
NORTON V. SUWA AND THE UNRAVELING OF FEDERAL PUBLIC LAND PLANNING

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ABSTRACT

In 2004, a unanimous Supreme Court ruled in Norton v. Southern Utah Wilderness Association (SUWA), that environmentalists could not obtain injunctive relief against the failure of the Bureau of Land Management (BLM) to regulate growing off-road vehicle (ORV) use in federal wilderness study areas in Utah, despite a statutory directive that BLM prevent “impairment” of such areas, and despite BLM’s promises in its land plan that it would monitor ORV use and close the areas if warranted. The Court acknowledged that the Administrative Procedure Act authorized federal courts to compel action in the face of agency inaction. However, the Court held that BLM’s failure to act to prevent impairment was not actionable because Congress had not directed BLM to take a “discrete” action, instead leaving the agency with considerable discretion as to how to prevent impairment. The decision in SUWA has produced widespread ramifications: federal land managers have employed it to successfully insulate from judicial review a wide variety of federal actions as well as inactions. Moreover, the Bush Administration seized upon the decision as a justification for redefining national forest land plans as aspirational in nature, without making any binding commitments as to particular authorized activities or land suitability. The Administration also moved to eliminate environmental review of national forest plans, claiming that, under its redefinition, plans produce no environmental effects, an effort that was subsequently stalled by the courts.

This article discusses these developments, maintaining that they are inconsistent with the congressional commitment to federal land planning made in 1976 in both the Federal Land Management and

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Policy Act and the National Forest Management Act. Thirty years ago, Congress created modern federal land planning as the cornerstone of greater public involvement in public land decision making. SUWA and its aftermath have destroyed that vision, making public land plans virtually irrelevant and a large waste of taxpayer dollars. If effective public participation in federal land planning requires that the public be able to enforce the promises made in land plans, Congress must amend the authorizing statutes to restore federal land plans as legally significant commitments of public resources.

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In 1976, Congress committed to land use planning on federal public lands by enacting both the National Forest Management Act (NFMA)¹ and the Federal Land Policy and Management Act (FLPMA).² Signing NFMA into law, President Ford announced that the statute “reaffirms and further defines the concept of multiple use-

1. Pub. L. 94-588, 90 Stat. 2949 (1976).

2. Pub. L. 94-579, 90 Stat. 2743 (1976).

sustained yield management and outlines policies and procedures for land management planning in the national forest system. . . . [T]his act guarantees the public full opportunity to participate in National Forest land and resource planning.”³ Actually, the Forest Service has engaged in some form of planning since the turn-of-the-century days of Gifford Pinchot, although the agency conducted its planning activities without significant congressional oversight or formal public involvement until the 1970s.⁴

As it did in NFMA, Congress in FLPMA incorporated the principles of multiple use management from the 1960 Multiple-Use Sustained Yield Act (MUSYA) into its management requirements.⁵ The Bureau of Land Management (BLM), the product of a 1946 merger between the Grazing Service and General Land Office, had engaged in little systematic planning during the first thirty years of its existence.⁶ Thus, FLPMA marked a fundamental shift in the management of BLM’s public lands, providing BLM with organic

3. DENNIS C. LE MASTER, *DECADE OF CHANGE: THE REMAKING OF FOREST SERVICE STATUTORY AUTHORITY DURING THE 1970S* 78 (1984), *citing* 3 PUB. PAPERS 2619-21 (Oct. 22, 1976).

4. *See* CHARLES F. WILKINSON & H. MICHAEL ANDERSON, *LAND AND RESOURCE PLANNING IN THE NATIONAL FORESTS* 15 (Island Press 1987).

5. *See* George Cameron Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA, and the Multiple Use Mandate*, 14 ENVTL. L. 1, 6 (1983) (observing that, with little debate, Congress based FLPMA’s multiple use management requirements on the Forest Service’s 1960 MUSYA).

6. *See* George Cameron Coggins & Parthenia Blessing Evans, *Multiple Use, Sustained Yield Planning on the Public Lands*, 53 U. COLO. L. REV. 411, 447 (1982) (noting that the lack of adequate funding and planning authority for the agency contributed to the general lack of BLM planning during the first decades of its existence). Congressionally-directed BLM planning began in 1969, when BLM began to implement the Classification and Multiple-Use Act of 1964 (CMUA). 43 U.S.C. §§ 1411-1418 (expired 1970). The CMUA required BLM to prepare Management Framework Plans for the lands under its control and provided the Secretary of Interior with greater authority to classify public lands for disposal or retention as federal public lands. When the Public Land Law Review Commission issued its report on the nation’s public lands in 1970, which automatically caused the CMUA to expire, 180 million acres of federal land had been classified or reclassified under the CMUA. GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, *PUBLIC NATURAL RESOURCES LAW* §10D:21 (2007). *See also* George Cameron Coggins, *The Developing Law of Land Use Planning On the Federal Lands*, 61 U. COLO. L. REV. 307, 317 (1990) (describing planning under the CMUA as “early and primitive” and noting that such plans were developed following a different procedure, and contained different information, than plans that would later be developed under FLPMA); *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 876 (1990) (discussing the classification provisions of the CMUA). *See also infra* note 66 (discussing BLM’s formation).

authority for the first time.⁷ FLPMA also made planning the centerpiece of BLM land management.⁸

In NFMA and FLPMA, Congress assigned federal land managers new responsibilities, while reining in their discretion by subjecting them to public accountability and scrutiny.⁹ Both statutes reflected a federal commitment to public involvement, congressional oversight, and long-range planning as the central tenets of public land decision making.¹⁰

But federal land planning has been emasculated in the 21st century, as the Supreme Court has ruled that land use plans are not ripe for judicial review,¹¹ and that plan terms are not enforceable.¹² These decisions have led at least the Forest Service to conclude that land plans are merely aspirational statements of good intentions, and that plans require no analysis of their environmental effects under the National Environmental Policy Act (NEPA).¹³ These developments have fundamentally altered the nature of land planning on federal public lands, removing the public from the planning process and insulating agencies from challenges to planning decisions. Congress intended public planning to be the fulcrum of FLPMA and NFMA, but recent changes in Forest Service planning regulations have undermined the public planning process.¹⁴ These regulatory changes seem designed to impose limits on environmental challenges to agency decisions at the programmatic level, which will produce

7. Coggins, *supra* note 5, at 26-27. On the significance of organic statutes, see Robert L. Fischman, *The National Wildlife Refuge System and the Hallmarks of Modern Organic Legislation*, 29 *ECOLOGY* L. Q. 457 (2002).

8. See Coggins, *supra* note 5, at 15. See also S. COMM. ON ENERGY & NAT. RESOURCES, 95TH CONG., *LEGISLATIVE HISTORY OF THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976* (1978).

9. S. REP. NO. 94-583, at 7 (1975), reprinted in S. COMM. ON ENERGY & NAT. RESOURCES, 95TH CONG., *supra* note 8, at 72.

10. See SAMUEL TRASK DANA & SALLY K. FAIRFAX, *FOREST AND RANGE POLICY: ITS DEVELOPMENT IN THE UNITED STATES* 339 (2d ed. 1980).

11. *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 732 (1998).

12. *Norton v. S. Utah Wilderness Alliance (SUWA)*, 542 U.S. 55, 69 (2004).

13. See National Environmental Policy Act Documentation Needed for Developing, Revising, or Amending Land Management Plans; Categorical Exclusion, 71 Fed. Reg. 75,481 (Dec. 15, 2006) (categorically excluding Forest Service forest plans developed under the 2005 planning rule from NEPA analysis); see also *infra* notes 306-09 and accompanying text (discussing the 2006 forest planning categorical exclusion).

14. See National Forest System Land Management Planning, 70 Fed. Reg. 1023 (Jan. 5, 2005) (to be codified at 36 C.F.R. pt. 219) (describing the Forest Service's revised regulations for NFMA forest planning); see also *infra* notes 271-93 and accompanying text (discussing the Bush Administration's 2005 planning rule).

piecemeal litigation and shield a wide swath of public land use decisions from judicial review. The result is the effective abandonment by at least one land management agency of the considerable public resources devoted to the planning process over the past three decades.¹⁵ This article maintains that these developments represent a giant leap backward for federal land management agencies and argues that Congress must restore federal land planning and return to its roots if the public is to participate effectively in agency decision-making processes.

Effective federal land planning suffered a serious blow in 2004, when a unanimous Supreme Court ruled in *Norton v. Southern Utah Wilderness Alliance (SUWA)* that a plan provision stating that BLM “will” monitor off-road vehicle (ORV) use was not a legally binding commitment.¹⁶ Environmentalists sued under section 706(1) of the Administrative Procedure Act (APA) to “compel agency action unlawfully withheld or unreasonably delayed,”¹⁷ arguing that BLM’s failure to control or even monitor ORV use within wilderness study

15. NFMA requires the Forest Service to prepare a forest plan every fifteen years for each of the 155 national forests it manages, at an estimated cost of \$5 million to \$7 million per plan. See 16 U.S.C. § 1604(f)(5) (2000) (requiring plans be revised whenever the Secretary finds a forest’s conditions have changed “significantly” but at least every fifteen years); see also *In One of His Last Acts, Bosworth Defends Planning Rule*, PUBLIC LAND NEWS, Jan. 19, 2007, at 5. Unlike the Forest Service, BLM does not have statutory or regulatory timelines for plan revisions. See 43 C.F.R. § 1610.5-6 (2006) (requiring BLM to revise land use plans “as necessary, based on . . . new data, new or revised policy and changes in circumstances affecting the entire plan or major portions of the plan”).

Planning is expensive, but one of the congressional goals in establishing the planning process was to ensure better funding for the Forest Service, so that the agency would have sufficient resources to make informed and reasoned decisions that took into account a wider range of information and interests than commodity production. In the five years following NFMA’s passage, Forest Service appropriations nearly doubled. LEMASTER, *supra* note 3, at 151. In recent years, however, the Forest Service’s budget has been slashed: President Bush’s 2008 budget proposed reducing Forest Service funding from the previous year by \$64 million, resulting in a budget request for the agency totaling \$4.1 billion. Rocky Barker, *Forest Service Money Is Drying Up*, IDAHO STATESMAN, May 13, 2007, at 1. While appropriations for land use planning have been relatively flat in recent years, with \$52.6 million marked for planning for 2008, or 1.28% of the agency’s budget, the proportion of the Forest Service budget consumed by firefighting costs has increased dramatically. *Id.* In 2006, the agency spent \$1.6 billion fighting fires, more than 40% of its entire budget. *Id.* See also *infra* notes 79-91 and accompanying text (discussing Forest Service spending on land use planning).

BLM’s budget was also reduced for 2008, although less dramatically: BLM’s 2008 budget of \$1.85 billion is just \$5 billion less than its 2006 budget. See *Bush’s Budget, 2008*, HIGH COUNTRY NEWS, Mar. 5, 2007, at 3; see also *infra* notes 92-96 and accompanying text (discussing BLM spending on land use planning).

16. *SUWA*, 542 U.S. at 72.

17. 5 U.S.C. § 706(1) (2000).

areas (WSAs) in Utah violated both FLPMA and NEPA.¹⁸ Although the Tenth Circuit agreed that FLPMA required BLM to take action to preserve the wilderness characteristics of WSAs and manage the lands consistent with applicable land management plans,¹⁹ and that NEPA required the agency to take a “hard look” at whether it needed to supplement its environmental impact statement (EIS) on the land plan to account for a substantial increase in ORV use,²⁰ the Supreme Court disagreed.

The Court held that while FLPMA required BLM to manage WSAs in a manner not to impair wilderness characteristics, the agency possessed wide discretion to decide how to comply with this statutory directive, and thus BLM need not ban ORV use in the areas.²¹ Further, the *SUWA* court ruled that although BLM may not act in a manner inconsistent with a land plan, a plan’s provisions are not usually judicially enforceable because land plans only guide, not generally prescribe, actions.²² The Court also decided that even though BLM’s decision to approve a land use plan may require NEPA analysis, once approved there is no further “major Federal action” involved in a land use plan requiring EIS supplementation.²³

The *SUWA* decision echoed a conclusion the Court reached in the context of national forest plans six years earlier. In 1998, in *Ohio Forestry Association v. Sierra Club*, the Court ruled that

18. FLPMA required BLM to review roadless areas larger than 5000 acres to determine their suitability for designation as wilderness. 43 U.S.C. § 1782(a) (2000). *See infra* notes 123-26 (discussing WSAs in Utah).

19. *S. Utah Wilderness Alliance v. Norton (SUWA I)*, 301 F.3d 1217, 1225 (10th Cir. 2002) (construing section 603(c) of FLPMA, 43 U.S.C. § 1782(c) (2000), which requires BLM to “continue to manage [WSAs] . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness”). In addition, the Tenth Circuit interpreted section 302(a) of FLPMA, 43 U.S.C. § 1732(a) (2000), which requires BLM to “manage the public lands . . . in accordance with the land use plans . . . when they are available.” *SUWA I*, 301 F.3d at 1233. BLM’s regulations prevent the agency from acting in a way that is inconsistent with an area’s land management plan. 43 C.F.R. § 1610.5-3(a) (2005) (“All future resource management authorizations and actions . . . and subsequent more detailed or specific planning, shall conform to the approved plan”).

20. *See SUWA I*, 301 F.3d at 1239 (concluding that BLM violated NEPA by failing to supplement the EIS on the applicable BLM resource management plan to account for substantial increases in ORV use).

21. *SUWA*, 542 U.S. at 66.

22. *Id.* at 71.

23. *Id.* at 73. The Court did note that a supplemental NEPA analysis may be required when the agency revises or amends a land use plan. *Id.* Also, the Court stated that plans that commit specific areas to ORV use would be reviewable. *Id.* at 69 n. 4. It would also seem that plans that authorize activities such as continued grazing levels should be reviewable.

environmentalists could not challenge the forest plan for the Wayne National Forest because federal land plans are generally not ripe for review.²⁴ Both *Ohio Forestry* and *SUWA* placed significant roadblocks in the path of challenges to planning decisions, virtually eliminating the public's ability to challenge agency land management decisions on a programmatic level. Even more ominously, the two decisions have encouraged land management agencies to significantly revise their conception of a land management plan, from a vehicle for determining which lands are suitable for various activities to paperwork that makes no commitments about land suitability and sets few, if any, standards governing future activities.

Responding to the Supreme Court's two decisions, in 2005 the Forest Service issued a new rule significantly amending its forest plan rules.²⁵ Citing both *Ohio Forestry* and *SUWA* in its preamble, the new rule emphasized the "strategic" nature of land management plans, which now would authorize no specific projects, merely "characteriz[ing]" future conditions and providing "guidance" for future decisions.²⁶ Then, in late 2006, the Forest Service delivered the *coup de grace* to the planning process by amending the Forest Service Handbook to create a new categorical exclusion (CX) that exempted

24. *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998). *Ohio Forestry* did not preclude judicial review of all forest plan terms, however. The Court noted that claims based on a forest plan's ORV use restrictions, road closures, or trail construction provisions would not have been barred. *Id.* at 738. However, because the Sierra Club did not raise these arguments below, the Court refused to consider them in reaching its decision. See *infra* notes 119-21 (discussing challenges to forest plans not barred by *Ohio Forestry*).

25. See Theo Stein, *Forest Management "Streamlined" Bush's Rules Simplify the Planning Process, but Critics Say Timber and Mining Firms Will Benefit*, DENVER POST, Dec. 23, 2004, at A1 (noting that Bush Administration officials billed the new rule as a means of streamlining the planning process by reducing the time the agency would spend revising each forest plan and cutting planning costs by nearly a third); see also *infra* notes 271-93 and accompanying text (discussing the Bush Administration's 2005 planning rule).

26. National Forest System Land Management Planning, 70 Fed. Reg. 1023, 1025 (Jan. 5, 2005) (to be codified at 36 C.F.R. § 219). The Forest Service promulgated the 2005 planning rule without seeking advice from a Committee of Scientists, a group of independent experts that Congress required the Forest Service to assemble in NFMA to advise the agency in developing land plan regulations. See George Hoberg, *Science, Politics, and U.S. Forest Service Law: The Battle over the Forest Service Planning Rule*, 44 NAT. RESOURCES J. 1, 21-22 (2004) (noting that Democratic members of Congress, critical of the proposed planning rule, "chastised" the Bush Administration for making decisions without consulting a committee of scientists, a departure from "a long pattern of employing scientific advisers to help resolve difficult forest policy conflicts"). NFMA requires that the Secretary of Agriculture, before promulgating regulations governing land planning, to "appoint a committee of scientists who are not officers or employees of the Forest Service. The committee shall provide scientific and technical advice and counsel on proposed guidelines and procedures to assure that an effective interdisciplinary approach is proposed and adopted." 16 U.S.C. § 1604(h)(1) (2000).

forest plans, plan amendments, and plan revisions under the 2005 planning rule from NEPA documentation.²⁷ The agency again cited both *SUWA* and *Ohio Forestry* in its preamble to support its characterization of land plans as merely “strategic and aspirational,” and thus without any direct environmental effects.²⁸

This article analyzes the Supreme Court’s decision in *SUWA* in the context of these recent rollbacks in federal land planning. Section I begins with a discussion of the congressional intent in making land planning a focal point of both NFMA and FLPMA and proceeds to discuss the federal government’s considerable investments in public land planning over the last thirty years. Section II analyzes the Court’s decision in *SUWA*. Section III explains how lower courts have interpreted *SUWA* to limit opportunities for the public to hold agencies accountable for their planning decisions. Section IV discusses recent agency policies reflecting an understanding that, under *SUWA* and *Ohio Forestry*, federal land use plans are unenforceable, aspirational documents, and abandoning the notion of planning as an informed, public process that Congress intended to govern public lands management. Section IV posits that this redefinition of planning suggests a reemergence of a focus on commodity production that originally led Congress to require agencies to open up their decision-making procedures through the land planning process. This article concludes that in light of the immense resources that have been devoted to public land planning, the benefits derived from widespread public participation, and the congressional intent to make planning the focus of both FLPMA and NFMA, Congress should respond to the *Ohio Forestry* and *SUWA* decisions by reinvigorating federal land planning and making federal land management agencies publicly accountable for their planning decisions.

27. National Environmental Policy Act Documentation Needed for Developing, Revising, or Amending Land Management Plans; Categorical Exclusion, 71 Fed. Reg. 75,481 (Dec. 15, 2006). This CX (see above) was just the latest in a series of congressional and administrative actions aimed at “streamlining” the NEPA process by exempting a wide range of activities from environmental review. See ROBERT G. DREHER, NEPA UNDER SIEGE: THE POLITICAL ASSAULT ON THE NATIONAL ENVIRONMENTAL POLICY ACT 7-10, Georgetown Envtl. L. & Pol’y Inst. 2005 (describing how expanded use of CXs, restrictions on the substance of environmental review, and restrictions on public participation and judicial review have been used in recent years to weaken NEPA); see also Bradley C. Karkkainen, *Whither NEPA?*, 12 N.Y.U. ENVTL. L.J. 333, 352–55 (2004) (discussing the Bush Administration task force formed to reform NEPA that recommended expanding the use of CXs).

28. National Environmental Policy Act Documentation Needed for Developing, Revising, or Amending Land Management Plans; Categorical Exclusion, 71 Fed. Reg. at 75,483.

I. BACKGROUND: RESOURCE PLANNING ON THE PUBLIC LANDS

Although the Forest Service engaged in some form of planning in its early days under Gifford Pinchot's direction, congressionally-mandated, forest-wide planning did not begin until the 1970s.²⁹ NFMA changed national forest management, as well as the relationship between Congress and the Forest Service, by imposing substantive planning procedures that required public participation, and by holding the Forest Service accountable for its management decisions by subjecting them to judicial review.³⁰ Congress also made planning and public involvement centerpieces of BLM land management in FLPMA.³¹ By requiring public participation in planning decisions, both NFMA and FLPMA created processes that involved the public early in the land management process, before BLM and the Forest Service could commit to a specific course of action. Once an agency has chosen a specific course of action, it becomes a project proponent, and the public's influence diminishes. But the price of such open-minded land planning was not cheap—both BLM and the Forest Service spend millions of dollars developing each federal land plan.³²

A. National Forest Planning

The Forest Service is responsible for managing more than 191 million acres of land, including 155 national forests, 20 national grasslands, and eight land utilization projects.³³ In the Organic Act of

29. Congress passed NFMA, which required forest-wide planning, in 1976. *See supra* note 2 and accompanying text (discussing the passage of NFMA and FLPMA).

30. *See* WILKINSON & ANDERSON, *supra* note 4, at 72 (noting that before Congress exerted control over forest management in the 1970s, "Forest Service decisions were considered protected by an aura of virtual unreviewability"). As an example, Wilkinson and Anderson claimed that they were not able to uncover any evidence of a Forest Service activity being restrained by an injunction before 1970. *Id.* The authors cite *Parker v. United States*, 309 F. Supp. 593, 601 (D. Colo. 1970), *aff'd* 448 F. 2d 793 (10th Cir. 1971) (enjoining the Forest Service from completing a timber sale in a potential wilderness area in the White River National Forest until the President made a final decision on the area's wilderness designation), as the first case producing an injunction.

31. *See* 43 U.S.C. § 1701(a)(2) (2000) (stating it is in the "national interest" for public lands to be managed "through a land use planning process"); § 1701(a)(5) (requiring public participation in developing regulations governing public land decision making); *see also* Coggins, *supra* note 5, at 10-11 (noting that congressional policies in FLPMA include the intent that "[i]nventorying and planning should become the central focus of rangeland management," as well as the intent to increase public involvement in BLM decision making).

32. *See infra* notes 79-96 and accompanying text (discussing the federal investment in land planning).

33. Office of the Fed. Reg., U. S. Government Manual 118 (2006-07).

1897 (Organic Act), Congress directed the Secretary of Agriculture to manage the lands that would later become the national forest system to “regulate their occupancy and use and to preserve the forests thereon from destruction.”³⁴ Federal forest planning began under Gifford Pinchot, who in 1898 ushered in plans for managing timber lands for both harvest and forest preservation as the head of the Department of Agriculture’s Division of Forestry, some seven years before authority to manage federal national forest lands would be officially transferred to the Agriculture Department.³⁵ The Organic Act gave the Forest Service broad authority by supplying only vague directives for managing national forest land.³⁶ Land planning would remain an agency-driven process until the 1970s.

Congressional involvement in Forest Service planning began with the Multiple-Use Sustained Yield Act (MUSYA) of 1960.³⁷ In MUSYA, Congress expanded the purposes the Forest Service must consider in managing forests beyond the watershed and timber uses established in the Organic Act³⁸ to include recreation, range, wildlife, and fish.³⁹ The Forest Service implemented MUSYA’s requirement that the agency give “due consideration” in its management decisions to the “relative values” of an area’s resources through planning.⁴⁰ During the next decade, Forest Service planning for wilderness areas began under the Wilderness Act of 1964,⁴¹ and the National Environmental Policy Act of 1969⁴², which added a critical

34. 16 U.S.C. § 551 (2000).

35. The Department of Interior General Land Office managed the nation’s forest reserves until 1905, when Congress transferred authority to manage the reserves to the Department of Agriculture Division of Forestry, which soon thereafter became the Forest Service. *See id.* § 472 (transferring forest management authority to the Secretary of Agriculture). Congress designated the forest reserves as national forests in 1907, ten years after passing the Organic Act. *See WILKINSON & ANDERSON, supra* note 4, at 19 (discussing the beginnings of national forest planning).

36. 16 U.S.C. § 551.

37. 16 U.S.C. §§ 528-31.

38. *See id.* § 475 (declaring the purposes for establishing the national forests to be “to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber”).

39. *Id.* § 528.

40. *Id.* § 529. Under the MUSYA, the Forest Service began to use planning for resource functions, such as wildlife and recreation, and it began to use zoning to designate areas appropriate for particular uses. *See WILKINSON & ANDERSON, supra* note 4, at 30–31 (describing the dual planning processes that the Forest Service developed in response to the MUSYA as the “parents of the integrated land and resource planning” in NFMA).

41. 16 U.S.C. §§ 1131-1136 (2000).

42. 42 U.S.C. §§ 4321-4370f (2000).

component by requiring public involvement.⁴³ Congress became more actively involved in Forest Service planning with the enactment of the Forest and Rangeland Renewable Resources Planning Act of 1974 (RPA),⁴⁴ which required the Forest Service to meet national goals for forest resource allocation and compile periodic assessments of the nation's forest resources.⁴⁵ Drafted during the Nixon Administration by a Congress aiming to limit that administration's efforts to regionalize Forest Service administration while increasing congressional control over national forest management decisions,⁴⁶ the RPA added "top-down" planning by imposing national planning requirements on the Forest Service to supplement the forest-level planning the agency historically practiced.⁴⁷

The RPA produced no immediate changes in the Forest Service's management practices, which, during the 1960s and 1970s, included increased timber sales and clearcutting.⁴⁸ But the year after Congress passed the RPA, the Fourth Circuit affirmed an injunction against clearcutting in the Monongahela National Forest, ruling that the clearcuts ("even-aged timber harvests") violated the terms of the Organic Act, which required timber on national forest land to be "marked and designated" prior to sale.⁴⁹ Congress responded to the

43. See WILKINSON & ANDERSON, *supra* note 4, at 32-33 (discussing how the Wilderness Act brought about a Forest Service decision to inventory roadless areas, and how, in addition to increasing public participation in Forest Service decision making, NEPA required the agency to analyze environmental effects of mining on its lands and prompted it to develop detailed resource inventories).

44. Forest and Rangeland Renewable Resources Planning Act of 1974 (RPA), Pub. L. 93-378, 88 Stat. 476 (codified as amended at 16 U.S.C. §§ 1601-1610 (2000)). The RPA was among the first bills President Ford signed into law, just over a week after President Nixon resigned on Aug. 9, 1974. LE MASTER, *supra* note 3, at 49.

45. TRASK & FAIRFAX, *supra* note 10, at 324-25. The RPA grew out of timber industry efforts in the late 1960s to promote legislation which would increase Forest Service funding to allow for more intensive management of high-quality timber sites and require the Forest Service to engage in national-level resource planning. When Congress finally passed the RPA, it was a resource planning and policy statute that some environmentalists also supported. *Id.*

46. LE MASTER, *supra* note 3, at 37.

47. WILKINSON & ANDERSON, *supra* note 4, at 77. The RPA required the Forest Service to prepare an assessment describing the renewable resources on its lands every ten years, a programmatic proposal of long-range objectives for the agency every five years, and an annual report comparing the agency's activities to its proposed objectives. 16 U.S.C. §§ 1601(a), 1602, 1606(d) (2000).

48. See WILKINSON & ANDERSON, *supra* note 4, at 41 (discussing how the Forest Service's increase in timber sales and clearcutting prompted widespread criticism during the early 1970s).

49. *W. Va. Div. of the Izaak Walton League of Am., Inc. v. Butz*, 367 F. Supp. 422, 433 (N.D. W. Va. 1973), *aff'd* 522 F.2d 945 (4th Cir. 1975) (interpreting 16 U.S.C. § 476 (repealed 1976)).

Monongahela decision the following year by enacting the National Forest Management Act (NFMA) of 1976, reforming Forest Service timber management policies⁵⁰ and repealing the provision in the Organic Act that required trees to be marked prior to sale.⁵¹

Although controversy over clearcutting and the *Monongahela* decision prompted NFMA, that legislation addressed far more than just clearcutting. NFMA comprehensively revised the Forest Service's land management policies and practices, and significantly changed the relationship between Congress and the Forest Service by imposing substantive planning provisions, restricting discretionary authority over timber harvests and requiring public participation in Forest Service decision making.⁵² The Senate Report on NFMA, explaining the need for the legislation, quoted President Theodore Roosevelt:

The reward of foresight for this Nation is great and easily foretold. But there must be a look ahead, there must be a realization of the fact that to waste, to destroy, our natural resources, to skin and exhaust land instead of using it so as to increase its usefulness, will result in undermining in the days of our children the very prosperity which we ought by right to hand down to them amplified and developed.⁵³

Senator Hubert Humphrey (D-Minn.), author of the bill which eventually became NFMA,⁵⁴ wanted to ensure that the Forest Service would not "turn the national forests into tree production programs which override other values."⁵⁵ The Senate committee responsible for drafting NFMA considered public participation and planning to be the cornerstones of the legislation, maintaining "that land management planning and the formulation of regulations to govern

50. WILKINSON & ANDERSON, *supra* note 4, at 72.

51. National Forest Management Act of 1976, Pub. L. 94-588, §13, 90 Stat. 2958 (1976).

52. 16 U.S.C. § 1604(d) (2000) (public participation); § 1604(f) (required forest plan provisions); § 1604(g)(3) (timber harvesting).

53. S. REP. NO. 94-893, at 7 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6667-68 (1976).

54. *See* WILKINSON & ANDERSON, *supra* note 4, at 42. Two bills to reform national forest management were before the Senate to reform national forest management: Senate Bill 2926, S. 2926, 94th Cong. (1976), proposed by Sen. Randolph (D-W.Va.), established specific timber management standards, while Sen. Humphrey's bill, Senate Bill 3091, S. 3091 94th Cong. (1976), amended the Organic Act to allow clearcutting and required the Forest Service to regulate timber harvests through forest plans. *See* WILKINSON & ANDERSON, *supra* note 4, at 42.

55. *Forest and Rangeland Management: J. Hearings Before the Subcomm. on Environment, Soil Conservation, and Forestry of the S. Comm. on Agriculture and Forestry and the Subcomm. on the Environment and Land Resources of the S. Comm. on Interior and Insular Affairs*, 94th Cong. 262 (1976) (statement of Sen. Hubert Humphrey, Chairman, S. Comm. on Agriculture and Forestry).

the planning process shall be accomplished with improved opportunity for public participation at all levels.”⁵⁶ By requiring public and scientific involvement in forest planning, NFMA changed the Forest Service’s decision-making process and opened the agency’s decisions to public accountability and judicial scrutiny.⁵⁷ Congress designed the planning process to recalibrate the weight the Forest Service gave to commodity user interests by involving the public at an early point in the Forest Service’s land management decisions.⁵⁸

NFMA amended the RPA by directing the Secretary of Agriculture to develop land and resource management plans, consistent with MUYSA,⁵⁹ for each unit of the national forest system.⁶⁰ In addition, NFMA required the Forest Service to promulgate regulations to govern land plans according to the criteria Congress specified in the statute.⁶¹ Among the latter was a directive that the agency assemble a committee of scientists to supply scientific and technical advice to the agency concerning its planning regulations.⁶² Other NFMA provisions restricted timber harvesting,⁶³ directed the Forest Service to adopt procedures to ensure preparation of forest plans consistent with NEPA,⁶⁴ and required consistency of all contracts and use permits with forest land management plans.⁶⁵

B. BLM Land Planning

Congress created the Bureau of Land Management (BLM) in 1946 out of the ashes of the General Land Office (established in 1812) and the Grazing Service (established in 1934).⁶⁶ BLM now manages

56. S. REP. NO. 94-893, at 34 (1976), as reprinted in 1976 U.S.C.C.A.N. 6693.

57. WILKINSON & ANDERSON, *supra* note 4, at 72.

58. *See id.* at 69-72 (discussing how congressional concerns regarding an overemphasis on timber production instead of over other uses influenced NFMA’s planning provisions).

59. 16 U.S.C. § 1604(a) (2000).

60. *Id.* §§ 528-531.

61. *Id.* § 1604(g). For example, NFMA restricted timber harvesting, required the Forest Service to adopt procedures for ensuring that forest plans were prepared consistent with NEPA, required the Forest Service to take inventory of resources, and required that all contracts and permits allowing use of a national forest conform to the forest’s land management plan. *Id.* §§ 1604(g), (i).

62. *Id.* §1604(h)(1).

63. *Id.* §1604(g)(3).

64. *Id.* §1604(g)(1).

65. *Id.* §1604(i).

66. Reorganization Plan No. 2 of 1946, 11 Fed. Reg. 7876 (July 20, 1946). *See* Al Pierson, *The Bureau of Land Management: A Half-Century of Challenges and Change*, 32 LAND & WATER L. REV. 345, 345 (1997) (discussing the controversy over raising grazing fees from a

262 million acres of land, almost all located in the West.⁶⁷ Formal BLM planning began in the wake of the 1964 Classification and Multiple Use Act, which required preparation of what were called “management framework plans” (MFPs).⁶⁸ NEPA, signed into law on the first day of 1970, imposed new planning obligations on the agency,⁶⁹ especially after a D.C. federal district court ruled that the agency could not meet its obligations under NEPA by preparing a single EIS for its entire grazing program but instead had to prepare EISs on all proposed plans that could produce significant environmental effects.⁷⁰ But BLM prepared no systematic, detailed land plans until after 1976, when Congress passed FLPMA, requiring preparation of resource management plans (RMPs) with extensive requirements for public participation.⁷¹

Congress designed planning as the centerpiece of BLM land management.⁷² FLPMA required BLM’s RMPs to meet nine criteria, the majority of which were quite vague, allowing BLM a great deal of

nickel to fifteen cents per animal unit month that led to the decision to merge the Grazing Service with the General Land Office to create the BLM).

67. U.S. Government Manual, *supra* note 33, at 251.

68. 43 U.S.C. §§ 1411-1418 (expired 1970); see Coggins, *The Developing Law of Land Use Planning*, *supra* note 6, at 307 (discussing the origins of formal land use planning on the federal lands).

69. Pub. L. 91-190, 83 Stat. 852. For a more detailed discussion of early BLM planning, see Coggins, *The Developing Law of Land Use Planning*, *supra* note 6, at 317-19.

70. *Natural Res. Def. Council v. Morton*, 388 F. Supp. 829 (D. D.C. 1974), *aff’d per curiam*, 527 F.2d 1386 (D.C. Cir.), *cert. denied*, 427 U.S. 913 (1976).

71. More than a decade after FLPMA’s planning requirements came into force, commentators lamented the “inconsistent and difficult” planning efforts undertaken by BLM, which resulted in resource management plans being prepared for just 12 out of 162 planning areas by 1987, even under the “drastically revised” planning regulations devised to streamline planning by limiting public participation promulgated under Interior Secretary Watt. Coggins, *The Developing Law of Land Use Planning*, *supra* note 6, at 318. For a discussion of the Department of Interior policies under Secretary Watt, see George Cameron Coggins & Doris K. Nagel, “*Nothing Beside Remains*”: *The Legal Legacy of James G. Watt’s Tenure as Secretary of Interior on Federal Land Law and Policy*, 17 B.C. ENVTL. AFF. L. REV. 473, 489 (1990) (chronicling Secretary Watt’s attempts to “change the way Interior conducted its business”).

72. Coggins, *supra* note 5, at 15. The House Report on FLPMA stated that by legislating formalized policies for managing the public lands, the “proper multiple use mix of retained public lands is to be achieved by comprehensive land use planning, coordinated with State and local planning. Planning decisions are to be made only after full opportunity for public involvement in the planning process. Management and disposal of the public lands are to be consistent with land use plans so developed.” H. REP. NO. 94-1163, at 2 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6175, 6176. Like the Forest Service under NFMA, BLM was to “treat land use planning as dynamic and subject to change with changing conditions and values.” *Id.* at 6179. Further, the House intended the public participation requirements in FLPMA would not diminish BLM’s authority and responsibilities to manage the public lands, but instead to “provide means for input by the interested public before decisions are made.” *Id.* at 6181.

discretion.⁷³ Planning was a central focus of FLPMA, a statute in which Congress declared it was national policy to retain federal ownership of public lands and requiring any disposition of federal land to be “a result of the land use planning procedure[s].”⁷⁴ FLPMA also directed BLM to manage lands “in accordance with” land use plans.⁷⁵ BLM regulations require the “future management authorizations and actions [to] . . . conform to the approved plan.”⁷⁶ Congress’s integrated planning was also folded into a number of FLPMA’s substantive provisions regarding land acquisition, disposal, and conveyance.⁷⁷ FLPMA also required public participation to be a central element of the FLPMA land planning process.⁷⁸

73. Coggins, *The Developing Law of Land Use Planning*, *supra* note 6, at 321-23. According to 43 U.S.C. § 1712(c) (2000), the land use plans must

1) use and observe the principle of multiple use and sustained yield . . . 2) use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences; 3) give priority to the designation and protection of areas of critical environmental concern; 4) rely, to the extent it is available, on the inventory of the public lands, their resources, and other values; 5) consider present and potential uses of the public lands; 6) consider the relative scarcity of the values involved and the availability of alternative means . . . ; 7) weigh long-term benefits to the public against short-term benefits; 8) provide for compliance with applicable pollution control laws . . . ; and 9) to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities . . . with the land use planning . . . of other [federal, state, and local agencies]

43 U.S.C. § 1712(c) (2000). *See also* Bureau of Land Management, *Land Use Planning Handbook 1* (Mar. 11, 2005) (establishing policies and guidance for BLM land use planning under FLPMA).

74. 43 U.S.C. § 1701(a)(1) (2000). The statute also called for creating inventories of resources on public lands such that “their present and future use is projected through a land use planning process” and for setting “goals and objectives [to] be established by law as guidelines for public land use planning.” *Id.* §§ 1701(a)(2), (7). BLM is to rely on these inventories in the planning process “to the extent [an inventory] is available.” *Id.* § 1712(c)(4).

75. *Id.* § 1732(a). FLPMA made an exception to the requirement that BLM manage lands consistent with the land plan, when available, “where a tract of such public land has been dedicated to specific uses according to any other provisions of law,” in which case it “shall be managed in accordance with such law.” *Id.*

76. 43 C.F.R. § 1610.5-3(a) (2006).

77. Coggins, *The Developing Law of Land Use Planning*, *supra* note 6, at 323-25. FLPMA requires that land sales, acquisitions, and conveyances by states must be consistent with land use plans. 43 U.S.C. §§ 1713(a), 1715(b), 1721(c)(1) (2000). Additional FLPMA provisions required planning in BLM wilderness designation and in managing individual grazing permits. *Id.* §§ 1782, 1752(d).

78. FLPMA directs BLM to “allow an opportunity for public involvement and by regulation shall establish procedures . . . to comment upon and participate in the formulation of plans and programs relating to the management of the public lands. 43 U.S.C. § 1712(f). Section 103(d) of FLPMA defines “public involvement” as “the opportunity for participation by affected citizens in rule making, decision making, and planning with respect to the public lands.” *Id.* § 1702(d).

C. Federal Investment in Land Planning

Congress and federal land management agencies have made a multi-million dollar investment in land use planning since the late 1970s. When the Forest Service began to develop forest plans under NFMA, the agency estimated that each plan would cost around \$1 million⁷⁹ — roughly \$3.6 million in 2007 dollars when adjusted for inflation.⁸⁰ By the mid-1980s, however, actual planning costs climbed to more than \$3 million per plan—or \$5.76 million in 2007 dollars—and land planning consumed approximately ten percent of the budget of many national forests.⁸¹ One estimate had the Forest Service spending \$300 million on plan development to meet NFMA’s goal of completing plans for every national forest by 1985.⁸² The Forest Service now predicts that plans developed under its 2005 planning rule each will carry a price tag of about \$9 million.⁸³ Even monitoring and evaluation requirements in forest plans are costly, with the Forest Service estimating that these costs under the new planning rule will total around \$45 million, or about \$360,000 per plan.⁸⁴

79. RANDAL O’TOOLE, REFORMING THE FOREST SERVICE 176 (1988).

80. Dollar values have been adjusted for inflation to reflect 2007 values using the U.S. Department of Labor Bureau of Labor Statistics inflation calculator based on the Consumer Price Index. The inflation calculator is available at <http://www.bls.gov/cpi/> (last visited Sept. 21, 2007).

81. O’TOOLE, *supra* note 79, at 176.

82. *Id.* The \$300 million figure was based on the 123 plans slated for completion by 1985, estimating a \$2 million per-plan cost for each of the sixty-plus plans that were not complete by the deadline. *Id.* at 24. Adjusted for inflation, this figure would amount to \$576 million in 2007 dollars. See 16 U.S.C. § 1604(c) (2000) (requiring the Secretary of Agriculture to “attempt” to incorporate NFMA standards and guidelines into land plans for all units of the national forests by Sept. 30, 1985). Other estimates of planning costs have been much lower, with one suggesting that the Forest Service had spent just \$250 million on planning by 1996. Steven Quarles, *The Problem with Planning, in THE NATIONAL FOREST MANAGEMENT ACT IN A CHANGING SOCIETY* 135 (1998). Mr. Quarles presented the oral arguments to the Supreme Court for the intervening industry groups in *Ohio Forestry*. U.S. Supreme Court Media, *Ohio Forestry Association v. Sierra Club*, http://www.oyez.org/cases/1990-1999/1997/1997_97_16/ (last visited Sept. 21, 2007).

83. U.S. FOREST SERVICE & BUSINESS GENETICS, A BUSINESS EVALUATION OF THE 2000 AND PROPOSED NFMA PLANNING RULES 25 (2002). In comparison, the report estimated that plan revisions developed under the 2000 planning rule would have cost \$12.9 million. *Id.* See also Robert Keiter, *Public Lands and Law Reform: Putting Theory, Policy, and Practice in Perspective*, 2005 UTAH L. REV. 1127, 1189-90 (2005) (discussing cost and procedural hurdles in federal land planning). Some estimates have placed recent planning costs slightly lower, at \$5 to \$7 million per plan. See *In One of His Last Acts, Bosworth Defends Planning Rule*, PUBLIC LAND NEWS, Jan. 19, 2005, at 5.

84. USDA Forest Service, Cost-Benefit Analysis: The Final Rule (36 CFR 219) for National Forest Land Management Planning 22 (2005), <http://www.fs.fed.us/emc/nfma/includes/cba2.pdf> (last visited Sept. 21, 2007).

By 1995, the Forest Service had prepared forest plans for all of the 155 national forests under its management.⁸⁵ Because forest plans must be revised and reissued at least every fifteen years,⁸⁶ most forest plans are in their second generation.⁸⁷ In 2005, the Forest Service claimed that it had prepared 150 forest plans and plan revisions,⁸⁸ and the agency anticipated completing another 100 forest plans and plan revisions during the ensuing decade.⁸⁹ Using a conservative estimate of an adjusted \$5.8 million cost per plan, the Forest Service has already spent \$870 million on planning alone. Budget appropriations for Forest Service land management planning have seen a slight, but steady, decline during the Bush Administration, with the 2008 budget proposal requesting \$52.6 million for land management planning, along with an additional \$166.2 million for monitoring and evaluation in the national forest system.⁹⁰ Yet land management planning

85. National Forest System Land and Resource Management Planning, 60 Fed. Reg. 18,886 (Apr. 13, 1995). At the time the Forest Service issued the 1995 Federal Register notice, forest plans had been developed for all but four national forests: the Klamath, Six Rivers, Mendocino, and Shasta-Trinity National Forests. *Id.* Forest plans for these forests, all located in Northern California, were approved by the end of 1995. USDA Forest Service, Land and Resource Management Plan, Klamath National Forest, 1995; Shasta-Trinity National Forest, Land and Resource Management Plan, 1995; Mendocino National Forest, Forest Management Plan, 1995; Six Rivers National Forest LRMP, 1995.

86. 16 U.S.C. § 1604(f)(5) (2000).

87. *See* USDA Forest Service, Schedule of Forest Service Land Management Plan Revisions & New Plans, Apr. 2, 2007, http://www.fs.fed.us/emc/nfma/includes/LRMP_schedule.pdf (last visited September 21, 2007) (listing land management plans that have been revised, are in the process of revision, or are in need of revision).

88. *See* National Forest System Land Management Planning, 70 Fed. Reg. 1023, 1024 (Jan. 5, 2005) (stating that the Forest Service has prepared 150 forest plans and plan revisions). Although the Forest Service has prepared a plan for each of the national forests and grasslands that it manages, the agency has issued a single plan covering multiple areas in some instances. This practice appears to be most prevalent in plans for forests and grasslands in the Southern (Region 8) and Rocky Mountain (Region 2) regions. In Region 2, for example, one plan includes the Arapaho and Roosevelt National Forests, along with the Pawnee National Grassland, and another single plan covers the Kiowa, Rita Blanca, Black Kettle, and McClellan Creek National Grasslands. USDA Forest Service, Arapaho & Roosevelt National Forests, Pawnee National Grassland, <http://www.fs.fed.us/r2/arnf/projects/> (last visited May 16, 2007); Cibola National Forest, Projects & Plans, <http://www.fs.fed.us/r3/cibola/projects/index.shtml> (last visited May 16, 2007). In Region 8, some plans combine individual forests, while other plans include all the national forest land in a particular state. USDA Forest Service, Forest Planning in the Southern Region, http://www.fs.fed.us/r8/planning/status_of_plans.shtml (last visited May 16, 2007).

89. National Forest System Land Management Planning, 70 Fed. Reg. at 1024.

90. UNITED STATES DEPARTMENT OF AGRICULTURE FOREST SERVICE, FISCAL YEAR 2008, PRESIDENT'S BUDGET OVERVIEW D-2 (2007) [hereinafter FOREST SERVICE FY2008 BUDGET], available at <http://www.fs.fed.us/publications/budget-2008/fy2008-forest-service-budget-overview.pdf>. These figures show a slight decline from 2006, when the Forest Service

consumes only a small fraction of the Forest Service's \$4.6 billion 2008 budget, just over one percent of the agency's annual budget.⁹¹

Funding for BLM land planning also has been in decline under the Bush Administration, dropping from a budgeted \$50 million in 2006 to a projected budget of \$47 million for the fiscal year 2008.⁹² Because BLM's annual budget, at \$1.85 billion for 2008,⁹³ is less than half of that of the Forest Service, planning encompasses a slightly larger proportion of the agency's annual budget, at roughly 2.5 percent. BLM RMPs have averaged three to four years to complete, at an approximate cost of \$2.5 million to \$4 million per plan.⁹⁴ Assuming an adjusted \$3 million per plan, BLM has spent approximately \$486 million on planning to date.

In 2001, BLM launched an effort to update all of its 162 land plans within a decade.⁹⁵ If it completes all these revisions, BLM will spend at least another \$512 million on land planning by 2011.⁹⁶ Together, then, BLM and the Forest Service have since the mid-1970's invested more than \$1 billion in developing land management plans and currently spend more than \$100 million combined annually on plan revisions.

received \$57.7 for land management planning and \$166.2 million for monitoring and evaluation. *Id.* By comparison, in 2002, the Forest Service appropriated \$70.358 million for land management planning; in 2003, the figure climbed to \$72.158 million, but dropped back down to \$70.868 million for 2004. UNITED STATES DEPARTMENT OF AGRICULTURE FOREST SERVICE, FISCAL YEAR 2004, BUDGET JUSTIFICATION I-20, available at <http://www.taxpayer.net/forest/USFSFY04BudgetJustification.pdf>.

91. FOREST SERVICE FY2008 BUDGET, at D-5. In comparison, Forest Service spending on wildland fire management has increased from 13% of the agency's annual budget in 1991 to 45% of the 2008 budget. *Id.* at 3.

92. U.S. OFFICE OF MGMT. AND BUDGET, DETAILED INFORMATION ON THE BUREAU OF LAND MANAGEMENT – LAND USE PLANNING ASSESSMENT, <http://www.whitehouse.gov/omb/expectmore/detail/10003707.2005.html>.

93. *See Forest Service Gets Little Public Help in Money Bill Run-Up*, PUBLIC LAND NEWS, May 4, 2007, at 3 (noting that dozens of witnesses voiced their support of BLM programs before the U.S. House subcommittee on Interior appropriations). Like the Forest Service, BLM also must devote a large chunk of its annual budget to wildland fire management, with the \$801.8 million marked for fire suppression encompassing 43% of BLM's 2008 budget. *See* Press Release, U.S. Department of Interior, President's Budget Will Improve National Parks, Working Landscapes, Indian Education and Safety (Feb. 5, 2007), http://www.doi.gov/news/07_News_Releases/070205b.html.

94. *See Forest Service Gets Little Public Help in Money Bill Run-Up*, PUBLIC LAND NEWS, May 4, 2007, at 3.

95. U.S. Dept. of Interior, Bureau of Land Management, Land Use Planning, <http://www.blm.gov/planning/policy.html> (last visited Apr. 13, 2007).

96. This figure is based on an estimated cost of \$3.2 million for each of the 162 BLM land plans.

II. *NORTON V. SOUTHERN UTAH WILDERNESS ALLIANCE*: UNDERMINING FEDERAL LAND PLANNING

In 2004, in *Norton v. Southern Utah Wilderness Alliance* (SUWA),⁹⁷ the Supreme Court placed a substantial roadblock in the way of members of the public seeking judicial review of federal land use plans. A unanimous Court, in an opinion by Justice Scalia, reversed the Tenth Circuit and rejected environmental claims, ruling that commitments BLM made in its land use plans were not generally enforceable.⁹⁸ The SUWA decision rested on the Court's conclusion that the Administrative Procedure Act's promise to compel agency action extended only to "discrete" agency actions,⁹⁹ consistent with Justice Scalia's judicial philosophy of protecting the Executive from public challenges through citizen suits.¹⁰⁰ Scalia's reluctance to recognize citizens' standing to challenge public land management decisions was evident in his 1990 opinion for the Court in *Lujan v. National Wildlife Federation*, where he concluded that environmentalists lacked standing to bring a programmatic challenge against a series of BLM actions in a single lawsuit.¹⁰¹ Eight years after *Lujan*, in *Ohio Forestry v. Sierra Club*, the Court decided that forest plans were not usually ripe for judicial review outside the context of a site-specific action.¹⁰² Considered together, *Lujan*, *Ohio Forestry*, and

97. *Norton v. S. Utah Wilderness Alliance (SUWA)*, 542 U.S. 55, 72 (2004).

98. See *infra* notes 144-67, and accompanying text (discussing the Court's reasoning in SUWA).

99. SUWA, 542 U.S. at 72.

100. See Brett Birdsong, *Justice Scalia's Footprints on the Public Lands*, 83 DEN. U. L. REV. 259, 285 (2005) (arguing that "by relying on the traditional elements of mandamus as a limit to the right to judicial review of agency nonfeasance under the APA," Justice Scalia has advanced his agenda of protecting the executive branch from judicial oversight). Other commentators have found Scalia's reasoning to be suspect. See, e.g., William D. Araiza, *In Praise of a Skeletal APA: Norton v. Southern Utah Wilderness Alliance, Judicial Remedies for Agency Inaction, and the Questionable Value of Amending the APA*, 56 ADMIN. L. J. 979, 985 (2004) (describing the Court's restriction of the APA provision allowing agency inaction to be reviewable to be limited to "discrete" actions to be "remarkably weak," in light of the APA's overarching policies and purposes aimed at maximizing opportunities "to seek meaningful judicial review consistent with a respect for the discretion retained by the agency"); Justin C. Konrad, Comment, *The Shrinking Scope of Judicial Review in Norton v. Southern Utah Wilderness Alliance*, 77 U. COLO. L. REV. 515, 534 (2006) (arguing that the FLPMA's non-impairment mandate satisfied the *Lujan* requirements for "agency action" relied on in the Court's SUWA opinion); Noah Perch-Ahern, Comment, *Broad Programmatic Attacks: SUWA, the Lower Courts' Responses, and the Law of Agency Inaction*, 18 TUL. ENVTL. L. J. 411, 422-29 (2005) (discussing early responses to SUWA in the lower courts).

101. 497 U.S. 871, 890 (1990).

102. 523 U.S. 726, 732 (1998). See *infra* notes 110-18, and accompanying text (discussing the Court's *Ohio Forestry* decision).

SUWA placed serious constraints on the public's ability to seek judicial review of BLM and Forest Service land use planning decisions.

A. *SUWA's Predecessors: Lujan v. National Wildlife Federation and Ohio Forestry Association v. Sierra Club*

Justice Scalia began to lay the groundwork for the Court's *SUWA* decision with his 1990 opinion in *Lujan v. National Wildlife Federation*, which restricted citizen suit standing in public land cases.¹⁰³ In *Lujan*, environmentalists challenged a series of BLM decisions to reclassify land withdrawals under FLPMA (these reclassifications opened up previously withdrawn lands to potential mineral development). The environmentalists claimed that this "land withdrawal review program" violated FLPMA, NEPA, and the APA.¹⁰⁴ Although the district court held that the environmentalists lacked standing because they failed to demonstrate injury-in-fact,¹⁰⁵ the D.C. Circuit reversed, concluding that the record was "more than adequate" to establish standing.¹⁰⁶ But the Supreme Court reversed, ruling that the environmentalists lacked standing to challenge BLM's "land withdrawal review program" because, according to the agency, there was in fact no such program.¹⁰⁷ Justice Scalia's opinion for the Court emphasized separation of powers concerns: to allow judicial intervention in executive decision making on the programmatic level would, he maintained, exceed the "traditional" role of the courts.¹⁰⁸

103. 497 U.S. 871 (1990); see Brett Birdsong, *Road Rage and R.S. 2477: Judicial and Administrative Responsibility for Resolving Road Claims on Public Lands*, 56 HASTINGS L. J. 523, 575-78 (2005) (discussing Justice Scalia's approach to interpreting when an agency regulation is retroactive based on whether the conduct occurs before the regulation's adoption).

104. 497 U.S. at 877. See 43 U.S.C. § 1714 (2000) (authorizing BLM to make or modify land withdrawals). *Id.* § 1712(d) (authorizing BLM to review land classifications as part of the land use planning process).

105. *Nat'l Wildlife Fed'n v. Burford*, 699 F. Supp. 327, 332 (D. D.C. 1988).

106. *Nat'l Wildlife Fed'n v. Burford*, 878 F. 2d 422, 425 (D.C. Cir. 1989). The D.C. Circuit had earlier concluded the environmentalists had standing in this suit when it upheld a preliminary injunction issued by the district court preventing BLM from making any new withdrawal revocations or classification terminations. 835 F.2d 305, 314 (D.C. Cir. 1987), *reh'g denied*, 844 F.2d 889 (D.C. Cir. 1988).

107. *Lujan*, 497 U.S. at 890.

108. *Id.* at 894. Scalia wrote that "[e]xcept where Congress explicitly provides for [the Court's] correction of the administrative process at a higher level of generality, we intervene in the administration of the laws only when, and to the extent that, a specific 'final agency action' has an actual or immediately threatened effect." *Id.* See also Birdsong, *supra* note 100, at 278 (discussing Scalia's *Lujan* concerns over programmatic judicial review of executive agency decisions).

Thus, the Court rejected the environmentalists' programmatic challenge, leaving the environmentalists with the burden of challenging each individual revocation of land withdrawal.¹⁰⁹

Eight years later, in *Ohio Forestry Association, Inc. v. Sierra Club* (1998), a unanimous Court held that an environmental challenge to timber cutting goals in a national forest plan was not ripe for judicial review.¹¹⁰ The Sierra Club had challenged the Wayne National Forest Plan for allowing excessive logging in general, and excessive clearcutting in particular.¹¹¹ The district court ruled in favor of the Forest Service on the merits.¹¹² But after deciding that the environmentalists' claims were ripe, the Sixth Circuit reversed the district court because it concluded that the Forest Service violated NFMA by favoring clearcutting in its forest plan.¹¹³

In a unanimous opinion by Justice Breyer, the Supreme Court reversed, holding that the environmental claims were not ripe because forest plans "do not command anyone to do anything or to refrain from doing anything; they do not grant, withhold, or modify

109. *Lujan*, 497 U.S. at 894. After *Lujan*, a split developed in the appellate courts over whether land use plans were reviewable by the courts. While both the Seventh and Ninth Circuits held that suits challenging land use plans were ripe, the Eighth and Eleventh Circuits rejected claims challenging land use plans on grounds that the challenges were not ripe outside the context of site-specific actions. See *Wilderness Soc'y v. Alcock*, 83 F.3d 386, 390 (11th Cir. 1996) (interpreting *Lujan* to indicate that a challenge to the forest plan for the Cherokee National Forest was not ripe); *Sierra Club v. Marita*, 46 F.3d 606, 613-14 (7th Cir. 1995) (holding that a forest plan was ripe for review and distinguishing *Lujan*); *Sierra Club v. Robertson*, 28 F.3d 753, 758-59 (8th Cir. 1994) (concluding that environmentalists lacked standing to challenge the forest plan for the Ouachita National Forest absent a site-specific action, analogizing challenging a forest plan to the type of programmatic challenge the Court rejected in *Lujan*); *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1517-19 (9th Cir. 1992) (distinguishing *Lujan* and holding that environmentalists had standing to challenge the forest plan for the Idaho Panhandle National Forest). See also Trent Baker, *Judicial Enforcement of Forest Plans in the Wake of Ohio Forestry*, 21 PUB. LAND & RESOURCES L. REV. 81, 86 (2000) (discussing the split that developed in the circuits following *Lujan* that led up to the Court's *Ohio Forestry* decision).

110. 523 U.S. 726, 739 (1998).

111. *Id.* at 728-29. The land plan for the Wayne National Forest allowed logging to take place on 126,000 acres of the 178,000 acre forest, with a projected timber harvest of 8000 acres, 5000 acres of which were to be clear-cut. *Id.* (citing USDA Forest Service, Land and Resource Management Plan, Wayne National Forest A-13 to A-17 (1987)).

112. See *Sierra Club v. Robertson*, 845 F. Supp. 485, 503 (S.D. Ohio 1997) (concluding that the Forest Service had fulfilled its statutory planning requirements under NFMA in adopting the forest plan).

113. *Sierra Club v. Thomas*, 105 F.3d 248, 250-51 (6th Cir. 1997). The Sixth Circuit concluded that the Forest Service failed to comply with NFMA's restrictions on clearcutting because the planning process favored clearcutting and prioritized timber interests over recreation and other uses of the forest, rejecting a Forest Service argument that clearcutting would "provide new opportunities for recreation." *Id.*

any formal legal license, power, or authority; they do not subject anyone to any civil criminal liability; they create no legal rights or obligations.”¹¹⁴ The Forest Service had argued that the forest plan’s clearcutting provision functioned only as guidance without making a binding commitment; therefore, a challenge could be ripe only in the context of a site-specific action because the plan provision had no on-the-ground effect.¹¹⁵ Justice Breyer adopted the government’s argument in his opinion, characterizing forest plans as mere “tools for agency planning and management” and concluding that a challenge to a plan’s terms was not ripe for judicial review until brought in the context of a site-specific action.¹¹⁶ The environmentalists did achieve a small victory when the Court held that if a plan made a commitment to a particular resource, such as authorizing ORV use, that issue would be ripe.¹¹⁷ Moreover, the Court ruled that the question of whether the Forest Service complied with NEPA was also ripe at the time the Forest Service approves a land plan.¹¹⁸

After *Ohio Forestry*, challenges to plans alleging procedural harm,¹¹⁹ as well as claims that a plan’s provisions would result in

114. *Ohio Forestry*, 523 U.S. at 733. Justice Breyer noted that he was paraphrasing *United States v. Los Angeles & Salt Lake R.R. Co.*, 273 U.S. 299, 309-10 (1927), where a railroad challenged a “final report” on the value of its properties that the Interstate Commerce Commission prepared under what the Court referred to as the “Valuation Act,” actually a series of amendments to the Interstate Commerce Act of 1887, 24 Stat. 379, requiring the Interstate Commerce Commission to investigate and make findings regarding the value of railroad properties. *Id.* at 307.

115. Brief for the Federal Respondents at 32-33, *Ohio Forestry*, 523 U.S. 726 (No. 97-16).

116. *Ohio Forestry*, 523 U.S. at 737.

117. *Id.* at 738-39. See *infra* notes 120-121 (discussing challenges to land use plans not barred by ripeness concerns after *Ohio Forestry*). This result would also seem to apply to a plan’s approval of a continuation of authorized grazing levels.

118. A NEPA challenge to a land plan would be ripe because NEPA “simply guarantees a particular procedure, not a particular result.” *Ohio Forestry*, 523 U.S. at 737. Therefore, a claim alleging procedural injury arising from an agency’s failure to comply with NEPA in developing a land plan would be ripe. Justice Breyer further noted that had the Sierra Club raised the claims that the forest plan’s approval of ORV use, or its failure to close roads or provide for additional trails, in its complaint “the ripeness analysis in this case with respect to those provisions of the Plan that produce the harm would be significantly different.” *Id.* at 738.

119. “[P]rocedural harm” results when the injury arises from an agency’s failure to follow statutorily required procedures, such as violating NEPA. See Baker, *supra* note 109, at 105-06 (concluding that although *Ohio Forestry* recognized that claims of NEPA violations in the preparation of forest plans, plaintiffs may also be able to show procedural harm under NFMA, FLPMA, or the ESA); see also Barton J. Birch, *Comment: Ohio Forestry and What It Means for the Future*, 37 IDAHO L. REV. 141, 162-66 (2000) (discussing lower courts’ upholding challenges to land use plans as ripe in limited situations after *Ohio Forestry*, but concluding that challenges to substantive plan provisions outside the context of a site-specific action were not ripe).

immediate on-the-ground harm, such as authorization of ORV use,¹²⁰ could avoid dismissal on ripeness grounds.¹²¹ But substantive challenges to land plans outside the context of a site-specific action were no longer ripe, requiring members of the public who are dissatisfied with the content of land plans to bide their time until on-the-ground damage was imminent, no matter how inevitable that damage might have been at the planning stage.¹²²

B. The Conflict in SUWA: Unregulated ORV Use in WSAs

SUWA involved a conflict over off-road vehicle (ORV) use on wilderness study areas on BLM lands in Utah. In 1991, the Secretary of Interior recommended that Congress designate as wilderness 1.9 million acres of the 5.2 million acres of BLM land that the agency inventoried for wilderness characteristics in Utah.¹²³ BLM must manage a study area under consideration for wilderness designation as if it were designated wilderness until Congress makes a final

120. The Court noted that had the Sierra Club raised the argument that the forest plan's approval of ORV use, its failure to close roads, and its failure to provide for additional trails, those claims might not have been barred by ripeness doctrine because they could have resulted in injury to an interested party without additional action. *Ohio Forestry*, 523 U.S. at 738. By inference, this reasoning would also seem to apply to authorizing continuation of grazing.

121. Claims against site-specific actions authorized by land use plans would of course be ripe. See *Baker*, *supra* note 109, at 95-106 (cataloging lower court decisions in challenges to forest plans during the first two years after *Ohio Forestry*, and concluding that ripeness problems did not prevent plaintiffs from proceeding with claims of procedural harm or challenges alleging site-specific harm). One exception was in the Ninth Circuit, which adopted a broad interpretation of *Ohio Forestry*, concluding that a suit challenging the Forest Service's failure to implement the monitoring requirements in a plan was not ripe. *Ecology Ctr., Inc. v. United States Forest Serv.*, 192 F.3d 922, 926 (9th Cir. 1999).

122. See *Ohio Forestry*, 523 U.S. at 734 (explaining why broader, non-site-specific suits are not ripe by stating that "[t]he Sierra Club thus will have ample opportunity later to bring its legal challenge at a time when harm is more imminent and more certain").

123. In FLPMA, Congress directed the Secretary of Interior to evaluate all BLM roadless areas (not merely those in Utah), mostly greater than 5000 acres, for suitability for wilderness designation under the Wilderness Act, by Oct. 21, 1991. 43 U.S.C. § 1782(a) (2000). Based on that inventory, the Act required the Secretary to recommend, "from time to time," wilderness lands to the President, whom the statute then required to make recommendations to Congress within two years of receiving the Secretary's recommendation, as only Congress may designate land as wilderness. *Id.* §§ 1782(a),(b). See Final Wilderness Inventory Decision, 45 Fed. Reg. 75,602, 75,604 (Nov. 14, 1980) (dropping 3.2 million of the 5.2 million acres the BLM inventoried from further consideration as wilderness for lack of wilderness characteristics); Bureau of Land Management, UTAH STATE WILDERNESS STUDY REPORT 3 (1991) (recommending designation of 1.9 million acres); see also Michael C. Blumm, *The Bush Administration's Sweetheart Settlement Policy: A Trojan Horse Strategy for Advancing Commodity Production on Public Lands*, 34 ENVTL. L. REP. 10,397, 10,404 (2004) (discussing BLM's wilderness inventories in Utah, and noting that in the 1990s, environmentalists identified an additional 5.9 million acres of potential wilderness in Utah that BLM overlooked).

determination about an area's wilderness status.¹²⁴ These "wilderness study areas" (WSAs) must be roadless and otherwise "without permanent improvements or human habitation . . . with the imprint of man's work substantially unnoticeable" and encompass at least 5,000 acres, or be "of sufficient size as to make practicable its preservation and use in an unimpaired condition."¹²⁵ When Congress was unable to make final wilderness designations in Utah, FLPMA required BLM to manage the WSAs as *de facto* wilderness.¹²⁶ BLM's failure to do so could damage the wilderness characteristics of the WSAs, effectively preempting the congressional prerogative of designating those areas as wilderness.¹²⁷

Over the last two decades, ORV use has increased exponentially on public lands in Utah and around the country.¹²⁸ In 1999, environmentalists filed suit to prevent further damage to BLM lands, seeking to require the agency to limit ORV use in nine Utah WSAs under section 706(1) of the Administrative Procedures Act (APA),

124. See 43 U.S.C. § 1782(c). BLM issued an "interim management policy" on wilderness management in 1979. Interim Management Policy and Guidelines for Lands Under Wilderness Review, 44 Fed. Reg. 72,014 (Dec. 12, 1979) (requiring BLM to manage WSAs in a manner that ensures the wilderness values will not be impaired before Congress makes its final determination). See also *S. Utah Wilderness Alliance v. Norton (SUWA I)*, 301 F.3d 1217, 1225 n.4 (10th Cir. 2002) (describing how BLM interpreted FLPMA's nonimpairment mandate in its interim management policy for WSAs).

125. 16 U.S.C. §§ 1131(a)-(c) (2000).

126. See 43 U.S.C. § 1782(c) (2000) (requiring BLM to manage WSAs so as "not to impair the suitability of such areas for preservation as wilderness . . ."). Congress was not only unable to designate wilderness areas in Utah, it largely failed to do so throughout the West. Nearly twenty years later, the only BLM designated wilderness areas are in Arizona, Arizona Desert Wilderness Act of 1990, Pub. L. No. 101-628, 104 Stat. 4469, California, California Desert Protection Act of 1994, Pub. L. No. 103-433, 108 Stat. 4471, and in southern Nevada, outside Las Vegas, Clark County Conservation of Public Land and Natural Resources Act of 2002, Pub. L. No. 107-282, 116 Stat. 1994.

127. The Wilderness Act defines wilderness "as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain . . . an area of undeveloped Federal land retaining its primeval character and influence . . . affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable [and possessing] outstanding opportunities for solitude or a primitive or unconfined type of recreation . . ." 16 U.S.C. § 1131(c) (2000).

128. See *Norton v. S. Utah Wilderness Alliance (SUWA)*, 542 U.S. 55, 60 (2004). In 2004, the Forest Service estimated that approximately 42 million people in the United States use ORVs each year, more than double the number of ORV users two decades before. *Id.* Between 1998 and 2003, sales of ORVs doubled, with 900,000 new vehicles sold in the United States in 2003. *Id.* In Utah, ORV use has increased even more dramatically, with the number of registered ORVs in the state climbing from 9,000 in 1979 to 83,000 in 2000, to more than 120,000 in 2007. Southern Utah Wilderness Alliance, *Off-Road Vehicles: Searching for Balance and Quiet in Utah's Wilderness*, http://www.suwa.org/site/PageServer?pagename=work_orv (last visited Mar. 30, 2007).

which provides a cause of action to injured members of the public to “compel agency action . . . unreasonably delayed”.¹²⁹ The environmentalists argued that BLM had a “mandatory, nondiscretionary duty”¹³⁰ to conduct ORV monitoring in the Henry Mountains under the Factory Butte area land plan and to complete an ORV implementation plan for the San Rafael plan.¹³¹ The Factory Butte plan stated that because of existing damage, ORV use in the area “will be monitored and closed if warranted,” and also more generally provided for “use supervision and monitoring” in WSAs.¹³² In addition to including a similar ORV use monitoring provision, the San Rafael plan promised that an ORV implementation plan for the area “will be developed.”¹³³ The environmentalists charged that BLM failed to take a “hard look” at information about increased ORV use occurring in WSAs after plan approval to determine whether to supplement its outdated NEPA analysis for the areas, in order to evaluate the environmental effects of increased ORV activity.¹³⁴

Motorized recreationalists, the state of Utah, and a number of Utah counties intervened on the side of the federal government.¹³⁵ Although the district court criticized BLM for inadequately managing ORV use in Utah WSAs, writing that “the court might agree with [SUWA] that too little is done too slowly,” it concluded that BLM had not entirely abandoned its management duties, and therefore dismissed the environmentalists’ claims of failing to act under the APA.¹³⁶ The district court also rejected the plaintiffs’ NEPA claim, concluding that because the decision to supplement NEPA analysis is “the kind of factual question that implicates agency technical

129. *SUWA I*, 301 F.3d at 1223; 5 U.S.C. § 706(1) (2000). The APA states that “the reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed.” *SUWA I*, 301 F.3d at 1223.

130. *SUWA I*, 301 F.3d at 1222.

131. *Id.* at 1234.

132. See Henry Mountain Resource Area Off-Road Vehicle Implementation Plan (Sept. 1988), in Joint Appendix at 140, *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004) (No. 03-101); *SUWA*, 542 U.S. at 68.

133. See Final Resource Management Plan, San Rafael Resource Area (May 1991), in Joint Appendix at 154 *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004) (No. 03-101); 2003 U.S. Briefs 101, 154; *SUWA I*, 301 F.3d at 1234.

134. See *SUWA I*, 301 F.3d at 1237. BLM had not updated its NEPA analysis for any of the challenged land plans in more than a decade. *Id.*

135. *S. Utah Wilderness Alliance v. Babbitt*, No. 2:99CV852K, 2000 WL 33914094 at *1 (D. Utah Dec. 22, 2000).

136. *Id.* at *9.

expertise,” the court would defer to the agency’s judgment and not require BLM to supplement its NEPA analysis.¹³⁷

The Tenth Circuit reversed in 2002, holding that FLPMA imposed a nondiscretionary duty on BLM to manage WSAs to prevent impairment of wilderness values, and that BLM’s management may have violated this standard.¹³⁸ Observing that under the APA a court may compel an agency to undertake an “unreasonably delayed or unlawfully withheld” action, even without a challenge to a site-specific action, the court ruled that efforts toward partial compliance did not prevent a court from compelling agency action under the APA.¹³⁹ Further, the court held that BLM had a “mandatory, nondiscretionary duty” to comply with the ORV use monitoring provision in the Factory Butte plan and the ORV implementation provision in the San Rafael plan.¹⁴⁰ The Tenth Circuit also reversed the district court’s dismissal of the NEPA claim, ruling that the lower court misconstrued the claim that BLM failed to take a “hard look” at whether it should supplement its NEPA analysis as a claim requesting the court to compel BLM to actually supplement its analysis.¹⁴¹ The Supreme Court accepted the government’s petition for certiorari¹⁴² and unanimously reversed the Tenth Circuit.¹⁴³

C. The Supreme Court’s Decision

The Supreme Court considered three issues: (1) whether BLM violated FLPMA by failing to manage WSAs in a manner that would prevent impairment; (2) whether BLM violated provisions in its land plans calling for monitoring ORV use; and (3) whether BLM violated

137. *Id.*

138. *SUWA I*, 301 F.3d at 1224. BLM argued that it could not be compelled to act because it had taken some steps to address ORV activity by closing some routes and posting signs prohibiting ORV use in others. The Tenth Circuit rejected this argument, holding that partial compliance that falls short of satisfying an actual legal requirement was insufficient to moot a claim to compel an agency to fulfill its obligations. *Id.* at 1231.

139. *Id.* at 1235-36.

140. *Id.* at 1236.

141. *Id.* at 1239. A dissent agreed with the majority that BLM could be compelled to take a hard look to consider whether it should supplement its NEPA analysis. *Id.* at 1240 (McKay, C.J., concurring in part and dissenting in part).

142. *Norton v. S. Utah Wilderness Alliance*, 540 U.S. 980 (2003). Motorized recreationalists also petitioned for *certiorari*. See *Utah Shared Access Alliance v. S. Utah Wilderness Alliance (SUWA)*, 542 U.S. 917 (2004) (remanding the case after the Court reversed the Tenth Circuit decision in *SUWA I*).

143. *SUWA*, 542 U.S. at 56 (2004).

NEPA by failing to take a “hard look” at whether it was necessary for the agency to produce a supplemental EIS for land plans in areas experiencing a substantial increase in ORV use that was not anticipated in the initial EIS on the land plans.¹⁴⁴ In an opinion by Justice Scalia, the Court unanimously ruled in favor of BLM on all counts.¹⁴⁵

The Court first addressed when a federal court may order an agency to take action under the APA, which authorizes suits by anyone “suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.”¹⁴⁶ “Agency action,” under the APA, is “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or *failure to act*.”¹⁴⁷ Justice Scalia first concluded the APA authorizes actions against an agency for a failure to act only when it fails to take one of the “discrete agency actions” mentioned above.¹⁴⁸ Second, Scalia acknowledged that the APA provided courts with the authority to compel agencies to take action “unlawfully withheld” under a specific statute, which also amounted to a “discrete” action.¹⁴⁹ Thus, under *SUWA*, there are two forms of discrete action that are actionable under the APA: one that is specifically mentioned in the APA itself;¹⁵⁰ and one that is specifically required of an agency by another statute.¹⁵¹ These limitations on suits

144. *Id.* at 60-61.

145. *Id.* at 56.

146. 5 U.S.C. § 702 (2000). Only final agency actions may be challenged under the APA. *Id.* § 704.

147. *Id.* § 551(13) (emphasis added).

148. *SUWA*, 542 U.S. at 62.

149. *Id.* Justice Scalia concluded that “discrete agency actions” were those which fit within the definition of the different categories of “agency action,” as defined by the APA. *Id.* The APA defines “agency action” to include “the whole or part of an agency rule, order, license, sanction, [or] relief.” 5 U.S.C. § 551(13) (2000). Under the APA, a “rule” includes “an agency statement of . . . future effect designed to implement, interpret, or prescribe law or policy.” *Id.* § 551(4). An “order” includes “a final disposition . . . in a matter other than rulemaking.” *Id.* § 551(6). A “license” means “a permit . . . or other form of permission.” *Id.* § 551(8). A “sanction” includes a “prohibition . . . or . . . taking [of] other compulsory or restrictive action.” *Id.* § 551(10). “Relief” includes a “grant of money, assistance, license, authority” or “recognition of a claim, right, or immunity,” or the “taking of other action on the application or petition or, and beneficial to a person.” *Id.* § 551(11).

150. *SUWA*, 542 U.S. at 62; 5 U.S.C. § 551(13); *see also supra* note 148 and accompanying text.

151. *SUWA*, 542 U.S. at 63; *see also supra* note 147 and accompanying text.

against agencies are, in Justice Scalia's words, necessary to avoid "broad programmatic attack[s]" on agency decision making.¹⁵²

Scalia did acknowledge the mandatory nature of FLPMA's requirement that BLM manage WSAs in a manner that prevents impairment of wilderness characteristics.¹⁵³ But because he thought BLM had "a great deal of discretion in deciding how to achieve it," the requirement was not the type of "discrete" action which a federal court may compel agency action under the APA.¹⁵⁴

The Court also rejected SUWA's claim that BLM violated the land plans' promises that ORV use "will be monitored and closed if warranted" by failing to monitor ORV use.¹⁵⁵ Because BLM completed a route designation plan for the San Rafael area by the time the case reached the Court, Justice Scalia declared the claims regarding that plan to be moot. Concerning BLM's ORV use monitoring in the Henry Mountains under the Factory Butte land plan,¹⁵⁶ Justice Scalia thought that "allowing general enforcement of plan terms would lead to pervasive interference with BLM's own ordering of priorities."¹⁵⁷ Thus, BLM's failure to undertake an action that the agency promised, in the land use plan, to undertake did not violate FLPMA's requirement that BLM manage lands "in accordance with" land use plans¹⁵⁸ because, in the Court's view, "a land use plan is generally a statement of priorities; it guides and

152. *SUWA*, 542 U.S. at 64. Justice Scalia also authored *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), in which the Court rejected a challenge to the BLM's "land withdrawal review" program on the ground that there was no program, and therefore no agency action. 797 U.S. at 879, discussed *supra* notes 100-10 and accompanying text. *But see* Konrad, *supra* note 100, at 534 (arguing that the FLPMA's non-impairment mandate did in fact satisfy *Lujan's* requirements for "agency action," which the Court in turn relied on in *SUWA*).

153. *SUWA*, 542 U.S. at 66.

154. *Id.* While he did not consider FLPMA's nonimpairment mandate for managing WSAs to be a "discrete" action that could be challenged under the APA, Justice Scalia earlier concluded that a biological opinion prepared under the Endangered Species Act was a "final agency action" challengeable under section 704 of the APA in *Bennett v. Spear*, 520 U.S. 154, 178-79 (1997) (holding that irrigators could challenge a biological opinion addressing Bureau of Reclamation dam operations on the Klamath River as a final agency action because the opinion marked the "consummation" of the agency's decision-making process, and because it had "direct and appreciable legal consequences").

155. *SUWA*, 542 U.S. at 68.

156. *Id.*

157. *Id.* at 71. The Court was concerned that allowing land use plan enforcement by citizens would place an undue burden on land management decision making because "allowing general enforcement of plan terms would lead to pervasive interference with BLM's own ordering of priorities." *Id.*

158. 43 U.S.C. § 1732(a) (2000).

constrains actions, but does not (at least in the usual case) prescribe them.”¹⁵⁹ Unless a land plan supplies a “clear indication of binding commitment,” the Court thought that the judiciary could not compel an agency to take an action based solely on the terms of the plan.¹⁶⁰ A different conclusion, Justice Scalia opined, would leave federal agencies with meddlesome lawsuits by environmental plaintiffs and, consequently, future land plans would become “much vaguer.”¹⁶¹

Justice Scalia’s professed concern about the future vagueness of land plans was pure judicial sophistry; in fact, one of the chief legacies of the *SUWA* decision has been new Forest Service planning regulations calling for vague terms in land use plans in order to avoid creating legally binding commitments that the public could challenge.¹⁶² And it was hardly clear why a promise in a land plan that an agency “will” undertake a certain action¹⁶³ was not such a “binding commitment.” Nor was it clear what it would take to create such a commitment.¹⁶⁴

Finally, the Court decided that BLM did not violate NEPA by failing to take a “hard look” to consider whether it should prepare a supplemental EIS on land use plans for areas experiencing increased ORV use.¹⁶⁵ The Court did not analyze whether increased ORV use qualified as a “significant new circumstance”¹⁶⁶—instead, it maintained that because the land use plan was not an ongoing major federal action, additional NEPA analysis would be required only if BLM was amended or revised.¹⁶⁷

159. *SUWA*, 542 U.S. at 71.

160. *Id.* at 69.

161. *Id.* at 72. According to the Court, such vague land use plans would result in “making coordination with other agencies more difficult, . . . depriving the public of important information concerning the agency’s long-range intentions.” *Id.*

162. See 2006 Memorandum from Coggins et al., updating the 5th ed. of FEDERAL PUBLIC LAND AND RESOURCES LAW, at 125 (highlighting *SUWA*’s influence on the 2005 planning rule) (on file with author). See also *infra* notes 271-93 (discussing recent agency amendments to the planning process in the 2005 planning rule).

163. See Henry Mountain Resource Area Off-Road Vehicle Implementation Plan (Sept. 1988), *supra* note 132 and accompanying text.

164. Justice Scalia unhelpfully suggested that what was required was a “clear indication of binding commitment in the terms of the plan.” *SUWA*, 542 U.S. at 69.

165. *SUWA*, 542 U.S. at 72.

166. *Id.* at 73.

167. *Id.* According to Justice Scalia, because “[a]pproval of a [land use plan]’ is a ‘major Federal action’ requiring an EIS, that action is completed when the plan is approved. The land use plan is the ‘proposed action’ contemplated by the regulation. There is no ongoing ‘major Federal action’ that could require supplementation” *Id.* (citation omitted) (emphasis in original).

Together with *Lujan* and *Ohio Forestry*, *SUWA* established a trilogy of constraints on the public's ability to challenge federal agency land use decisions.¹⁶⁸ After *Lujan*, citizens lacked standing to bring programmatic challenges against agency land management policies; they were left with challenging only individual action taken under the same policy of revoking land withdrawals.¹⁶⁹ Then, in *Ohio Forestry*, citizens lost the ability to challenge the terms of land use plans outside the context of a site-specific action.¹⁷⁰ Finally, the *SUWA* decision deprived citizens of the ability to compel an agency to fulfill most of its commitments in a federal land plan, or even to compel an agency to take a "hard look" at whether it had a duty to supplement its NEPA analysis for a plan due to changed circumstances or new information, apparently confining supplemental NEPA analysis to plan amendments or revisions.¹⁷¹ The combination of the three cases appeared to amount to a straightjacket on public challenges to agency land use plans.

III. *SUWA*'S EFFECT ON LITIGATION IN THE FEDERAL COURTS

SUWA's effect on environmental litigants was both immediate and chilling.¹⁷² The Supreme Court had accepted *certiorari* on another land plan challenge during the 2004 term, a Ninth Circuit decision concluding that the Forest Service had a nondiscretionary duty to maintain the wilderness characteristics in WSAs in Montana.¹⁷³ After its decision in *SUWA*, the Court vacated the decision and remanded the case for reconsideration in light of

168. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990).

169. *Id.* See *supra* notes 103-09 and accompanying text (discussing *Lujan*).

170. *Ohio Forestry v. Sierra Club*, 523 U.S. 726 (1998). See *supra* notes 110-18 and accompanying text (discussing *Ohio Forestry*).

171. *SUWA*, 542 U.S. at 55. See *supra* notes 142-67 and accompanying text (discussing *SUWA*).

172. *SUWA*'s effect on wilderness in Utah has been especially harsh. After the Court's decision, the Bush Administration entered a settlement agreement with the state of Utah revoking post-1991 WSAs in the state and eliminating new designations. See Henry Weinstein, *Utah Wilderness Appeal Rejected*, L.A. TIMES, Feb. 11, 2005, at A27; see also Blumm, *supra* note 123, at 10, 406-07 (noting that in the 2003 Utah settlement, BLM agreed not to manage lands as WSAs not identified prior to 1993, including 2.6 million acres identified as WSAs in a 1999 inventory, and the Department of Interior also agreed to revoke the *Wilderness Handbook* and other policies directing BLM to use the land planning process to identify potential wilderness areas); see also Perch-Ahern, *supra* note 100, at 422-29 (discussing early responses to *SUWA* in the lower courts).

173. *Mont. Wilderness Ass'n v. U.S. Forest Serv.*, 314 F.3d 1146, 1151 (9th Cir. 2003).

SUWA.¹⁷⁴ *SUWA* also led to the near-immediate reversal of another Ninth Circuit decision which held that the Forest Service's failure to consider the fifty-seven rivers in Arizona qualifying for potential inclusion in the Wild and Scenic River System when revising forest plans was actionable under APA as a failure to act.¹⁷⁵ After *SUWA*, the Ninth Circuit withdrew its earlier opinion and ruled that the agency's failure "to consider" was not a "discrete agency action," and thus environmentalists lacked standing to bring their suit.¹⁷⁶ Although *SUWA* did not entirely preclude judicial review of land plans,¹⁷⁷ it has severely constricted the public's ability to challenge agency action on a land plan level.¹⁷⁸ Litigants must now instead challenge individual actions taken under land use plans, even if it is the terms of the plans themselves that are objectionable.¹⁷⁹

174. *Veneman v. Mont. Wilderness Ass'n*, 542 U.S. 917 (2004). On remand, the Ninth Circuit sent the case back to the district court. *Mont. Wilderness Ass'n v. U.S. Forest Serv.*, 376 F.3d 1181 (9th Cir. 2004).

175. *Ctr. for Biological Diversity v. Veneman*, 335 F.3d 849 (9th Cir. 2003) (placing heavy reliance on the original Ninth Circuit *Montana Wilderness Association* opinion). When the Supreme Court remanded *Montana Wilderness Association*, 542 U.S. 917, the Ninth Circuit reconsidered its decision and reversed itself. *Ctr. for Biological Diversity v. Veneman*, 394 F.3d 1108, 1113 (9th Cir. 2005).

176. *Ctr. for Biological Diversity*, 394 F.3d at 1113.

177. *See Or. Natural Desert Ass'n v. Rasmussen*, 451 F. Supp. 2d 1202, 1215 (D. Or. 2006) (holding that BLM's approval of projects without sufficient information about wilderness values to make a reasoned decision of environmental impacts violated NEPA); *Friends of Yosemite Valley v. Scarlett*, 439 F. Supp. 2d 1074, 1089-90 (E.D. Cal. 2006) (holding that *SUWA* did not preclude an action challenging a record of decision adopting a revised plan); *Soda Mountain Wilderness Council v. Norton*, 424 F. Supp. 2d 1241, 1259-60 (E.D. Cal. 2006) (distinguishing *SUWA* both because the challenged action was an affirmative decision to amend a plan and because the original plan contained language stating the plan represented "BLM's commitment to these public desires and constitutes a compact with the public" to consolidate public lands with outstanding recreation opportunities or imperiled biological resources); *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115, 1166 (N.D. Cal. 2006) (ruling that it was arbitrary and capricious for BLM to approve a land management plan without taking the presence of listed species into consideration); *W. Watersheds Project v. Bennett*, 392 F. Supp. 2d 1217, 1227-28 (D. Idaho 2005) (rejecting a BLM argument that land use plan provisions were unenforceable under *SUWA* and holding that BLM's failure to comply with a land plan's monitoring requirements violated the land use plan).

178. *See Buckeye Forest Council v. U.S. Forest Serv.*, 378 F. Supp. 2d 835, 845 (S.D. Ohio 2005) (holding that *SUWA* foreclosed a claim to compel the Forest Service to prepare a supplemental EIS for a forest plan when an endangered species was discovered in a forest and the existing forest plan did not reflect the species' presence); *Shawnee Trail Conservancy v. Nicholas*, 343 F. Supp. 2d 687, 712-14 (S.D. Ill. 2004) (ruling that under *SUWA*, the Forest Service could not be compelled by recreationalists to undertake a trail maintenance program that could lead to reinstatement of ORV use in a national forest).

179. *See Norton v. S. Utah Wilderness Alliance (SUWA)*, 542 U.S. 55, 69-70 (2004).

Federal agencies have argued that *SUWA* bars numerous types of challenges to land planning decisions in a variety of contexts.¹⁸⁰ Paul Smyth, Acting Associate Solicitor for the Division of Land and Water Resources for the Department of Interior, described the decision as adding a new weapon for federal agencies to deploy in litigation “in a wide range of public land and natural resource cases and beyond.”¹⁸¹ BLM characterized the land plan ORV use monitoring requirements, as well as the agency’s land inventorying responsibilities, as “agency conduct.”¹⁸² BLM not only argued in *SUWA* that its land plans were not ongoing agency actions, the agency also maintained that broad categories of activities were unreviewable and “emphasized the difference between agency conduct and agency action.”¹⁸³ The agency contended that while agency “actions” were reviewable under the APA, agency “conduct” was not because it did not fit within the definition of the five types of agency action reviewable under the APA.¹⁸⁴

These arguments may have been a response to an unfavorable Ninth Circuit decision that interpreted land plans to have “ongoing effects extending beyond their mere approval.”¹⁸⁵ That case, *Pacific Rivers Council v. Thomas*, required the Forest Service to undertake ESA consultation on the effects that already-approved forest plans might have on newly listed salmon species, rejecting the agency’s argument that land management plans are not ongoing actions, and instead describing plans to be “comprehensive management [documents] governing a multitude of individual projects . . . hav[ing] an ongoing and long-lasting effect even after adoption.”¹⁸⁶ The Forest Service suffered a similar setback in *Neighbors of Cuddy Mountain v. U.S. Forest Service*, when the Ninth Circuit held that the Forest Service violated NFMA by failing to demonstrate that a timber sale

180. See Paul B. Smyth & Christina S. Kalavritinos, *The Supreme Court’s Decision: More than Another Lujan?*, 41 ROCKY MTN. MIN. L. FOUND. 279, 280 (2004).

181. *Id.*

182. *Id.* at 293. FLPMA requires BLM to maintain and update an inventory of the public lands and their resources under its management. 43 U.S.C. § 1711(a) (2000).

183. Smyth & Kalavritinos, *supra* note 180, at 293.

184. *Id.* The APA defines the term “agency action” to include “the whole or part of an agency rule, order, license, sanction, [or] relief.” 5 U.S.C. § 551(13) (2000). See *supra* notes 146-52 (discussing Justice Scalia’s interpretation of “agency action” in *SUWA*).

185. *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1055 (9th Cir. 1994).

186. *Id.* at 1053.

was consistent with the forest plan for the Payette National Forest.¹⁸⁷ The *SUWA* victory marked a significant reversal of fortune for the federal land managers, reducing their public accountability by reversing the accepted perception of land plans as enforceable documents with lasting effects.¹⁸⁸

The *SUWA* decision has been interpreted to be “significant for its recognition of the importance of administrative flexibility” and to prevent challenges in a range of situations in which the agency has failed to take a discretionary action.¹⁸⁹ Land management agency lawyers have argued that *SUWA* bars a number of claims requesting that various agency actions be set aside as arbitrary and capricious because a great deal of agency activity does not in fact rise to the level of an “action” under the APA.¹⁹⁰ The result has been the

187. 137 F.3d 1372, 1378 (9th Cir. 1998). NFMA requires the Forest Service to demonstrate that site-specific projects are consistent with the applicable forest plan. 16 U.S.C. § 1604(i) (2000). In *Cuddy Mountain*, the Ninth Circuit held that a timber sale was inconsistent with the forest plan because the plan required the Forest Service to evaluate the effect of actions on species dependant on old-growth forest habitat by analyzing the effects of the action on certain management indicator species, and the Forest Service failed to analyze how the sale would effect old-growth habitat for the pileated woodpecker habitat, a management indicator species. 137 F.3d at 1377.

188. Before *SUWA* and *Ohio Forestry*, challenges to land plans were generally considered ripe, and the plans themselves were enforceable on their terms. *See Res. Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1303-04 (9th Cir. 1994) (rejecting the Forest Service’s argument that a challenge to the forest plan for the Flathead National Forest would not be ripe unless it was brought in the context of a site-specific action); *Seattle Audubon Soc’y v. Espy*, 998 F.2d 699, 703 (9th Cir. 1993) (holding that “plaintiffs need not wait to challenge a specific project when their grievance is with an overall plan”); *Portland Audubon Soc’y v. Babbitt*, 998 F.2d 705, 708 (9th Cir. 1993) (holding a Forest Service decision not to supplement the NEPA analysis on a forest plan was ripe because “to the extent these [plans] pre-determine the future, the Secretary’s failure to comply with NEPA represents a concrete injury that would undermine any future challenges”); *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1516 (9th Cir. 1992) (noting that if challenges could not be brought against an EIS that was not site-specific the program could never be reviewed, and noting “[t]o the extent that the plan pre-determines the future, it represents a concrete injury that plaintiffs must, at some point, have standing to challenge”). The effect of this turnabout in the enforceability of land plan terms is most dramatically demonstrated by two Ninth Circuit decisions which were reversed in *SUWA*’s immediate aftermath: *Ctr. for Biological Diversity v. Veneman*, 394 F.3d 1108 (9th Cir. 2005), which is discussed *supra* notes 175-76 and accompanying text; and *Mont. Wilderness Ass’n v. U.S. Forest Serv.*, 314 F.3d 1146 (9th Cir. 2003), which is discussed *supra* notes 173-74 and accompanying text.

189. Smyth & Kalavritinos, *supra* note 180, at 287-88.

190. An example of agency conduct not rising to the level of an “action,” and thus arguably unreviewable under *SUWA*, is BLM’s responsibility to conduct land inventories under FLPMA; which DOI attorney Paul Smyth has maintained are not actions because they do not “change or prevent change of the management or use of the public lands.” *Id.* at 293, *citing* 43 U.S.C. § 1711(a) (2000). Section 551 of the APA defines “agency action” to include “the whole or part

transformation of land use plans from enforceable documents developed in a public process and providing the foundation for land management decision making into vague aspirational statements offering little or no opportunity for the public to obtain judicial review of an agency's land management decisions.

A. Environmental Challenges Precluded by SUWA

The *SUWA* decision led to a series of government victories in cases challenging Forest Service and BLM grazing decisions in Oregon filed by the Oregon Natural Desert Association (ONDA). For example, in *ONDA v. Taylor*, a district court relied on the Ninth Circuit's interpretation of *SUWA* in *Center for Biological Diversity* to conclude that grazing assessments, evaluations, and determinations required by BLM's FLPMA regulations were not discrete agency actions.¹⁹¹ In reaching this conclusion, the court rejected ONDA's contention that BLM failed to undertake a discrete action when it did not begin promised rangeland health assessments in seven grazing management areas in Eastern Oregon.¹⁹²

In another case, *ONDA v. Rasmussen*, a district judge rejected ONDA's claim that BLM violated FLPMA by failing to maintain an inventory of wilderness values for an Eastern Oregon grazing area that BLM concluded lacked wilderness values in a 1989 inventory.¹⁹³ ONDA also argued that BLM violated NEPA by failing to consider

of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13) (2000).

191. *Or. Natural Desert Ass'n v. Taylor*, No. 04-334-KI, 2005 WL 106599, at *5 (D. Or. Jan. 18, 2005), (relying on *Ctr. for Biological Diversity v. Veneman*, 394 F.3d 1108 (9th Cir. 2005)). *Center for Biological Diversity* is discussed *supra* notes 175-76 and accompanying text.

192. *Taylor*, 2005 WL 106599, at *6. Federal Rangeland Health regulations require BLM to develop state standards and guidelines for managing livestock grazing on public lands consistent with ecological criteria to ensure watershed health, water quality, and wildlife habitat are maintained or restored on public rangelands. 43 C.F.R. § 4180.1 (2006). These regulations also authorize BLM to conduct an assessment of whether the standards are being met in an area and, if they are not, to take action to help move the area toward compliance with the standards. 43 C.F.R. § 4180.2(c) (2006). ONDA argued that when BLM failed to perform such assessments on seven grazing management areas in the Jordan Resource Area, the agency failed to make a mandatory determination of whether the area met the rangeland health standards. *Taylor*, 2005 WL 106599, at *4. The court rejected this argument, holding that under *SUWA*, a failure to consider certain issues in making planning decisions does not constitute a failure to take a discrete agency action. *Id.* at *5.

193. 451 F. Supp. 2d 1202, 1215 (D. Or. 2006). FLPMA requires BLM to maintain a current inventory of the lands and their resources under its management. 43 U.S.C. § 1711(a) (2000). ONDA argued that by failing to maintain an inventory of the area's wilderness values, BLM failed to identify additional WSAs the agency overlooked in the initial 1989 inventory. *Rasmussen*, 451 F. Supp. 2d at 1206-07.

both whether the area's wilderness values had changed based on new evidence that some areas contained wilderness characteristics warranting designation as a WSA, and whether proposed grazing in the area might have a negative effect on these wilderness values.¹⁹⁴ The *Rasmussen* court relied on *Center for Biological Diversity v. Bureau of Land Management*, a California district court case in which environmentalists presented similar arguments, to conclude that BLM did not violate FLPMA by failing to maintain a current inventory, but the agency did violate NEPA by not considering sufficient information about species to make a reasoned decision.¹⁹⁵ In *ONDA v. Bureau of Land Management*, ONDA made similar arguments, claiming that BLM violated NEPA by failing to consider new information indicating the presence of additional WSAs and violated FLPMA by failing to maintain a current wilderness inventory before approving its Southeast Oregon land use plan.¹⁹⁶ The magistrate judge ruled against ONDA on both counts, holding that the NEPA claim failed because a wilderness inventory "does not by itself change the management or use public lands" and that the FLPMA claim was not ripe for review because the land plan did not authorize any site-specific actions, citing *Ohio Forestry*.¹⁹⁷ ONDA has appealed this decision to the Ninth Circuit.¹⁹⁸

194. *Rasmussen*, 451 F. Supp. 2d at 1211.

195. *Id.* at 1212-13.

196. No. Civ. 03-1017-JE, 2005 WL 711663, at *4 (D. Or. Mar. 29, 2005).

197. *Id.* at *4-*5.

198. Opening Brief of Plaintiff-Appellants, Or. Natural Desert Ass'n v. Bureau of Land Mgmt., No. 05-35931 (9th Cir. Jun. 8, 2006). ONDA has made similar arguments in three other cases. In *ONDA v. Shuford*, an Oregon district judge rejected ONDA's arguments that BLM violated NEPA when it failed to take a hard look at new information indicating additional potential WSAs existed before adopting its Andrews-Steens land use plan and violated FLPMA by failing to maintain an inventory of wilderness values in the area. No. 06-242-AA, 2007 U.S. Dist. LEXIS 42614, (D. Or. Jun. 8, 2007). The court held that here, unlike *Rasmussen*, BLM fulfilled its NEPA obligations because it considered – and largely rejected – the ONDA assessments of the area's wilderness characteristics. *Id.* at *7-*8. The court also rejected ONDA's FLPMA claims, holding that *SUWA* barred any failure to act claim because maintaining an existing inventory was within the agency's discretion, and further, that ONDA failed to demonstrate that BLM's existing inventory was so outdated and inaccurate as to render the decision to approve the land use plan arbitrary and capricious. *Id.* at *9-*11.

In *ONDA v. Gammon*, ONDA challenged BLM's decision to adopt its Lakeview land use plan without considering new information that additional WSAs existed in the area in its NEPA analysis and because BLM failed to maintain a wilderness inventory under FLPMA. No. 06-523-HO, 2007 U.S. Dist. LEXIS 48083, at *1- *2 (D. Or. Jun. 28, 2007). Citing *SUWA*, the court rejected ONDA's argument that BLM violated FLPMA by failing to maintain a current wilderness inventory, stating that such claims "are not susceptible to judicial enforcement." *Id.* at *8. Further, the court ruled in favor of BLM on the NEPA claim, holding that the agency

Another ONDA suit affected by *SUWA* concerned a challenge to the Forest Service's failure to comply with several provisions of the Wild & Scenic Rivers Act (WSRA).¹⁹⁹ The WSRA requires the Forest Service to prepare a "comprehensive management plan" for each designated river segment.²⁰⁰ ONDA claimed that the Forest Service had failed in its duty to "provide for the protection of the river values, address resource protection and other management practices" for two Oregon WSRA river segments,²⁰¹ and that the agency also failed to manage the protected rivers "in such a manner as to protect and enhance" the values which earned the river segments protection under the WSRA.²⁰² The district court concluded that both provisions created general duties for the agency but neither required any discrete agency action, and therefore the suit was barred under *SUWA*.²⁰³ Although the Ninth Circuit reversed the district court on another issue in the case – whether the Annual Operating Instructions (AOI) the Forest Service issued to grazing permit holders each year were final agency actions – it did not disturb the lower court's WSRA rulings.²⁰⁴

In a case decided shortly after *SUWA*, an Illinois district court ruled that an ORV user group's attempt to compel the Forest Service to conduct an ORV use analysis in the Shawnee National Forest was barred by *SUWA*.²⁰⁵ The ORV group had challenged the Forest

acted within its discretion and thus did not violate NEPA when it issued the Lakeview land use plan without updating its wilderness inventories. *Id.* at *9. Another case, *ONDA v. Freeborn*, is pending before the district court. In *Freeborn*, ONDA challenged a BLM rangeland project in Louse Canyon, located in the Jordan Resource Area, arguing that BLM failed to consider the effect of proposed activities on wilderness values in the area by not updating its wilderness inventory for the area. Complaint at 2, *ONDA v. Freeborn*, Civ. No. 06-1311-MO (D. Or. Sept. 14, 2006).

199. Or. Natural Desert Ass'n v. U.S. Forest Serv. (*ONDA*), No. 03-213-JO, 2005 U.S. Dist. LEXIS 43637, at *8 (D. Or. Jun. 3, 2005).

200. 16 U.S.C. § 1274(d)(1) (2000). The Forest Service completed management plans for the two river segments at issue in the suit. *ONDA*, 2005 U.S. Dist. LEXIS 43637, at *36.

201. *ONDA*, 2005 U.S. Dist. LEXIS 43637, at *36.

202. *Id.* at *37.

203. *Id.* at *37-38.

204. Or. Natural Desert Ass'n v. U.S. Forest Serv., 465 F.3d 977, 979 (9th Cir. 2006). The Ninth Circuit held that AOIs were final agency actions because they "represent[ed] the consummation of the Forest Service's determination regarding the extent, limitation, and other restrictions on a permit holder's right to graze his livestock under the terms of the permit," and therefore were properly characterized as a final agency decision. *Id.* at 986-87. The Forest Service argued that AOIs were neither "final" actions nor even "agency actions" under *SUWA*. *Id.* at 985. The Ninth Circuit concluded that an AOI, as part of a grazing permit, was a license, and thus within the scope of "agency actions" identified as actionable in *SUWA*. *Id.* at 990.

205. *Shawnee Trail Conservancy v. Nicholas*, 343 F. Supp. 2d 687, 701 (S.D. Ill. 2004).

Service's failure to conduct an ORV use analysis because a court order from an earlier case²⁰⁶ prevented the Forest Service from allowing ORV use under its forest plan for the area until the agency analyzed the environmental effects.²⁰⁷ The court rejected this challenge, holding that the order required the Forest Service to refrain from allowing ORV use in the forest until it completed its analysis, but the order created no binding agency commitment to undertake that analysis unless it authorized ORV use.²⁰⁸

B. Supplemental EISs on Land Use Plans After SUWA

Federal litigants have argued, with some success, that *SUWA* not only bars claims to compel an agency to supplement its NEPA analysis for a land use plan but also bars claims to compel an agency to supplement its NEPA analysis for other actions, including issuing licenses, and approving timber sale contracts, and land use plan amendments.²⁰⁹ After *SUWA*, several district courts have ruled that once an agency approves a land use plan or issues a license, there is no ongoing action requiring supplemental NEPA analysis.²¹⁰ For example, in *Cold Mountain v. Garber*, the Ninth Circuit held, with virtually no analysis, that *SUWA* barred the environmentalists' claim that NEPA required supplemental analysis for a Forest Service special use permit allowing the Montana Department of Livestock to operate a "bison capture facility" just outside Yellowstone National Park in the Gallatin National Forest, based on new information that measures intended to protect bald eagles in the area failed, and that

206. *Sierra Club v. U.S. Dep't. of Agric.*, No. 96-2244, 1997 WL 295308 (7th Cir. May 28, 1997).

207. *Shawnee Trail Conservancy*, 343 F. Supp. 2d at 700.

208. *Id.* at 702.

209. See *Cabinet Resource Group v. U.S. Fish & Wildlife Serv.*, 465 F. Supp. 2d 1067, 1101-02 (D. Mont. 2006) (*SUWA* barred a claim that the Forest Service failed to supplement its NEPA analysis for a forest plan amendment); cf. *Klamath Siskiyou Wildlands Center v. Boody*, 468 F.3d 549, 560 (9th Cir. 2006) (rejecting a Forest Service argument that land use plan amendments did not require NEPA analysis). In one case, the federal government argued, unsuccessfully, that *SUWA* obviated the need for supplemental NEPA analysis for timber sale contracts which had been enjoined by court order. *Or. Natural Res. Council Action v. United States Forest Serv.*, 445 F. Supp. 2d 1211, 1222 (D. Or. 2006).

210. *Cold Mountain v. Garber*, 375 F.3d 884, 887 (9th Cir. 2004) (holding that after the Forest Service issued a license, it had no obligation to supplement the NEPA analysis because there was no ongoing action); *Buckeye Forest Council v. U.S. Forest Serv.*, 378 F. Supp. 2d 835, 844 (S.D. Ohio 2005) (finding that the Forest Service had no obligation to supplement NEPA analysis for a forest plan, even though an ESA-listed species was discovered in the forest).

the state violated the conditions of its permit.²¹¹ The court concluded that the Forest Service's approval of the special use permit was analogous to issuing a license, and therefore a final action with no further NEPA obligations once the agency issued the license.²¹²

The forest plan for the Wayne National Forest, at issue in *Ohio Forestry*, was again challenged unsuccessfully by environmentalists in 2005, in *Buckeye Forest Council v. U.S. Forest Service*.²¹³ The district court held that *SUWA* barred an environmentalist claim that the Forest Service had to supplement the EIS on the forest plan after the Indiana bat, listed under the ESA, was discovered in the forest—the court reasoned that under *SUWA* once the agency approves a forest plan, the action is final, and thus there is no remaining action triggering a supplemental EIS.²¹⁴

Similarly, in *Cabinet Resource Group v. U.S. Fish & Wildlife Service*, a Montana federal district judge ruled that after *SUWA*, forest plan amendments, like forest plans themselves, were not ongoing agency actions that could require the Forest Service to supplement its NEPA analysis.²¹⁵ The court rejected the environmentalists' argument that the Forest Service should have supplemented its NEPA analysis for a forest plan amendment, designed to protect endangered grizzly bears by reducing the number of roads in the forest, when new information indicated an increase in grizzly bear deaths.²¹⁶ The court thought that *SUWA* barred the claim because, like the land plan challenged in *SUWA*, the Forest Service completed its action when it approved the forest plan amendments.²¹⁷ Although the amendments required future agency action to move toward compliance with its road density standards and called for the Forest Service to meet milestones demonstrating its compliance, these future actions were not ongoing actions because the court concluded

211. 375 F.3d at 891. The "bison capture facility" authorized by the special use permit was intended to help the state of Montana prevent wild bison from Yellowstone National Park from spreading brucellosis, a bovine bacterial infection which causes sterility in livestock, to Montana cattle. The special use permit allowed the state to operate a facility to monitor, test, and remove bison testing positive for brucellosis, and authorized the state to use "hazing" to drive bison back into the park. *Id.* at 886-87.

212. *Id.* at 894.

213. 378 F. Supp. 2d at 844-45.

214. *Id.* at 845. This result directly contradicts the Ninth Circuit's position regarding the Endangered Species Act in *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1057 (9th Cir. 1994), discussed *supra* notes 185-86.

215. 465 F. Supp. 2d 1067, 1100-01 (D. Mont. 2006).

216. *Id.* at 1101.

217. *Id.* at 1100-01.

that “the amendments do not require that any particular project be done.”²¹⁸

On the other hand, in *Sierra Club v. Bosworth*, a Northern California federal district court rejected the Forest Service’s argument that under *SUWA*, it had no obligation to supplement an EIS based on new information about the Pacific fisher for four timber sales, two of which were located in Giant Sequoia National Monument, and the other two in the adjacent Sequoia National Forest.²¹⁹ The court distinguished *SUWA*, where there was no ongoing federal action after BLM approved a land plan, from a decision to approve a timber sale contract, holding that the latter was an ongoing action because the timber projects were site-specific actions that had not yet been completed and were subject to contract clauses allowing the Forest Service to terminate the contract.²²⁰

An Oregon district court also rejected the Forest Service’s argument that there was no ongoing federal action, and thus no duty to supplement its NEPA analysis, after the district court enjoined the agency’s decision to award six timber sale contracts in the Mt. Hood and Willamette National Forests.²²¹ Because the court set aside the Forest Service’s original decision to award the timber contracts, it concluded that a federal action requiring supplemental NEPA analysis remained.²²²

In *Klamath Siskiyou Wildlands Center v. Boody*, BLM argued that modifications to an existing land management plan based on an annual species review did not amend the land use plan and therefore did not require supplemental NEPA analysis under *SUWA*.²²³ A district court agreed.²²⁴ However, the Ninth Circuit reversed, rejecting the agency’s argument and ruling instead that the annual

218. *Id.*

219. *Id.* at 935-39.

220. *Id.* at 939. The court also distinguished *Cold Mountain*, discussed *supra* notes 210-12 and accompanying text, because the special use permit involved there was a license which did not anticipate ongoing agency obligations as the timber contracts did. *Id.*

221. Or. Natural Res. Council Action v. U.S. Forest Serv., 445 F. Supp. 2d 1211, 1222 (D. Or. 2006).

222. *Id.* at 1222.

223. 468 F.3d 549, 560 (9th Cir. 2006), *reversing* *Klamath Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, No. 03-3124-CO, 2006 WL 448714, at *2 (D. Or. Feb. 21, 2006) (holding that a BLM decision to modify the survey and manage protections for the red tree vole did not amend the land use plan).

224. *Klamath Siskiyou Wildlands Ctr.*, 2006 WL 448714, at *2 (holding that annual species reviews did not amend the land use plan and therefore BLM had no obligation to update its NEPA analysis).

species reviews in fact amended the land use plan, and *SUWA* did not completely absolve an agency from supplementing its NEPA analysis when it amends a land use plan.²²⁵

In sum, federal agencies have experienced considerable, if not universal, success in arguing that they have no obligation to supplement their NEPA analysis after *SUWA*. Courts have found this argument persuasive when the NEPA analysis concerned a final action, and the challenge is to the agency's implementation that action, such as a license,²²⁶ ongoing management of a forest under an approved forest plan,²²⁷ or commitments in a forest plan amendment.²²⁸ *SUWA* has not absolved agencies from all obligations to provide supplemental NEPA analysis, however. Courts have held that ongoing actions, such as the Forest Service's management of timber contracts for projects that are not yet complete,²²⁹ as well as the initial decision to approve a forest plan amendment,²³⁰ still require supplemental NEPA analysis.

C. Land Plan Challenges Not Barred by *SUWA*

Just as *Ohio Forestry's* ruling that a challenge to a forest plan was not ripe limited but did not eviscerate the public's ability to challenge forest plans, *SUWA* did not preclude all attempts to enforce the terms of federal land use plans. Shortly after the Court's *SUWA* decision, in *Natural Resources Defense Council v. Patterson*, a California district court rejected BLM's argument that an attempt to compel the agency to comply with a California law requiring dam operators to allow sufficient river flow for fish passage was a programmatic challenge, and thus barred by both *SUWA* and *Lujan*.²³¹ The court ruled that

225. *Klamath Siskiyou Wildlands Ctr.*, 468 F.3d at 561.

226. *See supra* notes 211-12 and accompanying text (discussing *Cold Mountain*).

227. *See supra* notes 213-14 and accompanying text (discussing *Buckeye Forest Council*).

228. *See supra* notes 215-18 and accompanying text (discussing *Cabinet Resource Group*).

229. *See supra* notes 219-22 and accompanying text (discussing *Sierra Club* and *Oregon Natural Resources Council Action*).

230. *See supra* notes 223-25 and accompanying text (discussing *Klamath Siskiyou Wildlands Center*).

231. 333 F. Supp. 2d 906, 915-16 (E.D. Cal. 2004). The environmentalists alleged BLM's operation of Friant Dam on the San Joaquin River violated a California statute requiring dam operators to allow sufficient water for fish passage and to protect fish populations below the dam. *Id.* at 910. The Reclamation Act of 1902 requires the Secretary of Interior to comply with applicable state laws in operating dams under the act. 43 U.S.C. § 383 (2000). The California law stated that dam owners "shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to

BLM's obligation to comply with the state law was a discrete, required action—not a “general statutory directive”—and distinguished *SUWA* on that ground.²³²

Similarly, in *Western Watersheds Project v. Bennett*, a federal district judge in Idaho rejected BLM's argument that land plan provisions were unenforceable under *SUWA*.²³³ Environmentalists argued that BLM violated FLMA's requirement that the agency manage lands consistent with land plans by approving increased grazing without first monitoring for sensitive species in the Jarbidge Resource Area in southern Idaho, even though the land plan stated that grazing “would not be authorized unless monitoring studies indicate that the basic soil, vegetation and wildlife resources are being protected and additional forage is available.”²³⁴ The court distinguished *SUWA* as limited to the context of an agency's failure to act, and therefore inapplicable in the context of a challenge to an agency action inconsistent with an approved land use plan.²³⁵

In *Friends of Yosemite Valley v. Scarlett*, an Eastern California district judge ruled that *SUWA* did not bar a challenge brought by environmentalists to the National Park Service's implementation of a land plan for the Merced River corridor prepared under the WSRA.²³⁶ And in *Soda Mountain Wilderness Council v. Norton*, another California district judge rejected BLM's argument that *SUWA* precluded an environmentalist claim under FLPMA, distinguishing *SUWA* on several grounds.²³⁷ The court noted that, unlike *SUWA*, the challenge involved a final agency action: BLM's

keep in good condition any fish that may be planted or exist below the dam.” CAL. FISH & GAME CODE § 5937 (2007).

232. *Natural Res. Def. Council*, 333 F. Supp. 2d at 916.

233. 392 F. Supp. 2d 1217, 1227 (D. Idaho 2005).

234. *Id.* at 1227 (citing Jarbidge Resource Area Resource Management Plan Record of Decision at I-7 (1987)). Under FLPMA, BLM must manage the public lands consistent with land use plans. 43 U.S.C. § 1732(a) (2000).

235. *Western Watersheds Project*, 392 F. Supp. 2d at 1227. Because BLM's actions were inconsistent with a land use plan EIS prioritizing wildlife protection over grazing interests, the agency violated FLPMA's requirement that BLM manage lands consistent with land use plans. *Id.* at 1227-28.

236. 439 F. Supp. 2d 1074, 1089-90 (E.D. Cal. 2006). The management plan was prepared under a court order after environmentalists first challenged the National Park Service's failure to prepare a comprehensive management plan for a segment of the Merced River corridor under its jurisdiction after it had been designated a WSRA. After NPS issued a management plan and EIS, environmentalists challenged both, and the original plan was invalidated by the Ninth Circuit for failing to comply with NEPA by inadequately considering ORV use in the area. *Id.* at 1077-78.

237. 424 F. Supp. 2d 1241, 1259-60 (E.D. Cal. 2006).

decision to amend a land use plan.²³⁸ In addition, the court also concluded that BLM had made a binding commitment to engage in a specified process before consolidating or disposing of public lands.²³⁹ Environmentalists argued, and the court agreed, that language in the record of decision for the land plan stating that it “represents BLM’s commitment to these public desires and constitutes a compact with the public” indicated the type of “binding commitment” the Supreme Court stated was necessary to make a land use plan enforceable on its terms.²⁴⁰ Ascertaining precisely what amounts to the binding commitment the *SUWA* opinion called for²⁴¹ will likely produce considerable litigation in the future.

BLM was likewise unsuccessful in arguing that *SUWA* bars challenges to inadequate NEPA analysis at the time a land use plan is approved in *Center for Biological Diversity v. Bureau of Land Management*.²⁴² The court held that BLM’s NEPA analysis for its land use plan for the Algodones Dunes in Southern California was inadequate because it failed to take the required “hard look” at the effect of the land plan on endemic vertebrates.²⁴³ Environmentalists also argued that BLM’s failure to maintain a current inventory for the lands at issue, as required by FLPMA, led the agency to act arbitrarily when it approved its land plan based on an outdated inventory.²⁴⁴ Although the court noted that FLPMA did not require BLM to maintain a current inventory on every species, and that land use plan monitoring directives were not enforceable under *SUWA*, it nonetheless held that BLM acted arbitrarily in approving a land use plan based on “obviously outdated and inadequate inventories” when the record contained evidence BLM was aware species not included in the inventory were present in the area.²⁴⁵ In the wake of *SUWA*, it seems that NEPA may impose more enforceable obligations than does FLPMA.

238. *Id.* at 1260.

239. *Id.*

240. *Id.*

241. *Norton v. S. Utah Wilderness Alliance (SUWA)*, 542 U.S. 55, 69 (2004), discussed *supra* notes 159-61.

242. 422 F. Supp. 2d 1115, 1166 (N.D. Cal. 2006).

243. *Id.* at 1163.

244. *Id.* at 1167. See *supra* notes 193-95 and accompanying text (discussing FLPMA’s inventory requirement in the context of *ONDA v. Rasmussen*).

245. *Id.* at 1167-68.

D. SUWA's Litigation Legacy

Although not all land use plan terms are unenforceable after *SUWA*, the decision has imposed significant limits on the public's ability to judicially challenge land planning decisions. The government has successfully argued that under *SUWA* monitoring, analysis, and inventory requirements in land plans are unenforceable.²⁴⁶ But challenges to other agency actions as being inconsistent with an applicable land use plan,²⁴⁷ particularly plan provisions that bind an agency to a specific course of action,²⁴⁸ are not barred by *SUWA*. *SUWA* should also not serve as a defense to challenges to failures to undertake specific actions where an agency has made a "binding commitment" to undertake,²⁴⁹ since the APA expressly authorizes suits to compel an agency to act where it is unlawful for it to not act.²⁵⁰ Nor should *SUWA* serve as a bar to challenges to agency actions implementing such directives,²⁵¹ like annual operating instructions to graziers with Forest Service permits.²⁵²

While *SUWA* insulates agencies from having to supplement NEPA analysis on land plans and similar final actions like issuing licenses or existing land plan amendments,²⁵³ agencies should still be required to supplement NEPA analysis for ongoing actions like timber sale contracts, or when an agency approves a land plan amendment.²⁵⁴ *SUWA*'s holding concerning NEPA supplementation applies only to approved land plans or other agency actions that "end" when the agency approves the plan or the action. Thus, for example, the *SUWA* defense would not seem to excuse a failure to

246. See *supra* notes 175-76 and accompanying text (discussing *Center for Biological Diversity v. Veneman*); *supra* notes 191-204 and accompanying text (discussing the *ONDA* decisions).

247. See *supra* notes 233-35 and accompanying text (discussing *Western Watersheds Project*).

248. See *supra* notes 231-32 and accompanying text (discussing *Natural Resources Defense Council*); *supra* notes 236-41 and accompanying text (discussing *Friends of Yosemite* and *Soda Mountain Wilderness*).

249. See *supra* notes 237-41 and accompanying text (discussing *Soda Mountain Wilderness*).

250. 5 U.S.C. § 706(1) (2000).

251. See *id.* § 706(2) (authorizing suits against, *inter alia*, arbitrary actions, actions inconsistent with statutory directives, and inconsistent with procedures required by law).

252. See *ONDA v. U.S. Forest Serv.*, 465 F.3d 977, 979 (9th Cir. 2006), discussed *supra* notes 199-204 and accompanying text.

253. See *supra* notes 211-18 and accompanying text (discussing *Cold Mountain*, *Buckeye Forest Council*, and *Cabinet Resource Group*).

254. See *supra* notes 219-25 and accompanying text (discussing *Sierra Club*, *Oregon Natural Resources Council Action*, and *Klamath Siskiyou Wildlands Center*).

prepare supplemental NEPA analysis for a BLM allotment management plan, when new information or circumstances would trigger NEPA's supplemental analysis requirements.²⁵⁵ So the NEPA role in land management has not been eviscerated by the *SUWA* decision, although a recent attempt to change the Forest Service's planning regulations would have imposed additional obstacles to public challenges of land planning decisions, including new categorical exclusions from NEPA analysis.

IV. *SUWA*'S INFLUENCE ON PUBLIC LAND PLANNING POLICIES

Although *SUWA* has had a major effect on the enforceability of federal land plans, it also had an almost immediate—and dramatic—effect on the nature of Forest Service planning. At the time the Court decided *SUWA*, the Forest Service was already in the process of making radical revisions to its forest planning regulations, revoking regulations issued in the waning days of the Clinton Administration and rewriting the 1982 regulations adopted by the Reagan Administration, in order to increase agency discretion in land management decisions and decrease public oversight and judicial enforceability of forest plans.²⁵⁶ These revisions culminated in a 2005 planning rule, which the Forest Service complemented with a series of categorical exclusions (CXs) that effectively removed a wide range of Forest Service activities from environmental review, including (1) fire suppression and salvage logging; (2) forest plan approval, amendments, and revisions; and (3) activities related to oil and gas exploration and development.²⁵⁷ Although a California district court

255. 43 U.S.C. § 1752(d) (2000). An allotment management plan is a “document prepared in consultation with [the permittee] . . . [which, among other things] prescribes the manner in, and extent to, which livestock operations [on BLM or national forest lands] will be conducted in order to meet the multiple-use, sustained-yield, economic and other needs and objective as determined for the lands [by the land management agency].” *Id.* § 1702(k).

256. See Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 774–75 (2006) (discussing the Forest Service's decision to revoke the Clinton-era planning regulations and draft a radically different revision of the planning regulations); Katrina M. Kayden, Comment, *Will Paradise Become a Parking Lot?: The Debate Over the Bush Administration's Overhaul of Forest Management Regulations*, 17 VILL. ENVTL. L.J. 285, 291–94 (2006) (discussing the Bush Administration's decision to jettison the 2000 planning regulations and the Forest Service's development of the 2005 planning regulations).

257. See *infra* notes 302-05 and accompanying text (discussing the Healthy Forests Initiative provisions exempting fire suppression and salvage logging from environmental review); *infra* notes 306-09 and accompanying text (discussing the 2006 CX for forest planning); and *infra* notes 310-12 and accompanying text (discussing the 2007 CX for certain oil and gas development activities).

enjoined the planning regulations in early 2007,²⁵⁸ the new CXs have helped transform Forest Service planning from the meaningful process Congress designed to both inform and impose limits on agency decision making through public involvement at the forest inventory stage into an exercise of largely unchecked agency discretion.

A. *The 2005 Forest Planning Rule Revisions*

In NFMA, Congress required the Forest Service to develop regulations for the forest planning process after convening an advisory Committee of Scientists populated with experts from outside the agency.²⁵⁹ By requiring the Forest Service to involve independent scientists in developing NFMA planning regulations, Congress aimed to ensure an outside scientific perspective influenced the content of the agency's regulations.²⁶⁰ The Forest Service assembled the original committee to develop the initial 1979 planning regulations, then reconvened it in 1982 to revise the regulations under the Reagan Administration.²⁶¹ After efforts to revise Forest Service planning

258. *Citizens for Better Forestry v. U.S. Dept. of Agric.*, 481 F. Supp. 2d 1059, 1100 (N.D. Cal. 2007); see *infra* notes 289, 290 and accompanying text (discussing the decision to enjoin the 2005 rule because 1) the Forest Service failed to comply with NEPA, 2) the 2005 rule was outside the scope of the CX the agency claimed applied, and 3) the rule failed to comply with both APA and the ESA). The Forest Service has attempted to call the ruling into question by describing it as inconsistent with other recent rulings on forest plans by both the Tenth Circuit and an Alabama district judge. See Felicity Barringer, *Federal Judge Strikes Down Forest Management Rules*, N.Y. TIMES, Mar. 31, 2007, at A9 (noting that Mark Rey, the Department of Agriculture Undersecretary who oversees the Forest Service, stated other recent decisions regarding forest plans contradicted the decision); Juliet Eilperin, *Judge Suspends Administration Rules For Managing Forests*, WASH. POST, Mar. 31, 2007, at A02 (quoting a Forest Service spokesperson as stating that the other courts "presented with similar circumstances" concluded that the agency had fulfilled its NEPA obligations). Neither of those cases involved a challenge to the 2005 rule, however. In *Colo. Wild v. U.S. Forest Service*, the Tenth Circuit upheld a lower court's decision, ruling that environmentalists failed to demonstrate the Forest Service was arbitrary and capricious in developing a 2003 CE for small-scale timber harvests. 435 F.3d 1204, 1220–22 (10th Cir. 2006). The Alabama district court decision that Forest Service officials cited is similarly tangential to the California court's conclusions about the 2005 rule. In *Wildlaw v. U.S. Forest Service*, the court deferred to the Forest Service's decision that the CE covering "routine" administrative actions applied to its revisions to a rule governing its administrative appeal procedures. 471 F. Supp. 2d 1221, 1245 (M.D. Ala. 2007).

259. 16 U.S.C. § 1604(h)(1) (2000).

260. See Charles F. Wilkinson, *A Case Study in the Intersection of Law and Science: The 1999 Report of the Committee of Scientists*, 42 ARIZ. L. REV. 307, 307 (2000).

261. *Id.* at 308 (stating that the committee was reconvened in 1982). Congress included the requirement that the Forest Service develop the planning regulations under the advice of such a committee both to provide the opportunity to include different perspectives on the regulations and "because of skepticism regarding the Forest Service's willingness to incorporate science into

regulations failed in the early 1990s, the Forest Service assembled a second Committee of Scientists in 1997.²⁶² This second committee released a report in late 1999 entitled “Sustaining the People’s Lands,” which emphasized both ecological sustainability in forest planning and increased public participation to provide “early, broad, and significant [citizen] involvement in national forest stewardship.”²⁶³ The Clinton Administration used the recommendations in the 1999 committee report to develop a revised planning rule, issued in November 2000, with ecological sustainability as its centerpiece.²⁶⁴ In addition to ecological sustainability, the 2000 planning regulations also called for (1) rigorous scientific monitoring and evaluation requirements, (2) restoration of degraded lands, (3) incorporation of ecological principles by acknowledging uncertainty and disturbances, (4) use of species diversity to measure ecological sustainability and forest management decisions, and (5) independent scientific review.²⁶⁵

The Bush Administration immediately moved to rescind the 2000 rule in the spring of 2001, first by extending the deadline for compliance by a year.²⁶⁶ Then, in May 2002, the Administration pushed the deadline for compliance further back.²⁶⁷ In December 2002, the Administration proposed a revised planning rule, stating that “[c]ompliance with the regulatory direction on such matters as ecological sustainability and science consistency checks would be difficult, if not impossible, to accomplish.”²⁶⁸ While the 2002 proposed revisions were undergoing public review, the Forest Service issued an “interpretive rule” in 2004, which declared that until the

management in a serious way.” *Id.* at 307; *see also* Hoberg, *supra* note 26, at 6 (noting NFMA’s requirement that a committee of scientists must be consulted in formulating the planning regulations “clearly reflect[ed] a deep congressional distrust for the capacity of the Forest Service to develop regulations in a manner reflecting the new statutory standards”).

262. Wilkinson, *supra* note 260, at 308.

263. *Id.* at 309-10. The report was criticized as overstepping the Committee’s statutory authority to provide scientific and technical advice by promoting a Clinton Administration policy agenda of making sustainability the Forest Service’s “primary goal.” Hoberg, *supra* note 26, at 17.

264. National Forest System Land and Resource Management Planning, 36 C.F.R. § 219 (2000).

265. *See* GEORGE CAMERON COGGINS ET AL, FEDERAL PUBLIC LAND AND RESOURCES LAW 757-58 (5th ed. 2002).

266. National Forest System Land and Resource Management Planning; Extension of Compliance Deadline, 66 Fed. Reg. 27,552, 27,553 (May 17, 2001).

267. National Forest System Land and Resource Management Planning; Extension of Compliance Deadline, 67 Fed. Reg. 35,431, 35,432 (May 20, 2002).

268. National Forest System Land and Resource Management Planning; Proposed Rules, 67 Fed. Reg. 72,770, 72,772 (Dec. 6, 2002).

agency promulgated new planning regulations, the 1982 planning rule would govern forest plan amendments and revisions, except that the “transition provisions” of the 2000 rule – but not its substantive provisions – would govern site-specific actions.²⁶⁹ The 2000 rule’s transition provisions required the Forest Service to consider the “best available science” in gauging the effects of a proposed action on wildlife and forest health, replacing the 1982 management indicator species monitoring requirements.²⁷⁰ The Forest Service finally replaced the 2000 planning rule with a new rule in December 2005, without holding a public comment period or undertaking any NEPA analysis of the rule’s environmental effects.²⁷¹ Further, the 2005 planning rule cast aside the recommendations of the 1999 Committee of Scientists report and was developed without any advice of any scientific committee.²⁷²

Ohio Forestry and *SUWA* influenced the final 2005 planning rule significantly. The Forest Service cited language from both cases in its regulatory preamble to justify its treatment of forest plans as strategic

269. National Forest System Land and Resource Management Planning; Use of Best Available Science in Implementing Land Management Plans, 69 Fed. Reg. 58,055, 58056 (Sept. 29, 2004). The transition provisions directed the Forest Service to consider the “best available science” when making site-specific decisions implementing a forest plan. 36 C.F.R. § 219.35(a) (2007). This “best available science” standard replaced the 1982 regulation’s requirement that the Forest Service consider the effect of a site-specific action on “management indicator species,” — wildlife species the 1982 regulation required the Forest Service to monitor as proxies for overall forest health. 36 C.F.R. § 219.19(a)(1) (1982).

270. National Forest System Land and Resource Management Planning; Use of Best Available Science in Implementing Land Management Plans, 69 Fed. Reg. at 58,056. *See also* 36 C.F.R. § 219.19 (1982) (establishing criteria for selecting management indicator species in the 1982 regulations).

271. National Forest System Land and Resource Management Planning; Removal of 2000 Planning Rule, 70 Fed. Reg. 1022, 1023 (Jan. 5, 2005). The Forest Service concluded that the 2005 planning rule would “not have environmental effects” because the rule merely “provide[d] a starting point for project and activity NEPA analysis.” *Id.* at 1031. The Forest Service also concluded that the planning rule fit within the scope of a CX in the Forest Service Handbook that applied to “rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instruction.” *Id.* at 1053–54; *see also* Forest Service Handbook § 1909.15, ch. 31.12 (2007).

272. National Forest System Land and Resource Management Planning; Removal of 2000 Planning Rule, 70 Fed. Reg. at 1034. The Forest Service responded to comments that expressed concern that the agency developed its 2005 planning rule without consulting a committee of scientists by stating that it was not required to seek the advice of a scientific committee in revising the planning rule, and that actually the 1999 committee report was the basis for the rule because “[s]ustainability, public participation, adaptive management, monitoring and evaluation, the role of science, and the objection process, all concepts in the proposed and final rule, were recommendations of that report.” *Id.*

documents, without any resulting on-the-ground effects.²⁷³ The regulatory preamble noted that the *Ohio Forestry* decision described forest plans as “tools for agency planning and management” that “do not command anyone to do anything or to refrain from doing anything; they do not grant, withhold, or modify any formal legal license power or authority; they do not subject anyone to any civil or criminal liability; they create no legal rights or obligations.”²⁷⁴ Borrowing language from the Court’s opinion in *SUWA*, the regulatory preamble described land use plans as “tools by which ‘present and future use is projected’” and a more general “statement of priorities.”²⁷⁵

The 2005 planning rule seemingly emphasized flexibility over enforceability,²⁷⁶ replacing “standards” established in the 2000 planning rule with the vaguer term “guidelines,”²⁷⁷ and expanding the discretionary authority of agency officials, while reducing the enforceability of a plan’s provisions against the agency. For example, an agency decision to deviate from a forest plan’s guidelines will no longer require a plan amendment.²⁷⁸ In contrast to the abandoned 2000 planning rule’s emphasis on science-based decision making and ecological sustainability, the 2005 planning rule called for maximum administrative discretion and decision-making efficiency.²⁷⁹ The 2005 rule emphasized the “strategic nature” of forest plans and claimed

273. *Id.* The regulatory preamble stated that “[u]nder the Final Rule, plans will continue to be strategic in nature, as described by the Supreme Court in *Ohio Forestry* and *SUWA*.” *Id.*

274. *Id.* (citing *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 733 (1998)). The regulatory preamble also noted that in *SUWA*, the “Supreme Court also recently recognized the similar nature of land management plans,” noting that “like a [Forest Service] land management plan, a BLM plan typically ‘is not a final implementation decision on actions.’” National Forest System Land and Resource Management Planning; Removal of 2000 Planning Rule, 70 Fed. Reg. at 1034.

275. National Forest System Land and Resource Management Planning; Removal of 2000 Planning Rule, 70 Fed. Reg. at 1034.

276. See Martin Nie, *The 2005 National Forest System Land and Resource Management Planning Regulations: Comments and Analysis*, 27 PUB. LAND & RESOURCES L. REV. 99, 100 (2006) (noting that the 2005 rule replaced the “legally enforceable standards” of earlier iterations of its planning regulations with “general recommendations,” replacing former requirements that the agency “shall” take certain actions with language that the agency “should” proceed in a particular manner – frustrating legal challenges).

277. National Forest System Land and Resource Management Planning; Removal of 2000 Planning Rule, 70 Fed. Reg. at 1026. The 1982 planning rule referred to plan provisions as both “standards and guidelines.” *Id.*

278. See *id.* (claiming that “[i]f deviation from plan guidelines is appropriate in specific circumstances, the rationale for deviation should be based on project or activity analysis and explained fully . . . [h]owever, deviation does not require an amendment to the plan”).

279. See Nie, *supra* note 276, at 100.

that forest plans “do not authorize project and activity decisions, but rather characterize general future conditions and guidance for such decisions.”²⁸⁰ The rule acknowledged that the Forest Service might implement some on-the-ground decisions when a forest plan is approved, revised, or amended, although it predicted that those situations would involve “extraordinary circumstances.”²⁸¹ The rule failed to explain what constituted “extraordinary circumstances,” or how the agency would handle forest plan provisions having immediate on the ground effects under a planning rule designed to develop plans with no anticipated effects.

The Forest Service described its 2005 planning rule as “represent[ing] a paradigm shift in planning”²⁸² — which it certainly attempted. The rule represented a radical shift from NFMA’s congressional intent that forest plans were to be meaningful, prescriptive, judicially-enforceable documents, prepared with public participation and in a manner consistent with NEPA specifications.²⁸³ Congress envisioned NFMA forest planning as involving the public in forest management decisions at the forest planning stage, well before the Forest Service might assume a role of project proponent for a site-specific action.²⁸⁴ The idea was to place checks on the Forest Service’s previously unquestioned management decisions.²⁸⁵ But the 2005 planning rule seemed to contravene NFMA’s intent by increasing

280. National Forest System Land and Resource Management Planning; Removal of 2000 Planning Rule, 70 Fed. Reg. at 1025.

281. *Id.*

282. *Id.* at 1033.

283. *See supra* notes 52-58 and accompanying text (discussing how Congress intended to alter its relationship with the Forest Service in NFMA by subjecting the agency to significant oversight).

284. *See* 16 U.S.C. § 1604(d) (2000) (requiring public participation in the “development, review, and revision of land management plans”); Robert B. Keiter, *Public Lands and Law Reform: Putting Theory, Policy, and Practice in Perspective*, 2005 UTAH L. REV. 1127, 1175 (2005) (discussing increased public participation requirements in 1970s-era environmental legislation, including NFMA); *see also supra* notes 56-57 and accompanying text (noting the Senate committee report on NFMA included a statement indicating public should be involved in land management planning “at all levels” of the planning process).

285. *See* WILKINSON & ANDERSON, *supra* note 4, at 70 (noting that during the Senate hearings on NFMA in 1976, Senator Humphrey “observed that the Forest Service’s record had brought into question the extent to which the agency could be trusted to guard and manage public resources”). Other members of Congress shared the perception that the Forest Service needed additional oversight. For example, Senator Floyd Haskell (D. Colo.) stated that with NFMA, “the era of full delegation of land management decision-making authority to federal agencies is over.” *Id.* (citing S. REP. NO. 583, 94TH CONG., 1st Sess. (1975)).

agency discretion and weakening the planning process by the elimination of judicially enforceable standards.²⁸⁶

The proposed rule generated some 195,000 public comments²⁸⁷ and faced fierce opposition, including a proposed House amendment to a 2003 Interior appropriations bill, an effort that ultimately failed.²⁸⁸ But an environmentalist challenge to the 2005 rule produced a 2007 injunction issued by the federal district court for the Northern District of California.²⁸⁹ This injunction prevented the Forest Service from implementing the 2005 rule until it complied with NFMA, NEPA, and the ESA.²⁹⁰ In response to this decision, the Forest Service indicated its intent to comply with NEPA by producing an EIS for the 2005 rule.²⁹¹

Even if the Forest Service were to succeed in overturning this decision on appeal, or were to remedy the defects in its 2005 rule, the rule's effect on judicial review of forest plans will be delayed because any actions taken under forest plans adopted under the 1982 planning regulation must continue to comply with that regulation, not the 2005

286. Nie, *supra* note 276, at 105.

287. National Forest System Land and Resource Management Planning; Removal of 2000 Planning Rule, Forest 70 Fed. Reg. at 1034.

288. See U.S. House of Representatives Roll Call Vote 384 (July 17, 2003), <http://clerk.house.gov/evs/2003/roll384.xml> (recording the vote for Rep. Udall's proposed amendment to the Department of the Interior and Related Agencies Appropriations Act of 2004, H.R. 2691, 108th Cong. (1st Session 2003), which was intended to block funding to implement the Bush Administration's proposed changes to NFMA, which was defeated by a 198 to 223 vote).

289. *Citizens for Better Forestry v. U.S. Dept. of Agric.*, 481 F. Supp. 2d 1059, 1100 (N.D. Cal. 2007).

290. *Id.* The court also held that the Forest Service failed to provide adequate notice and comment on the 2005 rule, violating the APA, concluding that the "law is clear that an agency cannot promulgate without notice and comment a final rule that constitutes a 'paradigm shift' from the proposed rule for which there was notice and comment." *Id.* at 1076. The court concluded that the Forest Service violated NEPA when it employed a CX that was inappropriate, and the court found the fact that the Forest Service subsequently issued a new CX covering forest planning to "support[] the conclusion that the prior [CX] that was utilized in this case did not fit the 2005 rule." *Id.* at 1087. In addition, the court held that the Forest Service violated the ESA when it concluded that the 2005 rule would not affect listed species without first initiating section 7 consultation to determine whether the rule "may affect" listed species. *Id.* at 1091. See also *Enviros Will Likely Contest FS Rule on no Planning EIS*, PUBLIC LAND NEWS, Jan. 5, 2007, at 3, available at <http://www.plnfpr.com/newsletter1/P107Jan5.htm#PG3> (discussing the likelihood of environmentalists amending their complaint to contest the 2006 forest plan CX).

291. National Forest System Land Management Planning, 72 Fed. Reg. 26,775, 26,775 (May 11, 2007) (noting that the Forest Service plans to produce a draft EIS by June 2007 and complete a final EIS for the 2005 rule by November 2007).

rule.²⁹² Although the Forest Service has argued the 2005 regulations apply to management decisions for existing forest plans approved and implemented according to the 1982 regulations, several district court decisions indicate that forest plans will continue to be governed by the 1982 regulations, not the 2005 regulations, until the Forest Service either revises the applicable land use plan or promulgates a new one.²⁹³

B. The Proliferation of Categorical Exclusions

NEPA directs federal agencies to analyze the effects of any “major [f]ederal action significantly affecting the quality of the human environment”²⁹⁴ in an environmental impact statement (EIS) on that action.²⁹⁵ Agencies need not prepare an EIS on every federal action—that would create an administrative nightmare.²⁹⁶ The

292. Site-specific actions adopted according to the 2004 “interpretive rule” are governed by the 2000 rule’s “transition provisions” – not the 1982 rule – unless a site-specific decision specifically adopts the standards from the 1982 rule. *See Ecology Ctr., Inc. v. United States Forest Serv.*, 451 F. 3d 1183, 1190 (10th Cir. 2006) (ruling that a forest plan may require by reference particular standards “regardless of later changes in the regulations” and concluding that the 1982 regulations did not apply to a timber sale when the applicable forest plan did not adopt any specific regulatory provision by reference); *Utah Env’tl. Cong. v. Troyer*, 479 F. 3d 1269, 1281 (10th Cir. 2007) (concluding that when a forest plan adopted the 1982 rules by reference, that rule governed subsequent actions taken under the plan). *See also supra* notes 269-270 (discussing the 2004 interpretive rule and the 2000 rule’s transition provisions).

293. *See Idaho Wildlife Fed’n v. Tower*, No. CV-04-372-E-BLW, 2006 U.S. Dist. LEXIS 23140, at *4 (D. Idaho April 13, 2006) (holding that the 1982 regulation governed a forest plan adopted under that regulation, rejecting a Forest Service argument that the environmentalists’ claim that the agency failed to maintain sage grouse viability in the Curlew National Grassland, a Management Indicator Species (MIS), was moot because the Forest Service did not have the same obligations toward MIS under the 2005 rules as under the 1982 regulation); *Sierra Nevada Forest Prot. Campaign v. Tippin*, No. Civ. S 06-00351 FCD DAD, 2006 U.S. Dist. LEXIS 57832, at *47 (E.D. Cal. Aug. 16, 2006) (rejecting the Forest Service’s argument that the 2005 rules applied to the timber project, and holding that a forest plan prepared under the 1982 planning regulation continued to govern the forest plan and projects it authorized). *See also Utah Env’tl. Cong. v. Bosworth*, 439 F.3d 1184, 1190 (10th Cir. 2006) (reviewing the Forest Service’s management obligations for projects in the Fishlake National Forest under the 1982 regulations because the Forest Service adopted the forest plan under those regulations).

294. 42 U.S.C. § 4332(2)(C) (2000).

295. *See* 40 C.F.R. §§ 1502.1-1502.25 (2007) (stating requirements for when and how to prepare an EIS). The regulations state that the “primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in [NEPA] are infused into the ongoing programs and actions of the Federal Government.” *Id.* § 1502.1.

296. *See id.* § 1501.4 (establishing criteria for agencies to use to determine whether an EIS is necessary for a proposed action). In lieu of preparing an EIS, agencies may prepare a shorter environmental assessment (EA) and, if the EA concludes that the action will not have

Council on Environmental Quality's (CEQ) regulations implementing NEPA allow federal agencies to determine categories of actions that do not have the potential to affect the environment²⁹⁷ and authorize agencies to issue CXs that exempt actions from individual environmental review.²⁹⁸ In recent years, the Bush Administration has employed CXs to exempt numerous types of federal land management decisions which decades of past agency practice suggested warrant individual environmental review because of their potentially significant environmental effects.

In 2003, the Bush Administration assembled a NEPA Task Force, which released a report to the Council on Environmental Quality²⁹⁹ recommending, among other things, expanded use of CXs.³⁰⁰ The Administration began to introduce a number of CXs for public lands activities that would previously have required individualized environmental review.³⁰¹ For example, in connection with its Healthy Forests Initiative, the Forest Service issued CXs for "hazardous fuels reduction" projects and post-fire salvage logging, as well as for "thinning" projects intended to reduce fire risk.³⁰² The

significant environmental effects, the agency will issue a finding of no significant impact (FONSI). *Id.* §§ 1508.9, .13.

297. *Id.* § 1507.3(b)(2)(ii).

298. *Id.* § 1508.4. The regulation defines CX as "a category of actions which do not individually or cumulatively have a significant effect on the human environment . . . and for which, therefore, neither an environmental assessment nor an environmental impact statement is required." *Id.*

299. NEPA Task Force, *The NEPA Task Force Report to the Council on Environmental Quality: Modernizing NEPA Implementation 1-3* (2003), available at <http://www.nepa.gov/ntf/report/htmltoc.html>.

300. See Karkkainen, *supra* note 27, at 353 (discussing how the Forest Service created new categories of CXs as part of the Healthy Forests Initiative). These CXs "appeared to be a preemptive strike by the Administration, with the dual aim of accelerating the pace of forest thinning and salvage logging by eliminating environmental review and taking the underlying public policy disputes off the table by categorically declaring environmental impact analysis off-limits." *Id.* at 353-54; Jesse B. Davis, *The Healthy Forests Initiative: Unhealthy Policy Choices in Forest and Fire Management*, 34 ENVTL. L. 1209, 1224-28 (2004) (describing how, as part of the Healthy Forests Initiative, the Forest Service issued CXs for post-fire salvage operations and hazardous fuels reduction, as well as CXs for timber harvests that include up to 70 acres of live trees, salvage up to 250 acres of dead, dying, or fire-damaged trees, and allow up to 250 acres of trees to be cut to control insects or disease).

301. See DREHER, *supra* note 27, at 7-8 (discussing recent proposals to weaken or create exemptions from NEPA requirements, including a "rebuttable presumption" in the Energy Policy Act of 2005 that the oil and gas activities fall under a CX, an appropriations bill rider allowing the renewal of grazing permits in national forests over the next three years without NEPA review, and a proposed CX for forest plans drafted under the 2005 planning rule).

302. National Environmental Policy Act Documentation Needed for Fire Management Activities; Categorical Exclusions, 68 Fed. Reg. 33,814, *passim* (Jun. 5, 2003).

Forest Service opened the door for such CXs in 2002 by issuing a “clarification” of when “extraordinary circumstances” would require environmental analysis for an action that typically fell within the scope of a CX.³⁰³ Under the Forest Service Handbook, a CX is appropriate for an action when there are no “extraordinary circumstances” present.³⁰⁴ The revised Handbook definition of “extraordinary circumstances” gave the agency discretion to determine whether a CX applied to a proposed action, even where resource conditions created “extraordinary circumstances” that would otherwise make a CX inappropriate.³⁰⁵

In December 2006, the Forest Service continued its overhaul of NFMA forest planning by issuing an interim CX for forest plans, plan amendments, and plan revisions.³⁰⁶ The agency claimed that *SUWA* and *Ohio Forestry* provided the legal basis for its conclusion that an EIS was not required on forest plans, since the agency made no binding commitments in forest plans, and its plans had no site-specific effects.³⁰⁷ Citing the “strategic nature” of plans, the regulatory preamble to the 2005 planning regulations stated that the Court’s decisions “support the Forest Service’s conclusion that its land management plans developed under the 2005 planning rule that typically will not have independent environmental effects, and thus will not have significant environmental effects.”³⁰⁸ By recasting forest

303. Clarification of Extraordinary Circumstances for Categories of Actions Excluded from Documentation in an Environmental Assessment or an Environmental Impact Statement, 67 Fed. Reg. 54,622, 54,623 (Aug. 23, 2002).

304. *Id.* at 54,627 (noting that “[ex]traordinary circumstances” exist in the presence of resource conditions such as species protected under the ESA are present in an area; flood plains, wetlands, or municipal watersheds; wilderness areas, WSAs, or national recreation areas; inventoried roadless areas; research natural areas; American Indian or Alaska Native religious and cultural sites; and archaeological sites, historic properties, or areas); Forest Service Handbook § 1909.15, ch. 30.3(2) (2007).

305. Forest Service Handbook, *supra* note 304; *see also* Eric E. Huber, *Environmental Litigation and the Healthy Forests Initiative*, 29 VT. L. REV. 797, 802 (2005). The Forest Service issued the 2005 planning rule itself under a CX established in the Forest Service Handbook. *See supra* note 271 and accompanying text (discussing the Forest Service’s decision not to undertake NEPA analysis of the planning rule).

306. National Environmental Policy Act Documentation Needed for Developing, Revising, or Amending Land Management Plans; Categorical Exclusion, 71 Fed. Reg. 75,481, 75,481 (Dec. 15, 2006).

307. Plan Categorical Exclusion Questions and Answers 2, http://www.fs.fed.us/emc/plan_ce/includes/q_as.pdf (last visited Sept. 21, 2007).

308. National Environmental Policy Act Documentation Needed for Developing, Revising, or Amending Land Management Plans; Categorical Exclusion, 71 Fed. Reg. at 75,483.

plans as mere vision statements,³⁰⁹ the Forest Service eviscerated any meaningful analysis of the environmental effects of national forest land planning.

Two months later, in February 2007, the Forest Service issued another CX in a directive concluding that certain oil and natural gas exploration and development activities had no potential to have any significant effects on the environment.³¹⁰ Critics charged that this decision to carry out the president's policy of expedited review for energy-related projects, as articulated in Executive Order 13212 (2001),³¹¹ was yet another example of the Bush Administration chipping away at environmental review of Forest Service decisions.³¹²

V. CONCLUSION

By enacting NFMA and FLPMA thirty years ago, Congress committed public land managers to comprehensive land planning.

309. *Id.* at 75,485 (describing how components of plans developed under the 2005 planning rule, such as "desired conditions" describe "a vision for the desired condition of the forest" but do not create binding commitments for the agency). Interestingly, BLM's regulations continue to require an EIS on its land use plans. 43 C.F.R. § 1601.0-6 (2006). Therefore, until the agency amends these regulations, a CX on BLM land plans would be unlawful.

310. National Environmental Policy Act Documentation Needed for Oil and Natural Gas Exploration and Development Activities (Categorical Exclusion), 72 Fed. Reg. 7391, 7392 (Feb. 15, 2007).

311. *Id.* at 7392 (noting that the Forest Service's CX applied to additional activities to those already categorically excluded from NEPA analysis under the Energy Policy Act of 2005, which created a CE for five categories of oil and gas exploration and development activities conducted under the Mineral Leasing Act).

312. *See Forest Service Says Oil and Gas NEPA Exclusion Doesn't End Run Law*, PUBLIC LAND NEWS, Mar. 2, 2007, at 9, available at <http://www.plnfpr.com/newsletter1/P507March2.htm#PG9> (quoting Mike Anderson, senior resource analyst for The Wilderness Society, to the effect that Forest Service officials are "being dishonest when they say they don't need to do NEPA in plans because they will do NEPA at the project level, but then they don't do it at the project level as well"). The oil and gas CX applies to decisions to approve a surface use plan of operations for oil and natural gas activities, and any initial development activities, so long as the approval will not result in more than one mile of new road construction or reconstruction, more than three miles of pipelines, or more than four drill sites. National Environmental Policy Act Documentation Needed for Oil and Natural Gas Exploration and Development Activities (Categorical Exclusion), 72 Fed. Reg. at 7402. BLM has likewise proposed expanding its use of CXs to include grazing permit renewals, four new forestry CXs (three based on CXs already issued by the Forest Service), three new CXs for oil, gas, and geothermal energy development activities, and new categories of CXs for recreation management and emergency stabilization. National Environmental Policy Act Revised Implementing Procedures, 71 Fed. Reg. 4159, 4160 (Jan. 25, 2006). *See also* Brodie Farquhar, *Grazing, Seismic Permits Fall Under Plan*, CASPER STAR-TRIBUNE, Jan. 27, 2006, available at <http://www.trib.com/articles/2006/01/27/news/wyoming/557115e50dfe893972571030006de47.txt> (discussing BLM's proposed CXs and noting that three of the four forestry CXs mirrored those adopted by the Forest Service).

The benefits of planning as a prerequisite to public land decision making are many. The planning process attracts public attention when the focus of land management is on the resources an area possesses, not on the merits of a particular project. Without a project and its momentum, agency personnel are in a posture of unbiased managers rather than project proponents. Moreover, at the planning stage, with an areawide concentration and a focus on land resources, the cumulative effects of various potential resource developments can be evaluated without pressure from project sponsors. The planning process, in short, can encourage rational decision making in advance of specific land use decisions. It can also produce predictability, but only if the plan provisions are specific enough to allocate resources. Congress embraced this vision of the benefits of public land planning in 1976 when it passed both NFMA³¹³ and FLPMA.³¹⁴

But the landscape of public land planning in the 21st century has been changed dramatically by both the Supreme Court and the Bush Administration. In *Ohio Forestry*, the Court decided that forest plans were not ripe for review unless the challenged provision would have on-the-ground effects, and *SUWA* held that land use plans are not generally judicially enforceable. Both decisions sharply curtailed the public's ability to challenge the consistency of land plans with governing statutes. Under the now-enjoined 2005 planning regulations and the accompanying CX, the Forest Service could approve a forest plan without analyzing any environmental effects. Because most land use plan terms are now effectively unenforceable under *SUWA*, the public must wait until a specific provision in a land plan produces a site-specific action to challenge that provision.

The Forest Service used the *SUWA* and *Ohio Forestry* opinions to justify its radical revision of forest planning in the 2005 planning rules and its decisions to exempt a number of projects from environmental review.³¹⁵ These decisions run contrary to congressional intent to make federal land planning the focal point of both NFMA and FLPMA.³¹⁶ Instead of promoting informed decision

313. Pub. L. 94-588, 90 Stat. 2949 (1976).

314. Pub. L. 94-579, 90 Stat. 2743 (1976).

315. See *supra* notes 273-75 and accompanying text (discussing how the Forest Service used the Court's decisions to support its 2005 planning rule); *supra* notes 307-08 and accompanying text (discussing how the Forest Service used the Court's decision in the 2006 CE for forest plans adopted under the new rule).

316. See *supra* notes 52-74 and accompanying text (discussing congressional intent in adopting NFMA and FLPMA).

making and restraining agency discretion with increased public oversight and the potential for judicial enforcement, land planning has devolved into a series of virtually meaningless exercises undertaken with minimal public involvement, little judicial enforceability, and increased administrative discretion in the name of “efficiency” and “flexibility.”

Federal land managers should not be allowed to abandon land use planning as Congress envisioned it thirty years ago until Congress rejects that vision. Regrettably, recent Supreme Court decisions and the Bush Administration’s actions make it necessary for Congress to respond to the *SUWA*, *Ohio Forestry*, and the 2005 forest planning regulations by revising the vague planning directives in NFMA and FLPMA with language that recognizes the critical importance of federal land plans as significant and ongoing agency actions within the meaning of the APA. We suggest specific amendments to the APA to accomplish these goals in the Appendix to this article. These proposed amendments would (1) assure that federal land plans would again fulfill the original congressional goals of being the product of active public participation, (2) focus on rigorous environmental analysis, and (3) create enforceable commitments by federal land management agencies. Without such amendments to the APA, federal land planning in the 21st century will devolve into an expensive charade that wastes taxpayer dollars and deceives the public.

APPENDIX

To amend the definition of “agency action” contained in 5 U.S.C. § 1331(13) to add to the definition of agency action, as follows (references are to explanatory notes and accompanying text of this article; existing language in italics):

(13) *“agency action” includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act;* discrete agency actions that are ripe for judicial review include:

- A. approving or amending federal land management plans, which are binding compacts with the public (n. 240), and which generally require preparation of an environmental impact statement (EIS) or supplemental EIS that considers the effects of the plan on listed an candidate species under the Endangered Species Act, including new species added to the list (nn. 178, 186, 214) and designated or potential river segments for protection under the Wild and Scenic Rivers Act (nn. 175, 199-203, 236), in order to satisfy the National Environmental Policy Act;
- B. implementing commitments in approved federal land management plans, including monitoring requirements (nn. 131-32, 177, 182, 234, 246) and complying with state law (nn. 231-32);
- C. approving site-specific actions consistent with applicable federal land management plans, including licenses, permits, timber sales (nn. 221-22, 254), rights-of-way, and similar actions;
- D. maintaining a current inventory of all federal lands and resources, including an inventory of lands suitable for inclusion in the national wilderness system (nn. 172, 182, 193-95, 198, 246), and annual species reviews (nn. 223-25);
- E. approving or amending allotment management plans (n. 255) or annual operating instructions to grazing permittees (nn. 204, 252).
- F. approving and implementing standards for managing livestock grazing consistent with ecological criteria (nn. 191-92); and
- G. discovery of listed endangered species on federal lands (nn. 178, 186, 210).