphs.

7 65. Defendants deleted from the 2005 NFMA Rule virtually every resource standard that
8 appeared in the 2002 proposed rule, including a series of resource standards and guidelines expressly
9 required by the NFMA to be included in the Planning Regulations mandated by that act. 16 U.S.C. §
10 1604(g). For over twenty years, these standards have been provided in the NFMA Regulations
11 promulgated in 1982 and have served to ensure that Forest Plans, and site-specific activities and
12 projects undertaken pursuant to and consistent with Forest Plans, conform to the resource protection
13 requirements of the NFMA. The required regulatory standards, omitted from the 2005 NFMA Rule,
14 include, but are not limited to, standards to provide for the diversity of plant and animal communities
15 on the National Forests (*id.* § 1604(g)(3)(B)); to ensure that timber harvest is permitted only where it
16 will not cause irreversible damage to soil, slope, and watershed conditions, where harvested lands
17 can be adequately restocked with trees within five years, and where bodies of water are protected
18 from detrimental effects from timber harvests with respect to temperature, sedimentation, or
19 blockages (*id.* § 1604(g)(3)(E)); and to restrict the use of clearcutting and other even-aged timber
20 harvest methods and to restrict the size and shape of forest openings when these methods are
21 permitted (*id.* § 1604(g)(3)(F)).

22 66. Defendants' failure to include these mandatory standards and guidelines in the 2005
23 NFMA Rule violated and continues to violate 16 U.S.C. § 1604(g) of the NFMA, and is arbitrary,
24 capricious, an abuse of discretion, not in accordance with law, and without observance of procedure
25 required by law within the meaning of the APA, 5 U.S.C. § 706(2).
26
27
28

1 **THIRD CLAIM FOR RELIEF**

2 **Violation of APA:**
3 **Inadequate Notice and Comment on 2005 NFMA Rule**

4 67. Plaintiffs re-allege, as if fully set forth herein, each and every allegation contained in
5 the preceding paragraphs.

6 68. The APA requires federal agencies to provide public notice of, and an opportunity for
7 public comment on, all legislative rules. 5 U.S.C. § 553.

8 69. While defendants sought public comment on the 2002 Proposed Rule, the 2005
9 NFMA Rule as adopted varies significantly from the Proposed Rule presented for public comment in
10 ways that could not reasonably or logically have been anticipated by members of the public who
11 commented on the Proposed Rule. Among the significant, unforeseeable aspects of the 2005 NFMA
12 Rule are its deletion of virtually all standards to guide forest planning, including those specifically
13 required by the NFMA to be included in the NFMA Regulations; its introduction of an undefined
14 environmental management system governed by an undescribed consensus standard as a central part
15 of forest planning; and its abandonment of the Proposed Rule's requirement that Forest Plans be
16 consistent with the best available science.

17 70. Despite these significant and unforeseeable changes to the Proposed Rule that first
18 appeared in the final rule, defendants did not reinitiate public notice and comment on the 2005
19 NFMA Rule regarding these changes, instead adopting the rule as final, effective January 5, 2005.
20 In consequence the public never had notice of these proposed changes in draft form nor any
21 opportunity to comment upon them.

22 71. With particular respect to the introduction of the environmental management system
23 requirement, defendants made an adequate understanding of this provision wholly dependent upon
24 payment for information necessary to such an understanding. Under the 2005 NFMA Rule, National
25 Forest EMSs are required to adhere to a "consensus standard" which the rule does not make
26 available to the public, instead merely referring the public to a website where \$81 is charged to view
27 that consensus standard. Thus, not only did the Forest Service fail to provide the public with notice
28 and an opportunity to comment on the adoption of the EMS system during the rulemaking process,

1 but even now the relevant contents of the EMS portion of the rulemaking are available only for pay,
2 and no proper public notice of the substance of this new provision of the 2005 NFMA Rule has been
3 given.

4 72. Defendants' January 5, 2005 rulemaking therefore violates the Administrative
5 Procedure Act and is arbitrary, capricious, an abuse of discretion, not in accordance with law, and
6 enacted without observance of procedure required by law within the meaning of the APA, 5 U.S.C. §
7 706(2).

8 **FOURTH CLAIM FOR RELIEF**

9 **Violation of APA:**

10 **Failure to Provide Support in Record for Abandonment of Species Viability Requirement**

11 73. Plaintiffs re-allege, as if fully set forth herein, each and every allegation contained in
12 the preceding paragraphs.

13 74. The species viability provisions of the 1982 NFMA Regulations, including 1982
14 § 219.19, were the result of extensive scientific information and consultation, including in particular
15 the input of the Committee of Scientists mandated by the NFMA itself. Based on this scientific
16 input, the 1982 regulations recognized that, to sustain plant and animal communities in the National
17 Forests, the Forest Service must maintain the individual species that make up those communities.
18 The 2000 NFMA Rule, also the result of recommendations from a Committee of Scientists,
19 perpetuated the species viability approach. The species viability provisions of the 1982 NFMA
20 Regulations have been implemented in Forest Plans across the National Forest System for over
21 twenty years.

22 75. No scientific information supporting the abandonment of the species viability
23 approach as the means of providing for the diversity of plant and animal communities on the
24 National Forests, as required by 16 U.S.C. § 1604(g)(3)(B) of the NFMA, has been presented to the
25 public in conjunction with the promulgation of the 2005 NFMA Rule. Nor has any scientific
26 information been presented publicly that supports replacing the species viability approach with the
27 2005 NFMA Rule's vaguely described "ecosystem diversity" approach. The preambulatory material
28 to the 2005 NFMA Rule regarding 36 C.F.R. § 219.10(b) makes reference to a workshop that was

1 held in 2003 regarding the proper content of the diversity provision and claims that comments
2 received at this workshop were “useful in developing a scientifically credible and realistic approach”
3 for the 2005 NFMA Rule. 70 Fed. Reg. 1046. However, neither in the preamble to the 2005 NFMA
4 Rule nor elsewhere in the materials presented to the public in the course of this rulemaking is there
5 any reference to scientific information from this workshop that supports the abandonment of the
6 species viability approach.

7 76. The changes made by defendants to the viability provisions of the NFMA Regulations
8 in the 2005 NFMA Rule have no substantial basis in the record and are arbitrary and capricious and
9 an abuse of discretion in violation of the APA, 5 U.S.C. § 706(2).

10 **FIFTH CLAIM FOR RELIEF**

11 **Violation of NEPA and APA: 12 Failure to Prepare EIS on 2005 NFMA Rule**

13 77. Plaintiffs re-allege, as if fully set forth herein, each and every allegation contained in
14 the preceding paragraphs.

15 78. NEPA is the “basic national charter for protection of the environment.” 40 C.F.R. §
16 1500.1. Among other things, NEPA requires all agencies of the federal government to prepare a
17 “detailed statement” that discusses the environmental effects of, and reasonable alternatives to, all
18 “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. §
19 4332(2)(C). This statement is commonly known as an environmental impact statement (“EIS”). A
20 “major federal action” upon which an EIS may be required includes “new or revised agency rules
21 [and] regulations.” 40 C.F.R. § 1508.18(a). The environmental “effects” that must be considered in
22 an EIS include “indirect effects, which are caused by the action and are later in time or farther
23 removed in distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.8(b). Council on
24 Environmental Quality (“CEQ”) regulations list a number of factors that an agency must consider in
25 deciding whether to prepare an EIS. 40 C.F.R. § 1508.27.

26 79. When an agency does not know whether the effects of its action will be “significant,”
27 it may prepare an Environmental Assessment (“EA”) to help make that determination. 40 C.F.R. §
28 1501.4(b). An EA is a concise analysis of the need for the proposed action, of alternatives thereto,

1 and of the environmental impacts of both the action and the alternatives. 40 C.F.R. § 1508.9. If the
2 EA indicates that the federal action may significantly affect the quality of the human environment,
3 the agency must prepare an EIS. 40 C.F.R. § 1501.4(c). If the agency decides not to prepare an EIS,
4 it must prepare a finding of no significant impact (“FONSI”), which explains the agency’s reasons
5 for its decision. 40 C.F.R. § 1508.13.

6 80. Defendants failed to subject the 2005 NFMA Rule to any NEPA analysis whatsoever,
7 claiming instead that the rule was properly categorically excluded from the requirement of NEPA
8 analysis under a Forest Service exclusion for “rules, regulations, or policies to establish Service-
9 wide administrative procedures, program processes, or instruction.” 67 Fed. Reg. 72,793 (Dec. 6,
10 2002), citing § 31.1b of Forest Service Handbook 1909.15 (57 Fed. Reg. 43,168 (Sept. 18, 1992)).

11 81. Defendants’ approval of the 2005 NFMA Rule, which strips the NFMA Regulations
12 of virtually all resource management standards required by the NFMA and contained in prior
13 versions of these regulations, standards that provided concrete protections for natural forests,
14 wildlife and fish, watersheds, and other environmental resources, is a major federal action
15 significantly affecting the human environment within the meaning of 42 U.S.C. § 4332(2)(C) for at
16 least the following reasons:

17 a. The National Forest System has a multitude of unique geographic
18 characteristics, including recreation areas, designated wilderness, wild and scenic rivers, and
19 ecologically critical areas within the meaning of 40 C.F.R. § 1508.27(b)(3)

20 b. The effects of the 2005 NFMA Rule on the quality of the human environment
21 are likely to be “highly controversial” within the meaning of 40 C.F.R. § 1508.27(b)(4);

22 c. The possible effects on the human environment are “highly uncertain” and
23 involve “unique [and] unknown risks” within the meaning of 40 C.F.R. § 1508.27(b)(5);

24 d. The action “may establish a precedent for future actions with significant
25 effects” within the meaning of 40 C.F.R. § 1508.27(b)(6);

26 e. The action “may adversely affect an endangered or threatened species or its
27 [critical] habitat” within the meaning of 40 C.F.R. § 1508.27(b)(9); and
28

1 f. The action threatens a violation of federal law imposed for the protection of
2 the environment, namely 16 U.S.C. § 1604(g)(3), within the meaning of 40 C.F.R. § 1508.27(b)(10).
3 Consequently, defendants were obligated to prepare an EIS on the 2005 NFMA Rule before
4 approving it.

5 82. Moreover, NEPA requires that an EIS consider the cumulative impacts of a proposed
6 federal agency action together with past, present, and reasonably foreseeable future actions,
7 including all federal and non-federal activities. 40 C.F.R. § 1508.7; *see also* § 1508.27(b)(7).
8 Cumulative impact “is the impact on the environment which results from the incremental impact of
9 the action when added to other past, present or reasonably foreseeable future actions, regardless of
10 what agency (Federal or non-Federal) or person undertakes such other actions.” *Id.* § 1508.7.

11 83. The 2005 NFMA Rule is not put forth in isolation but is rather one component of a
12 multi-faceted effort by the present Executive Branch administration, involving many changes to
13 Forest Service and other federal rules, policies, and regulations, to change drastically and weaken the
14 regulatory framework governing National Forest System management. Other elements of this effort
15 include, but are not limited to: Notice, Comment, and Appeal Procedures for Projects and Activities
16 on National Forest System Lands, 68 Fed. Reg. 33,582 (June 4, 2003) (to be codified at 36 C.F.R. §
17 215.12(f)); National Environmental Policy Act Documentation Needed for Limited Timber Harvest,
18 68 Fed. Reg. 44,598 (July 29, 2003); National Environmental Policy Act Documentation Needed for
19 Fire Management Activities; Categorical Exclusions, 68 Fed. Reg. 33,814 (June 5, 2003); National
20 Environmental Policy Act Documentation Needed for Certain Special Use Authorizations, 66 Fed.
21 Reg. 48,412 (September 20, 2001); Special Areas; State Petitions for Inventoried Roadless Area
22 Management, 69 Fed. Reg. 42,636 (July 16, 2004) (to be codified at 36 C.F.R. part 294);
23 Predecisional Administrative Review Process for Hazardous Fuel Reduction Projects Authorized
24 Under the Healthy Forests Restoration Act of 2003, 69 Fed. Reg. 1,529 (Jan. 9, 2004) (to be codified
25 at 36 C.F.R. parts 215, 218); Joint Counterpart Endangered Species Act Section 7 Consultation
26 Regulations, 68 Fed. Reg. 68,254 (December 8, 2003) (to be codified at 50 C.F.R. part 402);
27 Memorandum from James L. Connaughton, Chairman, Council on Environmental Quality, on
28 Guidance for Environmental Assessments of Forest Health Projects (Dec. 9, 2002); Memorandum

1 from Dr. William T. Hogarth, National Oceanic and Atmospheric Administration, on Alternative
2 Approaches for Streamlining Section 7 Consultation re Hazardous Fuels Treatment Projects
3 (Oct. 11, 2002); Memorandum from Steve Williams, U.S. Fish & Wildlife Service, & Dr. William T.
4 Hogarth, National Oceanic and Atmospheric Administration, re Evaluating the Net Benefit of
5 Hazardous Fuels Treatment Projects (Dec. 10, 2002); Endangered and Threatened Wildlife and
6 Plants; Guidance on Streamlining Section 7 Consultation on Hazardous Fuels Treatment Projects,
7 68 Fed. Reg. 1,628 (January 13, 2003); and Clarification of Extraordinary Circumstances for
8 Categories of Actions Excluded from Documentation in an Environmental Assessment or an
9 Environmental Impact Statement, 67 Fed. Reg. 54,622 (August 23, 2002). The Forest Service has
10 failed to assess the cumulative impacts of the 2005 NFMA Rule in conjunction with these and other
11 changes the administration is seeking to implement in the management of the National Forest
12 System.

13 84. Defendants' failure to prepare an EIS before approving the 2005 NFMA Rule
14 violated and is continuing to violate Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C), and
15 NEPA's implementing regulations, and was arbitrary, capricious, an abuse of discretion, not in
16 accordance with law, and without observance of procedure required by law within the meaning of
17 the APA, 5 U.S.C. § 706(2).

18 **REQUEST FOR RELIEF**

19 Therefore, plaintiffs request that this Court:

- 20 1. Hold unlawful and set aside the defendants' September 29, 2004 rulemaking pursuant
21 to 5 U.S.C. § 706;
- 22 2. Enter a declaratory judgment that the defendants violated the Administrative
23 Procedure Act in promulgating the September 29, 2004 rulemaking;
- 24 3. Hold unlawful and set aside the defendants' January 5, 2005 rulemaking pursuant to 5
25 U.S.C. § 706;
- 26 4. Enter a declaratory judgment that the defendants violated the National Forest
27 Management Act, the Administrative Procedure Act, and the National Environmental Policy Act and
28 its implementing regulations in promulgating the 2005 NFMA Rule;

