ENVIRONMENTAL LITIGATION AND THE HEALTHY FORESTS INITIATIVE

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INTRODUCTION

The Bush administration proclaimed the Healthy Forests Initiative in 2002, ostensibly to address the wildfire problem in the western National Forests. In so doing, it eliminated longstanding requirements for environmental review and public participation in National Forest management. This article provides an overview of the Healthy Forests Initiative and summarizes the federal lawsuits filed in response to it. The article concludes that although the outcome of the litigation is uncertain, the future of millions of acres of National Forests depends upon it.

I. DESCRIPTION OF THE HEALTHY FORESTS INITIATIVE

A. Precursors to the Healthy Forests Initiative

The 2000 fire season . . . was one of the worst in 50 years. Approximately 123,000 fires burned more than 8.4 million acres. The total acreage burned was more than twice the 10-year national average. At times, nearly 30,000 personnel were on the fire lines, including military and firefighters from other countries. More than $2 billion from Federal accounts was spent suppressing wildland fires. This amount does not include State and local firefighting suppression costs, direct and indirect economic losses to communities, loss of property, and damage to ecosystems.¹

In response to the 2000 fire season, the Clinton administration directed the Secretaries of Agriculture and the Interior to begin an effort designed to

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lessen the impacts of fire on communities and ensure effective firefighting
capacity, which led to the National Fire Plan. The cornerstone of the
National Fire Plan is a report entitled “Managing the Impact of Wildfires on
Communities and the Environment: A Report to the President in Response
to the Wildfires of 2000,” issued September 8, 2000. Among its
recommendations, this report sets forth ways to reduce the impacts of fires
on rural communities, a short-term plan for rehabilitation of fire-damaged
ecosystems, and ways to limit the introduction of invasive species and
address natural restoration processes.

Congress supported the National Fire Plan through appropriations
language in the fiscal year 2001 Appropriations Act for the Department of
the Interior and related agencies. As part of its direction, Congress
mandated the creation of a coordinated national 10-year comprehensive
strategy. This led to the publication of “A Collaborative Approach for
Reducing Wildland Fire Risks to Communities and the Environment 10-
Year Comprehensive Strategy,” which was completed in August of 2001
“by Federal, State, tribal, and local government and non-governmental
representatives.” In May of 2002, these same parties completed the
Implementation Plan for the 10-Year Comprehensive Strategy. The 10-
year Implementation Plan establishes a performance-based framework for

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REDUCING WILDLAND FIRE RISKS TO COMMUNITIES AND THE ENVIRONMENT: 10-YEAR
COMPREHENSIVE STRATEGY 3 (Aug. 2001) [hereinafter 10-YEAR COMPREHENSIVE STRATEGY],
WILDFIRES ON COMMUNITIES AND THE ENVIRONMENT: A REPORT TO THE PRESIDENT IN RESPONSE TO
4. Id. at 1.
5. Id. at 2.
6. Id. at 7. The report, and the accompanying budget requests, strategies, plans, and direction,
have become collectively known as the National Fire Plan (NFP). “The NFP is intended to reduce risk
to communities and natural resources from wildland fires through rehabilitation, restoration and
maintenance of fire-adapted ecosystems, and by the reduction of accumulated fuels or highly
combustible fuels on forests, woodlands, grasslands, and rangelands.” Joint Counterpart Endangered
8. See id. at tit. IV, 114 Stat. at 1006–1010 (allowing necessary funds for the Department of
the Interior to manage “fire suppression operations, burned areas rehabilitation, hazardous fuels
reduction, and rural fire assistance.”).
9. 10-YEAR COMPREHENSIVE STRATEGY, supra note 2, at 3.
10. DEP’T OF AGRIC. & DEP’T OF THE INTERIOR, A COLLABORATIVE APPROACH FOR
REDUCING WILDLAND FIRE RISKS TO COMMUNITIES AND THE ENVIRONMENT, 10-YEAR
COMPREHENSIVE STRATEGY: IMPLEMENTATION PLAN, (May 2002) [hereinafter 10-YEAR
improving the management of wildland fire and hazardous fuels, meeting the need for ecosystem restoration and rehabilitation, implementing protective measures to reduce the risk of wildland fire to communities and environments, and monitoring progress over time.\footnote{This summation of the 10-year Comprehensive Strategy and 10-year Implementation Plan comes from the Department of Agriculture and the Department of the Interior, which provide additional detail on them. \textit{National Environmental Policy Act Documentation Needed for Fire Management Activities; Categorical Exclusions}, 67 Fed. Reg. 77,038, 77,040 (Dec. 16, 2002).}

\textit{B. Terms and Applications of the Healthy Forests Initiative}

On August 22, 2002, the Bush Administration issued “Healthy Forests: An Initiative for Wildfire Prevention and Stronger Communities,” commonly known as the Healthy Forests Initiative\footnote{\textit{The White House, Healthy Forests: An Initiative for Wildfire Prevention and Stronger Communities} (2002) [hereinafter \textit{Healthy Forests Initiative}], \textit{available at} http://www.whitehouse.gov/infocus/healthyforests/toc.html.} The Healthy Forests Initiative states that the western United States is threatened by catastrophic fires and environmental degradation “caused by a crisis of deteriorating forest and rangeland health, the result of a century of well-intentioned but misguided land management.”\footnote{\textit{Id.} at 1.} Further, “the forests and rangelands of the West have become unnaturally dense, and ecosystem health has suffered significantly. . . . Currently, 190 million acres of public land are at increased risk of catastrophic wildfires.”\footnote{\textit{Id.} at 2.} To address this problem, “[t]he Healthy Forests Initiative will implement core components of the National Fire Plan’s 10-year Comprehensive Strategy and Implementation Plan.”\footnote{\textit{Id.} at 3.} In the Healthy Forests Initiative, President Bush directed Agriculture Secretary Veneman and Interior Secretary Norton “to improve regulatory processes to ensure more timely decisions, greater efficiency, and better results in reducing the risk of catastrophic wildfires by restoring forest health.”\footnote{\textit{Id.} at 4.} They were to do this through improving procedures and streamlining environmental reviews.\footnote{\textit{Id.}} The Healthy Forests Initiative also stated that “President Bush will work with Congress on legislation to further accomplish more timely, efficient, and effective implementation of forest health projects.”\footnote{\textit{Id.}} This legislation was also “to fulfill the original promise of the 1994 Northwest Forest Plan by: [r]emoving needless
administrative obstacles and providing authority to allow timber projects to proceed without delay when consistent with the Northwest Forest Plan.”

The devil is in the details, however. The Healthy Forests Initiative stated that it would “[a]uthorize agencies to enter into long-term stewardship contracts with the private sector.” These contracts would “allow contractors to keep wood products in exchange for the service of thinning trees and brush and removing dead wood.” This quid pro quo was met with alarm by environmentalists since it would allow logging companies to log the big, profitable trees in exchange for taking away the small ones that have little or no commercial value. Nevertheless, the Forest Service revised its standard timber contracts, and, in 2003–2004, the Forest Service and the Bureau of Land Management entered into 145 stewardship contracts for 80,000 acres of treatment.

The Healthy Forests Initiative states that “[t]he Forest Service and Interior Department are planning to treat more [sic] 2.5 million acres of land [in 2002] with thinning or prescribed burns that reduce the accumulation of hazardous fuels and restore forest health.” These thinning projects are not, however, limited to underbrush or even small trees. The 10-Year Implementation Plan defines “appropriate tools” to be used as including “crushing, tractor and hand piling, thinning (to produce commercial or pre-commercial products), and pruning.” Neither the 10-Year Implementation Plan nor the 10-Year Comprehensive Strategy, however, define the term “hazardous fuels” to which these methods will be applied. Nor does the Healthy Forests Initiative define this term. In practice, this has led to large-diameter trees being logged under the auspices of “hazardous fuel reduction.”

Nor are Healthy Forests Initiative projects limited to the Wildland Urban Interface (WUI), the area most critical to community protection.

19. Id.
20. Id.
21. Id.
25. 10-YEAR IMPLEMENTATION PLAN, supra note 10, at 18.
27. Under the 10-Year Implementation Plan, the “Wildland Urban Interface” is defined as
Under the 10-Year Implementation Plan projects can be implemented outside the WUI if they are in lands where fire suppression has altered fire frequency on the land and there is a risk of losing key ecosystem components.\(^\text{28}\) In practice, there has been considerable logging outside the WUI under the justification of “hazardous fuel reduction.”\(^\text{29}\)

The Healthy Forests Initiative also contends that “[p]rocedural delays are stalling critical forest and rangeland management projects,” and that “[t]he appeals process is complex, time consuming and burdensome.”\(^\text{30}\) Whether administrative appeals cause or contribute to the wildfire problem is questionable.\(^\text{31}\) Nevertheless, the Healthy Forests Initiative calls for changes to the administrative appeals system to expedite fuel reduction projects.\(^\text{32}\) In addition, it criticizes that “[i]n some judicial districts, courts have provided injunctive relief to litigants based on short-term grounds, without deference to expert assessments of long-term risks to property or potential long-term environmental harm from delaying forest health projects.”\(^\text{33}\) The Healthy Forests Initiative calls for judicial reform to

\(^{10}\)-YEAR IMPLEMENTATION PLAN, supra note 10, at 20.

\(^{28}\) 10-YEAR IMPLEMENTATION PLAN, supra note 10, at 12. The Implementation Plan indicates that projects are not limited to the WUI, but are allowed “in condition classes 2 or 3 in fire regimes 1, 2, or 3 outside the wildland urban interface, and [which] are identified as high priority through collaboration consistent with the Implementation Plan, in total, and as a percent of all acres treated.” Id. The 10-Year Implementation Plan defines Condition Class 2 as: “Fire regimes on these lands have been moderately altered from their historical range by either increased or decreased fire frequency. A moderate risk of losing key ecosystem components has been identified on these lands.” Id. at 18. It defines Condition Class 3 as: “Fire regimes on these lands have been significantly altered from their historical return interval. The risk of losing key ecosystem components from fire is high. Fire frequencies have departed from historical ranges by multiple return intervals. Vegetation composition, structure and diversity have been significantly altered. Consequently, these lands verge on the greatest risk of ecological collapse.” Id.

\(^{29}\) In Oregon, for example, over 60% of the “hazardous fuels treatments” in FY 2004 were outside the WUI. In fact, the acreage of this logging outside the WUI more than doubled (a roughly 110% increase) from FY 2003 to FY 2004, while the acreage within the WUI treated only rose by about 11%. See HEALTHY FORESTS REPORT—OREGON, (Oct. 10, 2004), available at http://www.healthyforests.gov/projects/state_projects/oregon-healthy-forests-report-2004.pdf.

\(^{30}\) HEALTHY FORESTS INITIATIVE, supra note 12, at 13, 14.

\(^{31}\) The contention that administrative appeals contribute significantly to the wildfire problem is debunked by a General Accounting Office study that was summarized in a letter from the GAO. Letter from Barry T. Hill, General Accounting Office, to Larry Craig, Ranking Minority Member, Subcommittee on Forests and Public Lands (Aug. 31, 2001), available at http://www.gao.gov/new.items/d011114r.pdf. The letter stated that 1,671 hazardous fuel reduction projects were conducted by the Forest Service in 2001, of which only 1% of these projects were appealed and none were litigated. Id.

\(^{32}\) See HEALTHY FORESTS INITIATIVE, supra note 12, at 14 (reasoning that since “48 percent of all Forest Service mechanical fuels reduction projects were appealed,” the appeals system is unnecessarily burdensome).

\(^{33}\) Id. at 15.
address this alleged problem, but it does not discuss the grounds for the injunctions or the merits of the cases in which they were issued.34

II. IMPLEMENTATION OF THE HEALTHY FORESTS INITIATIVE

A. The Healthy Forest Restoration Act of 2003

In keeping with the call for legislation in the Healthy Forests Initiative, on December 3, 2003, President Bush signed the Healthy Forests Restoration Act of 2003 (HFRA).35 The HFRA authorized hazardous fuel reduction projects consistent with the 10-Year Implementation Plan.36 It provided that “not less than 50 percent of the funds allocated for authorized hazardous fuel reduction projects” be spent for projects in the WUI.37 It further provided that Environmental Assessments (EAs) or Environmental Impact Statements (EISs) would be done to comply with the National Environmental Policy Act (NEPA) and set forth the consideration of alternatives, public notices, and decision documents that would suffice.38 The HFRA directed the Secretary of Agriculture to establish a special administrative review process for hazardous fuel reduction projects on Forest Service land.39 Additionally, it also contained provisions on judicial review: limiting venue to the district where the project was to occur; limiting injunctions to sixty days in length (subject to renewal); and directing judges to balance the short- and long-term effects of the project in their weighing of the equities.40

34. See id. at 15–16 (giving examples where court injunctions have had deleterious impacts on the Forest Service).
36. § 6512(a).
37. § 6513(d)(1)(A).
38. § 6514. This section would not, however, seem to prevent the establishment of categorical exclusions under 40 C.F.R. § 1508.4 (2004). These categorical exclusions bypass the EA or EIS requirement, since the HFRA at section 6517 states:

Nothing in this subchapter affects, or otherwise biases, the use by the Secretary of other statutory or administrative authority (including categorical exclusions adopted to implement the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.)) to conduct a hazardous fuel reduction project on Federal land (including Federal land identified in section 6512(d) of this title) that is not conducted using the process authorized by section 6514 of this title.

§ 6517(a). In fact, the Forest Service would establish several categorical exclusions to carry out the Healthy Forests Initiative. See infra Part II.B.
39. § 6515.
40. § 6516.
B. New Regulations, Policies, and Procedures

The Healthy Forests Initiative is ultimately a statement of policies and goals, not a final agency action in itself. To implement the Healthy Forests Initiative it was, therefore, necessary to promulgate or change numerous regulations, policies, and procedures for the agencies involved. These actions provide the real means of carrying out the Healthy Forests Initiative.

The day after the issuance of the Healthy Forests Initiative, on August 23, 2002, the Forest Service issued its notice of adoption of a final interim directive.41 This directive revised the Forest Service Handbook 1909.15, Chapter 30, to change the definition of “extraordinary circumstances” that preclude use of a categorical exclusion from NEPA documentation. 42 This alteration was significant because if “extraordinary circumstances” apply to a project it must undergo an EA or EIS, and if “extraordinary circumstances” do not apply, the Forest Service can forego that analysis.43 Under the new directive “extraordinary circumstances” are not defined; rather the Forest Service provides a list of “resource conditions” for the officer to consider in deciding whether “extraordinary circumstances” are present.44 This list includes such things as whether endangered or threatened species or their habitat are present, whether wilderness or wilderness study areas are involved, and whether the project involves an Inventoried Roadless Area.45 This directive set the stage for the Forest Service’s new slate of categorical exclusions, which would be established over the course of 2003.

On June 4, 2003 the Forest Service issued the final Notice, Comment, and Appeal Procedures for National Forest System Projects and Activities.46 Commonly known as the “new Appeals Rule,” it revised the

42. Id.
43. See, e.g., Rhodes v. Johnson, 153 F.3d 785, 789–790 (7th Cir. 1998) (holding that because extraordinary circumstances were present, the removal of shrubs, which would normally be categorically excluded, requires the Forest Service to undertake an environmental assessment); California v. Norton, 311 F.3d 1162, 1177–78 (9th Cir. 2002) (holding that extraordinary circumstances preclude use of categorical exclusions to NEPA unless the United States adequately explains why this rule is not applicable).
45. Id. ch. 30.3.
Forest Service’s administrative appeal procedures. Now logging projects under appeal can be implemented immediately for “emergency” economic loss; categorical exclusions are exempted from notice, comment, and appeal; standing on appeal is limited to only those that submitted “substantive” comments to the agency; “interested party” status is eliminated; decisions signed by the Secretary or Undersecretary of Agriculture are exempt from appeal; the appeal deciding officer is the next higher line officer (e.g., in a decision signed by the District Ranger, the appeal is decided by Forest Supervisor); and, projects under categorical exclusions can be implemented immediately.

On June 5, 2003, the Forest Service and Bureau of Land Management issued the notice of the final NEPA requirements for fire management. This revised the Forest Service Handbook and Department of Interior Departmental Manual, and created categorical exclusions (Fuels CE). Under the Fuels CE, hazardous fuels reduction and rehabilitation activities without an EA or EIS are permitted for up to 4,500 acres burning, 1,000 acres mechanical treatments, and 4,200 post-fire rehabilitation activities. The projects carried out under the Fuels CE must be in the “Wildland Urban Interface Areas” or conditions 2 or 3 in Regime I, II, or III if outside the interface. The projects are not allowed in wilderness, but they can be in wilderness study areas provided that they will not “impair [their] suitability . . . for preservation as wilderness.”

47. § 215.1(a).
48. § 215.10.
49. § 215.12(f).
50. § 215.13(a); see also id. § 215.2 (defining “substantive comments” as those that “are specific to the proposed action, have a direct relationship to the proposed action and include supporting reasons for the Responsible Official to consider”).
51. § 215.13(b).
52. § 215.20(b).
53. § 215.8(a).
54. § 215.9(c).
56. FOREST SERVICE HANDBOOK, supra note 44, at ch. 31.2.
59. Id.
60. Id. See supra notes 27–28 for definitions of these conditions.
61. FOREST SERVICE HANDBOOK, supra note 44, at ch. 31.2, pt. 10.
On July 29, 2003, the Forest Service issued another categorical exclusion.\(^6^2\) This exclusion revised the Forest Service Handbook, 1909.15, Ch. 31.2 subsections 12, 13 and 14, and is commonly known as the “Small Timber CE.”\(^6^3\) The Small Timber CE permits, without the prerequisite of an EA or EIS, live tree harvest up to seventy acres with incidental live tree removal and 0.5 miles of temporary road construction; post-fire logging up to 250 acres and 0.5 miles of temporary road with incidental live tree removal for landings, skid trails, roads; and, “sanitation” (insects and disease) logging up to 250 acres and no more than one-half of a mile of temporary road with incidental live tree removal.\(^6^4\)

On December 8, 2003, the Department of Interior and Department of Commerce issued their Joint Counterpart Endangered Species Act Section 7 Consultation Regulations.\(^6^5\) This final “self-consultation” rule codified their joint counterpart regulations for consultation under section 7 of the Endangered Species Act to “streamline” projects implementing the National Fire Plan of 2000.\(^6^6\) In effect, it reduces legal protections for endangered and threatened species by providing that many potentially harmful projects—including timber cutting and roadbuilding—no longer need to be reviewed by the Fish and Wildlife Service or National Marine Fisheries Service before proceeding.\(^6^7\)

Next, on January 9, 2004, the Forest Service established the pre-decisional objection process for hazardous fuel reduction projects.\(^6^8\) This interim final rule established the sole process by which the public may seek administrative review and file objections to proposed hazardous fuel reduction projects authorized under the Healthy Forests Restoration Act of 2003.\(^6^9\)

Armed with the procedures set forth above, the Forest Service and Department of the Interior land management agencies have implemented the Healthy Forests Initiative on a massive scale.\(^7^0\) In 2004, for example,
the “agencies’ combined target for hazardous fuels treatment and improving land condition was 3.7 million acres.” They “far exceeded this goal by treating nearly 4.2 million acres, or 113% of the 2004 goal. Of these acres, 2.4 million were in the wildland-urban interface” and 1.8 million acres were outside of it.  

III. LITIGATION AGAINST THE HEALTHY FORESTS INITIATIVE

Because it is merely a statement of goals and policy, there is no litigation against the Healthy Forests Initiative per se. Rather, the


71. DECEMBER PROGRESS REPORT, supra note 23, at 1.
72. Id.
73. See generally Sierra Club v. Glickman, 974 F. Supp. 905, 914 (E.D. Tex. 1997) (stating that the Sierra Club had standing to sue the Forest Service because it was with respect to “alleged on-the-ground violations of the NFMA and regulations”), aff’d sub nom. Sierra Club v. Peterson, 185 F.3d 349 (5th Cir. 1999), rev’d en banc, 228 F.3d 559, 561 (5th Cir. 2000) (holding that suit cannot be brought against a Forest Service policy, but must be against specific projects, and then only after
litigation response has taken the form of lawsuits against the various
regulations and categorical exclusions that are implementing the Healthy
Forests Initiative. There are several lawsuits pending, and these are
summarized below.

A. The WildLaw Litigation

The first filed lawsuit, and the one that addresses the greatest number
of Healthy Forests Initiative actions in one suit, is *WildLaw v. Forest
Service*.74 Filed on June 20, 2003, the *WildLaw* suit attacks the Healthy
Forests Initiative’s administrative appeals regulations, the Fuels Categorical
Exclusion (CE) and the Small Timber CE.75 As a threshold matter, the suit
contends that the Forest Service violated NEPA, 42 U.S.C. § 4321, by
failing to prepare an EA or EIS for these actions.76

The plaintiffs in the *WildLaw* suit attack the categorical exclusions on
several grounds.77 They contend that, based on the administrative records
for the Fuels CE and the Small Timber CE, each violates NEPA because the
actions covered by the respective rules individually or cumulatively have
significant effects on the environment.78 As a result, they are not
appropriate actions for categorical exclusion.79 The plaintiffs also argue
that the data the Forest Service used to rationalize these categorical
exclusions lacks scientific and statistical merit.80

The *WildLaw* suit also includes claims against the new Appeals Rule.
The essence of these claims is that the Forest Service violated the
exhaustion of administrative remedies).

75. Plaintiffs’ First Brief at 4, *WildLaw* (No. CV-03-T-682-N) [hereinafter WildLaw Brief] (on
file with author).
76. On this issue the *WildLaw* suit contends that *Heartwood v. Forest Serv.*, 230 F.3d 947 (7th
Cir. 2000) was wrongly decided. *WildLaw* Brief, supra note 75, at 16. *Heartwood* held that no EA or
EIS was required for a 1990s categorical exclusion that was similar to the Small Timber CE, although it
was based on maximum board feet of timber harvest instead of acreage. *Heartwood*, F.3d at 954.
78. Id. at 1.
80. *WildLaw* Brief, supra note 75, at 61. In establishing the Fuels CE, the Forest Service
conducted a survey of more than 2,500 hazardous fuel reduction and rehabilitation/stabilization projects.
National Environmental Policy Act Documentation Needed for Fire Management Activities; Categorical
Exclusions, 68 Fed. Reg. 33,814 (June 5, 2003). A similar survey was performed for the Small Timber
Reg. 44,598 (July 29, 2003) (discussing a review of the environmental effects of 154 timber projects as
insignificant under NEPA). The *WildLaw* plaintiffs contend the data called for in these surveys were
faulty and that the outcome was pre-decided by the Forest Service. See *WildLaw* Brief, supra note 75,
at 44 (“[A]long with the help of a lot of smoke and a few mirrors—the Forest Service . . . made NEPA
virtually disappear from its entire decision-making process.”).
Department of the Interior and Related Agencies Appropriations Act’s Forest Service Decisionmaking and Appeals Reform Act (ARA). The ARA directs the Forest Service to “establish a notice and comment process for proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans . . . [and to] modify the procedure for appeals of decisions concerning such projects.” In a nutshell, the suit contends that the new Appeals Rule contradicts the ARA by depriving the public of notice, opportunity to comment and the right to appeal all projects and activities implementing National Forest land and resource management plans. The plaintiffs assert that the new Appeals Rule does this in three ways. First, it “fails to require public notice and opportunity for comment on ‘[p]rojects and activities which are categorically excluded from documentation in an environmental impact statement (EIS) or environmental assessment (EA),’ even if such projects and activities implement [National Forest] land and resource management plans.” Second, the new “Appeals Rule fails to allow appeals of ‘[d]ecisions for actions that have been categorically excluded from documentation in an EA or EIS,’ even if such actions implement [National Forest land and resource management] [p]lans.” And, third, the new “Appeals Rule also exempts decisions for projects and activities implementing [National Forest land and resource management plans] from ‘notice, comment, and appeal procedures’ ‘[w]hen the Secretary of Agriculture or Under Secretary, Natural Resources and Environment, issues a decision for projects and activities implementing land and resource management plans.’”

81. WildLaw Brief, supra note 75, at 97.
83. WildLaw Brief, supra note 75, at 97–134.
85. Id. at p. 23, para. 102 (first alteration in original) (quoting Notice, Comment, and Appeal Procedures for National Forest System Projects and Activities, 68 Fed. Reg. at 33,600 (codified at 36 C.F.R. § 215.12(f))).
86. Id. at 24, para. 104 (second alteration in original) (quoting Notice, Comment, and Appeal Procedures for National Forest System Projects and Activities, 68 Fed. Reg. at 33,602 (codified at 36 C.F.R. § 215.20(b))).
Another lawsuit was filed against the new Appeals Rule on July 28, 2003. In *Wilderness Society v. Rey* (*Rey II*), the plaintiffs contend that the new Appeals Rule violates the ARA for the same reasons set forth in the *WildLaw* suit. The Wilderness Society places a special emphasis on a previous ruling construing the ARA, *Wilderness Society v. Rey* (*Rey I*). In *Rey I*, the court had held that these same defendants “may not circumvent [the ARA] by attempting to create a new rule that any decision signed by the Undersecretary or Secretary is exempt from the statute.” Yet, the new Appeals Rule provision states the “[d]ecisions of the Secretary of Agriculture or Under Secretary, Natural Resources and Environment are not subject to the notice, comment, and appeal procedures set forth in this part.” The plaintiffs in *Rey II* thus contend that the new Appeals Rule is in direct contravention with the holding of *Rey I*.

As for the government’s defense in *Rey II*, they contend that the plaintiffs have no standing to challenge the appeal regulations in a facial, instead of an as-applied, context, and that the case is not ripe for adjudication. On the merits, the government’s basic contention is that Congress did not speak unambiguously with respect to the specific matters addressed in the regulations plaintiffs are challenging, and, as a result, the Forest Service’s construction of the ARA is entitled to deference from the court. The matter has been fully briefed on summary judgment, and a decision can be expected in the spring of 2005.

Meanwhile, there is a third case pending against the new Appeals Rule, *Earth Island Institute v. Pengilly*. Some claims in this case overlap with *WildLaw* and *Rey II*, but it challenges even more of the new Appeals Rule. The suit contends that the new rule improperly exempts many
Forest Service decisions from appeal, particularly categorical exclusion decisions and decisions by the Secretary and Under Secretary of Agriculture.\textsuperscript{95} It further contends that the new rule unlawfully denies appeals to appellants who have notified the Forest Service of their interest in the challenged project and improperly allows the Forest Service to not decide appeals.\textsuperscript{96} The suit also contends that the new rule improperly restricts the automatic stay provisions of the ARA and avoids uniformity in the public comment and appeals processes required by the ARA.\textsuperscript{97}

The defense in the \textit{Earth Island Institute} suit again alleges a lack of ripeness and standing, and asserts agency deference.\textsuperscript{98} The non-ARA portions of the suit have been settled, briefing is finished on the ARA claims, and oral argument was held in December, 2004.

\textbf{C. Litigation Against the Fuels CE}

A facial and “as applied challenge” to the Fuels CE was filed in October, 2004, by the Sierra Club and Sierra Nevada Forest Protection Campaign.\textsuperscript{99} This suit makes the same facial-challenges claims as the \textit{WildLaw} suit and, like that suit, seeks a nationwide injunction on operation of the Fuels CE.\textsuperscript{100} The \textit{Sierra Club} suit makes an additional claim against the Forest Service’s designation of “extraordinary circumstances.”\textsuperscript{101} The claim is based on 40 C.F.R. § 1508.4, which requires a categorical exclusion to include provision for “extraordinary circumstances,” or those circumstances “in which a normally excluded action may have a significant environmental effect.”\textsuperscript{102} The Sierra Club contends that the Forest Service’s designation of “extraordinary circumstances” did not meet the requirements of 40 C.F.R. § 1508.4 because the Forest Service just listed “[r]esource conditions that should be considered in determining whether extraordinary circumstances . . . warrant further analysis and documentation

\textsuperscript{95.} Id. at 27.
\textsuperscript{96.} See id. at 29 (claiming that the ARA does not “restrict the right of appeal to those parties who file ‘substantive comments’”).
\textsuperscript{97.} See id. at 27 (claiming that the new rule improperly exempts “economic loss” from the automatic stay).
\textsuperscript{100.} Id.
\textsuperscript{101.} Id. at 18–19.
\textsuperscript{102.} 40 C.F.R. § 1508.4 (2004).
in an EA or an EIS." 103 The Forest Service stated: “The mere presence of one or more of these resource conditions does not preclude use of a categorical exclusion.” 104 Plaintiffs contend that allowing the deciding officer to determine “significance” for purposes of deciding whether the extraordinary circumstances exception applies results in a case-by-case categorical exclusion, which is not allowed under 40 C.F.R. § 1508.4. 105 The Sierra Club suit also makes “as applied” challenges to the Fuels CE. 106 The Complaint names five timber sales in the Lassen National Forest and Eldorado National Forest that are implementing the Fuels CE, and names several future projects expected to be approved applying the categorical exclusion. 107 The plaintiffs contend that these sales have individual and/or cumulatively significant effects making the use of the Fuels CE for them contrary to 40 C.F.R. §§ 1501.4, 1508.4, 1508.9 and 1508.27. 108 Plaintiffs further challenge defendants’ finding that the sales were not significant as “arbitrary and capricious, an abuse of discretion or not in accordance with law, contrary to the APA.” 109 In addition, plaintiffs contend that the projects involve extraordinary circumstances, including California Spotted Owl and Northern Goshawk habitat, and thus a categorical exclusion cannot be applied to these projects. 110 Plaintiffs also challenge the Forest Service’s case-by-case analysis of the projects as “an impermissible ad hoc use of a categorical exclusion contrary to 40 C.F.R. § 1508.4.” 111

The Fuels CE is applicable to all units of the National Forest System. In the Forest Service’s fiscal year 2004, the Fuels CE and other “administrative tools” were used to treat 442,000 acres while in 2005 the Forest Service projects 351,238 acres will be treated. 112 It is likely, however, that use of the Fuels CE will be even greater. The Fuels CE was based upon a review of more than 2,500 projects over two years, and the projects covered more than 2.5 million acres. 113 Projecting those numbers

104. *Id.*
106. *Id.* at 22.
107. *Id.* at 22–24.
108. *Id.* at 24.
109. *Id.* at 24.
110. See *id.* at 22 (stating that some “projects involve extraordinary circumstances, in that species designated by the Forest Service as sensitive species and/or sensitive species’ habitat are present”); accord Rhodes v. Johnson, 153 F.3d 785, 790 (7th Cir. 1998) (holding that if an extraordinary circumstance exists the Forest Service’s use of a categorical exclusion is not allowed).
113. The Forest Service surveyed 2,559 projects over two years to support its decision to issue the Fuels CE. U.S. Forest Serv., *Final Report on Data Call* 3 (2003), *available at* http://www.fs.fed.us/emc/hfi/analysis.pdf. Those projects involved treatment of 2,542,328.8 acres by
into the future indicates that the Fuels CE will likely be used for more than 1.25 million acres per year. And, the usage may be even higher considering that the purpose of the Fuel CE is to expedite projects. Given the large number of projects and acreage involved, it is likely that there will be several more lawsuits in 2005 challenging the Fuels CE and projects approved under it.

D. Litigation Against the Small Timber CE

Although the footprint of any one project under the Small Timber CE is relatively little, collectively these projects present death by a thousand cuts for the forests because the use of this categorical exclusion seems limitless. Nowhere in the rulemaking record does the Forest Service indicate how many projects the new regulations will cover, how many total acres will be affected, or how many board feet of timber will be removed. There is no discussion of the types or ages of trees to be cut, nor of the effects to wildlife or watersheds from these projects. The Forest Service used no apparent objective quantitative or qualitative measure of “significance” in the promulgation of this categorical exclusion.114

Another lawsuit was filed on December 1, 2004 against the small timber CE, regarding the Shaw Lake Vegetation Management Project in Colorado. That suit is Colorado Wild v. U.S. Forest Service, and contends that the small timber CE “violates NEPA, both facially and as-applied.”115 In addition, a successful challenge against the application of the Small Timber CE was made in Earth Island Institute.116 In that case the court granted a preliminary injunction against a timber harvest in the Burnt Ridge area of the 2002 McNally fire in California.117 The court found the Forest Service was violating the CE regulations and NEPA “by permitting a


117. Id. at 3.
More lawsuits are looming against the Small Timber CE. For example, the Forest Service has proposed two logging projects under this categorical exclusion in a portion of Carson-Iceberg inventoried roadless area scorched in a 2003 prescribed burn. These projects would remove approximately 3 million board feet of timber from 500 acres of the inventoried roadless area. These projects exemplify the segmentation allowed under this categorical exclusion because the two projects, although practically adjacent to one another, qualify for the exclusion because the agency treated them as separate actions. Another example is the Sims Fire Salvage project proposed for the Shasta-Trinity National Forest and Six Rivers National Forest. It is likely that this lawsuit and others like it will make the same arguments that led to the previous Small Timber CE (which was based on board feet rather than acreage) to be invalidated in Heartwood. Namely, the Forest Service’s designation of the class of actions to be covered by the categorical exclusion was arbitrary and capricious because it was based on an arbitrarily designated amount of acres.

E. Litigation Against the Self-Consultation Rule

Pursuant to the new Joint Counterpart Endangered Species Act section 7 Consultation Regulations, on March 2, 2004 and March 3, 2004, the U.S. Fish and Wildlife Service entered into “Alternative Consultation
Agreements” with the Forest Service and the Bureau of Land Management. These agreements authorized the agencies to avoid consultation for any National Fire Projects that they find may affect but are not likely to adversely affect endangered or threatened species or critical habitat. This led to the July 22, 2004 filing of *Defenders of Wildlife v. Norton*. In that case, plaintiffs challenge the self-consultation rule on the grounds that it violates section 7 of the Endangered Species Act and the Administrative Procedure Act. In addition, they contend that the agencies violated NEPA by not preparing an EIS or an adequate EA for the rule or for the Alternative Consultation Agreements. The case is scheduled to be fully briefed by July 31, 2005.

**CONCLUSION**

The Healthy Forests Initiative has undermined public participation and environmental review for countless timber projects in the National Forests. It did this based on the faulty premise that administrative appeals and NEPA review are to blame for the western wildfire problem. Under the guise of the Healthy Forests Initiative, the Forest Service is conducting commercial timber sales on millions of acres outside the immediate community protection zones, without full review of their effects. Time will tell if the litigation brought in response to the Healthy Forests Initiative succeeds, but the role of the public and the extent of environmental review in management of the National Forests depends upon it.

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129. *Id.*