No. 07-463

IN THE
Supreme Court of the United States

PRISCILLA SUMMERS, *et al.*,
Petitioners,
v.
EARTH ISLAND INSTITUTE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMERICAN FOREST & PAPER ASSOCIATION, NATIONAL ASSOCIATION OF HOME BUILDERS, AMERICAN FARM BUREAU FEDERATION, CROPLIFE AMERICA, AMERICAN FOREST RESOURCE COUNCIL, CALIFORNIA FORESTRY ASSOCIATION, AND MINNESOTA FOREST INDUSTRIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

THOMAS R. LUNDQUIST
Counsel of Record
STEVEN P. QUARLES
J. MICHAEL KLISE
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, DC 20004-2595
(202) 624-2500

Attorneys for Amici Curiae

(Additional Counsel Listed On Inside Cover)

Additional counsel:

DUANE J. DESIDERIO
THOMAS WARD
NATIONAL ASSOCIATION OF HOME BUILDERS
1201 15th Street, NW
Washington DC 20005
(202) 266-8200
Counsel for National Association of Home Builders

WILLIAM R. MURRAY
AMERICAN FOREST & PAPER ASSOCIATION
1111 19th Street, NW
Suite 800
Washington, DC 20036
(202) 463-2782
Counsel for American Forest & Paper Association

JULIE ANNA POTTS
DANIELLE QUIST
AMERICAN FARM BUREAU FEDERATION
600 Maryland Ave., SW
Washington, DC 20024
(202) 406-3616
Counsel for American Farm Bureau Federation

DOUGLAS T. NELSON
JOSHUA SALTZMAN
CROPLIFE AMERICA
1156 15th Street, NW
Washington, DC 20005
(202) 872-3880
Counsel for CropLife America

TABLE OF CONTENTS

TABLE OF CONTENTS
Continued

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
Continued

Page

TABLE OF AUTHORITIES
Continued

Page

TABLE OF AUTHORITIES
Continued

Page

TABLE OF AUTHORITIES
Continued

Statutes

Regulations and Preambles

TABLE OF AUTHORITIES
Continued

Legislative History

Other Authorities

TABLE OF AUTHORITIES
Continued

Page

INTERESTS OF *AMICI CURIAE*[1]

Amici are trade associations representing business sectors of the U.S. economy. *Amici* are the American Forest & Paper Association, National Association of Home Builders, American Farm Bureau Federation, CropLife America, American Forest Resource Council, California Forestry Association, and Minnesota Forest Industries. *Amici* have vital interests in the permissible scope of judicial review and relief in Administrative Procedure Act ("APA") suits against federal agencies. Those are the central issues in this appeal.

The businesses of *Amici*'s members are heavily regulated by federal rules. Our members invest substantial resources to plan for, and comply with, a known set of regulations. When non-regulated third parties challenge those regulations, lower courts often find such facial challenges are ripe. When such plaintiffs prevail, district courts too frequently issue nationwide injunctions against the rules. *See* Pet. 30.

Such broad judicial review and relief are contrary to *Amici*'s interest in a stable regulatory structure. As shown in the Brief of Petitioners and the Argument below, such broad review and relief contravene this Court's precedents. Accordingly, *Amici* support Federal Petitioners.

---

[1] Petitioners and Respondents have consented to the filing of this brief in letters on file in the clerk's office. No counsel for a party authored this brief in whole or in part, and no person or entity, other than *Amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Regulated industries are sometimes plaintiffs in challenges to rules. This Court has appropriately found that, where rules require the regulated to adjust their behavior or face significant adverse consequences, facial challenges to rules are reviewable. *Amici* wish to reinforce why such facial challenges to rules are justiciable.

Counsel for *Amici* were counsel for petitioners in a leading ripeness decision, *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998). And since the American Forest & Paper Ass'n submitted an *amicus* brief in this case before the Ninth Circuit, we can provide some pertinent context on the Forest Service rules at issue.

INTRODUCTION

1. Under the Appeals Reform Act ("ARA"), the Forest Service "shall establish a notice and comment process for proposed . . . activities implementing" forest plans in national forests and "shall modify the procedure for appeals of decisions concerning such projects." 106 Stat. 1419 (1992), 16 U.S.C. 1612 note. ARA procedures are not required before *any* Forest Service action. As recognized by the district court and Earth Island Institute ("Earth Island" or "Respondents"), the "ARA certainly permits exclusion of environmentally insignificant projects from the appeals process." Pet. App. 51a-52a.

2. The Forest Service adopted revised ARA rules at 68 Fed. Reg. 33582 (June 4, 2003). Two rules exempt from ARA procedures projects "which are categorically excluded from documentation in an environmental impact statement (EIS) or environmental assessment (EA)" under the National Environmental Policy Act ("NEPA"). 36 C.F.R.

215.4(a) and 215.12(f). The Council on Environmental Quality has encouraged agencies to take greater advantage of categorical exclusions ("CEs"). This allows limited agency resources to be focused efficiently on actions with truly significant adverse environmental impacts. 48 Fed. Reg. 34265-66 (July 28, 1983); *see* 40 C.F.R. 1500.4(p), 1500.5(k), 1507.3(b)(2)(ii), 1508.4; *Colorado Wild v. U.S. Forest Serv.*, 435 F.3d 1204, 1209-10 (10th Cir. 2006).

The Forest Service adopted several CEs to further the President's Healthy Forests Initiative ("HFI"). HFI seeks to reduce risks of catastrophic wildfires and to improve forest health by timely completion of active forest management.[2] Providing NEPA-like notice and comment, and then administrative appeals, on projects within CEs adds time delays and costs that are in tension with HFI objectives and with CEQ's objectives in promoting greater efficiency through CEs.

3. Earth Island brought both a facial challenge to nine provisions in the 2003 rules and a challenge to certain rules as applied to a project within a CE called the Burnt Ridge Project. Pet. App. 7a, 33a, 39a; *see* Pet. Br. at 4, 35 n.12, 39 n.14.

---

[2] *See* http://www.whitehouse.gov/infocus/healthyforests/. The CEs include actions to reduce hazardous fuels levels by conducting forest thinning (CE 10), for post-fire rehabilitation activities (CE 11), and for salvage logging (CE 13). CEs 10-14 were upheld in *Wildlaw v. U.S. Forest Serv.*, 471 F. Supp. 2d 1221 (M.D. Ala. 2007). CE 13 was upheld in *Colorado Wild v. U.S. Forest Serv.*, 435 F.3d 1204 (10th Cir. 2006). While CE 10 was upheld in *Sierra Club v. Bosworth*, No. 2:04 CV 2114 GEB DAD, 2005 WL 2281074 (E.D. Cal. Sept. 16, 2005), the Ninth Circuit saw things differently, and remanded CE 10. *Sierra Club v. Bosworth*, 510 F.3d 1016 (9th Cir. 2007).

The controversy regarding the Burnt Ridge Project was settled and dismissed. Pet. App. 15a, 39a; Pet. Br. at 5.

District Judge Singleton found justiciable the facial challenge to all nine of the 2003 rules.[3] Pet. App. 40a-47a. He concluded that several portions of the rules contravened the ARA and declared specific rules invalid. Pet. App. 49a-67a. A later order clarified that the district court was enjoining several rules nationwide. Pet. App. 29a-37a.

4. The Ninth Circuit concluded that the facial attacks on rules which had not been applied to Earth Island were not ripe. Pet. App. 13a-15a.

The panel then reasoned that, because 36 C.F.R. 215.4 and 215.12(f) – which exempt from ARA procedures those actions within a CE – had been "applied in the context of the Burnt Ridge Project," the "application" of those rules created a ripe controversy. Pet. App. 14a-15a. The panel also determined, without explanation, that the "parties' agreement to settle the Burnt Ridge Timber sale dispute does not affect the ripeness of Earth Island's challenge to 36 C.F.R. §§ 215.12(f) and 215.4(a)." Pet. App. 15a.

After reviewing an "application of the regulation to the project," for relief the panel affirmed a nationwide injunction against use of the two rules. Pet. App. 15a, 21a. The panel stated that a

---

[3] Other environmental groups contested the ARA rules in the Middle District of Alabama. That court found the facial challenge to be unripe. *Wildlaw v. U.S. Forest Serv.*, 471 F. Supp. 2d 1221 (M.D. Ala. 2007).

"nationwide injunction . . . is compelled by the text of the Administrative Procedure Act." Pet. App. 21a.

5. This Court granted the Solicitor General's petition for certiorari on Jan. 18, 2008. Opposing the petition, Earth Island argued that, if a "challenged regulation has actually been or is likely to be applied to them, a facial rule challenge is acceptable if it presents purely legal issues or otherwise does not require additional 'concreteness' to be capable of judicial resolution." Respondents' Brief in Opposition ("Opp. Cert.") at 9-10; *see id*. at 12, 20.

SUMMARY OF ARGUMENT

The justiciability of facial challenges to rules often depends on whether suit is brought by an immediately affected regulated industry or is brought by third parties fearing contingent environmental hardship and injury from a future application of the rule. Where the rule itself burdens the "primary conduct" of a business and where the court challenge presents a pure issue of law, this Court has appropriately allowed facial review of, and relief against, the rule. *Reno v. Catholic Social Servs.*, 509 U.S. 43, 57-58 (1993) (analyzing several decisions); *Abbott Labs. v. Gardner*, 387 U.S. 136, 149-54 (1967).

Here, the ARA rules place no burdens on Earth Island's primary conduct. Additionally, Earth Island's claim of environmental hardship and injury is contingent on the Forest Service's approval of a separately challengeable project in an area used by its members. Judicial review in that as-applied setting would avoid meaningful irreparable hardship and injury to Earth Island. Hence, in this case, the "agency action" that could be subject to judicial

review is the approval of a proposed project – not approval of the rule. 5 U.S.C. 706. Judicial relief would be limited to that site-specific, justiciable controversy, without affecting application of the rule in other jurisdictions. *See Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998); *Reno v. CSS*, 509 U.S. at 56-59; *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 891-94 (1990).

The courts below exceeded prudential and Art. III limits by deciding the merits of a facial challenge to ARA rules and issuing a nationwide injunction where there was no justiciable controversy. The Ninth Circuit correctly found that the facial challenge to rules was not justiciable. Pet. App. 11a-15a. But then the panel committed several errors.

a. The panel concluded it could still reach the merits after the justiciable challenge (an as-applied challenge) was settled and dismissed. Pet. App. 15a. That offends this Court's mootness jurisprudence.

b. Under the Ninth Circuit's statement that an "application of the regulation to the [Burnt Ridge] project" (Pet. App. 15a) was the justiciable action, only relief as to that project was authorized. The APA and this Court's decisions limit the scope of relief to the scope of the justiciable "action" or controversy. *Lewis v. Casey*, 518 U.S. 343, 358-59 (1996); *Lujan v. NWF*, 497 U.S. at 892-94. A nationwide injunction against the two rules was impermissible.

c. The panel stated that the "loss of th[e asserted ARA] right of administrative appeal is a sufficient procedural injury" (Pet. App. 10a) to confer jurisdiction. That contravenes *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571-78 (1992).

ARGUMENT

I. There Was No Justiciable Controversy Permitting Judicial Review, A Nationwide Injunction, Or Any Other Relief

Ripeness, standing, and mootness cluster around Art. III's limitation of the judicial role to a discrete and active Case or Controversy. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). All of these doctrines play a role in demonstrating the errors committed by the courts below.

A. Earth Island Lacks A Ripe Facial Challenge To The ARA Rules

The 1967 *Abbott Labs* trilogy describes and applies the principal factors that continue to guide courts in assessing the ripeness of facial challenges to rules. In *Abbott Labs*' classic formulation, ripeness requires consideration of "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[4]

---

[4] *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). *Ohio Forestry* provides a refinement containing three "consider[ations]: (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998).

In *Abbott Labs*, the Court allowed pre-enforcement review because the rules had significant "direct effect on the day-to-day business of all prescription drug companies." 387 U.S. at 152. FDA's rules on drug labeling effectively compelled the companies to spend large sums to conform their products to the

(continued…)

1. Earth Island is mistaken that its APA facial challenge to rules is presumed to be justiciable. *See* Opp. Cert. at 9-16. To the contrary, a "regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA until the scope of the controversy has been reduced . . . by some concrete action applying the regulation to the claimant[]." *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 891 (1990). This Court cited and applied this aspect of *Lujan v. NWF* to find nonjusticiable the APA facial challenges to rules in *National Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 808 (2003); and *Reno v. Catholic Social Servs.*, 509 U.S. 43, 56-58 (1993).

There is a "major exception" to this APA principle: a "substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately. . . . is 'ripe' for review at once." *Lujan v. NWF*, 497 U.S. at 891; *see* Pet. Br. at 15-16. At least "where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act . . . must be permitted." *Abbott Labs*, 387 U.S. at 153. If a "self-executing" rule creates an economic dilemma that

---

(continued)
labeling standards or else the companies would "risk serious criminal and civil penalties" for noncompliance. 387 U.S. at 152-54. A similar result was reached in the companion case concerning FDA's color additive rules. Since those rules are "self-executing, and have an immediate and substantial impact upon" the regulated companies, pre-enforcement review of the overall legality of the rules was allowed. *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 171-72 (1967).

burdens "primary conduct," a facial challenge to a rule is presumptively justiciable. *National Park*, 538 U.S. at 810. *See* Section II.

Earth Island does not meet the standards for a ripe facial challenge to rules. The ARA rules do not impair Earth Island's primary conduct. *See* Pet. Br. at 22, 24. In contrast to *Abbott Labs*, 387 U.S. at 152-54, the ARA rules impose *no burdens* backed by sanctions. As in *Ohio Forestry*, 523 U.S. at 733-34, the rules limiting administrative appeals "do not command anyone to do anything" affirmative. The rules leave Earth Island free to bring a suit against any ground-disturbing project that injures its members.

The rules do deny a purported *benefit* – the ability to file comments and an administrative appeal on some low-impact Forest Service actions. As in *Reno v. CSS*, since the rules "impose no penalties for violating any newly imposed restriction, but limit access to a benefit [arguably] created by the Reform Act," the "promulgation of the challenged regulations did not itself" create a "ripe claim." 509 U.S. at 58-59.

2. Because *environmental* injuries and hardships become imminent only to the extent an environment-disturbing project is proposed in an application of the rules, facial challenges to rules based on theories of environmental damage are seldom justiciable. *See* Sections I.B and II. If a project is proposed that would impose imminent personal environmental injury and hardship on Earth Island's members, Earth Island can seek judicial review and a preliminary injunction to avoid such injury. Review could extend to whether an administrative appeal was wrongfully denied on the

justiciable site-specific controversy. This fact pattern places this case squarely within *Ohio Forestry*'s logic for allowing only later and more-limited judicial review and relief. 523 U.S. at 733-35; *see* Section I.B, below.[5]

3. Respondents also argue the rules impose sufficient immediate *procedural* hardships to support a facial challenge. Opp. Cert. at 20-26. For several reasons, the alleged procedural hardships and injuries (the decreased ability to file comments

---

[5] The ARA rules free Respondents from exhausting administrative remedies prior to judicial review for some actions. This reduces certain costs to Earth Island. Even if narrower case-by-case litigation increases Earth Island's costs, this is not a cognizable hardship under *Ohio Forestry*, 523 U.S. at 734-35. Accordingly, the district court's desire to save Earth Island the expense of "bringing multiple lawsuits in multiple jurisdictions in order to challenge the regulations as they are applied to specific projects" (Pet. App. 46a) does not provide a persuasive basis for engaging in broad review of the ARA rules. *See* Pet. Br. at 25-26.

Earth Island may be advocating for more agency process to achieve other goals. For example, the delays inherent in an administrative appeal make it more likely that some time-sensitive and cost-sensitive projects will not be conducted. *See* Pet. App. 71a (Bensman Declaration); THE PROCESS PREDICAMENT: HOW STATUTORY, REGULATORY, AND ADMINISTRATIVE FACTORS AFFECT NATIONAL FOREST MANAGEMENT (Forest Service 2002) (http://www.fs.fed.us/projects/documents/Process-Predicament.pdf). As an example of how procedures affect substance, Judge Posner has observed that requiring an EIS "is very costly and time-consuming" and "has been the kiss of death to many a federal project." *Cronin v. U.S. Dep't of Agric.*, 919 F.2d 439, 443 (7th Cir. 1990). Loss of such procedural "benefits" should not be cognizable hardship under the logic of *Ohio Forestry* and *Reno v. CSS*.

and administrative appeals on some projects) should not create a justiciable facial challenge to the rules.

First, an assertion that the rules violate the "procedures required by [ARA statutory] law" cannot provide standing under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571-78 (1992). There, the Court found that environmental groups lacked standing to contest Endangered Species Act rules that limited procedural consultation among federal agencies to U.S.-based projects.

Second, with respect to Respondents' theory that their alleged "informational injury" warrants facial review and relief, the Court should be reluctant to extend the concept of informational injury beyond the primary conduct of voting and voters' rights in *Federal Election Comm'n v. Akins*, 424 U.S. 11, 24-25 (1998). Recognizing an informational injury leads tautologically to a conclusion that standing exists to redress the reduced amount of information available. *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 83-85 (D.C. Cir. 1991) (NEPA standing cannot be based on a theory of informational injury). This, in turn, fosters the prohibited result of authorizing suits based on a "self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law." *Lujan v. Defenders*, 504 U.S. at 573. The ARA does not create informational rights, and does not allow standing on a theory of informational injury. *See Bensman v. U.S. Forest Serv.*, 408 F.3d 945, 955-60 (7th Cir. 2005).

Third, if informational injury is cognizable under the ARA, Respondents have not shown such injury. The Forest Service provides scoping information and other advance information on all

pertinent projects, including those within a CE from NEPA. *See* 69 Fed. Reg. 40594-95 (July 6, 2004); Pet. Br. at 22-24. The record suggests Respondents did receive notice, and could and did file a lawsuit challenging a proposed action that would injure their interests. *See* Opp. Cert. at 20-26.

4. The Ninth Circuit's conclusion that "the loss of th[e] right of administrative appeal is sufficient procedural injury in fact to support a challenge to the regulation" (Pet. App. 10a) is not correct. To create a personal stake in the outcome, the disregard of the procedure must also "impair a separate concrete interest," such as the personal environmental injury if some "federal facility is constructed next door" to Earth Island's members. *Lujan v. Defenders*, 504 U.S. at 572-73 and notes 7 & 8 (justiciable site-specific controversy where "one living adjacent to the site for proposed construction of a federally licensed dam" wishes to challenge the NEPA procedures on the dam). As Justices Kennedy and Souter summarized in their concurrence, "the party bringing suit must show that the action injures him in a concrete and personal way" so that legal questions "'will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context.'" *Id*. at 581.

Accordingly, under the logic of, and examples in, *Lujan v. Defenders*, a justiciable controversy should exist only if the denial of procedures (*e.g.*, ARA or NEPA procedures) and the imminent concrete environmental injury concern the same proposed

site-specific action.[6] Otherwise, courts could be

---

[6] *See Winkelman v. Parma City School Dist.*, 127 S. Ct. 1994, 2008 n.3 (2007) (concurring opinion of Justices Scalia and Thomas); Pet. Br. at 31-33. Based on this understanding, some circuit courts have found standing is lacking on challenges that a forest plan EIS does not comply with NEPA procedures (*e.g.*, there is no imminent personal environmental injury as any first-level NEPA document does not mandate ground-disturbing activities, and the totality of NEPA compliance can be assessed in a challenge to a proposed site-specific project). *Wilderness Soc'y v. Alcock*, 83 F.3d 386 (11th Cir. 1996); *Sierra Club v. Robertson*, 28 F.3d 753 (8th Cir. 1994). This Court's resolution of the similar issue in *Ohio Forestry* is unclear. The Court found the NEPA issues in the Complaint to be nonjusticiable (523 U.S. at 731, 739), but did not fully explain its reasoning. The opinion also states that "a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper." 523 U.S. at 737.

The Ninth Circuit has construed the sentence on "NEPA procedure" to allow non-regulated parties to litigate procedural challenges to rules and other broad documents at the time of their issuance, but not substantive challenges. Pet. App. 10a; *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 977 (9th Cir. 2003). In contrast, where the suit "involves a broad rulemaking," the D.C. Circuit requires a "more exacting" showing that the challenged act *itself* "demonstrably increased some specific risk of environmental harm to the interests *of the plaintiff*." *Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 667 (D.C. Cir. 1996) (en banc). And earlier, the Ninth Circuit had occasionally found broad procedural and informational challenges to be nonjusticiable, where all issues could be reviewed in the context of a later site-specific action. *E.g., Ecology Ctr. v. U.S. Forest Serv.*, 192 F.3d 922 (9th Cir. 1999) (the quality of forest-wide wildlife information is not reviewable); *Rapid Transit Advocates v. Southern California Rapid Transit Dist.*, 752 F.2d 373, 378-79 (9th Cir. 1985) (challenge to a first-level NEPA document not justiciable where the totality of NEPA compliance could be litigated later but before environmental injury occurs).

lured into rendering broad advisory opinions on issues where the potential injury to plaintiffs is speculative and contingent. That would be contrary to the sound separation-of-powers principles that animate the limitations on the scope of judicial review and relief. *See* pages 29-30, below.

5. In sum, Earth Island had no justiciable facial challenge to the rules. *Accord* Pet. App. 11a-15a; *Wildlaw*, 471 F. Supp. 2d at 1238-41.

B. Where Justiciability Doctrines Limit The APA-Reviewable "Action" To A Site-Specific Project, A Court Lacks Jurisdiction To Enjoin The Rule

1. Art. III standing exists only where plaintiff demonstrates an "'imminent' injury in fact." *Medimmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764, 772 n.8 (2007). One aspect of ripeness concerns whether hardship would occur if review were postponed. *Id*. Accordingly, where the rule causes no imminent hardship or injury to the particular plaintiff, judicial review must await "some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Lujan v. NWF*, 497 U.S. at 891. Thus, ripeness and standing certainly have a timing component.

Yet, those doctrines go beyond timing. Ripeness and standing principles also can control: (1) which agency action is the subject of judicial review; and (2) the scope of judicial relief. *See* Pet. Br. at 16-17, 25, 41. Where justiciability depends on environmental hardship and injury, *Lujan v. NWF* explains that the subject of judicial review is the rule's application to a ripe site-specific controversy,

not the rule itself. Significantly, that focused judicial review does not open up the entire rule to injunctive or set-aside relief.

> [I]t is at least entirely certain that the flaws in the entire "program" . . . cannot be laid before the courts for wholesale correction under the APA, simply because one [site-specific action] that is ripe for review adversely affects one of respondent's members. The case-by-case approach that this requires is understandably frustrating to an organization such as respondent, which has as its objective across-the-board protection of . . . forests[.] But this is the traditional, and remains the normal, mode of operation of the courts. Except where Congress explicitly provides for our correction of the administrative process at a higher level of generality, we intervene in the administration of laws only when, and to the extent that, a specific "final agency action" has an actual or immediately threatened effect. Such an intervention . . . is assuredly not as swift or as immediately far-reaching a corrective process as those interested in systemic improvement would desire.

Lujan v. NWF, 497 U.S. at 893-94.

Ohio Forestry explains *NWF v. Lujan*'s limitation of the remedy "to the extent" of the ripe as-applied controversy; a remedy that is not "systemic," but is less "far-reaching." While a challenge to a "site-specific logging decision" allows a look back at the portions of a forest plan (or rule) that play "a causal role with respect to the future, then imminent harm from logging," the reviewing court cannot strike down the forest plan (or rule).

523 U.S. at 734. Instead, "one initial site-specific victory (if based on the Plan's unlawfulness)" might eventually carry the day "through preclusion principles," but not through a nationwide injunction. *Id*. at 734-35. That is, once a court finds an aspect of a forest plan is unlawful in the course of deciding a controversy on a site-specific project, stare decisis, res judicata, or collateral estoppel prevents relitigation of that matter in a particular district court or circuit. This may prompt the agency to change its forest plan.

As the Court reasoned in *Lewis v. Casey*, principles of standing, separation-of-powers, and equity also limit the scope of relief where, as here, the plaintiff might be injured only by some applications of a rule.

> The actual-injury requirement would hardly serve the purpose we have described above – of preventing courts from undertaking tasks assigned to the political branches – if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy *all* inadequacies in that administration. The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established. . . .
>
> [T]he inadequacy which the suit empowered the court to remedy – was failure to provide the special services that Bartholic would have needed. . . . [S]tanding is not dispensed in gross. . . . "[N]or does a plaintiff who has been subject to injurious conduct of one kind possess by virtue or that injury the necessary stake in litigating conduct of another kind, although

> similar, to which he has not been subject." *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982). . . . These two instances [of personal injuries to Messrs. Bartholic and Harris] were a patently inadequate basis for a conclusion of systemwide violation and imposition of systemwide relief.

Lewis v. Casey, 518 U.S. 343, 358-59 (1996).

Other precedents support that, if an environmental group has standing with respect to a project-specific implementation of a rule, the rule itself is not subject to judicial relief. "[S]tanding as to one claim cannot suffice for all claims arising out of the same 'nucleus of operative facts.'" *DaimlerChrysler*, 547 U.S. at 353. Accordingly, where only a site-specific action causes the imminent injury to plaintiff that Art. III requires for an exercise of judicial authority, that site-specific action is both the reviewable action before the court and the only lawful subject of a remedy.

"[P]laintiff must establish justiciability as to each form of relief." *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC)*, 528 U.S. 167, 185 (2000). As the courts below had no jurisdiction over a facial challenge to rules, those courts lacked jurisdiction to issue a nationwide injunction as the form of relief.

2. The text of the APA embodies the logical result that the scope of relief should be limited to the justiciable action before the court. The APA provides judicial authority to "set aside" the particular "action" that is the subject of judicial review. 5 U.S.C. 706. Hence, where justiciability doctrines dictate that the reviewable "action" is an as-applied challenge to a site-specific project, only the project

shown to injure plaintiff may be set aside – the rule itself should not be enjoined.[7]

3. The Ninth Circuit stated that only "an application of the regulations to the project" is justiciable. Pet. App. 15a. Thus, the action under review was approval of the project, not approval of the rules. Under the principles discussed above, the courts below lacked jurisdiction to issue a nationwide injunction against the rules.

Moreover, the Ninth Circuit's statement that a "nationwide injunction . . . is compelled by the [APA's] text" (Pet. App. 21a) is incorrect on the merits. *See* Pet. Br. at 19-21, 41-43. The APA provides "[n]othing herein . . . affects . . . the power . . . of the court to . . . deny relief on any other appropriate legal or equitable ground." 5 U.S.C. 702. This means that "injunctive" remedies "are discretionary." *Reno v. CSS*, 509 U.S. at 57. For example, the Court has vacated injunctions in at

---

[7] Under this approach, the rule remains enforceable, at least in other jurisdictions. The approach has several institutional benefits. First, it respects the Executive Branch's prerogatives in implementing the law by not enjoining an agency rule merely because one of many district courts perceives some inadequacy. Second, by permitting other courts to consider the validity of the rule, the approach allows a more-complete ventilation of competing views in the lower courts. This allows more lower courts to reach the best result and helps to inform this Court's exercise of supervisory jurisdiction. *See United States v. Mendoza*, 464 U.S. 154, 160, 164 (1984) (providing reasons why offensive collateral estoppel does not apply against the government). Third, this approach does not order overbroad relief at the behest of plaintiffs who suffer personal environmental injury only to the extent of some applications of the regulation. *See generally* Pet. Br. at 40-47.

least two decisions that illustrate the APA does not mandate an injunction. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542-46 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982). The APA should not be read to eliminate a court's longstanding equitable discretion "to mould each decree to the necessities of the particular case." *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 496 (2001).[8]

The Ninth Circuit's approach unwisely directs each district court to veto a federal agency's rule or other action if any shortcoming is perceived. Consistent with *Lujan v. NWF*'s understanding of the separation of powers, the Court should continue to read the APA as not mandating such a massive transfer of power from the Executive Branch to the Judicial Branch.

---

[8] *See Amoco Prod.*, 480 U.S. at 542-46; *Romero-Barcelo*, 456 U.S. at 312-13; Ronald Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L. J. 291, 309-44 (2003).

The APA, in 5 U.S.C. 706, requires consideration of "prejudicial error" versus harmless error. That would be irrelevant if the APA mandated enjoining the action whenever there were any error. One consequence is: where an agency has failed to explain some matter in sufficient depth or there is some other curable procedural shortcoming, "bedrock principles of administrative law preclude us from declaring definitively that her decision was arbitrary and capricious without first affording her an opportunity to articulate, if possible, a better explanation." *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1023 (D.C. Cir. 1999).

C. Settlement Rendered Moot The Only Justiciable Challenge. The Courts Below Lacked Jurisdiction To Reach The Merits And To Grant Any Relief.

A federal court must presume it lacks jurisdiction, and plaintiffs bear the burden of showing otherwise. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1997). Earth Island relied on the application of 36 C.F.R. 215.4(a) and 215.12(f) to the Burnt Ridge Project to establish a justiciable controversy, as did the Ninth Circuit. Pet. App. 15a.

Any imminent hardship and injury Earth Island faced from that proposed Project evaporated when the parties settled their differences over the Project. Under the settlement, the Forest Service would prepare a NEPA document on the Project, and that would allow more public comment and an administrative appeal. Pet. App. 7a, 15a, 39a. Because Earth Island no longer had an immediate stake in the outcome of that Project, this mooted any controversy that depends on the Burnt Ridge Project. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67-73 (1997); *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-80 (1990); *see* Pet. Br. at 34-40.

Hence, the disposition in this Court should be: the courts below lacked jurisdiction to consider the merits and to grant any relief. "Without jurisdiction the court cannot proceed at all in any cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998).

II. Because Environmental Injury Is Caused By Some Ground-Disturbing Action, The Mere Existence Of ARA Rules Does Not Create Imminent Environmental Injury And Hardship To Earth Island. In Contrast, Where Rules Burden The Primary Conduct Of A Regulated Industry, Judicial Review And Relief Can Be Broader.

The Court's opinion in this case may well provide general guidance on the justiciability of facial challenges to rules when brought by the regulated industry versus by third parties. Petitioners' brief provides the federal agencies' perspective on general principles in those areas. *Amici* provide our perspective below.

As introduced above, the application of neutral principles of ripeness and standing to distinct classes of plaintiffs can produce different results on the timing of judicial review, which "action" is the focus of judicial review, and the scope of relief. Most such APA facial challenges to rules are not justiciable when brought by third parties who are not immediately burdened by the rules, but are justiciable when brought by the regulated industry. As we shall see, this result occurs due to differences in the types and causes of imminent injury and hardship to distinct groups of plaintiffs.[9]

---

[9] This Court recognized a distinction among different classes of plaintiffs in stating that

> standing depends considerably upon whether the plaintiff is himself an object of the action (or foregone action) at issue. If he is, there is ordinarily little question that the
>
> (continued…)

1. For private plaintiffs,[10] the imminent personal *environmental* injury required for standing and the *environmental* hardship required for a ripe controversy occur when a specific environment-disturbing action is about to be approved and conducted at a particular site. The site-specific nature of environmental injury and hardship helps to explain why, when environmental groups bring APA suits, judicial review and relief should be limited to the site-specific action.

Thirty-six years ago, this Court found that an environmental group's alleged "special interest" in a problem and desire to "vindicate [its] value preferences through the judicial process" do not create a justiciable controversy – the "party seeking review [must] be himself among the injured" by demonstrating personal environmental injury if "development" occurs at a specific location. *Sierra Club v. Morton*, 405 U.S. 727, 734-40 (1972). Any asserted ideological or psychic injury in knowing that lands unvisited by a plaintiff are being used for some active human use also does not create standing. *Lujan v. Defenders*, 504 U.S. at 563-68

(continued)

> action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed."

Lujan v. Defenders, 504 U.S. at 561-62.

[10] State plaintiffs may receive "special solicitude" for standing purposes, as explained in *Massachusetts v. EPA*, 127 S. Ct. 1438, 1454-56 (2007).

and n.3; *see Steel Co.*, 523 U.S. at 107 ("psychic satisfaction" is not sufficient); *Allen v. Wright*, 468 U.S. 737, 754-56 (1984) ("abstract stigmatic injury" does not provide standing).

A "plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly 'in the vicinity' of it." *Lujan v. Defenders*, 504 U.S. at 565-66. "The relevant showing for purposes of Article III standing" is "not injury to the environment but [personal] injury to the plaintiff." *Laidlaw*, 528 U.S. at 181. Hence, Earth Island's general interest in Forest Service matters does not create a justiciable controversy.

The Court should continue to find an environmental group's assertion that a rule "is likely to be applied to them" in the future (Opp. Cert. at 9) does not create a ripe facial challenge against the rule. Speculation that Earth Island's members may, someday and somewhere, suffer hardship and injury from some site-specific application of the rule does not satisfy this Court's standards for facial review. *National Park*, 538 U.S. at 809-12; *Lujan v. Defenders*, 504 U.S. at 563-67 (an intention to "some day" visit an area impacted by a project is not an "actual or imminent" injury for standing purposes); *Ohio Forestry*, 523 U.S. at 734-39 (plan-level challenge not ripe even though the challenged forest plan was being implemented by timber sales and other actions); *Lujan v. NWF*, 497 U.S. at 891-94. As a federal court must presume it lacks jurisdiction (*Kokkonen*, 511 U.S. at 377), courts cannot presume that the necessary facts exist for a justiciable controversy. *Lujan v. NWF*, 497 U.S. at 888-89.

2. Moreover, when a rule or other broad agency action is adopted, environmental hardship and injury normally are contingent on the agency's approval of a later site-specific action. A "future injury contingent" on a later action does "not satisfy the requirements of Art. III." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). Hence, contingent environmental hardships do not allow a facial challenge to the broader action. *Ohio Forestry*, 523 U.S. at 732-39; *Lujan v. NWF*, 497 U.S. at 891-94.

Similarly, APA facial challenges to rules brought by industry groups have been deemed unripe where the particular rule did not substantially burden "primary conduct" and where no "irremediable . . . consequences flow from requiring a later challenge." *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164-65 (1967); *see National Park*, 538 U.S. at 809-12.[11]

---

[11] In *Toilet Goods*, the rules provided the FDA could order inspections of a company's facilities and data. Those rules were not "felt immediately by those subject to it in conducting their day-to-day affairs" on a matter of "primary conduct." 387 U.S. at 164. Rather, economic hardship was contingent on a later FDA action invoking the rule against a specific company, and that action could be separately challenged. 387 U.S. at 164-65.

In *National Park*, the Court found that, because the National Park Service lacked authority to issue binding rules under the Contract Disputes Act ("CDA"), the agency's policy statement did not compel park concessionaires "to do anything." 538 U.S. at 808-11. Since the policy created no immediate dilemma, the facial challenge was disallowed. *Id.* The Court also found that a contractor could litigate whether the "procedures set forth in the CDA" are required in a later as-applied challenge. 538 U.S. at 810-12. Similarly, Earth Island (continued…)

Toilet Goods v. Gardner has guided several subsequent APA decisions. These decisions find unripe the facial challenges to programmatic agency actions where: (1) the broad action itself does not impose significant burdens on plaintiff; and (2) there is an opportunity for later judicial review in an as-applied setting, and postponing review to that context would cause no serious irremediable injury to plaintiff. *E.g.*, *Ohio Forestry*, 523 U.S. at 733-37; *Reno v. CSS*, 509 U.S. at 57-61; *Lujan v. NWF*, 497 U.S. at 891-94. Earth Island's facial challenge to ARA rules falls within this category of nonjusticiable cases.

3. In contrast, most rulemaking challenges brought by the regulated industry fall within the category of justiciable cases. This clearly is true where a special review statute allows direct review of rules and waives the prudential aspects of ripeness and standing. *See* Section III.

a. With respect to industry suits under the APA, Petitioners arguably suggest that facial challenges are justiciable only when non-compliance with the rules carries a "threat of serious penalties." Pet. Br. at 16; *see id.* at 20-21, 43 n.15. *Amici* agree the existence of penalties plus an issue of law is sufficient.

Yet, other facial challenges to rules by the regulated industry are justiciable under this Court's precedents. The key factor seems to be whether the rules burden primary conduct by creating a practical

---

(continued)
can litigate whether ARA procedures apply in a fact-specific setting, such as the Burnt Ridge Project before its withdrawal.

dilemma, wherein one of the regulated industry's choices in response to a rule entails significant economic costs.

The Court has characterized the *Abbott Labs* trilogy as allowing challenges to regulations where their "promulgation . . . presented plaintiffs with the immediate dilemma to choose between complying with newly imposed, disadvantageous restrictions and risking serious penalties for violation." *Reno v. CSS*, 509 U.S. at 57. Several other decisions of this Court find such dilemmas for the regulated industry sufficient to support facial challenges to rules.[12]

The practical dilemma for primary conduct need not be an imminent compliance deadline or civil penalties. This Court has appropriately recognized that businesses often must make substantial "expenditures" now to conduct the "advance planning" needed to satisfy future-oriented rules or to obtain later permits. *Pacific Gas & Electric Co. v. State Energy Resources Cons. & Dev. Comm'n*, 461 U.S. 190, 201-02 (1983) (collecting decisions). "One

---

[12] *E.g., Thomas v. Union Carbide Agric. Prods.*, 473 U.S. 568, 581-82 (1985) (challenge to EPA rules that "forced [industry] to choose between relinquishing any right to compensation from a follow-on registrant or engaging in unconstitutional adjudication"); *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 73 n.12 (1980) (the effluent limitation "regulations affect thousands of point sources throughout the country" and "determine the level of funding they must budget for pollution controls. They should not be left to speculate what the regulations require of them"); *Frozen Food Express v. United States*, 351 U.S. 40, 44 (1956) (ICC order is reviewable because it "touches vital interests of carriers and shippers alike and sets the standard for shaping the manner in which an important segment of the trucking business will be done").

does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending [as it normally is when the regulated industry challenges the rules that will govern permitting], that is enough," at least when questions over the legality of the rule "impose a palpable and considerable hardship on the" regulated industry. *Id*.

Thus, where the rule itself creates a dilemma and one choice burdens the primary conduct of a business, and where there is a pure issue of law, the rule itself is the subject of judicial review. *See id*.; *Reno v. CSS*, 509 U.S. at 57; *Lujan v. NWF*, 497 U.S. at 891; note 12, above.

b. The APA empowers the court to "set aside" the reviewed "action." 5 U.S.C. 706. Accordingly, where adoption of the rule is the reviewable action, the rule itself may be set aside. The greater scope of the justiciable controversy allows relief of equal breadth.

That broad relief is particularly appropriate where the suit is brought by a trade association on behalf of its members. There, relief should extend to the entire represented industry. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 342-43, 346 (1977); *see id*. at 340, 354 (affirming an injunction against enforcement of a statute). *Compare* Pet. Br. at 43 n.15 (suggesting relief in some industry suits should be limited to "the party before the court").

4. In cases involving *Amici*, circuit courts have correctly applied the Court's precedents in finding facial challenges to rules to be justiciable. Some of

these decisions involved the special review provisions discussed in Section III.

In one case, federal rules defined when mechanized earth-moving activities discharged dredged materials and required a Clean Water Act ("CWA") permit. Home builders alleged the rules exceeded CWA limits. The D.C. Circuit found that the hardship-backed dilemma the rules created for primary economic conduct allowed pre-enforcement review:

> Industry will face hardship if review of its challenge is denied for, if left intact, section 323.2(d)(2) will subject to the permitting process every party that engages in dredging which results in more than "incidental" fallback, as determined using the regulation's allegedly unlawful framework and volume determinant. Each such dredger therefore faces the choice of applying for a permit for activities Industry claims are outside the scope of the Corps' and EPA's authority under section 404 or face civil or criminal penalties for failing to do so. . . . Thus, the regulation is reviewable as "'a substantive rule which as a practical matter requires the [appellants] to adjust [their] conduct immediately.'" *Nat'l Park*, [538 U.S. at 808].

National Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 440 F.3d 459, 465 (D.C. Cir. 2006).

NAHB earlier challenged rules that limit the availability of nationwide permits ("NWPs") in ways that were alleged to contravene the CWA. The D.C. Circuit found that the dilemma and economic

burdens the rules created for the regulated community were sufficient hardships.

> [I]n the absence of judicial review the appellants are left with . . . choices . . . [accompanied by economic burdens to primary conduct]: They must either modify their projects to conform to the NWP thresholds and conditions (as the Corps contemplates they will do) or refrain from building until they can secure individual permits. The NWPs therefore affect the appellants' activities in a "direct and immediate way."

National Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 417 F.3d 1272, 1284 (D.C. Cir. 2005); *see id*. at 1279-84.

III. The Default Principle That *Lujan v. NWF* Reads Into The APA Can Be Altered By Congress In A Special Review Statute

Lujan v. NWF reads the APA in a manner which respects the different institutional roles of the Judicial Branch and the political Branches. "[R]espondent cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." *Lujan v. NWF*, 497 U.S. at 891. Because the Executive Branch has the primary discretion in implementing statutory law, the APA is "ordinarily" read – outside the "exception" where "a substantive rule . . . as a practical matter requires the plaintiff to adjust his conduct immediately" – in favor of "case-by-case" adjudication and against programmatic judicial relief. 497 U.S. at 891-94; *see Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 66-

67 (2004). Thus, this prudential aspect of ripeness is rooted in separation-of-powers respect for the functions of co-equal Branches.

As *Lujan v. NWF* describes, the prudential limitations on judicial review can be overcome by Congress. Congress can adopt a special review "provision" that makes an agency "regulation" presumptively reviewable in more situations than does the APA. 497 U.S. at 891. "Congress [can] explicitly provide[] for our correction of the administrative process at a higher level of generality." 497 U.S. at 894. In effect, *Lujan v. NWF* creates a default principle favoring narrow judicial review and relief under the APA where a rule does not burden primary conduct, but allows the default principle to be altered by Congress.

Since Earth Island's suit was brought under the APA, the default principle applies. But some environmental laws do contain such special review provisions. For example, § 307(b) of the Clean Air Act allows review of EPA's nationwide rules and certain other actions "only in the United States Court of Appeals for the District of Columbia" and only if a petition is "filed within sixty days from the date of such promulgation." 42 U.S.C. 7607(b). *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 479-80 (2001), found this provision rendered ripe an industry challenge, regardless of whether it was ripe under the APA's default principle. *See* Pet. Br. at 19, 46.

CWA § 509(b) expressly provides for review of specific EPA actions (*e.g.*, "promulgating any effluent limitation") in the "Court of Appeals," and only if the application for review is "made within 120 days" of the challenged action. 33 U.S.C. 1369(b). This

language provides a clear legislative preference for facial review of, and relief against, CWA rules. Accordingly, this Court and lower courts have reached the merits of challenges to effluent limitation rules and guidelines. *See EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 71-72 (1980) (CWA § 509(b) challenge to variance provisions of effluent regulations); *Waterkeeper Alliance v. EPA*, 399 F.3d 486, 491-97 (2d Cir. 2005) (challenges by environmental groups and industry to "effluent limitation guidelines," NPDES permit requirements, and other aspects of CWA rules governing concentrated animal feeding operations).[13]

The short time deadlines for judicial review in those statutes indicate that Congress favored regulatory certainty and that Congress waived prudential aspects of justiciability. The special review provisions, by allowing only a designated court to set aside a nationwide rule, suggest that the Court should be wary of reading the APA to always provide that authority to each district court.

In contrast, some environmental statutes contain citizen suit provisions that place review in any district court and that do not waive APA

---

[13] The "specific effluent limitations contained in each individual NPDES permit are dictated by the terms of more general 'effluent limitation guidelines" adopted by EPA. 399 F.3d at 491. This suggests that, when EPA adopts the governing guidelines, those guidelines are justiciable.

Additionally, CWA § 509(b)'s special provision allowing "direct review of the EPA's determinations regarding state permitting programs" provided a justiciable controversy in *National Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2528 (2007).

requirements. *E.g.*, 16 U.S.C. 1540(g) (Endangered Species Act). APA review principles should apply when such citizen suits are brought against federal agencies. *See* 5 U.S.C. 559; *Dickinson v. Zurko*, 527 U.S. 150, 154-55 (1999); *Marcello v. Bonds*, 349 U.S. 302, 310 (1955); *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 685-87 (D.C. Cir. 1982). The Ninth Circuit occasionally has misstated that the APA does not apply in ESA citizen suits against federal agencies, and engaged in a breadth of review and relief not permitted under the APA. *Washington Toxics Coalition v. EPA*, 413 F.3d 1024, 1034 (9th Cir. 2005).

IV. Earth Island Conceded And The District Court Found Some Forest Service Actions Are Not Subject To ARA Procedures. This Supports Not Finding The Rules Invalid On Their Face.

The district court recognized the "ARA certainly permits exclusion of environmentally insignificant projects from the appeals process." Pet. App. 51a. Yet, such environmental insignificance is precisely what places an action within a categorical exclusion from NEPA. 40 C.F.R. 1508.4.

Similarly, Earth Island has admitted the ARA does not extend "to minor actions such as road maintenance" and "Christmas tree cutting." ER 149 (district court CR 95, Mem. at 4). Those activities, and the activities described in the Opp. Cert., are actions within duly established CEs.[14] Thus, the

---

[14] In its Opp. Cert. (at 13 n.2), Earth Island stated that ARA procedures are not required before "maintaining Forest Service (continued…)

district court and Earth Island concede that the ARA does not apply to certain actions within CEs.

Where the alleged legal error in the rule extends only to "certain types of construction contracts" and the rule does not burden primary conduct, this supports finding the rule is not fit for facial review. *National Park*, 538 U.S. at 812. Here, the concessions that ARA procedures do not apply to "certain types" of actions within a CE suggest the ARA exemption for categorically excluded projects in 36 C.F.R. 215.4(a) and 215.12(f) is not fit for facial review.

The concessions certainly weigh against enjoining the two rules in their entirety, and against requiring ARA procedures before the Forest Service can take any action. *See Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1190 (2008). Indeed, in light of the ambiguities concerning which Forest Service actions are not

---

(continued)
buildings or mowing ranger station lawns." The actions described by Earth Island are within the CEs in §§ 31.11.3, .4, and .8 of the Forest Service's NEPA Handbook. FSH 1909.15, Environmental Policy and Procedures Handbook (http://www.fs.fed.us/im/directives/fsh/1909.15/1909.15_30.doc).

The Opp. Cert. (at 13 n.2) suggests some actions are not subject to the ARA because they are not "activities 'implementing land and resource management plans.'" That distinction is improbable. A forest plan provides "one integrated plan for each" national forest for up to 15 years, and requires actions to be "consistent" with the plan. 16 U.S.C. 1604(b), (f)(1), (f)(5), and (i).

subject to ARA procedures, the rules may well be sustainable on the merits.[15]

CONCLUSION

The judgments of the courts below should be reversed and vacated. The case should be dismissed for lack of a justiciable controversy.

---

[15] Under a colloquy on the ARA Conference Report, the appeals process for "licenses and permits should remain unaffected." 138 Cong. Rec. 29003 (Sept. 30, 1992). This provides another indication the ARA procedures do not apply universally to each and every Forest Service action.

Senator Fowler's initial floor amendment reflects his belief there should be a right to administratively appeal at least some timber sales. 138 Cong. Rec. 21759 (Aug. 5, 1992). That proposal was substantially amended by a Craig-DeConcini amendment, which perceived the major problem as being delays in conducting projects caused by a long administrative process and frivolous appeals, and which promoted a more-streamlined agency process. *See* 138 Cong. Rec. 21989-22014 (Aug. 6, 1992). The Fowler language was amended again in the Conference Report. *See* 138 Cong. Rec. 29002-03 (Sept. 30, 1992). *See also* Bobertz & Fischman, *Administrative Appeal Reform: The Case Of The Forest Service*, 64 U. COLO. L. REV. 371, 372-401 (1993). Thus, the ARA reflects an accommodation of different legislative intents that a more-efficient agency appeals process should apply to some uncertain subset of Forest Service actions. The ambiguities suggest the ARA rules are sustainable under a *Chevron* Step II analysis. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-45 (1984); Pet. Br. at 3-4, 27-28, 45 n.17.

Respectfully submitted,

THOMAS R. LUNDQUIST
Counsel of Record
STEVEN P. QUARLES
J. MICHAEL KLISE
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, DC 20004-2595
(202) 624-2500
Attorneys for Amici Curiae

DUANE J. DESIDERIO
THOMAS WARD
NATIONAL ASSOCIATION OF HOME BUILDERS
1201 15th Street, NW
Washington DC 20005
(202) 266-8200
Counsel for National Association of Home Builders

WILLIAM R. MURRAY
AMERICAN FOREST & PAPER ASSOCIATION
1111 19th Street, NW
Suite 800
Washington, DC 20036
(202) 463-2782
Counsel for American Forest & Paper Association

JULIE ANNA POTTS
DANIELLE QUIST
AMERICAN FARM BUREAU FEDERATION
600 Maryland Ave., SW
Washington, DC 20024
(202) 406-3616
Counsel for American Farm Bureau Federation

DOUGLAS T. NELSON
JOSHUA SALTZMAN
CROPLIFE AMERICA
1156 15th Street, NW
Washington, DC 20005
(202) 872-3880
Counsel for CropLife America

APRIL 2008