

1 Matt Kenna, CO Bar # 22159
Western Environmental Law Center
2 679 E. 2nd Ave., Suite 11B
Durango, CO 81301
3 Phone: (970) 385-6941
Fax: (970) 385-6804
4 *Pro Hac Vice*
Attorney for Plaintiffs Heartwood and
5 Center for Biological Diversity

6 Aaron Isherwood, CA Bar # 184392
Sierra Club Environmental Law Program
7 85 Second St., 2nd Floor
San Francisco, CA 94105-3441
8 Phone: (415) 977-5680
Fax: (415) 977-5793
9 Attorney for Plaintiff Sierra Club

10 Rachel M. Fazio, CA Bar # 187580
John Muir Project
11 P.O. Box 697
Cedar Ridge, CA 95924
12 Phone: (530) 273-9290
Fax: (530) 273-9260
13 Attorney for Plaintiffs Earth Island Institute
and Sequoia Forestkeeper
14
15 Danielle Fugere, CA Bar # 160873
Environmental Advocates
1004 O'Reilly Avenue
16 San Francisco, CA 94129
Phone: (415) 561-2222 x121
17 Fax: (415) 561-2223
Attorney for Plaintiffs Earth Island Institute
18 and Sequoia Forestkeeper

19 UNITED STATES DISTRICT COURT
20 EASTERN DISTRICT OF CALIFORNIA

21
22 EARTH ISLAND INSTITUTE, et al.,

23 Plaintiffs,

24 v.

25 NANCY RUTHENBECK, et al.,

26 Defendants.

CIV-F-03-6386-JKS-DLB

**PLAINTIFFS' MEMORANDUM IN
RESPONSE TO DEFENDANTS'
MOTION FOR STAY PENDING
APPEAL AND IN SUPPORT OF
MOTION TO CLARIFY**

27 Date:
Time:
COURTROOM:

28 JAMES K. SINGLETON
UNITED STATES DISTRICT JUDGE

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INTRODUCTION.....1

FACTS.....1

ARGUMENT:

I. The Courts’ Orders Do Not Require Minor Actions to Be Suspended
and Subjected to Appeal.....2

II. The Forest Service’ Motion for Stay Should Be Denied.....4

A. The Forest Service Will Not Suffer Irreparable Injury Absent a Stay.....4

B. In Contrast, Plaintiffs Would Suffer Irreparable Harm if a Stay is Granted.....6

C. The Forest Service is Not Likely to Succeed on the Merits of its Appeal.....7

1. The Court Properly Found that it had Jurisdiction over Plaintiffs’ Claims.7

2. The Courts’ Orders Are Not Likely to be Reversed on the Grounds
that they are Impermissibly Broad.....10

3. The Court is Not Likely to be Reversed on its Finding on the Merits
that Not All Categorically-Excluded Actions may be Exempted from
Comment and Appeal.....13

CONCLUSION.....15

1 **INTRODUCTION**

2 The plaintiffs now respond to the U.S. Forest Service’s motion for stay pending appeal,
3 and ask that the court clarify the effect of its orders of July 7 and September 20. The Forest
4 Service, after drastically under-applying the Court’s order of July 7 by limiting it to the Eastern
5 District of California until the Court issued its order of September 20, is now over-applying the
6 order by suspending many minor actions such as mushroom collecting and outfitter permits, even
7 though this should not be occurring, apparently to portray the Court’s order in an extreme and
8 unfavorable light to further the Forest Service’s own public relations purposes. For this reason,
9 plaintiffs request that the Court clarify the effect of its orders, so that the Forest Service may no
10 longer use the public as pawns in its efforts to discredit the plaintiffs and the Court’s order. The
11 Court should further deny the Forest Service’s motion for stay, which is largely premised on its
12 mischaracterization of the effect of the Court’s orders. A proposed order accompanies this brief.

13 **FACTS**

14 In the days after the Court issued its order of September 20 confirming that its July 7
15 order applied nationwide, the Forest Service began suspending already-approved projects in
16 order to subject them to comment and appeal. Some of these projects were properly suspended,
17 such as timber sales. However, it also suspended many minor actions such as “repair and
18 maintenance of recreation sites and facilities,” and “approval, modification, or continuation of
19 minor, short-term (one year or less) special uses of National Forest System lands, such as for
20 state-licensed outfitters or guides, or approving gathering forest products for personal use.”
21 Second Declaration of Gloria Manning at 6 ¶6 (accompanying FS Motion for Stay). This has
22 created an extreme hardship for the public, as recounted in numerous press accounts. Exh. A.
23 (small sample of newspaper articles); Exh. D at ¶ 5 (Declaration of Jim Bensman, discussing one
24 AP article alone appearing “in about 60 papers around the world”).

25 When it became apparent to plaintiffs that this was occurring, the undersigned proceeded
26 to make calls and send letters to counsel for the Forest Service, explaining that the Court’s orders
27 did not cover these minor activities, and in the event that the Forest Service honestly believed
28 that it might, offering to work with the Forest Service to avoid this result. Exh.s B, C. However,
the Forest Service never responded to plaintiffs’ letters and calls pointing out the applicable law

1 and offering a cooperative approach, and instead continued to suspend many activities which
2 should not be suspended, and moved the Court for a stay based largely on this
3 mischaracterization of the Court's orders.

4 **ARGUMENT:**

5 **I. The Courts' Orders Do Not Require Minor Actions to Be Suspended and Subjected
6 to Appeal**

7 As the plaintiffs explained to the Forest Service by letter, activities such as outfitter
8 permits, individual Christmas tree cutting, and mushroom picking are not affected by the Court's
9 orders. See Exh. C. Rather, the previous rules governing comment and appeal are now in effect,
10 which do not require that such actions be subjected to appeal.

11 "The effect of invalidating an agency rule is to reinstate the rule previously in force."
12 Paulsen v. Daniels, 413 F.3d 999, 1008 (9th Cir. 2005), citing Action on Smoking & Health v.
13 Civil Aeronautics Board, 713 F.2d 795, 797 (D.C. Cir. 1983). The rule previously in force is the
14 1993 rule, 58 Fed. Reg. 58,904 (Nov. 3, 1993), which mandated that categorically-excluded
15 timber sales be subject to public notice, comment and appeal, as supplemented by the 2000 rules
16 resulting from the settlement agreement entered in Heartwood v. U.S. Forest Service, Civ. No.
17 99-4255 (S.D. Ill.) (Consent Judgment dated Sept. 15, 2000). See Pls. Opening Brief on Merits
18 at 2-3. Thus, in addition to categorically-excluded timber sales,¹ the following activities are the
19 only other categorically-excluded activities which need to be subjected to public notice, comment
20 and appeal, which are governed by the 2000 rule:

21
22 ¹. The 1993 rule made categorically excluded timber sales subject to appeal by excluding
23 "categories 1 through 3 and 5 through 9" of the Forest Service's categorical exclusion rules,
24 which were the categorical exclusion rules except timber sales, which were category 4. Pl.
25 Opening Brief on the Merits at 2, citing 58 Fed. Reg. 19,369, 19,373 (Apr. 14, 1993); 57 Fed.
26 Reg. 43,180, 43,209-10 (Sept. 18, 1992). Category 4 no longer exists, as it was set aside in
27 another case brought by Heartwood. Heartwood v. U.S. Forest Service, 73 F. Supp 2d 962 (S.D.
28 Ill. 1999) (this case should not be confused with the earlier Heartwood case regarding the
Appeals reform Act ("ARA") and which resulted in the settlement discussed above). However,
the Category 4 timber CE rule was replaced in 2003 by three separate CE rules for logging. 68
Fed. Reg. 44,598 (July 29, 2003). Accordingly, logging decisions using these three categories of
logging rules are now subject to comment and appeal as a result of the Court's ruling.

- 1 (1) Projects involving the use of prescribed burning;
- 2 (2) Projects involving the creation or maintenance of wildlife openings;
- 3 (3) The designation of travel routes for off-highway vehicle (OHV)([sic] use which is not
4 conducted through the travel management planning process as part of the forest
5 planning process;
- 6 (4) The construction of new OHV routes and facilities intended to support OHV use;
- 7 (5) The upgrading, widening, or modification of OHV routes to increase either the levels
8 or types of use by OHVs (but not projects performed for the maintenance of
9 existing routes);
- 10 (6) The issuance or reissuance of special use permits for OHV activities conducted on
11 areas, trails, or roads that are not designated for such activities;
- 12 (7) Projects in which the cutting of trees for thinning or wildlife purposes occurs over an
13 area greater than 5 contiguous acres;
- 14 (8) Gathering geophysical data using shorthole, vibroseis, or surface charge;
- 15 (9) Trenching to obtain evidence of mineralization;
- 16 (10) Clearing vegetation for sight paths from areas used for mineral, energy, or
17 geophysical investigation or support facilities for such activities.

18 65 Fed. Reg. 61,302 (Oct. 17, 2000). Although this state of the previous regulations was not
19 discussed in depth in prior briefing because the Forest Service never indicated that it might take a
20 contrary position, plaintiffs mentioned that the result would be to “reinstate the status quo in
21 effect on June 3, 2003, before the new rules were promulgated.” Pl. Reply Brf. on the Merits at
22 25; see id. at n.15.²

23 The plaintiffs request that the Court make clear that these are the only categorically-
24 excluded decisions now subject to appeal, unless and until the Forest Service promulgates a new
25 regulation through normal rulemaking processes.

26 Despite the binding case law stating that the old rules are now back in effect, and that the
27 plaintiffs sent its October 3 letter to the Forest Service citing this precedent, the Forest Service
28 inexplicably states that “the Forest Service is without a valid set of regulations defining which
CE projects require notice of appeal,” instead offering four other options for carrying out the
Court’s orders. FS Brf. at 11. However, there is only one option permitted by the binding law of
this circuit, one not offered by the Forest Service, and that is to apply the 1993/2000 regulations

². Although this was discussed in the context of whether the entire set of 2003 ARA regulations should be set aside versus severing only the ones found to be arbitrary and capricious, as that was what was at issue in that briefing, the same result should of course occur where regulations are merely severed, with only the old regulations governing the severed regulations coming back into effect.

1 discussed above.

2 It is important to note, as has been discussed throughout this litigation, that minor actions
3 like Christmas tree cutting were never subject to appeal, even before the ARA was passed,
4 because they were not approved through a “decision document.” Pl. Opening Brf. at 2-3; Earth
5 Island Institute v. Pengilly, 376 F. Supp. 2d 994, 1004 (E.D. Cal. 2005) (this Court’s July 7
6 order). Because the intent of the ARA was essentially to codify the Forest Service’s appeal
7 opportunities available prior to 1992 (see Pl. Opening Brf. at 11-12), even if the 1993/2000
8 regulations were to be ignored, the ARA could not be read to expand the class of appealable
9 actions to minor actions such as road maintenance as the Forest Service has done in the wake of
10 the Court’s orders.

11 **II. The Forest Service’ Motion for Stay Should Be Denied**

12 The Forest Service has not shown that the extraordinary remedy of a stay pending appeal
13 should be granted. First, the above discussion on the scope of the Court’s orders undercuts much
14 of the basis for the Forest Service’s assertion of irreparable harm, and even considering the
15 actions which it must subject to comment and appeal such as timber sales, it has not shown that
16 doing so would cause the agency irreparable harm. In contrast, the plaintiffs would be
17 irreparably harmed by being denied the opportunity to comment and appeal timber sales and
18 other substantial projects pending appeal. Lastly, the Forest Service provides no new arguments
19 as to why the Court’s orders might be erroneous, and the Court’s orders are not likely to be
20 reversed on appeal.

21 **A. The Forest Service Will Not Suffer Irreparable Injury Absent a Stay**

22 Given that much of the Forest Service’s asserted harms are based on an erroneous
23 characterization of the effects of the Court’s orders as discussed above, that factor alone shows
24 that the agency will not suffer irreparable harm absent a stay. See FS Brf. at 12 (discussing the
25 supposed effect of the orders on “outfitter and guide permits” and “hiking and ski area []
26 maintenance activities.”). However, even considering the projects that are actually affected by
27 the Court’s orders, subjecting them to comment and appeal will not cause irreparable injury.
28

1 First, the Forest Service ignores that it retains its authority to exempt emergencies from
2 the stay provision of the ARA. 36 C.F.R. § 215.2 (2003). As the Court upheld the agency's
3 regulations which allows this provision to be applied even in the context of "economic"
4 emergencies, it is simply not credible for the Forest Service to argue that irreparable harm will
5 occur as a result of the Court's orders, given this authority.

6 Second, while there are timber sales, oil and gas exploration activities etc. that must be
7 temporarily suspended for 30-105 days while they are subjected to public comment and possible
8 appeal, that does not constitute irreparable harm. This state of the regulations was exactly that
9 which existed prior to the promulgation of the 2003 regulations, both under the pre-1993
10 regulations which the Forest Service had sought to abandon but which the ARA instead stated
11 were required, as well as under the 1993/2000 regulations which are now back in effect. To
12 argue that operating under these regulations causes the Forest Service irreparable harm, which
13 the agency did for years under regulations it itself promulgated, is not credible.

14 To the extent the Forest Service has found itself in a bind on actions approved between
15 July 7 and September 20, the dates of the Court's two orders, it must be noted that this problem
16 is of the Forest Service's own making. If the agency had properly applied the order nationwide
17 after July 7, there would be no projects needing suspension at this point, as the comment and
18 appeal period would have already passed for most of those projects. However, instead the
19 agency choose not to follow the Court's July 7 order outside the Eastern District of California,
20 based on a law review article advocating a so-called "non-acquiescence" doctrine, which as
21 previous explained has been explicitly rejected by the Ninth Circuit and which the agency knew
22 or should have know it could not rely upon. Pl. Contempt Reply at 3, quoting Murray v. Heckler,
23 722 F.2d 499, 503 (9th Cir. 1983).

24 The Forest Service argues "in particular" that it needs to quickly carry out timber sales
25 intended to reduce hazardous fuel loading. FS Brf. at 10. However, the courts, including this
26 Court, have rejected the idea that a short delay to conduct the proper review procedures for such
27 timber sales creates the risk of fire danger. See Order Granting Plaintiffs' Motion for Preliminary
28 Injunction and Issuing Preliminary Injunction (Dec. 10, 2003) at 2 ("The snags will be cut down,

1 [and] potentially extreme levels of flammable slash will be generated and possibly left at the site
2 . . .”); see also Bensman v. U.S. Forest Service, 984 F. Supp. 1242, 1247 (W.D. Mo.) (1997)
3 (“The Court can imagine no better fire source than dead tree limbs stacked 30 inches tall on the
4 forest floor” resulting from logging); Sierra Club v. Bosworth, 199 F. Supp. 2d 971, 992 (N.D.
5 Cal. 2002) (logging intended to reduce fire danger “may actually increase fire risk in the
6 short-term.”). Thinning to reduce fire risk is a long-term strategy, and there are no short-term
7 risks from delaying such projects for a couple of months to allow comment and appeal to make
8 sure that such projects are properly configured.

9 Accordingly, the Forest Service will not suffer irreparable injury in the absence of a stay

10 **B. In Contrast, Plaintiffs Would Suffer Irreparable Harm if a Stay is Granted**

11 Given that the Forest Service will not suffer irreparable harm if a stay is denied, as it will
12 simply need to operate under its regulatory regime that was in place prior to June of 2003, the
13 inquiry can stop here. However, even if a balancing of harms is considered, the plaintiffs are the
14 parties with irreparable harm at risk here.

15 The Forest Service argues that plaintiffs have not shown that they are harmed by any
16 proposed projects. FS Brf. at 12. However, plaintiffs did in fact show this as to projects that
17 were at issue when this case was being briefed on the merits, submitting the declaration of
18 Heartwood member Jim Bensman with its opening brief on the merits, and pointing out in reply
19 that the Burnt Ridge project originally at issue in this case provided a prime example of why
20 comment and appeal was necessary. Pl. Reply Brf. on Merits at 3 n.2 and acc. text.³ The Court
21 further found that the plaintiffs have been harmed in a manner that supports setting aside the
22 2003 regulations which it found to be arbitrary and capricious. 376 F. Supp. 2d at 1000-01.
23 Plaintiffs now submit additional declarations from the plaintiff groups which show that if the
24

25
26 ³. The Forest Service argues that plaintiffs never sought preliminary injunctive on the
27 rules, and that this shows they do not suffer harm. FS Brf. at 12 n. 9. However, plaintiffs did in
28 fact raise the ARA claim at issue here, regarding appealability of certain CEs, in its preliminary
injunction motion on the Burnt Ridge project, but the Court declined to rule in favor of plaintiffs
at that time. Preliminary Injunction Order at 2 n.1.

1 court grants a stay and they are no longer permitted to comment and appeal timber sales and
2 other significant projects, they will be harmed by not being able to influence the Forest Service to
3 alter or suspend such decisions throughout the country which improperly harm the environment
4 or which do not otherwise achieve the stated goals of the projects. Exh.s D-G.

5 For instance, Jim Bensman of plaintiff Heartwood discusses several projects in the
6 Midwest which he needs to be able to comment on and appeal, including the Shirley Creek
7 Salvage timber sale, the Cold Hill Silvicultural Assessment, and the New Pheasant Thinning
8 project. Exh. D at 2-4. Erik Ryberg of plaintiff Center for Biological Diversity provides an
9 example in the Payette National Forest in Idaho. Exh. E at 2-3. Rene Voss of plaintiff Sierra
10 Club provides an example in the Gallatin National Forest in Montana. Exh. F at 1-2. And Craig
11 Thomas of the Sierra Club discusses numerous projects in California he needs to be able to
12 comment on, and appeal if necessary. Exh. G at 3-5.

13 As both the Supreme Court and the Ninth Circuit have repeatedly held, “[e]nvironmental
14 injury, by its nature, can seldom be adequately remedied by money damages and is often
15 permanent or at least of long duration, i.e., irreparable.” Idaho Sporting Congress v. Alexander,
16 222 F.3d 562, 569 (9th Cir. 2000) (quoting Amoco Prod. Co. v. Village of Gambell, 480 U.S.
17 531, 545 (1987) (alteration in original)). That is the case here, and if the Court grants a stay,
18 plaintiffs will be irreparably harmed.

19 **C. The Forest Service is Not Likely to Succeed on the Merits of its Appeal**

20 Given that the Forest Service has not shown that it will suffer irreparable harm if a stay is
21 not granted, the Court need not address whether it is likely to be reversed on appeal. However, in
22 the event that the Court addresses these arguments, the Forest Service presents no new arguments
23 for why the Court’s orders were erroneous and are likely to be reversed on appeal, and they are
24 without merit.

25 **1. The Court Properly Found that it had Jurisdiction over Plaintiffs’**
26 **Claims**

27 The Forest Service argues once again that plaintiffs’ claims are not ripe and that they do
28 not have standing because this case presents a facial challenge. FS Brf. at 2-6. However, just as

1 the Court found for the plaintiffs in these regards on the merits, it should likewise do so now. See
2 376 F. Supp. 2d at 999-1002.

3 The Courts have been clear that contrary to the Forest Service's arguments, it is perfectly
4 acceptable to mount a facial challenge to published, final regulations, and only in the small class
5 of cases where implementation of such regulations is unlikely might a facial challenge be unripe.
6 The Forest Service seeks to avoid this salutary point of law by conflating the jurisprudence
7 governing facial challenges to published regulations, as here, with "programmatic" challenges to
8 large collections of individual agency actions. For instance, in the first case cited by the Forest
9 Service (FS Brf. at 2), Lujan v. National Wildlife Federation, the Court found that

10 [Plaintiffs] challenge the entirety of petitioners' so-called "land withdrawal review
11 program." That is not an "agency action" within the meaning of § 702, much less a "final
12 agency action" within the meaning of § 704. The term "land withdrawal review
13 program" (which as far as we know is not derived from any authoritative text) does not
14 refer to a single BLM order or regulation, or even to a completed universe of particular
15 BLM orders and regulations. It is simply the name by which petitioners have
16 occasionally referred to the continuing (and thus constantly changing) operations of the
17 BLM in reviewing withdrawal revocation applications and the classifications of public
18 lands and developing land use plans as required by the FLPMA. It is no more an
19 identifiable "agency action"--much less a "final agency action"--than a "weapons
20 procurement program" of the Department of Defense or a "drug interdiction program" of
21 the Drug Enforcement Administration. As the District Court explained, the "land
22 withdrawal review program" extends to, currently at least, "1250 or so individual
23 classification terminations and withdrawal revocations."

24 497 U.S. 871, 890 (1990) (emphasis added). In contrast, the APA is clear that final regulations
25 as are at issue here are "final agency actions" subject to review. 5 U.S.C. § 552(13) ("agency
26 action' includes the whole or part of an agency rule . . ."). See also Ohio Forestry Ass'n, Inc. v.
27 Sierra Club, 523 U.S. 726 (1998) (FS Brf. at 3) (rejecting challenge to portion of Forest Plan
28 which provided framework for numerous timber sales on a National Forest).

29 However, where, as here, a challenge is to a set of published regulations, ripeness is
30 governed by Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) and its progeny. As Abbott
31 points out, it is the general rule that final agency regulations are ripe for judicial review when
32 issued. 387 U.S. at 139-140; see also Sullivan v. Zelby, 493 U.S. 521, 536-37 n.18 (1990) ("We
33 fail to see why each [plaintiff] should be compelled to raise a separate, as-applied challenge to
34 the regulations, or why a facial challenge is not a proper response to the systemic [enforcement of

1 the challenged regulations].”) This is particularly true where, as here, resolution of the
2 regulations’ validity relies on purely legal issues. Abbott at 149-151. The only time a challenge
3 to final regulations is not ripe is where there is a significant possibility that the regulations might
4 never be enforced. Toilet Goods Ass’n v. Gardner, 387 U.S. 158, 160-64 (1967) (ripeness not
5 found for “this particular regulation in this particular context” because the regulation there only
6 “*may* under certain circumstances” have been enforced, requiring post-enforcement review)
7 (emphasis in original). However, this is the rare exception. See Gardner v. Toilet Goods Ass’n,
8 387 U.S. 167 (1967) (companion case finding regulation ripe for review).

9 This rare exception is not found here, as it is undisputed that the rules have been used
10 countless times by the Forest Service since they have been issued. While the Forest Service
11 argues that plaintiffs must challenge each instance of implementation, this is not the law, and this
12 extraordinary argument that a facial challenge to a regulation can not stand must be rejected.
13 Where, as here, a party challenges a regulation’s facial conformity with its authorizing statute,
14 “[t]he question before [the Court] is purely one of statutory interpretation that would not benefit
15 from further factual development of the issues presented.” Whitman v. Am. Trucking Ass’ns,
16 Inc., 531 U.S. 457, 458 (2001). Plaintiffs’ appeal rights have already been impinged, and even if
17 they had not, “[t]here is no reason why the Court must wait until [the plaintiff] loses his right to
18 appeal before considering the validity of these regulations.” Nat’l Treas. Employees Union v.
19 Cornelius, 617 F. Supp. 365, 367 (D.D.C. 1985) (holding pre-enforcement challenge to agency
20 appeal rules ripe for review); see also Gardner v. Toilet Goods Assn., supra, 387 U.S. at 172
21 (finding challenge to agency regulation ripe where plaintiff faced quandary of either complying
22 or facing penalties for non-compliance). Thus, plaintiffs’ claims are more than ripe for review,
23 because not only are plaintiffs sure to be adversely affected by the new appeal rules in the future,
24 but plaintiffs have already been affected many times.

25 The Forest Service’s claim that the rules which the Court set aside do not affect the
26 plaintiffs’ “primary conduct” is flat wrong. See FS Brf. at 3-4. The plaintiffs’ primary conduct is
27 making sure that Forest Service projects comply with law and policy in an environmentally-
28 sound manner, in large measure using public comments and appeals to achieve that objective.

1 Exh.s D-G (declarations of plaintiff organizations). That plaintiffs are severely harmed by the
2 lack of comment and appeal provided by the challenged regulations has already been shown
3 above in the discussion of harm. The declarations provided by the plaintiff groups in this case
4 directly rebut the Forest Service's assertion that plaintiffs' harms are somehow limited to the
5 Midwest, and instead show that they are harmed throughout the country. See FS Brf. at 5.

6 The Forest Service next argues that permitting a facial challenge "freezes" consideration
7 of the regulations by other courts, reiterating its argument in made in its Rule 60(b) motion and
8 re-citing United States v. Mendoza, 464 U.S. 154, 160 (1984). FS Brf. at 5. However, as
9 explained by plaintiffs in that context, Mendoza simply means that the Forest Service is not
10 estopped from taking positions in other litigation on the ARA which were unsuccessful here. It
11 does not say that a district court may not set aside regulations it finds to be arbitrary and
12 capricious. In fact, the Courts are clear that a district court should grant such relief. See, e.g.,
13 NRDC v. EPA, 966 F.2d 1292, 1304 (9th Cir. 1992) (vacating a Clean Water Act rule); Asarco v.
14 EPA, 616 F.2d 1153, 1162 (9th Cir. 1980) (vacating Clean Air Act rule); Chemical Manufacturers
15 Assoc. v. EPA, 28 F.3d 1259, 1268 (D.C. Cir. 1994) (vacating Clean Air Act rule); Nat'l Mining
16 Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1409 (D.C. Cir.1998) (setting aside Clean
17 Water Act rule); Bresgal v. Brock, 843 F.2d 1163, 1168-72 (9th Cir. 1987) (upholding
18 nationwide injunction preventing application of policy found to be arbitrary and capricious).

19 For these reasons, the Court is not likely to be reversed on appeal regarding its ripeness
20 and standing findings.

21 **2. The Courts' Orders Are Not Likely to be Reversed on the Grounds** 22 **that they are Impermissibly Broad**

23 The Forest Service reiterates its arguments on standing and ripeness in arguing that the
24 Court's order was overly broad. FS Brf. at 6-8. The arguments again fail.

25 Plaintiffs have already rebutted the Forest Service's arguments that plaintiffs have failed
26 to show they are harmed by the rules throughout the country. FS Brf. at 6-7. Accordingly, setting
27 aside the regulations was not "more burdensome than necessary." Califano v. Yamasaki, 442
28 U.S. 682, 702 (1979) (FS Brf. at 6) involved a class action in which relief must be tailored to that

1 class, not a challenge to a regulation under the APA, where as discussed above, setting aside an
2 arbitrary and capricious rule is the normal and customary relief.

3 The Forest Service again raises Mendoza, which as discussed above only goes to
4 estoppel, not relief. In fact, the Forest Service’s own citation to Holland v. Nat’l mining Assoc.,
5 309 F.3d 808 (D.C. Cir. 2002), shows that other courts need not follow the Court’s ruling here
6 and remain free to make up their own mind. FS Brf. at 7. But that is entirely a different matter
7 from saying that district courts may not set aside regulations and prevent their application
8 nationwide, an idea contrary to established and binding case law.

9 The other cases relied upon by the Forest Service, while they address remedy, do not
10 involve the proper remedy where a facial challenge to regulations is at issue. See FS Brf. at 8 n.5.
11 For instance, in Kentuckians for the Commonwealth, Inc. v. Rivenburgh, it was the fact that
12 plaintiffs were “challenging a specific agency action” that led the court to conclude that an
13 injunction which went beyond that specific action was overbroad. 317 F.3d 425, 435 (4th Cir.
14 2003) (emphasis in original). See id. at 438 (“None of the parties sought a declaration that the
15 New Rule was illegal or inconsistent with the Clean Water Act . . .”). The district court decision
16 in Ohio Valley Ent’l Coalition v. Bulen applied Ketuckians to the case before it which dealt with
17 a challenge to a nationwide permit. 2004 WL 1576726 at *18 (S.D. W. Va. 200 4). However,
18 this decision should not be applied here. First, that application was based as a factual matter on
19 the fact that plaintiffs there were all “West Virginians, and they have established their standing to
20 bring this lawsuit by demonstrating that they visit, live near, recreate near, drive by and/or fly
21 over areas of the state that are visibly harmed by valley fills, surface impoundments, and related
22 surface mining activities" in West Virginia.” Id. That is not the case here, where the Court has
23 found that plaintiffs are harmed by the rules throughout the country, and not just in this judicial
24 district. 376 F. Supp. 2d at 999-1001. As this Court further noted in rejecting the Forest
25 Service’s ripeness argument, “Plaintiffs could be faced with bringing multiple lawsuits in
26 multiple jurisdictions in order to challenge the regulations as they are applied to specific projects-
27 -and the Forest Service faced with defending against them. This facial challenge promotes
28 judicial economy . . .” Id. at 1002.

1 Second, to the extent the Ohio Valley court felt compelled to apply Kentuckians, it did so
2 in error, because as discussed above Kentuckians was not a rule challenge case. Third, even if
3 Ohio Valley were directly analogous here and properly decided, by its own terms its result and its
4 view of Kentuckians should not be applied outside the Fourth Circuit:

5 The District of Columbia Circuit Court of Appeals has stated that, "when a
6 reviewing court determines that agency regulations are unlawful, the ordinary result is
7 that the rules are vacated-not that their application to the individual petitioners is
8 proscribed." *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C.
9 Cir.1998) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n. 21 (D.C. Cir.1989)). In
10 *National Mining Association*, the D.C. Circuit upheld the district court's injunction
11 prohibiting the Corp from enforcing the so-called "Tulloch Rule" anywhere in the United
12 States. 145 F.3d at 1408-10. The court quoted Justice Blackmun's dissenting opinion in
13 *Lujan*, which the court described as "apparently expressing the view of all nine Justice on
14 this question":

15 The Administrative Procedure Act permits suit to be brought by any person
16 'adversely affected or aggrieved by agency action.' In some cases the 'agency action' will
17 consist of a rule of broad applicability; and if the plaintiff prevails, the result is that the
18 rule is invalidated, not simply that the court forbids its application to a particular
19 individual. Under these circumstances a single plaintiff, so long as he is injured by the
20 rule, may obtain 'programmatic' relief that affects the rights of parties not before the
21 court. On the other hand, if a generally lawful policy is applied in an illegal manner on a
22 particular occasion, one who is injured is not thereby entitled to challenge other
23 applications of the rule.

24 **Id.* at 1409 (quoting *Lujan*, 497 U.S. at 913 (Blackmun, J., dissenting)).

25 The reasoning of *National Mining Association* appears to apply to this case. The
26 Fourth Circuit Court of Appeals has held, however, that "injunctive relief should be no
27 more burdensome to the defendant than necessary to provide complete relief to the
28 plaintiffs," and that "an injunction should be carefully addressed to the circumstances of
the case." *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 436
(4th Cir.2003).

29 Ohio Valley at *17-18. Thus, to the extent Kentuckians and Ohio Valley could be construed as
30 factually similar to this case, they still should not be applied because their legal view is not
31 accepted by other circuits, including the Ninth Circuit.

32 As discussed above, the Ninth Circuit agrees with the D.C. Circuit that national relief is
33 warranted in a case such as this. See, e.g., *NRDC v. EPA*, 966 F.2d 1292, 1304 (9th Cir. 1992)
34 (vacating a Clean Water Act rule); *Asarco v. EPA*, 616 F.2d 1153, 1162 (9th Cir. 1980)
35 (vacating Clean Air Act rule); *Chemical Manufacturers Assoc. v. EPA*, 28 F.3d 1259, 1268
36 (D.C. Cir. 1994) (vacating Clean Air Act rule); *Bresgal v. Brock*, 843 F.2d 1163, 1168-72 (9th
37 Cir. 1987) (upholding nationwide injunction preventing application of policy found to be
38

1 arbitrary and capricious). Bresgal, the only Ninth Circuit case the Forest Service mentions, is
2 even a closer case than this, as it only involved application of a mere agency policy, in
3 comparison to here and in National Mining, discussed above in Ohio Valley, and the Ninth
4 Circuit cases cited above, where actual regulations were found to be illegal. The Forest Service
5 seeks to distinguish Bresgal on the grounds that it involved farmworkers who might travel
6 outside the district. That factual distinction is irrelevant. Rather, the salient point of law from
7 Bresgal is that a broad injunction is not overbroad “if such breadth is necessary to give
8 prevailing parties the relief to which they are entitled.” Bresgal at 1170-71 (emphasis in
9 original). When a regulation of national scope is found to be invalid, the relief must be to set it
10 aside completely, especially where, as here, plaintiffs are affected by it throughout the country.

11 For these reasons, the Court is not likely to be reversed on the scope of its order.

12 **3. The Court is Not Likely to be Reversed on its Finding on the Merits**
13 **that Not All Categorically-Excluded Actions may be Exempted from**
14 **Comment and Appeal**

15 Lastly, the Forest Service argues that the Court was wrong on the merits of plaintiffs’
16 claim that the 2003 regulations at issue illegally exempted timber sales and other substantial
17 projects categorically excluded from the need to prepare an Environmental Assessment (“EA”)
18 or Environmental Impact Statement (“EIS”) under the National Environmental Policy Act
19 (“NEPA”), from public comment and appeal under the ARA. FS Brf. at 9-10.⁴ This argument
20 fails.

21 The Forest Service again argues that the ARA did not address the scope of activities
22 which should be subject to notice, comment and appeal, and thus Congress has delegated that
23 task to the Forest Service. This statement is absolutely wrong. If Congress wanted to leave
24 discretion with the Forest Service to eliminate appeals for timber sales and other substantive
25 proposals, it would not have passed the ARA, but rather would have left the status quo as it
26 was prior to the ARA, where the Forest Service had discretion to determine the scope of

27 ⁴. The Forest Service does not argue that the Court was wrong in finding that the other
28 three sets of regulations which it set aside are arbitrary and capricious.

1 appeals. Instead, Congress passed the ARA, which plainly states that “the Secretary of
2 Agriculture, acting through the Chief of the Forest Service, shall establish a notice and
3 comment process for proposed actions of the Forest Service concerning projects and activities
4 implementing land and resource management plans,” and provide appeals for such decisions.
5 ARA §§ (a),(d) (emphasis added). “‘Shall’ means shall.” Center for Biological Diversity v.
6 Norton, 254 F.3d 833, 837 (9th Cir. 2001) (citation omitted).

7 The Forest Service attempts to explain away this prime directive of the ARA by arguing
8 that the language was only intended to distinguish between site-specific activities and decisions
9 approving Forest Plans. However, simply because Forest Plan approvals are not governed by
10 the ARA does not mean that the language can be read to allow exemption of important classes
11 of “projects and activities implementing land and resource management plans.” A plain
12 reading of the statute simply does not permit this interpretation- it is like saying that where a
13 statutory directive says “the agency must paint its buildings green,” that since the directive does
14 not apply to cars, the agency may simply paint many of its buildings blue. It is a “false
15 syllogism,” and can not stand. See Breiner v. Sheet Metal Workers Int. Assoc. Local Union
16 No. 6, 493 U.S. 67, 86 (1989).

17 The Forest Service’s argument further ignores the legislative history of the ARA, which
18 confirms that Congress did not intend the Forest Service to exclude timber sales and other
19 substantial actions from administrative appeal simply because the agency views such projects
20 as “insignificant” under NEPA. As even the Forest Service itself explained in promulgating its
21 initial ARA regulations in 1993, which made timber decisions subject to appeal: “These
22 decisions, because they involve timber management, are sometimes subject to more complex
23 analyses than the other actions [exempted from appeal]. Much of the discussion in Congress
24 about the Forest Service appeals process was directed towards timber harvesting, and the
25 Agency feels that it is important to preserve the opportunity to appeal such decisions.” 58 Fed.
26 Reg. at 19,373.

27 While the Forest Service properly found that timber sale decisions categorically
28 excluded from NEPA analysis must nonetheless be subject to appeal under the ARA in 1993,

1 the history of the Forest Service’s rules and of the ARA shows that other substantive decisions
2 besides timber sales, such oil leasing, mining, and new off-road vehicle route establishment,
3 are required by the ARA to be made subject to appeal as well just as they were prior to passage
4 of the ARA (and as was accepted by the Forest Service in the Heartwood settlement resulting
5 in the 2000 rules). “The process will allow for continued citizens' rights to participate in, and
6 appeal decisions of, the Forest Service while providing for more timely consideration of such
7 appeals.” 138 Cong. Rec. H9870-02, 1992 WL 250783 (Sept. 30, 1992) (Conference Report).
8 “We believe that the agency's recent proposal to eliminate appeals of timber sales, oil and gas
9 leases, and other project level activities is a slap in the face of democratic values.” 138 Cong.
10 Rec. E2075-02, 1992 WL 157159 (July 2, 1992)) (comment letter incorporated by Rep.
11 Richardson). See also 138 Cong. Rec. S11643-03, 1992 WL 195134 (Aug. 6, 1992);
12 138 Cong. Rec. S15843-01 1992 WL 250710 (Sept. 30, 1992).

13 Other courts besides this one have so ruled as well. In The Wilderness Society v. Rey,
14 supra, plaintiffs challenged the decision of the Forest Service to exempt a decision from
15 administrative appeal. 180 F. Supp. 2d 1141 (D. Mont. 2002). The court rejected the Forest
16 Service’s exemption, finding: “The [timber sale] is a project that implements a land and
17 resource management plan, and is subject to appeal pursuant to 36 C.F.R. § 215.7 [1993]. By
18 attempting to exempt this [decision] from appeal as required by [the ARA], the government is
19 in violation of the law.” Id. at 1145.

20 Accordingly, the Court’s decision is not likely to be reversed on appeal.

21 **CONCLUSION**

22 For these reasons, the Forest Service’s motion for stay pending appeal should be denied.
23 The plaintiffs further request that the Court clarify that the 1993/2000 rules are now in effect,
24 which do not allow the Forest Service to suspend actions such as outfitter permits and
25 mushroom gathering as it has been doing in recent weeks.

