

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

**Habitat Education Center, Inc., David Zaber,
and Ricardo Jomarron,**

CIV NO.

Plaintiffs,

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

v.

**Dale Bosworth, as Chief of the U.S. Forest
Service, Ann M. Veneman, as Secretary
of the United States Department of Agriculture,
Steven Williams, Director of the United
States Fish and Wildlife Service, and Gale
Norton, Secretary of the Interior,**

Defendants.

Plaintiffs Habitat Education Center (“HEC”), David Zaber and Ricardo Jomarron hereby seek declaratory and injunctive relief against Defendants Dale Bosworth, in his official capacity as Chief of the United States Forest Service, Ann M. Veneman, in her official capacity as Secretary of the United States Department of Agriculture, (collectively, the “Forest Service”), Steven Williams, in his official capacity as Director of the United States Fish and Wildlife Service, and Gale Norton, Secretary of the Interior (collectively, the “Fish and Wildlife Service”), with regard to their approval of specific timber sales and logging activities in the Northwest Howell area of the Chequamegon-Nicolet National Forest in northern Wisconsin. In support of this Complaint, Plaintiffs state the following:

I. INTRODUCTION

1. This action involves the Defendants' violations of the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, the National Forest Management Act, 16 U.S.C. §§ 1600-1687 (“NFMA”), the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (“ESA”), and

the Administrative Procedure Act, 5 U.S.C. §§ 553-559 and 701-706 (“APA”) in connection with the Forest Service’s decision to approve extensive logging activities covering 7,740 acres in the Northwest Howell area of the Chequamegon-Nicolet National Forest (“CNNF”) in northern Wisconsin. Plaintiffs are a citizens’ group, its members, and individuals who work to improve the CNNF and use and enjoy the Northwest Howell area for a variety of recreational purposes and engage in natural resource protection activities.

2. Plaintiffs do not oppose all logging activity, nor do they oppose every aspect of the timber sales that have been approved by the Defendants in the Northwest Howell project area. Rather, Plaintiffs contend that the Defendants’ approvals of the extensive logging activities and timber sales are in violation of laws intended to protect important natural resources, rivers and streams, habitat, biodiversity, and recreational opportunities, and that the Defendants failed to provide full consideration to alternatives that could have mitigated the adverse impacts in particularly sensitive ecological areas.

3. In 1986, the Forest Service issued forest management plans for the CNNF. As required by the NFMA, the Forest Service is now developing an updated forest land and resource management plan. The draft forest management plan and an accompanying draft environmental impact statement was issued in April 2003. The Forest Service has indicated that it will issue the final forest management plan and the final environmental impact statement within the next two months. Nonetheless, the Defendants have approved the challenged Northwest Howell timber sales and logging activities under the 1986 plans, rather than under the terms of the updated new plan which will soon be issued in December 2003.

4. Defendants Bosworth, Veneman and the Forest Service have violated NEPA because they: (a) failed to consider the cumulative harmful impacts on natural resources and the

environment of the many past, present and reasonably foreseeable future logging projects in the CNNF, and on private lands and in nearby National Forests; (b) based the Northwest Howell timber sales and logging activities on the 1986 Forest Land and Resource Management Plans (“1986 Forest Plans”) for the CNNF that the Forest Service has acknowledged are outdated due to changed conditions and which are now being updated and revised, and (c) limited the consideration of alternatives by implementing timber sales based on the 1986 Forest Plans that are inconsistent with the proposed 2003 updated Forest Plan.

5. Defendants Bosworth, Veneman and the Forest Service have violated NFMA because they: (a) based the Northwest Howell timber sales and logging activities on the 1986 Forest Plans for the CNNF that the Forest Service has acknowledged are outdated due to changed conditions and which are now being updated and revised; (b) failed to assess population trends of Management Indicator Species (“MIS”); and (c) failed to ensure that implementation of activities proposed in their selected logging alternative will not jeopardize the viability of Regional Forester’s Sensitive Species (“RFSS”) that occur in the project areas and across the CNNF.

6. Defendants Bosworth, Veneman and the Forest Service, and Defendants Williams, Norton and the Fish and Wildlife Service have violated Section 7 of the Endangered Species Act with regard to the Northwest Howell project because the Forest Service erroneously concluded, and the Fish and Wildlife Service improperly concurred, that the timber sales and logging activities would have “no effect” on the federally-threatened Canada Lynx animals. The Forest Service arbitrarily failed to find that the timber sales and logging activities “may affect” the Canada Lynx and then failed to enter into formal consultation with the Fish and Wildlife Service regarding the harmful impacts on the Canada Lynx.

7. If the Defendants' actions are not enjoined and reversed, they will cause irreparable harm to natural resources and environmental quality, to the Plaintiff organization and its members, to the individual Plaintiffs, and to the public in the manner described herein, in violation of federal law, and contrary to the public interest. Plaintiffs seek declaratory and injunctive relief, and their attorneys' fees and costs.

II. JURISDICTION AND VENUE

8. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 2201, as this action presents cases and controversies under the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370a ("NEPA"), the National Forest Management Act, 16 U.S.C. §§ 1600-1687 ("NFMA"), the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* ("ESA"), and the Administrative Procedure Act, 5 U.S.C. §§ 553-559 and 701-706 ("APA").

9. Injunctive relief is authorized by Rule 65 of the Federal Rules of Civil Procedure.

10. Declaratory relief is authorized by the Declaratory Judgment Act, 28 U.S.C. § 2201.

11. Venue is proper in the United States District Court for the Eastern District of Wisconsin pursuant to 28 U.S.C. § 1391(e)(2), as a substantial part of the events or omissions giving rise to the claim occur in this district and because the Regional Office of the Forest Service is in Milwaukee.

12. Plaintiffs have no adequate remedy at law. Unless this Court grants the relief requested herein, the Defendants' actions will cause irreparable harm to natural resources and environmental quality, to the Plaintiff organization and its members, to the individual Plaintiffs, and to the public in the manner described herein, in violation of federal law, and contrary to the public interest. No monetary damages or other legal remedy could adequately compensate Plaintiffs, the Plaintiff organization's members, or the public for this harm. Plaintiffs and the

members of the plaintiff organizations are persons adversely affected or aggrieved by federal agency action within the meaning of § 702 of the Administrative Procedure Act.

III. PARTIES

13. Plaintiff Habitat Education Center, Inc. (“HEC”) is a citizens’ organization that is engaged in forest and wildlife protection and management. HEC has been active in CNNF management for more than a year, and it has members and supporters that use and enjoy the area in and around Northwest Howell for a variety of recreational purposes. They would be harmed by the timber sales, logging activities, road construction and reconstruction, operations and maintenance and other related activities allowed by the Defendants’ actions.

14. Plaintiff David J. Zaber is Vice-President of the Habitat Education Center. He uses the CNNF for recreation, scientific study, and educational and spiritual purposes. He has visited the Northwest Howell area, as well as other areas of the CNNF, on multiple occasions during the past several years. Through HEC, he conducts a growing program focusing on bringing minority youth to the CNNF. He plans to continue to use the CNNF and the Northwest Howell area for these purposes in the future.

15. Plaintiff Ricardo Jomarron is President of the Habitat Education Center. He uses the CNNF extensively for both recreational and professional purposes, particularly the older closed canopy mixed hardwood areas. In the CNNF, he has videotaped forest education interviews and habitat visuals, conducted on-site research of American pine marten, and conducted school field trips.

16. Defendant Forest Service is an agency of the United States Department of Agriculture, which has responsibility for the management and protection of the CNNF, including the Northwest Howell area. Dale Bosworth is Chief of the Forest Service, and Ann Veneman is

the Secretary of the United States Department of Agriculture. They are the persons responsible for ensuring that all actions taken under the authority of the Forest Service are in full compliance with federal law. Defendants Bosworth and Veneman are sued in their official capacities

17. Defendant Fish and Wildlife Service is an agency of the United States Department of the Interior, which has responsibility for administering the Endangered Species Act. Steven Williams is Director of the Fish and Wildlife Service, and Gale Norton is the Secretary of the United States Department of Interior. They are the persons responsible for ensuring that all actions taken under the authority of the Fish and Wildlife Service with regard to the Endangered Species Act fully comply with federal law. Defendants Williams and Norton are sued in their official capacities.

IV. FACTUAL BACKGROUND

THE CHEQUAMEGON NICOLET NATIONAL FOREST

19. The Chequamegon-Nicolet National Forest (“CNNF”) spans across Northern Wisconsin. It includes approximately 1.5 million acres of northern hardwood trees and mixed conifer trees in the forest.

20. The CNNF is habitat for more than 300 species of wildlife. It contains the only habitat in Wisconsin for the state-listed endangered pine marten.

21. On information and belief, more than 100,000 people visit the CNNF for fishing, hunting, camping, hiking, canoeing and other recreational activities each year.

22. The CNNF is located within portions of 41 different river basins, 19 of which drain through the Great Lakes to the Atlantic Ocean, and 22 of which drain through the Upper Mississippi River to the Gulf of Mexico.

REVISED FOREST LAND AND RESOURCE MANAGEMENT PLAN

23. The National Forest Management Act (“NFMA”), 16 U.S.C. §§ 1600-1687, directs the Secretary of Agriculture to formulate a Land and Resource Management Plan (“Forest Plan”) for each of the national forests. The Forest Plan is a programmatic document that “guide[s] all natural resource management activities,” including use of the land for “outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness.” 16 U.S.C. § 1604(e)(1). The Forest Plan identifies the resource management practices, the projected levels of production of goods and services, and the location where various types of resource management may occur. Generally, a Forest Plan is effective for 10 - 15 years.

24. In 1986, the Forest Service completed Forest Plans for the Chequamegon and the Nicolet National Forests (collectively, the “1986 Forest Plans”). At that time, the Forest Service prepared separate plans for the Chequamegon National Forest and the Nicolet National Forest, respectively, because they were administered as separate forest units. Since 1993, the Forest Service has jointly administered the Chequamegon and Nicolet National Forests as one unit.

25. NFMA requires the Forest Service to revise a forest plan: “from time to time when the Secretary [of Agriculture] finds conditions in a unit have significantly changed, but at least every fifteen years....” 16 U.S.C. § 1604(f)(5).

26. In 1996, the Forest Service began the CNNF forest plan revision process. At that time, the Forest Service:

determined there is a need to revise [the 1986 Forest Plans] to **adjust to changed conditions**, incorporate new information, and consider the management of National Forest System lands in the context of the larger landscape in which these lands are situated....the Forest Service has determined that there is a need to **make some changes to the primary decisions made** in the 1986 Forest Plans.

(Emphasis added.)

27. In April 2003, the Forest Service issued a Proposed Land and Resource Management Plan (the “2003 Forest Plan”) for the CNNF together with a Draft Environmental Impact Statement (“2003 Forest Plan DEIS”) prepared pursuant to NEPA. The public comment period for the 2003 Forest Plan and the 2003 Forest Plan DEIS closed on August 11, 2003. Plaintiff herein submitted detailed written comments. According to the Forest Service, the final Forest Plan and the final Environmental Impact Statement (“EIS”) will be issued by the end of 2003.

PROPOSED TIMBER SALES IN THE CNNF

28. A forest plan is implemented through individual “projects” including timber sales and logging activities. All such projects must be fully consistent with the forest plan. 16 U.S.C §1604(i).

29. The Forest Service is engaged in the final process of revising the 1986 Forest Plans and preparing to issue an updated 2003 Forest Plan by the end of this year. The Forest Service is nonetheless proceeding with six separate timber sales in the CNNF under the former 1986 Forest Plans: the Northwest Howell Project, the Cayuga Project, the McCaslin Project, the Hoffman-Sailor West Project, the Sunken Moose Project, and the Gilman Tornado Project. These sales cumulatively involve approximately 45,000 acres of timber-cutting and related logging activities, and numerous miles of road construction and reconstruction.

30. The Forest Service issued its final approval of the Northwest Howell timber sales and logging activities, and that approval through the Record of Decision is the subject of this action.

31. The Northwest Howell Project involves 7,740 acres of timber cutting in the northeastern portion of the Nicolet side of the CENN, including 513 acres of clear cutting and 127 acres of shelterwood cuts (two stage clearcuts).

32. To access this timber, the Forest Service would build 1.9 miles of new roads, reconstruct 24 miles of existing “roads”, and decommission 18 miles of road.

33. The Forest Service has approved timber cutting and other site-specific logging activities in the Northwest Howell area for 5 years, which is approximately one-third to one-half of the projected life of the updated 2003 Forest Plan that will soon be issued for the CENN.

34. The Forest Service has confirmed the presence or high probability of the following Regional Forester’s Sensitive Species within the Northwest Howell area:

- American Pine Marten
- Northern Goshawk
- Red-shouldered Hawk
- Swainson’s Thrush
- Black Tern
- Trumpeter Swan
- Connecticut Warbler
- Black-backed Warbler
- Wood Turtle
- West Virginia White Butterfly
- Zebra Clubtail
- Round-leaved Orchis
- Green Spleenwort
- Minigan’s Moonwort
- Goblin Fern
- Blunt-Lobed Grape Fern
- St. Lawrence Grape Fern
- Calypso Orchid (Fairy Slipper)
- Assiniboine Sedge
- Sheathed Sedge
- Spineless Hornwort
- Northern Wild Comfrey
- Ram’s Head Lady Slipper Orchid
- Spreading Wood Fern
- Marsh Willow-herb
- White Adder’s Mouth
- Canada Mountain Rice Grass
- Ginseng
- Braun’s Holly Fern
- Small Yellow Water Crowfoot
- Brown Beak-Sedge
- Foamflower
- Marsh Valarian
- Northern Long-eared Myotis

35. On information and belief the Northwest Howell area provides habitat for the federally-listed threatened Canada Lynx.

V. PROCEDURAL BACKGROUND

35. In November 2002, the Forest Service issued its Draft Environmental Impact Statement for the Northwest Howell Project. On January 13, 2003, Plaintiff filed written comments with detailed objections to some of the Northwest Howell timber sales.

36. In April 2003, the Forest Service issued the Final Environmental Impact Statement for the Northwest Howell Project, together with its Record of Decision (“ROD”) approving the timber sales and logging activities.

37. On June 2, 2003, pursuant to 36 CFR Part 215, Plaintiff filed a written appeal of the ROD with the Regional Forester for Region 9 of the Forest Service.¹

38. In the appeal, Plaintiff raised the following issues:

a. The Forest Service should wait for the updated 2003 Forest Plan and forest and land management planning process to be completed before considering the timber sale.

b. The Forest Service failed to meet the minimum requirements under NEPA because it: (i) failed to consider the “cumulative impacts” of the timber sales and logging activities, as required by NEPA; (ii) failed to rigorously explore and objectively evaluate all reasonable alternatives, as required by NEPA; and (iii) failed to employ high quality and accurate scientific information.

c. The Forest Service violated NFMA because it: (i) failed to ensure that viable populations of various sensitive species and Management Indicator Species will be maintained; and (ii) failed to develop adequate mitigation plans.

¹ 36 CFR Part 215 has been amended effective June 4, 2003 68 Fed. Reg. 33582. However, the Northwest Howell appeal is still governed by the 1993 version because the notice soliciting public comment was published prior to June 4, 2003.

39. On June 16, 2003, in accordance with 36 CFR 215.16, the informal disposition process was commenced through a telephone call with the District Ranger and other representatives of the Forest Service. At the conclusion of that telephone call, the District Ranger informed the Plaintiffs that he would contact them soon for further discussion.

40. On information and belief, some time after June 16, 2003, the District Ranger notified the Appeal Deciding Officer in writing that the appeal was not entirely resolved through informal disposition and that formal review and disposition of the unresolved portion of the Northwest Howell appeal should continue.

41. On June 25, 2003, Plaintiff was informed by the District Ranger that the Forest Service was reviewing the information cited in the Northwest Howell appeal to determine whether further cumulative effects analysis was warranted.

42. On July 11, 2003, Plaintiff was informed by the District Ranger that the Forest Service had decided to prepare a Supplemental Information Report (“SIR”) relating to cumulative effects. The District Ranger had a duty to notify the Appeal Deciding Officer of this outcome of the informal disposition meeting (36 CFR §215.16(d)). Nonetheless, the District Ranger failed to notify the Appeal Deciding Officer that the Forest Service would be preparing an SIR.

43. On July 15, 2003, Plaintiff faxed a letter to the Appeal Deciding Officer notifying him of this development – the preparation of an SIR. Plaintiff specifically requested that the Appeal Deciding Officer either grant the Northwest Howell appeal or, instead, defer a decision until after the SIR was completed and the public was provided an opportunity to review the SIR and submit written comments.

44. On the morning of July 16, 2003, a representative of the Forest Service, Eastern Region in Milwaukee telephoned one of the counsel for Plaintiffs and informed him that the Northwest Howell appeal had been denied and that the ROD had been affirmed on July 14, 2003. That date was 3 days prior to the deadline for rendering a decision on the Northwest Howell appeal (36 CFR 215.17(a)), and at least 3 days after the District Ranger had decided to prepare the SIR.

45. After being informed that the appeal had been decided, on July 16, 2003, Plaintiff HEC sent the District Ranger a letter stating that the Plaintiff assumed that the Northwest Howell ROD would not be implemented until after: (a) the SIR was completed; (b) there would be a determination as to whether the SIR affected the ROD; and (c) the public had been provided notice and an opportunity to submit written comments. Plaintiff requested immediate written notification if any of these assumptions were incorrect.

46. On July 18, 2003, the Appeal Deciding Officer sent a letter to Plaintiffs' counsel responding to the July 15, 2003 Letter. The Appeal Deciding Officer Letter stated that: (a) the ROD had been affirmed on July 14, 2003; (b) the Appeal Deciding Officer found, among other things, that "the cumulative effects analysis was adequate"; and (c) the District Ranger had "agreed to hear [Plaintiff's] concerns outside of the appeals'[sic] process." The Appeal Deciding Officer also advised Plaintiff to work with the District Ranger to resolve concerns.

47. Plaintiffs received no response from the District Ranger to the July 16, 2003 Letter, referred to in paragraph 45 above.

48. On August 5, 2003 Plaintiff received a letter from the District Ranger stating that timber sales for the Northwest Howell area were planned to be advertised for bids and that bids would be opened 30 days after the advertisement. This letter further noted that that the first bid

advertisement for the “Canthook” sale was issued on July 30, 2003, with bids expected to be opened on September 3, 2003. The Canthook sale is for 2,735 CCF of timber and has a \$7,600 bid guarantee. This letter also notified Plaintiff that there would be four more bids opened for the Northwest Howell area by September 17, 2003.

49. On August 21, 2003, Plaintiff filed a 60-day notice of intent to sue letter with the Directors of the Forest Service and the Fish and Wildlife Service under the Endangered Species Act (“ESA”). 16 U.S.C. § 1540(g)(2).

50. The 60-day notice of intent to sue letter states that the Forest Service and Fish and Wildlife Service improperly concluded that the Northwest Howell project would have “no effect” on the federally-listed threatened Canada Lynx and that the agencies should have engaged in formal consultation pursuant to Section 7 of the ESA. The expiration of that 60-day period will occur on October 20, 2003.

VI. APPLICABLE STATUTES AND REGULATIONS

National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq.

51. NEPA is the “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). NEPA seeks to protect the environment by ensuring that public officials “make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.” 40 C.F.R. § 1500.1(c).

52. NEPA requires all federal agencies to prepare a detailed Environmental Impact Statement (“EIS”) on every proposal for a major federal action which will or may significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C). In an EIS, the agency must identify the purpose and need of the proposed action, 40 C.F.R. § 1502.13, “rigorously explore and objectively evaluate all reasonable alternatives” to the proposed action, 40 C.F.R. §

1502.14(a), and thoroughly analyze the environmental impacts of the proposed action and alternatives, 40 C.F.R. § 1502.16.

53. NEPA’s implementing regulations require an agency to consider the direct and indirect effects of its actions, and the cumulative impacts of past, present and reasonably foreseeable future actions, on the environment. 40 C.F.R. § 1508.25(c). “Direct effects” are those that “are caused by the action and occur at the same time and place.” 40 C.F.R. § 1508.8(a). “Indirect effects” are those that “are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.8(b). “Cumulative impact” is defined as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” 40 C.F.R. § 1508.7.

54. NEPA’s implementing regulations also require that an agency use “accurate scientific analysis” and “high quality” information in analyzing a proposed action. 40 C.F.R. § 1500.1(b). In addition, the implementing regulations require that an agency insure the “scientific integrity” of its analyses. 40 C.F.R. § 1502.24.

55. When a proposed federal action – such as revising and updating a Forest Plan – is under consideration, NEPA’s implementing regulations, 40 C.F.R. § 1506.1(a), provide that:

(a) Until an agency issues a record of decision as provided in § 1505.2 (except as provided in Paragraph (c) of this section), no action concerning the proposal shall be taken which would:

- (1) Have an adverse environmental impact; or
- (2) Limit the choice of reasonable alternatives.

The National Forest Management Act, 16 U.S.C. §§ 1600-1687

56. The NFMA directs the Secretary of Agriculture to formulate forest plans for each of the national forests and requires that the Secretary implement regulations to ensure that the plans are prepared in accordance with NEPA. 16 U.S.C. § 1604(g)(1). A forest plan is a programmatic document that “guide[s] all natural resource management activities” by identifying resource management practices, projected levels of production of goods and services, and the location where various types of resource management may occur. 16 U.S.C. § 1604(e)(1). All site-specific projects, such as timber sales, must be consistent with the governing forest plan. 16 U.S.C. § 1604(i).

57. NFMA requires that the Forest Service revise a forest plan “from time to time when the Secretary [of Agriculture] finds conditions in a unit have significantly changed, but at least every fifteen years” 16 U.S.C. § 1604(f)(5). In order to help determine when a forest plan needs to be revised due to changed conditions, NFMA regulations require that each forest plan include provisions for monitoring and evaluating “how well objectives have been met and how closely management standards and guidelines have been applied.” 36 C.F.R. § 219.11(k).²

58. NFMA’s implementing regulations require the Forest Service to: ensure the existence of fish and wildlife habitat adequate to maintain viable populations of existing native vertebrate species, 36 C.F.R. § 219.19; 36 C.F.R. § 219.27(a)(6); provide for diversity of plant and animal communities, 36 C.F.R. § 219.26, 36 C.F.R. § 219.27(a)(5); and identify “Management Indicator Species” as warning signs of adverse ecological change, 36 C.F.R. § 219.19(a)(1).

59. Upon identification of these Management Indicator Species, NFMA regulations require the Forest Service to undertake monitoring and evaluation of the populations and the habitats of them, as well as other species, and species diversity in general. 36 C.F.R. § 219.19(a)(2); 36 C.F.R. § 219.19(a)(6); 36 C.F.R. § 219.26; 36 C.F.R. § 219.27

60. The Forest Service is also required pursuant to guidance in the Forest Service Manual to identify Regional Forester Sensitive Species (“RFSS”), which are “those plants and animal species identified by a Regional Forester for which population viability is a concern as evidenced by: a) significant current or predicted downward trends in numbers and density” and “b) significant current or predicted downward trends in habitat capability that would reduce a species existing distribution.”

61. The Forest Service Manual provides at Section 2672.1 that: “There must be no impacts to sensitive species without an analysis of the significance of adverse effects on the populations, its habitat, and on the viability of the species as a whole. It is essential to establish population viability objectives when making decisions that would significantly reduce sensitive species numbers.”

The Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544

62. The ESA was enacted in 1973 to “provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species.” 16 U.S.C. § 1531(a)(1),(b).

63. The ESA requires the Secretary of the Interior to take a number of steps to identify and protect threatened and endangered species. The Secretary has, in turn, delegated

² On May 17, 2001, the Department of Agriculture suspended a Final Rule promulgated in November 2000 with respect to NFMA’s implementing regulations. 66 Fed. Reg. 27552. As such, the 1982 implementing regulations,

responsibility for administering the ESA to the Fish and Wildlife Service. 50 C.F.R. § 402.01(b).

64. Section 4 of the ESA, 16 U.S.C. § 1533, requires the Fish and Wildlife Service to list species of wildlife or plants endangered or threatened with extinction. The regulations governing such listing, and the list of the species themselves, are found at 50 C.F.R. Part 17.

65. On March 24, 2000, the Fish and Wildlife Service listed the Canada Lynx as a “threatened” species.

66. Section 4 of the ESA requires that when the Fish and Wildlife Service lists a species, the agency also “concurrently” designate “critical habitat” for the listed species. 16 U.S.C. § 1533(b)(6)(C). The ESA defines “critical habitat” to be areas that are either: (1) occupied by the species and have physical or biological features that are essential to the conservation of the species and that may require special management considerations or protection, or (2) not currently occupied by the species but “essential for the conservation of the species.” 16 U.S.C. § 1532(5)(A)(I).

67. Contrary to this clear legal duty, the Fish and Wildlife Service has failed to designate critical habitat for the threatened Canada Lynx, and has previously stated that it does not anticipate doing so until 2006. *Defenders of Wildlife v. Norton*, 239 F.Supp. 2d 9 (D.D.C. 2002).

68. Listed species are protected under the conservation and biological opinion provisions found in Section 7 of the ESA. 16 U.S.C. § 1535(a).

69. Under Section 7(a)(2) of the ESA, a federal agency must “insure,” in “consultation” with Fish and Wildlife Service, that a contemplated agency action “is not likely to

codified at 36 C.F.R. § 200-297 (1999) govern this action.

jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.” 16 U.S.C. § 1536(a)(2). If the Fish and Wildlife Service or the federal agency determines that a contemplated agency action “may affect listed species or critical habitat,” the agency must enter into “formal consultation” with the Fish and Wildlife Service. 50 C.F.R. § 402.14(a). Formal consultation requires the Fish and Wildlife Service to issue a Biological Opinion “detailing how the agency action affects the species or its critical habitat.” 16 U.S.C. § 1536(b)(3)(A). If the contemplated agency action will jeopardize the continued existence of a listed species or destroy or “adversely modify” critical habitat, the Biological Opinion must set forth reasonable and prudent alternatives to avoid such results. *Id.*

70. Generally, formal consultation is not required if the agency determines, and the Fish and Wildlife Service concurs in writing, that a contemplated agency action that “may affect” a listed species “is not likely to adversely affect” that species or its critical habitat. 50 C.F.R. § 402.14(b). Because the Fish and Wildlife Service has not designated “critical habitat” for the threatened Canada Lynx, however, the Fish and Wildlife Service is unable to concur with any agency determination that a contemplated agency action “may affect” but is “not likely to adversely affect” the Canada Lynx. *Defenders of Wildlife v. Norton*, 239 F.Supp.2d 9, 21-25 (D.D.C. 2002). Therefore, if a contemplated agency action “may affect” the Canada Lynx, the Fish and Wildlife Service must engage in formal consultation with the agency contemplating such action.

The Administrative Procedure Act, 5 U.S.C. §§ 553-559, 701-706

71. The Administrative Procedure Act, 5 U.S.C. §§ 553-59, 701-706, provides for judicial review of agency actions, such as those at issue here. A reviewing court shall hold

unlawful and set aside agency actions, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

VII. GENERAL ALLEGATIONS

Failure to Consider Cumulative Impacts

72. The Northwest Howell Project is proposed to be implemented by the Forest Service at about the same time as five other timber sales: the Cayuga Project, the McCaslin Project, the Hoffman-Sailor West Project, the Sunken Moose Project and the Gilman Tornado Project.

73. These six timber sales and logging projects combined will, if executed, result in approximately 58,350 acres of timber cutting and construction or reconstruction of about 140 miles of roads.

74. The Forest Service's files for Northwest Howell contain a map of previous cuts within the project area since 1982. This map shows that a large portion of the project area has been logged within the past 21 years, but contains no further information regarding the sales.

75. The Forest Service, in its EIS documents, generally acknowledges past, present and future timber cutting and development activities on the state- and privately-held lands within the project areas and the CNNF, but provides no substantive analysis of these activities or further information regarding their nature, magnitude or impact.

76. No information or analysis is provided in the Northwest Howell Project final EIS documents concerning past, present or proposed future timber harvesting in the CNNF outside the Northwest Howell project area, except for passing references to cumulative impacts generally and to the five additional timber sales described above.

77. The Northwest Howell final EIS documents contain no analysis of the cumulative impacts of the Northwest Howell project timber sales and logging activities, considered together with past, current or future timber harvest activities in the project areas and the CNNF.

78. Neither the Northwest Howell final EIS, nor the SIR, nor the remaining documents in the Northwest Howell project files provide sufficient information regarding the location, nature, and magnitude of past, current, or future timber harvest activities in the project areas and the CNNF from which cumulative impacts could be inferred and analyzed.

Limited Consideration of Alternatives in the 2003 Forest Plan Revision

79. In connection with the EIS, the Forest Service prepared documents comparing the logging activities proposed in the Northwest Howell area with the proposed revised and updated 2003 Forest Plan. These comparison documents, “the Forest Plan Revision Compatibility Analysis,” are intended to determine the compatibility of the projects with the updated 2003 Forest Plan.

80. The Forest Plan Revision Compatibility Analysis prepared in connection with the Northwest Howell project indicates 11 instances in which a “temporary opening” – *i.e.* clearcut or removal timber cutting – proposed in the final EIS’s preferred alternative would be inconsistent with one or more alternatives identified in the proposed 2003 Forest Plan revision. Only one of these instances is identified in the document as being not “substantial in scope.”

81. The final EIS for the Northwest Howell project indicates that changes affected by the timber sales and logging activities would impact one of the proposed alternatives for the new 2003 Forest Plan by delaying the desired forest composition set forth in that alternative “by at least another 40-60 years while these stands mature.”

Reliance on the Outdated 1986 Forest Plan

82. NFMA requires the Forest Service to revise a forest plan “from time to time when the Secretary [of Agriculture] finds conditions in a unit have significantly changed, but at least every fifteen years” 16 U.S.C. § 1604(f)(5).

83. In 1996, the Forest Service began the process of revising the separate 1986 Forest Plans as a single combined Forest Plan for both the Chequamegon and Nicolet National Forests.

84. During this revision process, the Forest Service has acknowledged numerous times that changed conditions and new scientific information required revision to fundamental elements of the 1986 Forest Plans. For example:

- The Forest Service’s 1996 Need For Change report, quoted in the proposed 2003 Forest Plan Draft EIS, states that “Indicators for the need to change [the 1986 Forest Plans] were as follows: public comments during implementation of the 1986 Plans, **changed conditions as reflected in monitoring and evaluation during Plan implementation**, the availability of new information and scientific understanding, and the need to more thoroughly consider the management of these Forests in the broad context of the larger landscape in which they are situated.” 2003 Forest Plan Draft EIS, p. 2-1 (emphasis added).
- The Forest Service’s 1996 Notice of Intent to Prepare an Environmental Impact Statement for the revised plan states that “the Forest Service has determined there is a need to revise [the 1986 Forest Plans] to **adjust to changed conditions**, incorporate new information, and consider the management of National Forest System lands in the context of the larger landscape in which these lands are situated. . . .the Forest Service has determined that there is a need **to make some changes to the primary decisions made** in the 1986 Forest Plans (emphasis added).
- The Forest Service’s 1998 End-of-Decade Monitoring Report for the CNNF notes that “major changes” to the 1986 Forest Plans considered since 1994 “have been delayed in anticipation of revising and combining the Plans in the late 1990’s [sic].” Monitoring Report, p. 6.
- The 2003 Forest Plan Draft EIS states that the Forest Service “determined that the [1986 Forest] Plans should be revised in response to updated resource information and scientific knowledge; and changing social, economic, and environmental concerns.

85. The 2003 Forest Plan draft EIS identifies a number of “problems” with the 1986

Forest Plans, including:

- “The 1986 Plans provided little explicit direction on ecosystem sustainability, and new information since 1986 demonstrates the need for heightened and/or changed direction.” p. 1-13.
- “The current standards and guidelines” for the 1986 Forest Plans “have resulted in a landscape pattern where small patches dominate,” which “impacts many species that react negatively to large amounts of forest edge.” p. 1-15.
- “The 1986 Plans do not consistently define old growth, nor does the management direction incorporate an updated definition of old growth, including the significance of old growth to ecological sustainability.” p. 1-16.
- “Guidelines to maintain coarse woody debris need updating for consistency and to encompass new information.” p. 1-16.
- “The 1986 Forest Plans are inconsistent in direction for management of Threatened, Endangered, and Sensitive species . . . and do not sufficiently provide for area-sensitive or edge-sensitive species.” p. 1-17.
- “Forest management methodologies need to be revised to provide for the diversity of plant and animal communities, and to maintain viability of species existing on the Forests.” p. 1-20.

86. The proposed 2003 Forest Plan revises the 1986 Forest Plans with regard to four important topics for management of the CNNF: (a) access and recreational opportunities; (b) biological diversity; (c) special land allocations; and (d) timber production. Within these topics, the proposed 2003 Forest Plan calls for revisions to a total of 10 sub-topics, including ecosystem restoration, landscape pattern, wildlife, and timber production. 2003 Forest Plan Draft EIS, p.1-5.

87. The ROD states that the “Purpose and Need for Action and desired conditions for Northwest Howell Project Area are based on [1986] Forest Plan goals, objectives, and standards” and the Northwest Howell Project is “consistent” with the outdated 1986 Forest Plan for the Nicolet. ROD, p. 4.

Failure to Ensure the Viability of Regional Forester Sensitive Species (“RFSS”)

88. The RFSS confirmed that the Northwest Howell Project area includes Northern goshawk (*Accipiter gentiles*), Red-shouldered hawk (*Buteo linneatus*), American marten (*Martes americana*), Goblin fern (*Botrichium mormo*), and other Regional Forester’s Sensitive Species (RFSS).

89. These species are known to be declining within the Northwest Howell area and elsewhere in the CNNF.

90. The Forest Service concluded that timber sales and logging activities in Northwest Howell may impact individuals of these and other species, but will not cause a trend toward federal listing or a loss of viability. However, other Forest Service documents, and statements by experts cited and relied upon by the Forest Service in those documents, conflict with this conclusion. They indicate that the viability of these species is threatened by the proposed timber sales and logging activities because: (a) the populations of these species in the project areas and the CNNF are small and growing smaller; (b) that these species will be negatively impacted by timber cutting and logging activities, which will, inter alia, diminish their ability to breed, hunt, and avoid predators; and (c) that the mitigation measures being implemented by the Forest Service pursuant to the 1986 Forest Plans are insufficient to protect the species from a loss of viability.

91. Notwithstanding the statement in the Forest Service Manual that “[i]t is essential to establish population viability objectives when making decisions that would significantly reduce sensitive species numbers,” the Forest Service establishes no such viability objectives for RFSS in the Northwest Howell area.

Failure to Monitor Animal Population Trends

92. NFMA regulations require that, pursuant to the requirement of the NFMA regulations at 36 C.F.R. § 219.19 that “[f]ish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area,” planning alternatives “shall be stated and evaluated in terms of both amount and quality of habitat and of animal population trends” of Management Indicator Species. 36 C.F.R. § 219.19(a)(2), (6).

93. The Forest Service is required under this provision to collect population data for Management Indicator Species for each project, rather than merely extrapolating estimates of the Management Indicator Species population based upon available habitat as a proxy for population data.

94. The 1986 Forest Plan further specifies that for most Management Indicator Species, the unit of measure for performing the evaluation required under 36 C.F.R. § 219 shall be “population trends” in addition to “amount of habitat available.”

Failure to Enter Formal Consultation Regarding the Effect of the NHP on the Threatened Canada Lynx

95. The Forest Service and the Fish and Wildlife Service violated Section 7 of the ESA by not entering into formal consultation leading to a Biological Opinion regarding the impact of Northwest Howell timber sales and logging activities on the threatened Canada Lynx.

96. The ROD concludes that the timber sales and logging activities will have “no effect” on federally threatened or endangered species.

97. In the April 1, 2003 Biological Assessment, the Forest Service concluded that the timber sales and logging activities will not affect the Canada Lynx because “no Canada lynx or appropriate habitats are present on [Forest Service] lands in [the Northwest Howell].”

98. In a December 26, 2002 letter, the Fish and Wildlife Service identified the counties in which the Northwest Howell Project would occur as “potential habitat” for the Canada Lynx, but agreed with the Forest Service that the project would have no effect on endangered or threatened species. The ROD describes the December 26, 2002 letter as “concluding consultation.”

99. The Forest Service’s and Fish and Wildlife Service’s conclusion that the timber sales and logging activities in Northwest Howell would have “no effect” on the Canada Lynx is incorrect for the following reasons:

- There is evidence of Canada Lynx in the CNNF: (a) the Forest Service’s Habitat Suitability Assessment notes that annual snow track surveys detected Canada Lynx tracks in four of six years between 1992 and 1998; and (b) on information and belief, a Wisconsin DNR ecologist acknowledged in a November 2002 radio interview that a Canada Lynx was sighted in the northern part of the Nicolet National Forest in the previous month.
- Evidence of Canada Lynx is quite rare even in areas where they are known to exist: (a) the Canada Wildlife Service webpage notes that “[e]ven for trappers who have spent a lifetime in areas where lynxes are common, encounters with these predators are rare and memorable;” and (b) on information and belief, post surveys such as those used by the Forest Service in the CNNF frequently do not detect Canada Lynx even in areas where the Canada Lynx is known to exist.

- The Defendants’ references to Canada Lynx that have been seen in the CNNF as transient visitors or “dispersers” rather than part of a resident breeding population is both legally irrelevant and factually unsupported: (a) the ESA protects Canada Lynx when they are located in Wisconsin, regardless of whether they are dispersers or residents; (b) on information and belief, the Forest Service and other agencies for years made a similar argument that only disperser populations of Lynx existed in the Superior National Forest and in Maine, until recently discovering breeding populations of Canada Lynx in both areas.
- The Northwest Howell area serves as at least potential critical habitat for the Canada Lynx: (a) on information and belief, the Northwest Howell contains the boreal type of forest and the snowshoe hares necessary to be suitable Canada Lynx habitat; (b) in the absence of formal consultation, the Fish and Wildlife Service cannot determine that critical habitat of the Canada Lynx will not be destroyed or adversely modified because the Fish and Wildlife Service has not complied with its legal duty to designate critical habitat for the Canada Lynx.

100. Because the timber sales and logging activities “may affect” the Canada Lynx, the Forest Service and the Fish and Wildlife Service were required to enter into formal consultation regarding the impact on the Canada Lynx. *Defenders of Wildlife v. Norton*, 239 F.Supp. 2d 9 (D.D.C. 2002).

VIII. CLAIMS FOR RELIEF

COUNT I

VIOLATIONS OF THE NATIONAL ENVIRONMENTAL POLICY ACT AND THE ADMINISTRATIVE PROCEDURE ACT (Forest Service Defendants)

101. Plaintiffs reassert and reallege Paragraphs 1 through 100 above.

102. The Forest Service violated NEPA and its implementing regulations, 40 C.F.R. §§ 1500-1517 , and the Administrative Procedure Act (“APA”), in approving the ROD for the Northwest Howell project because it:

- Failed to consider the cumulative impacts of other past, present and reasonably foreseeable future logging projects in the CNNF, private lands, and nearby National Forests.
- Failed to rigorously evaluate and fully consider alternatives to the proposed actions.
- Is based on inadequate and outdated scientific information
- Authorized actions in the Northwest Howell project areas that will limit alternatives under the proposed revised and updated 2003 Forest Plan.

103. Accordingly, the Defendant’s failure to comply with NEPA and its implementing regulations and its approval of the ROD is arbitrary, capricious, and not in accordance with law, and thus violates the Administrative Procedure Act, 5 U.S.C. § 706.

COUNT II

VIOLATIONS OF THE NATIONAL FOREST MANAGEMENT ACT AND THE ADMINISTRATIVE PROCEDURE ACT (Forest Service Defendants)

104. Plaintiffs reassert and reallege Paragraph 1 through 103 above.

105. The Forest Service violated NFMA and its implementing regulations, 36 C.F.R. §§ 200-297, in approving the ROD for the Northwest Howell project because it:

- Based the Northwest Howell project on the 1986 Forest Plan that the Forest Service has acknowledged is outdated and is being revised and updated in 2003.
- Failed to ensure the viability of Regional Forester Sensitive Species.
- Failed to appropriately monitor Management Indicator Species.

106. Accordingly, the Defendant's failure to comply with NEPA and its implementing regulations and its approval of the ROD is arbitrary, capricious, and not in accordance with law, and thus violates the Administrative Procedure Act, 5 U.S.C. § 706.

COUNT III

VIOLATIONS OF THE ENDANGERED SPECIES ACT (Forest Service and Fish and Wildlife Service Defendants)

107. Plaintiffs reassert and reallege Paragraph 1 through 106 above.

108. The Forest Service and the Fish and Wildlife Service violated Section 7 of the ESA and its implementing regulations, 50 C.F.R. § 402.14, because the Forest Service issued the ROD without first having entered into formal consultation with the Fish and Wildlife Service regarding the effect of the Northwest Howell timber sales and logging activities on the Canada Lynx and its habitat.

IX. RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request that this Court enter a judgment in favor of Plaintiffs and against Defendants as follows:

1. A declaration that the Defendant Forest Service violated the National Environmental Policy Act and the National Forest Management Act by approving the ROD authorizing the Northwest Howell project timber sales and logging activities.
2. A declaration that the Defendant Forest Service's approval of the ROD for the Northwest Howell project was arbitrary, capricious, an abuse of discretion, and contrary to law.
3. A declaration that the Forest Service and the Fish and Wildlife Service violated the Endangered Species Act by failing to enter into formal consultation regarding the impacts of the Northwest Howell project timber sales and logging activities on the threatened Canada Lynx.
4. An injunction stopping the Northwest Howell project from being implemented until the Defendants fully comply with requirements of the National Environmental Policy Act, the National Forest Management Act, and the Endangered Species Act.
5. An order directing the Forest Service to: (1) halt all activity on the Northwest Howell project until such time as the revised and updated 2003 Forest Plan for the CNNF is completed; (2) ensure the viability of Regional Forester Sensitive Species; and (3) monitor population trends of all Management Indicator Species in the Northwest Howell project area.
6. An order directing the Forest Service and the Fish and Wildlife Service to enter into formal consultation regarding the effect of the Northwest Howell project timber sales and logging activities on the Canada Lynx.

7. An order that the Plaintiffs recover their costs, including reasonable attorneys' fees, incurred in connection with this action, as provided for under the Endangered Species Act, 16 U.S.C. § 1540(g)(4), and the Equal Access to Justice Act, 28 U.S.C. § 2412(d), and other applicable law; and

8. Such other and further relief as the Court may deem just and proper and in the public interest.

Dated: October 20, 2003

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