

University of Montana

## ScholarWorks at University of Montana

---

Graduate Student Theses, Dissertations, &  
Professional Papers

Graduate School

---

2001

### Judicial enforcement of species monitoring requirements in forest plans: Ripeness and agency deference

Trent N. Baker  
*The University of Montana*

Follow this and additional works at: <https://scholarworks.umt.edu/etd>

**Let us know how access to this document benefits you.**

---

#### Recommended Citation

Baker, Trent N., "Judicial enforcement of species monitoring requirements in forest plans: Ripeness and agency deference" (2001). *Graduate Student Theses, Dissertations, & Professional Papers*. 8657.  
<https://scholarworks.umt.edu/etd/8657>

This Thesis is brought to you for free and open access by the Graduate School at ScholarWorks at University of Montana. It has been accepted for inclusion in Graduate Student Theses, Dissertations, & Professional Papers by an authorized administrator of ScholarWorks at University of Montana. For more information, please contact [scholarworks@mso.umt.edu](mailto:scholarworks@mso.umt.edu).



Maureen and Mike  
MANSFIELD LIBRARY

The University of

**Montana**

---

Permission is granted by the author to reproduce this material in its entirety,  
provided that this material is used for scholarly purposes and is properly cited in  
published works and reports.

**\*\*Please check "Yes" or "No" and provide signature\*\***

Yes, I grant permission

No, I do not grant permission

Author's Signature: Trent N. Baird

Date: 6/6/01

Any copying for commercial purposes or financial gain may be undertaken only with  
the author's explicit consent.

---



JUDICIAL ENFORCEMENT OF SPECIES MONITORING REQUIREMENTS IN  
FOREST PLANS: RIPENESS AND AGENCY DEFERENCE

by

Trent N. Baker

B.S. University of Utah, 1993

J.D. University of Montana School of Law, 2001

presented in partial fulfillment of the requirements


for the degree of

Master of Science

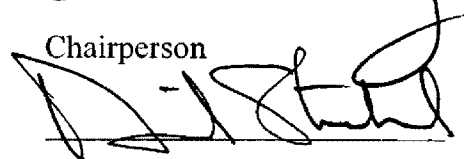
The University of Montana

May 2001

Approved by:



Chairperson



Dean, Graduate School

6-8-01

Date

UMI Number: EP39458

All rights reserved

INFORMATION TO ALL USERS

The quality of this reproduction is dependent upon the quality of the copy submitted.

In the unlikely event that the author did not send a complete manuscript and there are missing pages, these will be noted. Also, if material had to be removed, a note will indicate the deletion.



UMI EP39458

Published by ProQuest LLC (2013). Copyright in the Dissertation held by the Author.


Microform Edition © ProQuest LLC.

All rights reserved. This work is protected against unauthorized copying under Title 17, United States Code



ProQuest LLC.  
789 East Eisenhower Parkway  
P.O. Box 1346  
Ann Arbor, MI 48106 - 1346

Judicial Enforcement of Species Monitoring Requirements in Forest Plans: Ripeness and Agency Deference

Chairperson: Len Broberg 

Today's Forest Service is increasingly more cognizant of the non-extractive uses and values of national forests, and under the current regime of "ecosystem management," seeks to integrate biological and human uses of natural resources in order to allow resource extraction while minimizing loss of biodiversity. A primary component of ecosystem management is analyzing the effects of management activities on a variety of scales, including landscape, watershed, and project levels, through species surveys and monitoring. It follows that establishing an ecological baseline prior to any management activity is essential to analysis of the actual effects of that activity and to determining the probable consequences of such activities in the future.

Federal recognition of the importance of surveying and monitoring is now embodied in national environmental acts governing public lands and their implementing regulations, as well as within each forest's individual land and resource management plan, all of which require collection and consideration of this information. However, environmentalists and federal cases suggest that the Forest Service, and other federal land management agencies, frequently ignore or inadequately perform these requirements. While enforcement of these regulations cannot insure the Agency will make the most environmentally sound decision in each instance, it makes it more likely, and provides environmental plaintiffs grounds on which to challenge poor and unsupportable decisions.

Numerous judicial challenges attempting to force the Forest Service to adequately perform the species surveying and monitoring requirements contained in federal environmental laws and individual forest plans have turned primarily on the application of two legal concepts. First, the judicial doctrine of ripeness and the associated requirement of final agency action governs the point at which a court may decide a controversy. Second, the concept of agency discretion determines the degree to which a court must defer to a land management agency's scientific expertise and its interpretation of its regulations. While the success of these challenges in federal courts has been inconsistent, this paper argues that judicial enforcement of monitoring requirements against federal land management agencies is proper, and remains a legally viable method to ensure that federal agencies make fully informed resource development decisions that consider and protect habitat, species, and biodiversity on our public lands.

<b>I.</b>	<b>Introduction</b>	1
<b>II.</b>	<b>Monitoring Requirements</b>	4
	A. The Science of Monitoring	4
	B. Statutory Framework and Policy of Monitoring	7
	1. National Environmental Policy Act	7
	2. National Forest Management Act	9
	3. Administrative Procedure Act	12
<b>III.</b>	<b>Ohio Forestry – Ripeness and Final Agency Action</b>	14
	A. Introduction	14
	B. Background	15
	1. The Ripeness Doctrine	15
	2. Judicial Climate Prior to <i>Ohio Forestry</i>	17
	C. <i>Ohio Forestry</i>	19
	1. Procedural History	21
	2. Supreme Court Decision	22
	3. Reasoning and Analysis	23
	D. Judicial Interpretation of <i>Ohio Forestry</i>	27
	1. Federal District Court Decisions	27
	2. Federal Circuit Court Decisions	29
	a. D.C. Circuit	29
	b. Ninth Circuit	31
	E. Ripeness in Species Monitoring Cases	34
	1. <i>ONRC v. United States Forest Service</i>	34
	2. <i>Sierra Club v. Martin</i>	36
	3. <i>Sierra Club v. Peterson</i>	39
	4. <i>Ecology Center v. United States Forest Service</i>	46
	F. Conclusion	49
<b>IV.</b>	<b>Standard of Review – Agency Deference and the Hard Look Doctrine</b>	53
	A. Introduction	53
	B. Background	54
	C. Arbitrary and Capricious - A Not-entirely-toothless Standard	56
	D. Deference in Species Monitoring Cases	60
	1. <i>Inland Empire Public Lands Council v. United States Forest Service</i>	60
	2. <i>Sierra Club v. Martin</i>	63
	3. <i>Sierra Club v. Glickman</i> (affirmed by <i>Peterson I</i> )	66
	4. <i>ONRC v. United States Forest Service</i>	69
	E. Conclusion	69
<b>V.</b>	<b>Conclusion</b>	70

## I. Introduction

In the wake of World War II, the United States Forest Service became the principal supplier of an enormous demand for timber.<sup>1</sup> One result of the Agency's focus on timber harvest was an unprecedented decline in the diversity of plant and animal life within national forests.<sup>2</sup> This decline is primarily due to the destruction of habitat resulting from timber harvest and the Forest Service's attempt to meet its dual mandates of production and preservation through intensive management activities.<sup>3</sup> In addition to the inherent existence value of individual species, scientists realize the importance of maintaining biodiversity since they do not fully understand the role of each species in -- or its importance to -- the ecosystem as a whole.<sup>4</sup> Over 50 years ago, Aldo Leopold recognized the need to maintain biodiversity when he noted that the first rule of the tinkerer is to keep all of the pieces.<sup>5</sup>

Today's Forest Service is increasingly more cognizant of the non-extractive uses and values of national forests, and under the current regime of "ecosystem management," seeks to integrate biological and human uses of natural resources in order to allow

---

<sup>1</sup> Harvest levels on federal forests increased 800% (from 1.5 to 11.5 billion board feet per year) between 1947 and 1971. David W. Crumpacker, *Prospects for Sustainability of Biodiversity Based on Conservation Biology and U.S. Forest Service Approaches to Ecosystem Management*, 40 LANDSCAPE AND URBAN PLANNING 47, 58 (1998); and see generally Paul W. Hirt, A CONSPIRACY OF OPTIMISM: MANAGEMENT OF THE NATIONAL FORESTS SINCE WORLD WAR TWO, (University of Nebraska Press, Lincoln 1994), and Charles F. Wilkinson and Michael H. Anderson, LAND AND RESOURCE PLANNING IN THE NATIONAL FORESTS, (Island Press, 1987).

<sup>2</sup> *Id.*; and see generally Edward O. Wilson, THE DIVERSITY OF LIFE, 259 (1992).

<sup>3</sup> Wilson, *supra* note 2 at 253-54; David S. Wilcove et al., *Quantifying Threats to Imperiled Species in the United States*, 48 BIOSCIENCE 607, 609 (1998). In Federal Register notices, habitat loss is almost invariably cited as one of the primary reason for determinations of threatened status of various species under the Endangered Species Act.

<sup>4</sup> See generally, CREATING A FORESTRY FOR THE 21<sup>ST</sup> CENTURY: THE SCIENCE OF ECOSYSTEM MANAGEMENT, Kathryn A. Kohm & Jerry F. Franklin, eds. (1997).

<sup>5</sup> Aldo Leopold, A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE (New York: Oxford University Press, 1949).



resource extraction while minimizing loss of biodiversity.<sup>6</sup> A primary component of ecosystem management is analyzing the effects of management activities on a variety of scales, including landscape, watershed, and project levels, through species surveys and monitoring.<sup>7</sup> It follows that establishing an ecological baseline prior to any management activity is essential to analysis of the actual effects of that activity and to determining the probable consequences of such activities in the future.

Federal recognition of the importance of surveying and monitoring is now embodied in national environmental acts governing public lands and their implementing regulations, as well as within each forest's individual land and resource management plan (LRMP), all of which require collection and consideration of this information. However, environmentalists and the cases discussed below suggest that the Forest Service, and other federal land management agencies, frequently ignore or inadequately perform these requirements.<sup>8</sup> While enforcement of these regulations cannot insure the Agency will make the most environmentally sound decision in each instance, it makes it more likely, and provides environmental plaintiffs grounds on which to challenge poor and unsupportable decisions.

Numerous judicial challenges attempting to force the Forest Service to adequately

---

<sup>6</sup> Peter F. Brussard et al., *Ecosystem Management: What is it Really?*, 40 LANDSCAPE AND URBAN PLANNING 9, 10 (1998).

<sup>7</sup> Forest Ecosystem Management Assessment Team, FOREST ECOSYSTEM MANAGEMENT: AN ECOLOGICAL, ECONOMIC, AND SOCIAL ASSESSMENT, VIII-14 (1993); see also William T. Saxon & Robert C. Szaro, *Implementing Ecosystem Management: Using Multiple Boundaries for Organizing Information*, 40 LANDSCAPE AND URBAN PLANNING 167, 169 (1998).

<sup>8</sup> Interview with Jeff Juel of the Ecology Center, December 6, 2000 (indicating that the monitoring in most Region I forests is inadequate at best, and noting that under the current state of the law in this Circuit, environmental groups are required to mount multiple timber-sale-specific challenges to inadequate monitoring; which are expensive, time-consuming, and beyond the resources of most environmental groups).

perform the species surveying and monitoring requirements contained in federal environmental laws and individual forest plans have turned primarily on the application of two legal concepts. First, the judicial doctrine of ripeness and the associated requirement of final agency action governs the point at which a court may decide a controversy. Second, the concept of agency discretion determines the degree to which a court must defer to a land management agency's scientific expertise and its interpretation of its regulations. While the success of these challenges in federal courts has been inconsistent, this paper argues that judicial enforcement of monitoring requirements against federal land management agencies is proper, and remains a legally viable method to ensure that federal agencies make fully informed resource development decisions that consider and protect habitat, species, and biodiversity on our public lands.

Section two of this paper provides background on monitoring requirements, discussing the science and policy behind them, and the statutory framework out of which they arise and in which they operate. The third section discusses the primary procedural barrier to the judicial enforcement of monitoring requirements, the doctrine of ripeness and the requirement of final agency action, as applied by the United States Supreme Court in a recent challenge to the substance of a forest plan. Section three also examines the facts, issues and holdings of recent cases involving judicial challenges to inadequate monitoring by federal land management agencies. In section four, this paper addresses the concept of agency deference, which has emerged as the primary substantive grounds for some courts' refusal to strictly enforce monitoring requirements. This section also examines how the standard of review was applied in recent federal cases involving Forest Service failures to monitor. Finally, this paper concludes that the better reasoned federal

court decisions hold that challenges to agency noncompliance with species monitoring requirements are ripe for judicial review as final agency actions or failures to act; and that while an agency is entitled to deference in interpreting and carrying out these regulations, an agency's failure to collect the required data is contrary to the law and renders arbitrary and capricious any decision based on inadequate data. Such a conclusion is proper in light of the policy and science behind monitoring requirements, and the precedent and reasoning of federal case law.

## **II. Monitoring Requirements**

### **A. The Science of Monitoring**

Scientists agree that under our stewardship, or lack of it, species are going extinct at a rate far in excess of normal background evolutionary extinction rates -- up to 100,000 times normal rates in the most species-rich tropical forests.<sup>9</sup> While there are many anthropogenic causes of species loss, habitat destruction is often cited as the primary culprit, and timber harvest poses a serious threat to species survival through forest and stream habitat destruction and fragmentation.<sup>10</sup> Effective forest management practices can minimize the effects of logging on forest species by maintaining diverse and healthy plant and animal populations.<sup>11</sup>

Maintaining diversity means more than preserving the number of different species present in an area -- a concept known as "species richness."<sup>12</sup> Maintaining diversity also

---

<sup>9</sup> Gary K. Meffe & C. Ronald Carroll, *PRINCIPLES OF CONSERVATION BIOLOGY* 110 (1994); *and* Wilson, *supra* note 2 at 280.

<sup>10</sup> Meffe & Carroll, *supra* note 9 at 237.

<sup>11</sup> Greg D. Corbin, *The United States Forest Service Response to Biodiversity Science*, 29 ENVTL. L. 377, 379 (1999)

<sup>12</sup> *Id.* at 393-94.

requires maintaining “species viability,” an abundance of individuals within a species, in order to guard against the loss of the individual species.<sup>13</sup> Effective forest management requires consideration of both measures, as changes in species richness may indicate loss of especially sensitive species, and changes in species viability may signal that disturbances have affected individual species within an area.<sup>14</sup> Further, genetic diversity within species is important to species’ ability to adapt to environmental changes and resist the deleterious genetic effects of shrinking populations.<sup>15</sup> Finally, understanding the roles of individual species within a larger community is necessary to preserving biodiversity by maintaining the ecosystem upon which all species in it rely.<sup>16</sup>

One scientifically recognized method of monitoring and preserving biodiversity is population viability analysis (PVA). PVA incorporates many levels of biodiversity, including genetic and species diversity, habitat needs, spatial distribution, inter and intra-population dynamics, and environmental influences on the continued existence of a population.<sup>17</sup> Once factors critical to a populations’ survival are determined, forest managers can estimate how many reproductive individuals are necessary to maintain diverse and healthy populations.<sup>18</sup> While performing PVA for every species present in a forest is beyond the mandate, economic and logistic capabilities of the Forest Service, conducting PVA for a few “indicator species” is not. The indicator species concept, or “management indicator species” in Forest Service parlance, assumes that effects of

---

<sup>13</sup> *Id.* at 394.

<sup>14</sup> *Id.*

<sup>15</sup> Meffe & Carroll *supra* note 9 at 153-58.

<sup>16</sup> Corbin *supra* note 11 at 396.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

management activities on a single species can be extrapolated to determine probable effects on the rest of the ecosystem.<sup>19</sup> While not without its critics and some degree of uncertainty, this approach allows forest managers to focus on well-chosen species or groups of species to understand and predict the effects of management decisions.<sup>20</sup> It is axiomatic that monitoring the effects of forest management practices on biodiversity is essential to determine their efficacy and to make meaningful changes in those practices.<sup>21</sup> One basic tenet of PVA for any species is that whether attempting complex mathematical models of population dynamics or estimating the effects of habitat manipulation, accepted scientific methods require some estimate of population size, if not more detailed information.<sup>22</sup>

Forest Service regulations and forest plans promulgated under those regulations require the Agency to maintain viable wildlife populations, and identify and collect data for management indicator species, as explained below. However, when the Forest Service finds itself with more to do than its staff or budget will allow, rather than spend precious resources collecting new information, the Agency often attempts to make management decisions based on data it already has.<sup>23</sup> This was the case when the Forest Service rejected the scientifically accepted methodology of PVA in favor of its own approach – habitat viability analysis.<sup>24</sup>

This method allows the forest service to use data regarding habitat types already

---

<sup>19</sup> *Id.* at 397.

<sup>20</sup> *Id.*

<sup>21</sup> Wilkinson & Anderson, *supra* note 1 at 304.

<sup>22</sup> Corbin, *supra* note 11 at 401.

<sup>23</sup> Andrew Orleman, *Do the Proposed Forest Service Regulations Protect Biodiversity? An Analysis of the Continuing Viability of "Habitat Viability Analysis,"* 20 J. LAND RESOURCES & ENVTL. L. 357, 361 (2000).

<sup>24</sup> *See* Sections III. E. and IV. D.

gathered through timber resource inventories, and information regarding habitat requirements of individual species.<sup>25</sup> The Forest Service then extrapolates the number of individuals in a population from the numbers of acres of suitable habitat within the planning area.<sup>26</sup> The Agency would then look at the number of acres of suitable habitat that would remain after a specific management prescription (e.g. timber sale) in order to determine whether or not the population would remain viable.<sup>27</sup>

While this method may be less expensive and acceptable to the Agency and some courts, it ignores the fact that “[s]trictly as a matter of science, however, the Forest Service’s ‘habitat viability analysis’ violates the most basic understanding that to determine population viability of individual species requires data on the population’s status.”<sup>28</sup>

## **B. Statutory Framework and Policy of Monitoring**

### **1. National Environmental Policy Act**

Due largely to growing public concern over the clearcutting of national forests, environmental groups in the late-1960s pursued change in Forest Service management practices; but convinced it was unlikely to come from the legislative or executive branches, they increasingly turned to the courts in their attempts to stop destructive management activities and to defend non-timber uses and values of forest lands.<sup>29</sup>

These groups received an unexpected gift at the outset of the Nixon

---

<sup>25</sup> *Inland Empire Public Lands Council v. United States Forest Service*, 88 F.3d 754, 759 (9<sup>th</sup> Cir. 1996).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 758.

<sup>28</sup> Corbin, *supra* note 11 at 401 (citing Michael L. Morrison et al., *Wildlife-habitat Relationships* 251 (1992)).

<sup>29</sup> Hirt, *supra* note 1 at 253.

administration, in the form of the National Environmental Policy Act of 1969 (NEPA),<sup>30</sup> which significantly increased environmentalists' ability to sue the Forest Service over management decisions.<sup>31</sup> NEPA is a procedural statute that provides for government analysis and public scrutiny of the environmental impacts of agency decisionmaking, with the stated purpose of ensuring the environmental effects of agency actions are revealed and accommodated before those actions are undertaken.<sup>32</sup>

To further this purpose, NEPA imposes certain pre-decision information gathering obligations on all agencies of the federal government.<sup>33</sup> The most well known requires preparation of an Environmental Impact Statement (EIS) before undertaking any major federal action that significantly effects the environment.<sup>34</sup> NEPA also requires federal agencies "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment."<sup>35</sup> In the mandate most related to monitoring requirements, NEPA says agencies shall "initiate and utilize ecological information in the planning and development of resource-oriented projects."<sup>36</sup>

NEPA also created the Council on Environmental Quality (CEQ) to "formulate and recommend national policies to promote the improvement of the quality of the environment."<sup>37</sup> The CEQ regulations address federal agency methodology and scientific

---

<sup>30</sup> 42 U.S.C. §§ 4321 to 4370d (1994).

<sup>31</sup> *Id.*

<sup>32</sup> 16 U.S.C. § 1604(g)(1) (1994).

<sup>33</sup> 16 U.S.C. § 4332(2) (1994).

<sup>34</sup> 42 U.S.C. § 4332(2)(C) (1994 & Supp. III 1997).

<sup>35</sup> 42 U.S.C. § 4332(2)(A) (1994).

<sup>36</sup> 42 U.S.C. § 4332(2)(H) (1994).

<sup>37</sup> 42 U.S.C. § 4342 (1994).

accuracy in the context of EISs, stating “[a]gencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in [EISs] . . . shall identify any methodologies used and shall make explicit reference . . . to scientific and other sources relied upon for conclusions.”<sup>38</sup>

On their face, NEPA and the CEQ regulations require the Forest Service to gather and utilize scientifically supportable data prior to making forest management decisions. However, little is made of these mandates in federal court cases that defer to the Forest Service decisions based upon inadequate scientific methods or a total lack of credible monitoring data.

## **2. National Forest Management Act**

A few years after the passage of NEPA, the Forest Service’s current system of forest planning was initiated in the Resources Planning Act of 1974,<sup>39</sup> and was eventually amended by the National Forest Management Act of 1976 (NFMA).<sup>40</sup> NFMA is the principal statute governing administration of the National Forests. It imposes numerous substantive management requirements, as well as a planning process incorporating the Resources Planning Act’s mandate that the Forest Service develop integrated LRMPs for each unit of the National Forest System.<sup>41</sup>

LRMPs, commonly known as forest plans, are analogous to city zoning regulations, because they identify appropriate uses for different areas within a national

---

<sup>38</sup> 40 C.F.R. § 1502.24.

<sup>39</sup> Kelly Murphy, *Cutting Through the Forest of the Standing Doctrine: Challenging Resource Management Plans in the Eighth and Ninth Circuits*, 18 U. ARK. LITTLE ROCK L.J. 223, 228-234 (1996); Paul A. Garrahan, *Failing to See the Forest for the Trees: Standing to Challenge National Forest Management Plans*, 16 VA. ENVTL. L.J. 145, 147-49 (1996).

<sup>40</sup> 16 U.S.C. §§ 1600-1614 (1994).

<sup>41</sup> 16 U.S.C. § 1604(a) (1994).



forest, but do not necessarily instigate any activities. Once approved, the plan is binding on all management activities within a forest until revised.<sup>42</sup> Revision is required at least every fifteen years, or more often as needed.<sup>43</sup> NFMA also requires that the Forest Service comply with NEPA,<sup>44</sup> and mandates an EIS accompany every forest plan.<sup>45</sup>

Among its substantive requirements, NFMA declares that the Forest Service must “provide for diversity of plant and animal communities,”<sup>46</sup> and must gather inventory and monitoring data.<sup>47</sup> NFMA also established a process to continually evaluate forest plans for consistency with contemporary scientific understanding, and required input from a Committee of Scientists in promulgating regulations to implement the diversity and monitoring requirements.<sup>48</sup>

To implement the diversity requirement, current Forest Service regulations state that:

Fish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native species in the planning area. For planning purposes, a viable population shall be regarded as one which has estimated numbers and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area. In order to insure that viable populations will be maintained, habitat must be provided to support, at least, a minimum number of reproductive individuals and that habitat must be well distributed so that those individuals can interact with others in the planning area.<sup>49</sup>

---

<sup>42</sup> 16 U.S.C. § 1604(i) (1994).

<sup>43</sup> 16 U.S.C. § 1604(f)(5) (1994).

<sup>44</sup> 42 U.S.C. §§ 4321-4370 (1994).

<sup>45</sup> 16 U.S.C. § 1604(g)(1) (1994).

<sup>46</sup> 16 U.S.C. § 1604(g)(3)(B) (1994).

<sup>47</sup> 16 U.S.C. § 1604(g)(2)(B) (1994).

<sup>48</sup> 16 U.S.C. §§ 1604 (f)(3), (5), and (h)(1).

<sup>49</sup> 36 C.F.R. § 219.19 (2000). *See also* 36 C.F.R. § 219.27(a)(6) (2000) (providing that “All management prescriptions shall . . . [p]rovide for adequate fish and wildlife habitat to maintain viable populations of existing native vertebrate species and provide that habitat for species chosen under § 219.19 is maintained and improved to the degree consistent with multiple-use objectives.”).

This regulation identifies two measurements of viability in the planning area: first, sufficient numbers of reproducing individuals; and second, well distributed habitat.<sup>50</sup> Recognizing that the Forest Service did not have the means to monitor these parameters for every species in the 191 million acre National Forest System, the regulations require that “[i]n order to estimate the effects of each [management] alternative on fish and wildlife populations,” the Forest Service “shall” designate MIS.<sup>51</sup> Further, the 219 regulations state, “[p]lanning alternatives shall be stated and evaluated in terms of *both amount and quality of habitat and of animal population trends* of the management indicator species,”<sup>52</sup> and that “[p]opulation trends of the management indicator species will be monitored and relationships to habitat changes determined.”<sup>53</sup> Again, these regulations treat evaluation and monitoring of habitat and populations as separate and distinct requirements.

Embodying the Committee of Scientists’ recognition that “[n]o plan is better than the resource inventory data that support it,”<sup>54</sup> the regulations also state “[i]ventories shall include quantitative data making possible the evaluation of diversity in terms of its prior and present condition.”<sup>55</sup>

Despite the Committee of Scientists’ recognition of the need for actual population data and constant updating of scientific methodology, federal court deference to the Agency’s creative interpretations of the regulations have allowed the Forest Service to

---

<sup>50</sup> Corbin, *supra* note 11 at 389.

<sup>51</sup> 36 C.F.R. § 219.19(a)(1) (2000).

<sup>52</sup> 36 C.F.R. § 219.19(a)(2) (2000) emphasis supplied.

<sup>53</sup> 36 C.F.R. § 219.19(a)(6) (2000).

<sup>54</sup> National Forest System Land and Resource Management Planning, 44 Fed. Reg. 26,554, 26,608 (May 4, 1979).

<sup>55</sup> 36 C.F.R. § 219.26 (2000).

fudge or ignore its mandate to gather the kind of data that would enable the Agency to utilize modern techniques like PVA. Now, the upcoming adoption of the proposed 219 regulations will codify the Agency's less accurate and assumption-loaded concept of "habitat viability analysis."<sup>56</sup> This will allow the Forest Service free reign to legally employ a methodology, that may or may not fulfill NFMA's mandate to preserve and promote biodiversity, in forest plans updated under the new regulations.<sup>57</sup> However, forest plans promulgated under the current regulations will still be governed by them for years to come,<sup>58</sup> and federal court enforcement of their monitoring requirements could protect biodiversity on hundreds of thousands of acres, and provide a yardstick with which to compare the effects of the new regulations.

### **3. Administrative Procedure Act**

Neither NFMA nor NEPA contain a citizen suit provision, which allows concerned citizens and groups representing their interests to seek judicial enforcement of these acts' requirements. Therefore, judicial review of agency decisions under these acts is accomplished through provisions of the Administrative Procedure Act (APA).<sup>59</sup> Section 10(a) of the APA provides that "a person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute, is entitled to judicial review thereof."<sup>60</sup>

The APA incorporates the judicial doctrine of "ripeness" by allowing judicial

---

<sup>56</sup> See generally Orleman, *supra* note 23.

<sup>57</sup> *Id.*

<sup>58</sup> 36 C.F.R. § 219.29 (2000).

<sup>59</sup> 5 U.S.C. §§ 551-559, 701-706 (1994).

<sup>60</sup> 5 U.S.C. § 702 (1994 & Supp. III 1997).

review of agency action only when it is a “final agency action.”<sup>61</sup> The Supreme Court recently stated two conditions that must be met for an administrative action to be considered final under the APA: (1) the action should mark the consummation of the agency’s decisionmaking process, and (2) the action should be one by which rights or obligations have been determined or from which legal consequences flow.<sup>62</sup> Agency failures to act are also reviewable,<sup>63</sup> and courts may compel “agency action unlawfully withheld or unreasonably delayed.”<sup>64</sup>

The APA also addresses the appropriate standard under which courts review agencies’ actions and interpretations of their regulations. Section 706(2)(A) of the APA directs the reviewing court to set aside agency action if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”<sup>65</sup>

The following section examines cases challenging agency failures to adequately follow the monitoring and surveying requirements of NFMA and individual LRMPs, where some federal courts have invoked the judicial doctrine of ripeness, as interpreted by the recent Supreme Court decision in *Ohio Forestry Ass’n v. Sierra Club*,<sup>66</sup> and held that inadequate monitoring is not a final agency action or failure to act.<sup>67</sup> Some of these decisions also suggest that agencies are entitled to substantial deference in interpreting the monitoring and surveying requirements, and that this deference allows the agencies to

---

<sup>61</sup> 5 U.S.C. § 704 (1994).

<sup>62</sup> *Bennett v. Spear*, 520 U.S. 154, 177 (1997).

<sup>63</sup> See 5 U.S.C. § 551(13) (1994) (expanding the definition of “agency action” to include a “failure to act”). See also 5 U.S.C. § 706(2)(A) (1994) (allowing courts to find an agency’s failure to act “arbitrary and capricious”).

<sup>64</sup> 5 U.S.C. § 706(1) (1994 & Supp. III 1997).

<sup>65</sup> 5 U.S.C. § 706(2)(A).

<sup>66</sup> 523 U.S. 726 (1998).

<sup>67</sup> *Sierra Club v. Peterson*, 2000 WL 1357506 (5<sup>th</sup> Cir. 2000); *Ecology Center v. United States Forest Service*, 192 F.3d 922 (9<sup>th</sup> Cir. 1999).

inadequately comply with or ignore these requirements altogether.<sup>68</sup>

Other federal court decisions have held that challenges to agency noncompliance with species monitoring requirements are ripe for review as final agency actions or failures to act, and that while the agency is entitled to deference in interpreting these regulations, the agency's failure to collect the required data rendered arbitrary and capricious any decisions based on the absent or inadequate data.<sup>69</sup>

### **III. *Ohio Forestry* – Ripeness and Final Agency Action**

#### **A. Introduction**

In *Ohio Forestry*,<sup>70</sup> two environmental groups challenged the U.S. Forest Service's Land and Resource Management Plan (LRMP) for the Wayne National Forest in Ohio, claiming that it allowed too much logging and clearcutting.<sup>71</sup> An association of forest industry interests, intervening on behalf of the Forest Service, claimed that the plan itself did not initiate specific timber sales, and thus was not ripe for review.<sup>72</sup> On May 18, 1998, a unanimous U.S. Supreme Court decision, written by Justice Breyer, held the challenge was not ripe and thereby limited the availability of judicial review of Forest Service LRMPs under the ripeness doctrine.<sup>73</sup>

Despite the limitations placed on challenges to forest plans by the *Ohio Forestry* holding, dicta specifically identified two types of challenges the Court would consider

---

<sup>68</sup> *Id.*

<sup>69</sup> *Sierra Club v. Martin*, 168 F.3d 1 (11<sup>th</sup> Cir. 1999); *Sierra Club v. Peterson*, 185 F.3d 349 (5<sup>th</sup> Cir. 1999) reversed after rehearing en banc; *Oregon Natural Resources Council Action v. United States Forest Service*, 192 F.Supp.2d 1085 (W.D. Wash. 1999); *Pacific Coast Fed'n of Fishermen's Ass'n v. National Marine Fisheries Service*, 71 F.Supp.2d 1063 (W.D. Wash. 1999).

<sup>70</sup> 118 S. Ct. 1665 (1998).

<sup>71</sup> *Id.* at 1669.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 1670.

ripe for judicial review: procedural claims, and substantive claims alleging site-specific and imminent harm. However, recent federal district and appellate court decisions demonstrate that questions remain as to the *Ohio Forestry* ruling's effect on monitoring challenges involving LRMPs.

This section provides background on the ripeness doctrine, and previous cases challenging forest plans, then examines the Wayne National Forest case in detail. An analysis of the decision's implications follows, illustrated by recent cases that interpret *Ohio Forestry*. This section concludes that recent decisions by lower courts are inconsistent in their characterization of claims as either procedural or substantive. Courts also misconstrue *Ohio Forestry* to require site-specific allegations in procedural claims, as well as claims alleging substantive defects in a plan. In light of *Ohio Forestry*, courts should consider ripe claims of procedural defects in agencies' compliance with monitoring requirements in regulations and LRMPs, without requiring allegations of imminent site-specific injuries. This section concludes that in such cases, reliance on *Ohio Forestry* is misplaced and serves only to confuse the issue.

## **B. Background**

### **1. The Ripeness Doctrine**

Ripeness and the related doctrine of standing are concepts of justiciability that limit access to courts by requiring a determination of "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."<sup>74</sup> The source of

---

<sup>74</sup> Paul A. Garrahan, *Failing to See the Forest for the Trees: Standing to Challenge National Forest Management Plans*, 16 VA. ENVTL. L.J. 145, 158-59 (1996) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1974)).

both doctrines is disputed, but standing is now generally accepted as a non-discretionary requirement of the “case or controversy” element in Article III of the Constitution.<sup>75</sup>

Though ripeness is frequently associated with Article III, it is often characterized by the Supreme Court as a prudential and discretionary limit.<sup>76</sup> Since the Court addresses the ripeness issue but declines discussion of standing in line with its practice of not deciding cases on constitutional grounds when discretionary limitations are available, *Ohio Forestry* supports the proposition that ripeness is a prudential and discretionary limitation.<sup>77</sup>

Despite their sources, the doctrines of standing and ripeness are so closely related that “[f]ew courts draw meaningful distinctions between the two.”<sup>78</sup> One reason for this confusion is that tests for the justiciability of a controversy under both doctrines initially address the imminence of injury to the plaintiff in similar terms.<sup>79</sup> The important distinction between the two is that standing determines the proper party to bring suit, where ripeness determines the proper time to bring suit.<sup>80</sup> Some courts recognize the ripeness doctrine is more appropriate to determine the justiciability of injuries that have not yet occurred.<sup>81</sup>

*Abbott Laboratories v. Gardner* is the leading case on the ripeness doctrine as

---

<sup>75</sup> *Id.* at 159.

<sup>76</sup> Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 155 (1987).

<sup>77</sup> Steven P. Quarles & Thomas R. Lundquist, *The Supreme Court Restricts Availability of Judicial Review in Ohio Forestry Ass'n v. Sierra Club*, 28 ENVTL. L. REP. 10621, 10626 (1998) (citing *Ohio Forestry*, 523 U.S. 732). Quarles represented the petitioner, Ohio Forestry Association, in *Ohio Forestry*.

<sup>78</sup> *Wilderness Soc'y v. Alcock*, 83 F.3d 386, 389 (11<sup>th</sup> Cir. 1996).

<sup>79</sup> *Id.* at 390. For Example, one prong of the standing test requires the injury be “actual or imminent,” and the traditional ripeness test requires it be immediate or imminently threatened.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

applied to challenges to administrative actions.<sup>82</sup> The Court stated “its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.”<sup>83</sup> The Court also stated a two-prong test for deciding whether an agency’s decision is ripe for judicial review, requiring evaluation of both “the fitness of the issue for judicial decision, and the hardship to the parties of withholding court consideration.”<sup>84</sup>

## 2. Judicial Climate Prior to *Ohio Forestry*

In 1990 the Supreme Court in *Lujan v. National Wildlife Federation*<sup>85</sup> construed the allowable scope of judicial review under the APA of public land management plans.<sup>86</sup> *Lujan* involved an environmental group’s challenge to the Bureau of Land Management’s (BLM) land withdrawal review program.<sup>87</sup> The complaint was based on alleged violations to the Federal Land Policy and Management Act of 1976<sup>88</sup> (FLPMA) and NEPA. Like NFMA, FLPMA provides no private right of action for violations of its provisions, so plaintiffs in *Lujan* sought judicial review under section 10(a) of the APA.<sup>89</sup> The Court addressed the ripeness of this challenge, and held the program was not “agency action” or “final agency action,” within the meaning of the APA.<sup>90</sup>

---

<sup>82</sup> 387 U.S. 136 (1967).

<sup>83</sup> *Id.* at 148-49.

<sup>84</sup> *Id.* at 149.

<sup>85</sup> 497 U.S. 871 (1990).

<sup>86</sup> Beth Brennan & Matt Clifford, *Standing, Ripeness, and Forest Plan Appeals*, 17 PUB. LAND & RESOURCES L. REV. 125, 133-35 (1996).

<sup>87</sup> *Lujan*, 497 U.S. at 875.

<sup>88</sup> 43 U.S.C. §§ 1701-1784 (1988 & Supp. V 1993).

<sup>89</sup> *Lujan*, 497 U.S. at 882.

<sup>90</sup> *Id.* at 890.



The Court reasoned that the program “does not refer to a single BLM order or regulation, or even to a completed universe of BLM orders and regulations,” but refers to “the continuing (and thus constantly changing) operations of BLM.”<sup>91</sup> The decision stated “a regulation is not ordinarily considered the type of agency action ripe for review under the APA until the scope of the controversy has been reduced to more manageable proportions and its factual components fleshed out by some concrete action applying the regulation to the claimant’s situation in a fashion that harms or threatens him.”<sup>92</sup>

A major exception noted in *Lujan* “is a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately,” and stated that this type of agency action is ripe for review.<sup>93</sup> The “case-by-case approach that this requires is understandably frustrating to [environmental organizations seeking] across-the-board protection of [natural resources],” but, the Court stated, such a limitation is the “traditional” and “normal mode of operation of the courts.”<sup>94</sup> The Court said that unless Congress specifically provides for judicial review “at a higher level of generality, we intervene . . . only when . . . a specific ‘final agency action’ has an actual or immediately threatened effect.”<sup>95</sup>

By the mid-1990s the federal appeals courts’ varying interpretations of *Lujan*

---

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 891.

<sup>93</sup> *Id.* (citing *Abbott Lab.*, 387 U.S. at 152-54).

<sup>94</sup> *Id.* at 894.

<sup>95</sup> *Id.* (citing *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 164-66 (1967)).

resulted in an even circuit split regarding the reviewability of LRMPs.<sup>96</sup> The Seventh<sup>97</sup> and Ninth Circuits<sup>98</sup> upheld such challenges, holding that the controversies were ripe for review because the plans were final, appealable, and presented threats of actual and imminent harm. The Eighth<sup>99</sup> and Eleventh Circuits<sup>100</sup> denied the justiciability of such claims on standing and ripeness grounds, finding the plans were merely advisory documents intended to guide site-specific decisions, and that allegations of injury were speculative prior to site-specific implementation of the plans. This was the unsettled state of the law regarding the ripeness of LRMP challenges when the Wayne National Forest controversy reached the Sixth Circuit,<sup>101</sup> and is likely the reason the Supreme Court accepted this case for review.

### C. *Ohio Forestry*

The planning process for the Wayne National Forest began in 1981.<sup>102</sup> Two environmental groups, the Sierra Club and the Citizens Council on Conservation and

---

<sup>96</sup> Garrahan, *supra* note 72, at 172-74; Quarles & Lundquist, *supra* note 75, at 10622; Brennan & Clifford, *supra* note 84 at 141-48; and Miles A. Yanick, *Loss of Protection as Injury in Fact: An Approach to Establishing Standing to Challenge Environmental Planning Decisions*, 29 U. Mich. J.L. Ref. 857, 865-873 (1996).

<sup>97</sup> *Sierra Club v. Marita*, 46 F.3d 606 (7<sup>th</sup> Cir. 1995). The court held a forest plan and its EIS were ripe for review because they could cause imminent harm, regardless of their programmatic nature. *Id.* at 613-14. Further, the court distinguished *Lujan* on the basis that here the Forest Service had issued a final, appealable plan. *Id.* at 614.

<sup>98</sup> *Idaho Conservation League v. Mumma*, 956 F.2d 1508 (9<sup>th</sup> Cir. 1992). This court similarly distinguished *Lujan* on both standing and ripeness grounds. *See Id.* at 1513-19. *See also* *Resources Ltd., Inc. v. Robertson*, 8 F.3d 1394 (9<sup>th</sup> Cir. 1993) (reversing the lower courts holding that the challenged LRMP was not ripe for review because there was no “actual or immediately threatened effect”); and *Seattle Audubon Soc’y v. Espy*, 998 F.2d 699 (9<sup>th</sup> Cir. 1993) (finding that while logging might not occur under the plan, potential harm to plaintiff’s aesthetic and scientific interests in owls that inhabit the forest constituted imminent injury).

<sup>99</sup> *Sierra Club v. Robertson*, 28 F.3d 753 (8<sup>th</sup> Cir. 1994). Here the court found the LRMP was a programmatic document that did not “effectuate any on-the-ground environmental consequences,” and noted that events would occur between the plan and site-specific projects, making any injury from the plan merely speculative. *Id.* at 758.

<sup>100</sup> *Wilderness Soc’y*, 83 F.3d 386 (holding that the LRMP was not ripe for review prior to a second stage site-specific decision).

<sup>101</sup> *Sierra Club v. Thomas*, 105 F.3d 248 (6<sup>th</sup> Cir. 1997), *rev’d and vacated by Ohio Forestry*, 523 U.S. 726 (1998).

<sup>102</sup> *Sierra Club v. Robertson*, 845 F. Supp. 485, 489 (S.D. Ohio 1994), *rev’d by Sierra Club v. Thomas*, 105 F.3d 248 (6<sup>th</sup> Cir. 1997).

Environmental Control participated in the planning process and the public comment period following publication of the proposed Plan and the draft EIS.<sup>103</sup> In 1988, the Forest Service adopted the final plan and accompanying final EIS.<sup>104</sup> Both groups complained of the Plan's designation of suitable timber lands and harvest methods, and appealed the adoption of the Plan through administrative channels.<sup>105</sup> The Chief of the Forest Service denied the groups' appeals in 1992 and affirmed adoption of the Plan, so they instigated legal action two months later.<sup>106</sup>

The complaint included three counts.<sup>107</sup> First, the groups alleged that approval of a plan that permits below-cost timber sales accomplished by clearcutting violates NFMA, NEPA, and the APA.<sup>108</sup> Second, they claimed that by permitting below-cost timber sales, the Forest Service violated its duty as public trustees.<sup>109</sup> Third, the plaintiffs alleged that by selecting lands suitable for timber production, the Forest Service followed regulations that failed to properly identify "economically unsuitable lands" and such lands were placed into a category where logging could take place.<sup>110</sup> Thus the regulations violated NFMA and the APA as an arbitrary and capricious abuse of discretion, not in accordance with law.<sup>111</sup>

The plaintiffs requested a declaratory judgment that the plan and the below-cost timber sales and clearcutting it authorized are unlawful, and sought an injunction prohibiting the Forest Service from allowing further timber harvest or below-cost timber

---

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Ohio Forestry*, 523 U.S. at 731.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

sales pending revision of the Plan.<sup>112</sup>

### 1. Procedural History

At the district court level, the parties did not raise the issue of justiciability, and in *Sierra Club v. Robertson*, Judge James L. Graham granted summary judgment for the Forest Service on the merits.<sup>113</sup> Judge Graham held the plaintiffs “failed to show that in adopting the plan for the Wayne [National Forest], the Forest Service acted arbitrarily or capriciously or that the plan is contrary to the law.”<sup>114</sup>

The plaintiffs appealed, and in *Sierra Club v. Thomas* the Court of Appeals for the Sixth Circuit reversed and joined the Seventh and Ninth Circuits, in holding that Forest Service LRMPs are ripe for judicial review.<sup>115</sup> The decision first addressed the threshold issue of justiciability with a discussion of standing.<sup>116</sup> The court stated that “[i]n cases involving Land Resource Management Plans, the most controverted standing issue is whether injury is imminent.”<sup>117</sup> The Sixth Circuit determined LRMPs “represent significant and concrete decisions that play a critical role in future Forest Service actions,” and stated that if the plaintiffs were only allowed to challenge the plan at the site-specific stage, “then the meaningful citizen participation contemplated by the [NFMA] would forever escape review.”<sup>118</sup> Then, specifically addressing the ripeness of the controversy, the decision concluded “[p]laintiffs need not wait to challenge a specific project when their grievance is with an overall plan.”<sup>119</sup>

Turning to the merits of the plaintiff’s first and third claims, the court found that

---

<sup>112</sup> *Id.*

<sup>113</sup> *Robertson*, 845 F. Supp. at 489.

<sup>114</sup> *Id.* at 503.

<sup>115</sup> *Thomas*, 105 F.3d at 250.

<sup>116</sup> *Id.* at 250.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* (quoting *Idaho Conservation League*, 956 F.2d at 1516).

<sup>119</sup> *Id.*

the Forest Service’s planning process was “improperly predisposed toward clearcutting” and the resulting plan was “arbitrary and capricious because it is based upon this artificial narrowing of options.”<sup>120</sup> The decision then engaged in an extraordinary analysis of the planning process, accusing the Forest Service of maintaining political and economic biases in favor of timber production and undervaluing primitive recreational uses.<sup>121</sup> In a concurring opinion, Judge Batchelder said “speculation about the motives and biases of the Forest Service, even if accurate, is unnecessary, and therefore, ought not to be voiced in this opinion.”<sup>122</sup> In conclusion, the court found the Forest Service “failed to comply with the protective spirit of the [NFMA],” and that this noncompliance violated section 1604(g)(3)(F)(v) of the Act.<sup>123</sup>

## 2. Supreme Court Decision

The Ohio Forestry Association was an intervenor-defendant in both lower court cases, but maintained a low profile until the appellate court’s decision raised the stakes for the logging industry.<sup>124</sup> The Ohio Forestry Association petitioned for a writ of certiorari over the objections of the plaintiffs and surprisingly, the Forest Service, which argued against Supreme Court review on procedural grounds.<sup>125</sup> The Supreme Court granted certiorari in October, 1997, to determine whether the dispute presented a justiciable controversy, and if so, whether the LRMP conformed to statutory and regulatory requirements.<sup>126</sup>

---

<sup>120</sup> *Id.* at 251.

<sup>121</sup> *Id.* at 251-52.

<sup>122</sup> *Id.* (Batchelder, J., concurring).

<sup>123</sup> *Id.* at 252. See 16 U.S.C. § 1604(g)(3)(F)(v) (requiring even-aged management practices (i.e. clearcutting) be used in national forests only when consistent with the protection of soil, watershed, fish, wildlife, recreation, and aesthetic resources, and the regeneration of the timber resource).

<sup>124</sup> Quarles & Lundquist, *supra* note 75, at 10624.

<sup>125</sup> *Id.*

<sup>126</sup> *Ohio Forestry*, 523 U.S. at 732.

In briefs and at oral argument, the Forest Service realigned itself with the Ohio Forestry Association and argued that the suit was not justiciable because the plaintiffs lacked standing and because the dispute over the plan's specifications for logging and clearcutting was not yet ripe for judicial review.<sup>127</sup> Because the Court disagreed with the Sixth Circuit and held the dispute was not ripe for review, the decision did not discuss standing or the merits of the case.

### 3. Reasoning and Analysis

In reaching its decision in *Ohio Forestry*, the Court relied primarily on two important ripeness decisions, *Abbott Laboratories*<sup>128</sup> and *Lujan*.<sup>129</sup> The Court modified the two-prong ripeness test from *Abbott Laboratories*, and distilled it into three factors.<sup>130</sup> The first factor asks whether delayed review would cause the plaintiff hardship.<sup>131</sup> The second factor requires determination of whether judicial intervention would inappropriately interfere with further administrative action by the defendant.<sup>132</sup> The third factor asks whether the courts would benefit from further factual development of the issues presented.<sup>133</sup>

In applying this standard, the Court first found that the plaintiffs failed to show delayed review would cause them hardship. The Court stated the challenged LRMP does not “create any adverse effects of a strictly legal kind, that is, effects of a sort that traditionally would have qualified as harm,” since LRMPs “do not command anyone to do anything or to refrain from doing anything.”<sup>134</sup> To illustrate, the Court said “the Plan

---

<sup>127</sup> *Id.*

<sup>128</sup> *Abbott Lab.*, 387 U.S. 136.

<sup>129</sup> *Lujan*, 497 U.S. 871.

<sup>130</sup> *Ohio Forestry*, 523 U.S. at 733.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* (paraphrasing *U.S. v. Los Angeles & Salt Lake R.R. Co.*, 273 U.S. 299, 309-10 (1927)).

does not give anyone a legal right to cut trees, nor does it abolish anyone's legal authority to object to trees being cut.”<sup>135</sup> The Court also found that the plan could not inflict immediate harm because several steps were required before the Forest Service could initiate any site-specific activity based on the plan, and plaintiffs could bring a challenge then.<sup>136</sup> Plaintiffs contended that the expense of multiple site-specific challenges required by delayed review, would constitute hardship.<sup>137</sup> The Court responded that “this kind of litigation cost-saving” is insufficient to justify review of an otherwise unripe case, because the disadvantages of premature review outweigh the additional costs.<sup>138</sup>

Second, the Court found immediate review would interfere with further agency action by hindering the Forest Service’s efforts to refine its policies, correct its own mistakes, and apply its own expertise.<sup>139</sup> The Court added that “further consideration will occur before the Plan is implemented,” and hearing the challenge now would “interfere with the system that Congress specified for the agency to reach forest logging decisions.”<sup>140</sup>

Third, the Court found immediate review “would require time-consuming judicial consideration of the details of an elaborate, technically based plan” with effects that may change over time.<sup>141</sup> The decision stated that this is the type of “abstract disagreement over administrative policies’ that the ripeness doctrine seeks to avoid,” and it would be best to wait until the controversy was “reduced to more manageable proportions,” and its “factual components [were] fleshed out” to “significantly advance our ability to deal with

---

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 734.

<sup>138</sup> *Id.* at 735. The Court then quoted *Lujan* for further justification of the case-by-case approach. *Id.*

<sup>139</sup> *Id.* (quoting *FTC v. Standard Oil Co.*, 449 U.S. 232, 242 (1980)).

<sup>140</sup> *Id.* at 735-36.

<sup>141</sup> *Id.* at 735.

the legal issues presented.”<sup>142</sup>

The Court also addressed the legislative intent behind NFMA, differentiating it from NEPA and other environmental statutes where Congress has specifically allowed for judicial review prior to enforcement.<sup>143</sup> In the judgment of the Court, Congress had not provided for pre-implementation judicial review of forest plans.<sup>144</sup> The *Ohio Forestry* opinion distinguishes substantive challenges to LRMPs under NFMA from procedural challenges under NEPA, stating that NEPA “guarantees a particular procedure, not a specific result.”<sup>145</sup> The purpose of NEPA is to insure that environmental effects of government agency actions are discovered and considered before action is taken.<sup>146</sup> In *Idaho Conservation League v. Mumma*, the Ninth Circuit illustrated this point, recognizing that when an agency does not follow procedures required by NEPA, the “risk that environmental impact will be overlooked” is the injury inflicted.<sup>147</sup> In *Ohio Forestry*, the Court stated that a procedural challenge brought by a plaintiff who is injured by a failure to comply with NEPA “may complain of that failure at the time the failure takes place, for the claim can never get riper.”<sup>148</sup>

In a final attempt to avoid dismissal for lack of ripeness, the plaintiffs argued that the opening of trails to motorized travel and coinciding failure to promote backcountry

---

<sup>142</sup> *Id.* at 736-37 (internal quotations omitted) (quoting *Abbott Lab.*, 387 U.S. at 148, *Lujan*, 497 U.S. at 891, and *Duke Power Co. v. Carolina Env'tl Study Group*, 438 U.S. 59, 82 (1978)).

<sup>143</sup> *Id.* at 737.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> 42 U.S.C. § 4321 (1994).

<sup>147</sup> 956 F.2d at 1514.

<sup>148</sup> *Ohio Forestry*, 523 U.S. at 737. In *Lujan v. Defenders of Wildlife*, the Court illustrates this point in terms of standing, stating “[t]hus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency’s failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.” 504 U.S. 555, 573 n.7 (1992).



recreation in areas designated for logging are harms that will occur now.<sup>149</sup> However, the complaint did not include these claims, so the Court declined to address them.<sup>150</sup> But the Court did state that the Government's brief and the Solicitor General, at oral argument, conceded that concerns of immediate harm resulting from the plan would be justiciable.<sup>151</sup> The Court explicitly recognized that if the plaintiffs "had previously raised these kinds of harm, the ripeness analysis in this case with respect to those provisions of the Plan that produce the harm would be significantly different."<sup>152</sup> Also, the Court's statement that the plaintiffs could not point to "any other way in which the Plan could now force it to modify its behavior in order to avoid future adverse consequences,"<sup>153</sup> implicitly recognizes that when a plaintiff can show a forest plan forces such a modification, the plan, or a part of it, is ripe for review. *Lujan* supports this view, finding elements of a plan that require claimants to immediately adjust their behavior are ripe. The Court, in *Ohio Forestry*, added "[a]ny such later challenge might also include a challenge to the lawfulness of the present Plan if (but only if) the present Plan then matters, i.e., if the Plan plays a causal role with respect to the future, then imminent, harm from logging."<sup>154</sup>

Despite the Court's closing out review of substantive provisions of LRMP's on the facts presented, *Ohio Forestry* expressed dicta that leaves open two avenues to challenge LRMPs: 1) claims of procedural harm, and 2) claims of substantive defects in a plan where injuries are not contingent on some activity requiring a second stage of decision making after the plan's adoption. The Court's reasoning and the foregoing analysis suggest site-specific allegations of imminent harm are necessary to claimants

---

<sup>149</sup> *Ohio Forestry*, 523 U.S. at 738.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 739.

<sup>152</sup> *Id.* at 738

<sup>153</sup> *Id.* at 734

<sup>154</sup> *Id.*

taking the second avenue, but not the first. Subsequent LRMP cases interpreting *Ohio Forestry* demonstrate apparent confusion over the characterization of claims as procedural or substantive, and when to require site-specific allegations of imminent harm.

#### **D. Judicial Interpretation of *Ohio Forestry***

In recent cases involving LRMP challenges, several federal courts found claims of procedural harm, and substantive claims of imminent site-specific harm justiciable in light of *Ohio Forestry*. Others have declined to do so, relying in part on *Ohio Forestry* to deny the ripeness of challenges to the Forest Service's failure to follow the monitoring requirements of its own regulations and LRMPs. Such challenges should be characterized as procedural claims and allowed without requiring site-specific allegations.

##### **1. Federal District Court Decisions**

In *Kentucky Heartwood, Inc. v. Worthington*, environmental groups sought to prevent certain logging activities in eastern Kentucky's Daniel Boone Forest until the Forest Service complied with applicable law, administrative regulations, and the provisions of the Forest Plan.<sup>155</sup> The plaintiffs asserted four separate claims. First, they alleged the agency violated the ESA's requirement of consultation with the Fish and Wildlife Service<sup>156</sup> in adopting the Plan, nine amendments to the Plan and three management policies which authorized projects that may affect listed species.<sup>157</sup> Second, the plaintiffs claimed the Forest Service's failure to consider alternatives to clearcutting violated NEPA requirement that the agency study, develop, and describe appropriate alternatives in the EIS that accompanies the Forest Plan.<sup>158</sup> Third, the plaintiffs argued

---

<sup>155</sup> 20 F. Supp. 2d 1076, 1090 (E.D. Ky. 1998).

<sup>156</sup> 16 U.S.C. § 1536 (supp. 1999), 50 C.F.R. §§ 402.11 and 402.14 (1999).

<sup>157</sup> *Kentucky Heartwood*, 20 F. Supp. 2d at 1088. The Daniel Boone Forest is home to at least thirty-three threatened or endangered species of plants and animals. *Id.* at 1081-82.

<sup>158</sup> *Id.*

the agency violated NFMA's requirement that amendments and policies supplemental to the Forest Plan go through the NEPA process before they can legally guide management activities in the forest.<sup>159</sup> Finally, they challenged the Forest Plan's adoption of clearcutting as the exclusive timber harvest method, claiming it violated NFMA, which does not allow exclusive use of clearcutting.<sup>160</sup>

After a lengthy discussion of the facts and holding in *Ohio Forestry*, District Court Judge Forester characterized the plaintiffs' first three claims as procedural and held their ESA and NEPA challenges to the forest plan were ripe, and their NFMA claim was also ripe "as it relates to defendant's failure to comply with a particular procedure."<sup>161</sup> However, Judge Forester dismissed the NFMA challenge to the forest plan's authorization of clearcutting as the exclusive harvest method, stating that challenges to the content of forest plans brought pursuant to NFMA are not justiciable in light of *Ohio Forestry*.<sup>162</sup>

*Kentucky Heartwood* applies the *Ohio Forestry* decision's acceptance of procedural challenges to LRMPs. It also demonstrates that not all claims brought under NFMA need necessarily be characterized as substantive. Though the Court in *Ohio Forestry* makes a rough distinction between NEPA claims as procedural and NFMA claims as substantive, this court finds that NFMA and ESA claims may also be procedural in nature.

---

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 1088.

<sup>161</sup> *Id.* at 1090.

<sup>162</sup> *Id.* (noting that *Ohio Forestry* distinguishes NEPA from NFMA on the grounds that former requires a particular procedure, while the latter requires a particular result. 523 U.S. at 737).

## 2. Federal Circuit Court Decisions

### a. D.C. Circuit

In *Wyoming Outdoor Council v. United States Forest Service*, a collection of environmental groups challenged a Forest Service decision authorizing oil and gas leasing of land in the Shoshone National Forest in northwestern Wyoming.<sup>163</sup> The plaintiffs argued the Agency violated its own regulations governing the leases and violated NEPA by authorizing the leases without first determining whether an adequate site specific environmental review had been performed.<sup>164</sup>

The Federal Onshore Oil and Gas Leasing Reform Act of 1987 governs the issuance of oil and gas leases in national forests.<sup>165</sup> In 1990, the Forest Service promulgated regulations implementing its responsibilities under the Act.<sup>166</sup> The regulations require Forest Service authorization of leases shall be subject to three site-specific factual findings made by the Agency.<sup>167</sup> First, the Forest Service must verify that leasing of the specific lands has been adequately addressed in a NEPA document and is consistent with the forest's LRMP.<sup>168</sup> If the Agency determines that NEPA has not been satisfied or further environmental assessment is necessary, additional analysis must be done before a leasing decision is made for specific lands.<sup>169</sup> Second, the Agency must ensure that conditions of surface use are stipulated in any resulting lease.<sup>170</sup> Third, the Forest Service must determine that the proposed surface use is allowable somewhere on

---

<sup>163</sup> 165 F.3d 43 (D.C. Cir. 1999).

<sup>164</sup> *Id.* at 45.

<sup>165</sup> *Id.* (citing 30 U.S.C. § 226(g)-(h) (Supp. 1999)).

<sup>166</sup> *Id.* (citing 36 C.F.R. § 228.102(c) and (e) (1999)).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* (citing 36 C.F.R. § 228.102(e)(1) (1999)).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* (citing 36 C.F.R. § 228.102(c)(1) and (e)(2) (1999)).

the land subject to leasing.<sup>171</sup>

In the EIS and the ROD for the proposed leases, the Forest Service found NEPA compliance was adequate, but expressly stated that it was not making any of the required findings.<sup>172</sup> The plaintiffs challenged the Agency's failure to include the required findings in the EIS and ROD, claiming this violated the Agency's regulations and NEPA.<sup>173</sup> The District Court held for the defendants, deferring to the Agency's interpretation of its own regulations and finding that the Service's EIS was sufficiently site-specific that it did not violate NEPA.<sup>174</sup> This appeal followed. In the meantime, the Agency completed the NEPA process, made the required findings, and authorized the BLM to lease three parcels in the Shoshone National Forest.<sup>175</sup>

After a discussion of the Constitution's Article III jurisdictional requirements, the Court of Appeals for the District of Columbia focused on the prudential concern of ripeness, and applied the *Ohio Forestry* three-part test.<sup>176</sup> With the benefit of hindsight, the court held the "point of irreversible and irretrievable commitment of resources and the concomitant obligation to fully comply with NEPA [did] not mature until the leases [were] issued," and thus the claim was unripe at the time the plaintiffs filed their appeal.<sup>177</sup> The court went on to say the plaintiffs could challenge the Service's NEPA compliance after the BLM issued the leases.<sup>178</sup>

In contrast, the court characterized as procedural the plaintiffs' claim that the Agency violated its own regulations by issuing the EIS and ROD without completing the

---

<sup>171</sup> *Id.* (citing 36 C.F.R. § 228.102(e)(3) (1999)).

<sup>172</sup> *Id.* at 47.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 48-49.

<sup>177</sup> *Id.* at 49.

<sup>178</sup> *Id.* at 50.

required findings.<sup>179</sup> The court stated that where an agency promulgates regulations that erect a procedural barrier and then ignores them, the plaintiff need only show that the government act performed without the procedure in question will cause a distinct risk to a particularized interest of the plaintiff.<sup>180</sup> Then, quoting *Ohio Forestry*, the court went on to say a person injured by an agency's failure to comply with a procedural requirement may complain of the failure when it occurs, because the claim can never get riper.<sup>181</sup>

*Wyoming Outdoor Council* treats ripeness as prudential requirement and shows that all NEPA-based challenges to LRMPs are not necessarily ripe in light of *Ohio Forestry*. However, this decision does recognize the procedural nature and ripeness of an agency decision to ignore its own implementing regulations. By finding an agency decision to ignore the procedural requirements of its own regulations ripe for review, the D.C. Circuit implies that such a decision is a final agency action or failure to act under the APA.

#### **b. Ninth Circuit**

*Wilderness Society v. Thomas* required the Ninth Circuit to decide whether the Forest Service violated NFMA in preparing a LRMP for the Prescott National Forest in central Arizona.<sup>182</sup> The final Prescott National Forest Plan identified a total amount of land not physically "capable" of sustaining commercial grazing.<sup>183</sup> A coalition of environmental groups filed suit, claiming in count one that the Plan violates NFMA and Forest Service regulations which also require a separate analysis to determine if lands physically "capable" of sustaining grazing are also "suitable" for grazing, taking into

---

<sup>179</sup> *Id.* at 51.

<sup>180</sup> *Id.* (quoting *Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1998)).

<sup>181</sup> *Id.* (quoting *Ohio Forestry*, 523 U.S. at 737).

<sup>182</sup> 188 F.3d 1130 (9<sup>th</sup> Cir. 1999).

<sup>183</sup> *Id.* at 1132.

account economic and environmental considerations, as well as alternative uses for the land.<sup>184</sup> The plaintiffs also made site-specific challenges, alleging in counts two and three that the Agency violated NFMA when it issued grazing permits for two grazing allotments pursuant to the Plan. The District Court granted summary judgment for the defendants and this appeal followed.<sup>185</sup>

The Ninth Circuit began its discussion by applying the *Ohio Forestry* three-part test to determine the ripeness of the plaintiffs' claims.<sup>186</sup> The court then acknowledged that *Ohio Forestry* allows challenges to a forest plan when plaintiffs allege either imminent, concrete injuries that would be caused by the plan, or a site-specific injury causally related to an alleged defect in the plan.<sup>187</sup> The court characterized count one as "a generic challenge [to a forest plan] that *Ohio Forestry* cautions against adjudicating" and held it unripe for review despite the court's explicit acknowledgment of the defective forest plan's causal relationship to the site-specific injuries alleged in counts two and three.<sup>188</sup> The court then found counts two and three ripe for review and stated that "[b]ecause the site-specific injury to the two [grazing] allotments is alleged to have been caused by a defect in the Forest Plan, we may consider whether the Forest Service complied with NFMA in making its general its general grazing suitability determinations in the Forest Plan."<sup>189</sup>

In *Wilderness Society*, the Ninth Circuit expressly recognized the justiciability of Forest Service noncompliance with a forest plan, when the failure to comply causes site-specific harm. *Wilderness Society* suggests that noncompliance with the mandates of a

---

<sup>184</sup> *Id.* at 1132-33.

<sup>185</sup> *Id.* at 1133.

<sup>186</sup> *Id.* (citing *Ohio Forestry*, 523 U.S. at 733).

<sup>187</sup> *Id.* at 1133-34 (citing *Ohio Forestry*, 523 U.S. at 738-39).

<sup>188</sup> *Id.* 1134.

<sup>189</sup> *Id.*

forest plan *is* a final agency action or a justiciable failure to act for purposes of the APA. *Wilderness Society* also unnecessarily extends the *Ohio Forestry* requirement of site-specific harm to what is more properly characterized as a procedural claim.

*Friends Of The Kalmiopsis v. United States Forest Service* is a memorandum decision issued by the Ninth Circuit involving a challenge by environmental groups to the Forest Service's handling of off-road vehicle (ORV) impacts in the Siskiyou National Forest in southwest Oregon and northwest California.<sup>190</sup> The plaintiffs claimed first that the Forest Service violated NFMA by failing to amend or revise the Forest LRMP to address new information pertaining to the spread of disease fatal to Port Orford cedar trees. Second, the plaintiffs alleged that the Service violated an executive order and the Agency's own implementing regulations by its failure to adequately monitor ORV impacts and prepare annual reviews of the Forest's ORV management plan. Finally, the environmental groups claimed that the Agency's violation of its own wet-season road closure was arbitrary and capricious.<sup>191</sup>

The court found the Agency's "lax monitoring unlikely to expose potential problems caused by ORVs."<sup>192</sup> However, the court found the claim unripe for review under the APA because there was no complete failure to perform a legally required duty that is necessary to constitute a final agency action or failure to act.<sup>193</sup> The agency and the court concede that in light of *Ohio Forestry*, these claims would be ripe for review if the harm was made more imminent by a Forest Service attempt to revise its Forest Plan or designate ORV areas without adequate monitoring.<sup>194</sup> In this case however, the court

---

<sup>190</sup> 198 F.3d 253 (9<sup>th</sup> Cir. 1999).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* (citing *Ohio Forestry*, 523 U.S. 726).



found no imminent agency action that hinged on the result of the allegedly deficient monitoring results and annual plan review.<sup>195</sup>

In *Friends Of The Kalmiopsis*, the Ninth Circuit addressed ripeness of claims brought under the APA which allege Forest Service failure to adequately fulfill monitoring requirements. Here, the court relied on *Ohio Forestry* and expressly stated that such claims would be ripe if the Forest Service made the harm more imminent by taking site-specific action based on inadequate monitoring. This suggests that the court is actually focusing on *Ohio Forestry*'s imminence requirement and not the finality of an agency decision to disregard mandatory regulations. However, *Ohio Forestry* involved a challenge to substantive provisions of an LRMP, which is easily distinguished from cases challenging agency interpretation and implementation of LRMP provisions. While a generic (non-site-specific) challenge to the content of an LRMP may indeed benefit from the focus provided by imminent site-specific harm, challenges to agency interpretation and implementation of forest plans and regulations are more akin to the procedural claims that *Ohio Forestry* recognizes as ripe when they occur.

#### **E. Ripeness in Species Monitoring Cases**

##### **1. *ONRC v. United States Forest Service***

Plaintiffs in *Oregon Natural Resources Council Action v. United States Forest Service and Bureau of Land Management (ONRC)* claimed the federal agencies violated the monitoring and surveying requirements of their own LRMP.<sup>196</sup> The LRMP in this case was the Northwest Forest Plan, adopted in 1994 in response to concerns over the management of federal forests within the geographic range of the northern spotted owl.<sup>197</sup>

---

<sup>195</sup> *Id.*

<sup>196</sup> 59 F. Supp. 2d 1085 (W.D. Wash. 1999) (hereinafter *ONRC*).

<sup>197</sup> *Id.* at 1087.

The plan seeks to ensure the viability of certain rare species by requiring surveys for those species before any ground-disturbing activities that are implemented after a specific cut-off date.<sup>198</sup> The agencies issued memoranda exempting timber sales from survey requirements when the sales' EISs were completed before the applicable cut-off date, or when the sales were to take place in an area of abundant red tree vole habitat or isolated watersheds under private ownership.<sup>199</sup>

The plaintiffs claimed the agencies' authorization of certain timber sales without first conducting surveys for certain species of wildlife, as required by the LRMP,<sup>200</sup> violated NFMA and FLPMA and their implementing regulations which require timber sales be consistent with guiding LRMPs.<sup>201</sup> The plaintiffs also alleged a NEPA violation because significant new information had come to light which the agencies failed to address by preparing a supplemental EIS<sup>202</sup> as required by NEPA and its implementing regulations.<sup>203</sup>

District Court Judge Dwyer characterized the plaintiffs' claims as procedural because they sought to enforce a procedural requirement that, if disregarded, could impair their concrete interests.<sup>204</sup> The agencies and intervening timber companies argued these claims were not final agency actions and not ripe for review under *Ohio Forestry*.<sup>205</sup> Judge Dwyer found the NEPA claims ripe for review under section 706(1) of the APA,

---

<sup>198</sup> *Id.* at 1088.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> See NFMA, 16 U.S.C. § 1604(i) (Supp. 1999), and 36 C.F.R. § 219.10(e) (1999); FLPMA, 43 U.S.C. § 1732(a) (Supp. 1999), and 43 C.F.R. § 1610.5-3 (1999).

<sup>202</sup> 59 F. Supp. 2d at 1088.

<sup>203</sup> NEPA at 42 U.S.C. §§ 4321-4370d (Supp. 1999), 40 C.F.R. § 1502.9(c) (1999).

<sup>204</sup> 59 F. Supp. 2d at 1089. Logging without the required surveys and thus without knowledge of the number and location of critical species (like the northern spotted owl and the red tree vole that the owl feeds on) may cause permanent harm to the species, and thus to the plaintiffs' interests. *Id.*

<sup>205</sup> *Id.* at 1090

which he characterized as “an exception to the final agency action requirement.”<sup>206</sup> *ONRC* stated that the agencies’ decision to authorize the timber sales without surveys constituted final agency actions under section 704 of the APA.<sup>207</sup> Judge Dwyer also found the plaintiffs’ challenge to specific timber sales rendered the claim ripe in light of *Ohio Forestry*.<sup>208</sup>

Like *Kentucky Heartwood*, *ONRC* also stands for the proposition that procedural claims, including those based on FLPMA and NFMA as well as NEPA, should be considered ripe under *Ohio Forestry*. In addition, it finds that an agency decision to disregard the requirements of a LRMP is reviewable as a final agency action or failure to act for the purposes of the APA. Finally, Judge Dwyer’s opinion also demonstrates the perceived need for site-specific allegations in order to square this type of challenge with the mandates of *Ohio Forestry*, even when the claim is procedural in nature.

## 2. *Sierra Club v. Martin*

In *Sierra Club v. Martin*, environmental groups challenged the Forest Service’s approval of seven timber sales in the Chattahoochee and Oconee National Forests in the Appalachian Mountains of northern Georgia.<sup>209</sup> The proposed timber sales would cover roughly 2000 acres, require the construction of eighteen miles of roads and release over 155 tons of sediment into nearby streams.<sup>210</sup> The LRMP under which the timber sales were approved was adopted in 1985 and amended in 1989.<sup>211</sup> Prior to any timber sale, the plan required the Forest Service to conduct a site-specific study to determine whether the

---

<sup>206</sup> *Id.* (quoting *ONRC v. BLM*, 150 F.3d 1132, 1137 (9<sup>th</sup> Cir. 1998)).

<sup>207</sup> *Id.* (citing *Bennett v. Spear*, 520 U.S. 154, 178 (1997)).

<sup>208</sup> *Id.* (citing *Martin*, 168 F. 3d at 6 (11<sup>th</sup> Cir. 1999) (holding plaintiff was “entitled to challenge the Forest Service’s compliance with the [forest] Plan as part of its site-specific challenge to the timber sales”).

<sup>209</sup> 168 F.3d 1 (11<sup>th</sup> Cir. 1999) rehearing and suggestion for rehearing en banc denied by *Sierra Club v. Martin*, 181 F.3d 111 (11<sup>th</sup> Cir. 1999).

<sup>210</sup> *Id.* at 2.

<sup>211</sup> *Id.*

sale would harm the area or resident species.<sup>212</sup> After studying the area of the proposed sales, the Agency determined there would be no adverse impact and approved the sales.<sup>213</sup>

The plaintiffs first alleged that the decision to approve the sales was arbitrary and capricious under the APA because the Service did not obtain or consider population data for sensitive species and species proposed or listed under the ESA, as required by the forest plan.<sup>214</sup> Second, the plaintiffs claimed the failure to acquire population data violated NFMA's 219 regulations as well.<sup>215</sup> The plaintiffs also challenged the forest plan itself, arguing that by allowing such timber harvests, it violated NFMA's requirement that the plan adequately protect the soil, watershed, fish and wildlife of the Forest.<sup>216</sup> The district court granted summary judgment to the defendants, holding that the Forest Service was not required to obtain population data before approving timber sales.<sup>217</sup>

The Court of Appeals for the Eleventh Circuit began with the first claim and refused to defer to the Forest Service's conclusion that there will be no significant impact to the sensitive species. The court found agency actions must be reversed as arbitrary and capricious when the agency fails to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"<sup>218</sup> The court held the Service's failure to gather the

---

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 2-3.

<sup>214</sup> *Id.* at 3.

<sup>215</sup> *Id.* The Sierra Club claimed the decision to proceed with the timber sales violated 36 C.F.R. §§ 219.19 and 219.26 because the agency had not collected population data for MISs. *Id.* at 5.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 5 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)) However, nothing in the record indicated that the Forest Service possessed baseline population data from which to measure the impacts on these species. *Id.*

population data was contrary to the forest plan and therefore the decision to authorize the sales without the data was arbitrary and capricious.<sup>219</sup>

In response to the second claim, the Forest Service argued that NFMA's 219 regulations could not be challenged at the site-specific level, because they apply only to the forest planning process.<sup>220</sup> Further, the Agency argued that the plan itself was not a final agency action and could not be challenged.<sup>221</sup> The court agreed that the regulations apply only to the planning process but noted that the planning process did not end with the plan's approval, because NFMA's implementing regulations require plan revision under various circumstances.<sup>222</sup> The 219 regulations, opined the court, taken together "require the Forest Service to gather quantitative data on MIS and use it to measure the impact of habitat changes on the Forest's diversity."<sup>223</sup> This, the court recognized, differs with the Ninth Circuit's conclusion in *Inland Empire*, that habitat viability analysis would satisfy the 219 regulations.<sup>224</sup>

Without citing *Ohio Forestry*, the court also held the environmental groups could challenge the Forest Service's compliance with its own LRMP as a part of their site-specific challenge to the timber sales.<sup>225</sup> The court recognized that a contrary result would make it impossible for a plaintiff to ever seek review of the Forest Service's compliance with a Forest Plan.<sup>226</sup> Instead of *Ohio Forestry*, the court relied on its own

---

<sup>219</sup> *Id.* at 5.

<sup>220</sup> *Id.* at 6.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 7. The court noted that to read the 219 regulations otherwise would render one or another meaningless "as well to disregard the regulations' directive that population trends of the MIS be monitored and that inventory data be gathered in order to monitor the effects of the forest plan." *Id.* citing *Sierra Club v. Glickman*, 974 F. Supp. 905, 936 (E.D. Tex. 1997).

<sup>224</sup> *Id.* at 7, n. 10. The court did not believe the Ninth Circuit's conclusion conformed with the plain language of 36 C.F.R. § 219.19(a)(2), which requires evaluation of "both amount and quality of habitat and of animal population trends of the management indicator species." *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

decision in *Wilderness Society v. Alcock* for the proposition that a court can hear a challenge to a Forest Plan once a site-specific action is proposed.<sup>227</sup> The decision did not address the Plaintiffs' challenge to the plan itself.

*Martin* does not cite *Ohio Forestry*, but it does treat a Forest Service decision to ignore its own LRMP's monitoring requirements, which derive from regulations implementing NFMA, as final for APA purposes. It is important to note that in *Martin*, the Eleventh Circuit did not uphold or declare ripe a challenge to the content of a LRMP. The court merely held that a claimant could seek review of the Forest Service's compliance with a forest plan it had already adopted. While this court also requires a site-specific complaint, it does so in reliance on a case other than *Ohio Forestry*.

### 3. *Sierra Club v. Peterson*

*Sierra Club v. Peterson (Peterson I)*<sup>228</sup> involved a fourteen-year dispute between environmental groups and the Forest Service over the management of four National Forests in eastern Texas.<sup>229</sup> In 1985, the environmental groups first challenged the Forest Service's management of these National Forests in response to the Agency's cutting of timber in wilderness areas to control the spread of the Southern Pine Beetle.<sup>230</sup> In 1987, the groups' efforts diverged into two distinct tracks of litigation.<sup>231</sup> The first involved claims that clearcutting violated NFMA and its associated regulations.<sup>232</sup> The second involved attempts by the groups to protect the habitat of the Red-Cockaded

---

<sup>227</sup> *Id.* (citing *Wilderness Soc'y*, 83 F.3d at 390).

<sup>228</sup> 185 F.3d 349 (5<sup>th</sup> Cir. 1999) (hereinafter *Peterson I*) reh'g en banc granted 204 F.3d 580 (5<sup>th</sup> Cir. 2000) rev'd after rehearing en banc 228 F.3d 559 (5<sup>th</sup> Cir. 2001).

<sup>229</sup> *Id.* at 353. These forests are the Sam Houston, Davy Crockett, Angelina, and the Sabine, which cover 639,000 acres in Texas.

<sup>230</sup> *Id.* at 355.

<sup>231</sup> *Id.* at 356.

<sup>232</sup> *Id.*

Woodpecker.<sup>233</sup> This case is the second-to-last stop on the first track.<sup>234</sup>

The environmental groups claimed that the Forest Service's authorization of even-aged management techniques (clearcutting) for several timber sales violated NFMA's mandate that the Agency protect the diversity of plant and animal communities and protect resources in the National Forests.<sup>235</sup> The Plaintiffs also argued the Service's practices violated NFMA, the Agency's implementing regulations, and the forests' LRMP requirements of inventorying and monitoring for diversity and resource protection.<sup>236</sup> The district court found it had jurisdiction to review the Forest Service's failure to authorize timber sales in compliance with NFMA and its regulations and concluded this failure was a final agency action for the purposes of the APA.<sup>237</sup> The Plaintiffs prevailed on the merits,<sup>238</sup> the district court enjoined future timber harvest until the Forest Service complied with NFMA, and the Agency and intervening timber interests appealed.<sup>239</sup>

After upholding the district court's finding that the environmental groups had standing, the majority opinion in *Peterson I* commenced a lengthy discussion of ripeness and final agency action, in which it distinguished the case from *Lujan* and *Ohio*

---

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 357.

<sup>237</sup> *Id.* at 358 (citing *Sierra Club v. Glickman*, 974 F. Supp. 905, 914 (E.D. Tex. 1997)).

<sup>238</sup> Specifically, the court determined that the Forest Service was violating its duties to protect: soil resources, *see* 16 U.S.C. §§ 1604(g)(3)(E)(i), (g)(3)(F)(v); 36 C.F.R. §§ 219.27(a)(1), (b)(5), (c)(6), (f); and watershed resources, *see* 16 U.S.C. §§ 1604(g)(3)(E)(i), (g)(3)(E)(iii), (g)(3)(F)(v); 36 C.F.R. §§ 219.27(a)(1), (a)(4), (b)(5), (c)(6), (e), (f). *See Sierra Club*, 974 F.Supp. at 942. Additionally, the court found that the Forest Service was not inventorying and monitoring the following properly: wildlife, *see* 16 U.S.C. §§ 1604(g)(2)(B), (g)(3)(C); 36 C.F.R. §§ 219.11(d), 219.12(d), (k), 219.19(a)(1), (a)(2), (a)(5), (a)(6); diversity, *see* 36 C.F.R. §§ 219.26; and its success in meeting its objectives and adhering to its standards, *see* 36 C.F.R. §§ 219.12(k). *See Sierra Club*, 974 F.Supp. at 942.

<sup>239</sup> *Id.*

*Forestry*.<sup>240</sup> Though the majority extolled the importance of the site-specific aspect of the challenge to satisfy *Ohio Forestry* and the ripeness doctrine, at one point its opinion characterized the Service's decision not to follow the forest plan's monitoring requirements (rather than the authorization of the timber sales) as the final agency action that rendered the claim justiciable.<sup>241</sup> The majority recognized the Forest Service's decision not to follow the inventory and monitoring requirements of the LRMP as an "adjudication" representing a "failure to act" which satisfies the "final agency action" requirement of the APA, as interpreted by *Ohio Forestry*.<sup>242</sup>

In *Peterson I*, a case virtually identical to *Martin*, the Fifth Circuit addressed the justiciability of a challenge to the Forest Service's authorization of timber sales without fulfilling its monitoring requirements.<sup>243</sup> In fact, the Fifth Circuit expressly agreed with the holding and reasoning of its "sister circuit" in *Martin*.<sup>244</sup> While the Eleventh Circuit, in *Martin*, declined the opportunity to reconcile its holding with *Ohio Forestry*, the Fifth Circuit had no choice. In response to a vigorous dissent on the ripeness issue, the *Peterson I* majority was forced to distinguish the instant case from *Lujan* and *Ohio Forestry*.<sup>245</sup>

First, the majority noted that in *Lujan*, "the plaintiffs challenged everything about the BLM's policies from soup to nuts, not a site-specific individual policy."<sup>246</sup> In *Peterson I*, the plaintiffs "pointed to specific activities on specific plots . . . and challenged the mechanism by which the Forest Service determined how to approve those

---

<sup>240</sup> *Id.* at 361-73. The majority opinion indicates it might have avoided much this discussion had it not been for a vigorous dissent on the issue. *Id.*

<sup>241</sup> *Id.* at 365-72.

<sup>242</sup> *Id.*

<sup>243</sup> 185 F.3d 349 (5<sup>th</sup> Cir. 1999).

<sup>244</sup> *Id.* at 372-73.

<sup>245</sup> *Id.* at 362-64.

<sup>246</sup> *Id.* at 363.



discrete logging practices.”<sup>247</sup> The majority cited with approval Justice Scalia’s observation in *Lujan* that a case would be ripe where a specific final agency action has an actual or immediately threatened effect which may require even a whole program to be revised by the agency to avoid an unlawful result.<sup>248</sup>

*Ohio Forestry*, according to the majority, is both easily distinguished and supportive of finding this dispute ripe for review.<sup>249</sup> In *Peterson I*, the plaintiffs alleged the Forest Service violated its regulations and NFMA when it approved even-aged management on site-specific timber sales without fulfilling the LRMP’s requirement that management indicator species be inventoried or monitored in order to assess the impact of various harvesting techniques.<sup>250</sup> Whereas in *Ohio Forestry*, no logging was yet authorized pursuant to the LRMP, and the Forest Service had not even reached the point of implementing its LRMP or NFMA “on-the-ground” when the suit was brought.<sup>251</sup> *Ohio Forestry* supports, the majority opined, the proposition that “disagreements over final, specific action are necessarily ripe.”<sup>252</sup>

Though the majority extolled the importance of the site-specific aspect of the challenge to satisfy *Ohio Forestry* and the ripeness doctrine, it characterized the Service’s decision not to follow the Forest Plan’s monitoring requirements (rather than the approval of the timber sales) as the final agency action that rendered the claim justiciable.<sup>253</sup> The majority recognized this decision as an “adjudication” representing a “failure to act” which satisfies the “final agency action” requirement of the APA, as interpreted by *Ohio*

---

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* (citing *Lujan*, 497 U.S. at 894).

<sup>249</sup> *Id.* at 363 n. 16.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 365-72.

*Forestry*.<sup>254</sup> The majority summarized its reasoning for this characterization and the propriety of the plaintiffs' challenge as follows:

“The Forest Service determined that it would conduct timber sales from trees growing in Texas’s National Forests; it considered two alternative means of harvesting the trees -- even-aged and uneven-aged timber management; it was aware of the regulations that required it to inventory and to monitor species that would be affected by even-aged timber management practices; it affirmatively decided not to follow those regulations; it engaged in even-aged management; it conducted timber sales subsequent to those practices. *When the Forest Service elected not to follow those regulations, it undertook a final agency action for the purposes of the inventorying and monitoring that the regulations prescribed. Failure to follow those regulations is what the Appellees challenged.*”<sup>255</sup>

*Peterson I* explicitly allows a single challenge to multiple timber sales without any discussion of the different site-specific effects at the various and individual sales, further demonstrating that what is important is not the “on-the-ground” effects of the Service’s decision not to monitor, but the decision itself.<sup>256</sup> In light of this characterization and the fact that the plaintiffs challenged the Service’s failure to follow the mandates of its forest plan rather than the plan itself, reliance on *Ohio Forestry* and the perceived need to distinguish or justify this decision seems unnecessary.

*Peterson II*<sup>257</sup> stemmed from the Fifth Circuit’s decision to rehear the case en banc,<sup>258</sup> and resulted in a split decision with seven judges joining the majority opinion overturning *Peterson I*, and five judges dissenting.<sup>259</sup> Relying mainly on *Lujan v.*

---

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 370-71 (emphasis supplied).

<sup>256</sup> 185 F.3d at 370-72.

<sup>257</sup> *Sierra Club v. Peterson*, 228 F.3d 559 (5<sup>th</sup> Cir. 2001) (hereinafter *Peterson II*).

<sup>258</sup> 204 F.3d 580 (5<sup>th</sup> Cir. 2000).

<sup>259</sup> Judges Jolly, Higginbotham, Davis, Jones, Smith, Barksdale, and DeMoss concurred in the majority opinion. Judge Higginbotham filed a separate concurrence. Judges Politz, Wiener, Benavides, and Dennis concurred in Judge Stewart’s dissent. Chief Judge King did not participate, and Judge Parker was recused and did not participate.

*National Wildlife Federation*,<sup>260</sup> the majority held that the plaintiffs had not challenged specific final agency actions, but characterized the suit as a wholesale challenge to Forest Service practices in Texas, and stated this was “precisely the type of programmatic challenge the Supreme Court Struck down in *Lujan*.”<sup>261</sup>

The majority did recognize that plaintiffs also made site-specific challenges, but stated that alleging specific improper final agency actions within a program does not allow a plaintiff to challenge an entire program.<sup>262</sup> The court somehow viewed as inapplicable in this case *Lujan*’s statement that environmental groups can challenge “a specific ‘final agency action’ [which] has an actual or immediately threatened effect,” even when such a challenge has “the effect of requiring a regulation, a series of regulations, or even a whole ‘program’ to be revised by the agency.”<sup>263</sup>

The majority also noted that the plaintiffs could not challenge the Agency’s failure to inventory or monitor because this was not a ‘final agency action’ from which legal consequences flowed.<sup>264</sup> Further, the court held that this was not a justiciable ‘failure to act,’ stating that “alleged failure to comply with the NFMA in maintaining Texas’s national forests does not reflect agency inaction,” as opposed to where the Forest Service has “failed to issue an LRMP or to conduct timber sales.”<sup>265</sup> The majority did not explain how failure to issue an LRMP, as required by NFMA, differs from a failure to inventory or monitor, as required by NFMA.

In a concurring opinion, Judge Higginbotham attempted to provide guidance to

---

<sup>260</sup> 497 U.S. 871 (1990).

<sup>261</sup> 228 F.3d at 566.

<sup>262</sup> *Id.* at 567.

<sup>263</sup> *Id.* (quoting *Lujan*, 497 U.S. at 894).

<sup>264</sup> *Id.* at note 11 (citing *Ohio Forestry*, 523 U.S. at 733-34).

<sup>265</sup> *Id.* at 568.

the trial court on remand.<sup>266</sup> “Regarding allegations and proof,” the Judge noted, “plaintiffs must allege and prove a specific timber sale will violate the law.”<sup>267</sup> Regarding the remedy in such a case, he stated “a court may not enjoin an entire program . . . [b]ut a component of enjoining a discrete, challenged action is enjoining the conduct that makes the challenged actions illegal” which may prevent “future sales that share the illegality.”<sup>268</sup>

The dissent made three important points. First, it pointed out that the plaintiffs had “continuously identified specific agency actions which they allege violate the NFMA.”<sup>269</sup> Second, the dissent noted that the purpose of requiring a final agency action is to reduce the scope of the controversy to manageable proportions and flesh out factual components by looking at a concrete action that applies the regulation in a manner that harms the plaintiff.<sup>270</sup> Finally, the dissent recognized that the case at bar was much more factually similar to *Sierra Club v. Martin*,<sup>271</sup> which the majority cited with approval, than to *Lujan*.<sup>272</sup>

The strained reasoning of the *Peterson II* majority is at least partially a problem with requiring substantive allegations of site-specific harm where procedural illegalities are alleged. It primarily stems from the total lack of logic in limiting the number and scope of substantive allegations of site-specific harm under the doctrine of ripeness. The opinion ignores *Ohio Forestry’s* explicit recognition that harm caused by a defect in the

---

<sup>266</sup> *Id.* at 570.

<sup>267</sup> *Id.* Further noting that “the trial court must find by a preponderance of the evidence, that the Forest Service will violate the law in executing or implementing the specific challenged timber sale.” *Id.* at 571.

<sup>268</sup> *Id.* at 571.

<sup>269</sup> *Id.* at 573 Illustrating this fact, the dissent notes that the district court was able to conduct a seven-day bench trial consisting largely of evidence focused on specific sales and parcels of land. *Id.*

<sup>270</sup> *Id.* (quoting *Lujan*, 497 U.S. at 890, and noting that this is exactly what the plaintiffs in this case did).

<sup>271</sup> 168 F.3d 1 (11<sup>th</sup> Cir. 1999).

<sup>272</sup> *Id.*

plan, will allow review of that portion of the plan.

Though *Peterson II* never reaches questions of agency discretion or the merits because it is decided on the jurisdictional issue of ripeness, even a cursory reading of the opinion suggests the presence of two guilty parties. The Forest Service is guilty of ignoring the mandates of NFMA throughout Texas's forests, and the judges responsible for the majority opinion are guilty of rendering an ill-considered and illogical opinion.

#### 4. *Ecology Center, Inc. v. United States Forest Service*

*Ecology Center, Inc. v. United States Forest Service* involved a challenge to a Forest Service decision not to follow the monitoring requirements of its LRMP for the Kootenai National Forest in Northwest Montana.<sup>273</sup> This challenge was similar to *Peterson*, but the plaintiff complained of no site-specific timber sales made under the Plan.<sup>274</sup> In a brief opinion, the Ninth Circuit affirmed the dismissal of the Ecology Center's action, holding that the challenge was not ripe for adjudication since the Forest Service's failure to perform certain monitoring tasks was not a final agency action or a justiciable failure to act under the APA as interpreted by *Ohio Forestry*.<sup>275</sup>

The Plaintiff challenged, under the APA, the Forest Service's failure to comply with monitoring duties imposed by NFMA, its implementing regulations, and the Kootenai National Forest Plan.<sup>276</sup> The plan was adopted in 1987 and requires the Agency to produce annual, biannual and five-year reports containing monitoring data for recreation trends, wildlife habitat and populations, species listed under the ESA, and the like.<sup>277</sup> In 1996, the Ecology Center filed suit alleging the Agency failed to publish the

---

<sup>273</sup> 192 F.3d 922 (9<sup>th</sup> Cir. 1999).

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at 926.

<sup>276</sup> *Id.* at 923.

<sup>277</sup> *Id.* at 924.

required reports in 1988 and 1993, and the required monitoring was insufficient in the reports it did file.<sup>278</sup> The Forest Service acknowledged its failure to publish reports for those two years and admitted that the reports it did publish contained inadequate data for some parameters.<sup>279</sup> However, the magistrate judge for the district court never reached the merits of the dispute but dismissed the action for lack of ripeness.<sup>280</sup>

For the Ninth Circuit, resolution of the jurisdiction issue hinged on whether the Agency's failure to adequately monitor was either a final agency action or an action unlawfully withheld or unreasonably delayed under the APA.<sup>281</sup> The court classified monitoring and reporting as advisory steps leading to an agency decision.<sup>282</sup> The court recognized that the duty to monitor was mandatory, but relying on *Ohio Forestry*, found that legal consequences did not flow, nor did rights or obligations arise from that duty.<sup>283</sup> *Ohio Forestry*, the court suggested, requires plaintiffs to withhold their challenge until "a time when harm is more imminent and more certain."<sup>284</sup>

While the Plaintiff's complaint did not allege imminent harm from a site-specific activity, the Ecology Center argued that it suffered actionable injury because the inadequate monitoring deprived it of information necessary to effective oversight of Agency activities provided for by NFMA.<sup>285</sup> The court countered that NFMA does not provide for public oversight of monitoring, only of the formation, amendment and revision of LRMPs.<sup>286</sup> The Plaintiffs argued denial of this claim would essentially

---

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at 924-26.

<sup>282</sup> *Id.* at 925.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* (quoting *Ohio Forestry*, 523 U.S. at 734).

<sup>285</sup> *Id.* at 925.

<sup>286</sup> *Id.* at 926 n. 7.

prevent judicial review of inadequate monitoring by the Agency.<sup>287</sup> The court stated that such claims would be justiciable when linked to an APA challenge to a final agency action like a timber sale.<sup>288</sup>

The court then addressed the Ecology Center's claim that the failure to monitor was ripe for review under section 706(1) of the APA as an agency action unlawfully withheld or unreasonably delayed.<sup>289</sup> This provision of the APA, the court maintained, applies only when there is a genuine failure to act, and not when the Forest Service "merely failed to conduct its duty in strict conformance with the plan and NFMA regulations."<sup>290</sup>

*Ecology Center* is a challenge similar to the *Martin* and *Peterson* cases, except the plaintiff complained of no site-specific timber sales made under the plan.<sup>291</sup> *Ecology Center* demonstrates unnecessary application of *Ohio Forestry* in a case similar to *Martin* and *Peterson*, where the challenge was not to a LRMP, but to the Forest Service's failure to follow the Plan's requirements. The decision also illustrates the perceived necessity for allegations of site-specific injury, like a timber sale, upon which the court can base a finding of imminent harm. This requirement seems misplaced when the plaintiff's claim in this case could easily be characterized as a claim of procedural harm, which even *Ohio Forestry* recognizes to be ripe upon occurrence, and not dependent on further allegations of site-specific harm. The Agency's failure to follow its own procedures, which are mandated by the Forest Plan, will prevent effective amendment and revision of the Plan,

---

<sup>287</sup> *Id.* at 926 n. 6.

<sup>288</sup> *Id.* at 926 (citing *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1153 (9<sup>th</sup> Cir. 1998) (allowing a challenge to a timber sale on grounds that the Forest Service violated its forest plan when it failed to monitor trout populations in a stream affected by the sale)).

<sup>289</sup> *Id.* at 926.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

as well as informed resource allocation decisions like timber sales.

*Ecology Center* ignores the reasoning of the D.C. Circuit, in *Wyoming Outdoor Council*, that where an agency promulgates regulations that erect a procedural barrier and then ignores them, the plaintiff need only show that the government act performed without the procedure in question will cause a distinct risk to a particularized interest of the plaintiff.<sup>292</sup> *Ecology Center* also runs counter to *Wyoming Outdoor Center's* recognition of the procedural nature and ripeness of an agency decision to ignore its own implementing regulations. By finding an agency decision to ignore the procedural requirements of its own regulations ripe for review, the D.C. Circuit implied that such a decision is a final agency action or failure to act under the APA.

*Ecology Center* also conflicts with other cases in the Ninth Circuit. The opinion in *Wilderness Society*, contrary to the holding in *Ecology Center*, suggests that noncompliance with the mandates of a forest plan is a final agency action or a justiciable failure to act for purposes of the APA. Finally, in *Friends Of The Kalmiopsis*, the Ninth Circuit relied on *Ohio Forestry* and expressly stated that such claims would be ripe if the Forest Service made the harm more imminent by taking site-specific action based on inadequate monitoring. While the *Ecology Center* failed to challenge a site-specific activity, the Forest Service made timber sales throughout the forest, in the absence of monitoring data.

## F. Conclusion

The *Ohio Forestry* decision is a serious blow to environmental plaintiffs, and it is tempting to read its holding as closing the courthouse door to all challenges to LRMPs. However, more careful inspection of the dicta reveals that the Court left two doors open,

---

<sup>292</sup> *Id.* (quoting *Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1998)).



and study of the subsequent case law shows that plaintiffs in lower court decisions after *Ohio Forestry* have taken advantage of these doors.

First, *Ohio Forestry* reaffirmed, from *Lujan*, the justiciability of challenges to LRMPs based on claims of procedural harm. Though *Ohio Forestry* explicitly recognizes only procedural claims brought under NEPA, subsequent cases show that such claims are also viable under NFMA, FLPMA, and the ESA. Second, Justice Breyer's opinion also affirms the ripeness of claims for injuries that are not contingent on a timber sale, or some other activity that requires a second stage of decision making.

However, it is doubtful that challenges to LRMPs based on such claims will result in wholesale review of the entire plan. Rather, language in *Ohio Forestry* along with prior and subsequent cases suggest courts will review only portions of the plan with a causal relationship to the harm. It should also be noted that *Ohio Forestry* and subsequent cases treat ripeness as a prudential and discretionary limitation on the justiciability of claims. Therefore, courts may vary in their application of the doctrine to different LRMPs.

Cases interpreting *Ohio Forestry* have generally recognized that the prudential concerns of ripeness are satisfied both by challenges to procedural requirements and claims of imminent harm not contingent on the outcome of further agency decisionmaking. These cases also demonstrate that courts give *Ohio Forestry's* requirement of site-specific allegations of harm talismanic significance even in the absence of a rational basis for such a requirement, and contrary to the language of *Ohio Forestry*.

Application of the *Ohio Forestry* requirement of site-specific allegations is unwarranted in challenges brought against the Forest Service for failure to properly

follow or implement LRMP monitoring requirements, because such challenges are only tangentially related to *Ohio Forestry* and are easily distinguishable for the simple fact that they are not substantive challenges to forest plans. Reliance on *Ohio Forestry* in such cases is problematic at best, and is likely to continue to lead to inconsistent and unfair decisions like *Ecology Center*, and *Peterson II*.

If anything, *Ohio Forestry* and *Lujan* stand for the proposition that cases regarding a failure to properly monitor or otherwise follow LRMP guidelines do not require allegations of site-specific harm. While *Ohio Forestry* equated procedural challenges with NEPA, subsequent cases have recognized that claims brought under NFMA, FLPMA, and the ESA may also be procedural in nature. *Ohio Forestry's* statement that challenges to an agency's failure to follow procedural requirements are necessarily ripe, assumes that such a failure constitutes a "final agency action" or an action "unlawfully withheld or unreasonably delayed" for purposes of the APA.

Monitoring requirements, imposed by regulations implementing NFMA, and forest plans prepared pursuant to those regulations, are essentially procedural requirements. Like NEPA, monitoring requirements guarantee particular procedures, not specific results. The injury inflicted by an agency's failure to monitor is similar to the Ninth Circuit's description of injuries occasioned by a failure to follow NEPA requirements – the risk that environmental impacts will be overlooked.<sup>293</sup> If the failure to monitor is properly characterized as a procedural claim, *Ohio Forestry* and *Lujan* stand for the proposition that site-specific allegations are unnecessary.

Absent the misplaced requirements of site-specific allegations of harm, *Peterson I*, *Martin*, and *ONRC* demonstrate more workable resolutions of agencies' failures to

---

<sup>293</sup> *Idaho Conservation League*, 956 F.2d at 1514.

properly follow mandatory regulations. These decisions explicitly recognize that agency decisions to ignore their own regulations are reviewable under the APA as final agency actions or failures to act. However, the requirement of site-specific allegations are unnecessary when the claim is properly characterized as procedural, because the failure to follow procedure is the injury, and the results of the procedural misstep do not need to be fleshed out to demonstrate harm. When a statute guarantees that certain information will be considered in rendering a decision, failure to consider that information prior to the decision is the illegal act and the resultant harm.

Further, when the missing information is ecological monitoring data, making decisions without it will effect not only specific timber sales, but the entire forest ecosystem. This is because information regarding species population in one area of a forest should effect management decisions made elsewhere that also impact that species. For example, monitoring data which chronicles the effect of a certain management decision on a species in one forest, should be considered in making a similar decision in another forest, or even in different areas of the same forest. Also, a management decision to allow limited destruction of a species' habitat through timber harvest on one parcel of land, would likely be different if population data showed that in fact the population inhabiting another parcel of suitable habitat was smaller in number, and the timber harvest would constitute an impact on the overall population that the species may not recover from.

On the other hand, *Ecology Center* and *Peterson II* represent overly restrictive readings of *Ohio Forestry* that allow the Forest Service to ignore its own LRMPs and thereby violate the spirit and letter of the environmental acts that require these plans to guide all activities in our national forests. Until the effect of *Ohio Forestry* on such cases

is clarified, environmental plaintiffs can protect their claims by including challenges to site-specific actions. A requirement of site-specific activity in these cases elevates form over function and it is doubtful the Supreme Court intended such an interpretation or result.

#### **IV. Standard of Review – Agency Deference and the Hard Look Doctrine**

##### **A. Introduction**

Even in cases where environmental plaintiffs' failure to monitor claims have surmounted the initial procedural hurdle regarding justiciability or ripeness, a second hurdle remains -- agency deference. Agency deference influences the standard of review or level of scrutiny that a court applies to challenged agency action or inaction.

Generally, the more deferential the standard, the harder it is for environmental plaintiffs to prove to the reviewing court that the agency decision violates the applicable law or regulation. However, even under the same standard of review, courts have enough wiggle room to come to different conclusions as to whether or not an agency action is unlawful.

This chapter discusses the appropriate standard of review in monitoring cases. The first section provides background information on the standard of review and agency deference. The second section examines the arbitrary and capricious standard, and how it might apply to challenges regarding agency failures to gather appropriate population data. In the third section, this chapter compares the two primary federal court cases addressing the Forest Service's failure to gather population data under the current NFMA regulations. Finally this chapter concludes that even under the most deferential standard, a failure to gather actual population data should itself be considered an unlawful decision, and any timber harvest or other resource decision made in the absence of such data is also

illegal.

## **B. Background**

In its 1984 opinion in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court attempted to resolve the long-standing conflict concerning the proper scope of judicial review of agency interpretations of statutory provisions.<sup>294</sup> In *Chevron*, the Court announced a two-prong standard of review for determining whether a federal agency's interpretation and construction of a statute is permissible.<sup>295</sup> Under *Chevron*, courts must first determine whether Congress has unambiguously expressed its intent on an interpretive issue.<sup>296</sup> If the intent of Congress is clear, then the court must give effect to that intent, because the courts must give effect to the unambiguously expressed intent of Congress.<sup>297</sup> The second step provides that if Congress was silent or ambiguous on an interpretive issue, a reviewing court must exercise limited review and may not "simply impose its own construction on the statute as would be necessary in the absence of an administrative interpretation."<sup>298</sup> "Rather," the Court continued, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."<sup>299</sup>

Thus, the *Chevron* Court distinguished between two situations. In the first, Congress explicitly directed the agency to promulgate regulations, by leaving a "gap" for the agency to fill.<sup>300</sup> When this occurs, "there is an express delegation of authority to the

---

<sup>294</sup> 467 U.S. 837 (1984).

<sup>295</sup> *Id.* at 842-43.

<sup>296</sup> *Id.* at 843.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at 843-44.

agency to elucidate a specific provision of the statute by regulation,” and “[s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”<sup>301</sup> The second situation occurs when Congress’s legislative grant of authority to an agency is “implicit rather than explicit.”<sup>302</sup> In that case, the reviewing court must uphold the agency’s interpretation so long as it is “reasonable.”<sup>303</sup>

As noted above, the statutory provisions which give rise to the Forest Service’s duty to monitor species populations include certain provisions of NEPA and NFMA. Both of these statutes explicitly grant federal agencies the authority to promulgate regulations to implement their provisions.<sup>304</sup> Thus, failure to monitor cases will generally fit under the first situation in *Chevron*. Further, since neither NEPA, nor NFMA contain provisions for judicial review, such review is accomplished through the APA, which provides the standard of review for agency actions is whether they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”<sup>305</sup>

Considering the foregoing, it is no surprise that federal courts review Forest Service monitoring procedures under the “arbitrary or capricious” standard. Despite the broad discretion granted agencies under this standard, the arbitrary and capricious standard of review is not entirely toothless. Courts can and have held arbitrary and capricious the Forest Service’s failure to gather actual population data, among other inadequate agency procedures and decisions.

---

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* at 844.

<sup>303</sup> *Id.*

<sup>304</sup> See *supra* notes 29-38 and accompanying text regarding NEPA; and notes 39-56 and accompanying text regarding NFMA.

<sup>305</sup> 5 U.S.C. § 706(2)(A).

### C. Arbitrary and Capricious - A Not-entirely-toothless Standard

In a line of cases, beginning with *Citizens to Preserve Overton Park v. Volpe*, the Supreme Court delineated the scope of this standard of review.<sup>306</sup> In *Overton Park*, the Court was asked to scrutinize a decision by the Secretary of Transportation to release federal funds to the Tennessee highway department for construction of a six-lane interstate highway through a Memphis public park.<sup>307</sup> After finding that arbitrary and capricious was the proper standard of review under the APA, the Court stated that the presumption of the validity of the Secretary's decision inherent in this standard "is not to shield his action from a thorough, probing, in-depth review."<sup>308</sup> Rather, the Court found the APA required determination of "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."<sup>309</sup> The Court continued that "this inquiry into the facts is to be searching and careful."<sup>310</sup>

This explanation of the arbitrary and capricious standard of review, and the requirement that an agency consider detailed information, came to be known as the "hard look" doctrine after the Supreme Court decided *Kleppe v. Sierra Club* in 1976.<sup>311</sup> In *Kleppe*, the Court considered whether the Department of the Interior and other federal agencies should have to prepare a region-wide, comprehensive environmental impact statement prior to allowing development of coal reserves on federally owned or

---

<sup>306</sup> 401 U.S. 402 (1971).

<sup>307</sup> *Id.*

<sup>308</sup> *Id.* at 415.

<sup>309</sup> *Id.* at 416 (internal citations omitted).

<sup>310</sup> *Id.*

<sup>311</sup> 427 U.S. 390 (1976). Judge Leventhal is given credit for formulation of the doctrine stating that a court must "satisfy itself that the agency has exercised a reasoned discretion with reasons that do not deviate from or ignore the ascertainable legislative intent. See Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 514 (1974) (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850 (D.C.Cir. 1970)).

controlled land in the Northern Great Plains.<sup>312</sup> The Court said that it should not substitute its judgment for that of the Agency, but should “insure that the agency has taken a ‘hard look’ at environmental consequences.”<sup>313</sup>

In 1983, the Supreme Court further fleshed out the hard look doctrine and scope of review of agency actions.<sup>314</sup> Agency actions are unlawful under the arbitrary and capricious standard if the agency “failed to consider an important aspect of the problem,” has “offered an explanation for its decision that runs counter to the evidence before the agency,” or has not articulated “a rational connection between the facts found and the choice made.”<sup>315</sup>

While hard look review has gained general acceptance in federal courts, it is not without its detractors. One commentator suggested that “techno-bureaucratic rationality,” rather than “comprehensive analytical rationality,” is the appropriate mode of decisionmaking for agencies as well as corporations, and that “hard look” review is inconsistent with this mode of decisionmaking.<sup>316</sup> This commentator believes that “hard look” review aims for an ideal of “comprehensive analytical rationality” that is impossible for an agency to achieve, due to “inadequate data, unquantifiable values, mixed societal goals, and political realities.”<sup>317</sup>

Other commentators recognize the difficulties presented by such pragmatic

---

<sup>312</sup> *Id.*

<sup>313</sup> *Id.* at 410 n.21 (quoting *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972)).

<sup>314</sup> *Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

<sup>315</sup> *Id.* at 43.

<sup>316</sup> Mark Seidenfeld, *Hard Look Review in a World of Techno-Bureaucratic Decisionmaking: A Reply to Professor McGarity*, 75 TEX. L. REV. 559, 559-60 (1997) (citing Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 537-39 (1997) (stating that the evidentiary requirements which must be satisfied for agencies to satisfy hard look review prevents agencies from taking a techno-bureaucratic approach - one that emphasizes political as well as scientific considerations)).

<sup>317</sup> *Id.* at 563.



constraints, but also recognize that “hard look” review is essential to help agencies make appropriate decisions in spite of such pressures.<sup>318</sup> Hard look review can help agencies recognize that its choices often involve values, and can help avoid taking inappropriate shortcuts to satisfy value judgments.<sup>319</sup> Active judicial review of an agency’s decisionmaking process can also give agency staff the incentive and power to resist political pressure from superiors to reach preordained results.<sup>320</sup> It can force consideration of concerns voiced by those outside the lead agency, like other agencies and public interest groups.<sup>321</sup> It can force the agency to consider other alternatives or different decisional criteria, to ask whether additional data or analysis is necessary, and to consult with those who might not share its “potentially provincial professional perspective.”<sup>322</sup>

Adding to the debate regarding the propriety of current embodiment of the hard look doctrine, others argue that courts should extend the doctrine to include evaluation of the accuracy and integrity of the scientific evidence considered in agency decisions.<sup>323</sup> Examining the issue in the NEPA context, one commentator suggested that federal courts can and should conduct such evaluations, given the CEQ regulation’s requirement that agencies rely on high-quality science,<sup>324</sup> and the Supreme Court’s express recognition, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>325</sup> of the judicial duty to evaluate the

---

<sup>318</sup> *Id.* at 563-66.

<sup>319</sup> *Id.* at 565.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *Id.* Seidenfeld goes on to chronicle evidence that hard look review provides these benefits. *Id.* at 565-68.

<sup>323</sup> See Patricia Smith King, *Applying Daubert to the “Hard Look” Requirement of NEPA: Scientific Evidence Before the Forest Service in Sierra Club v. Marita*, 2 WIS. ENVTL. L. J. 147, 156 (1995).

<sup>324</sup> See *supra* note 38 and accompanying text. NFMA also contains provisions intended to promote use of up-to-date and high-quality science. See *supra* note 48 and accompanying text.

<sup>325</sup> 113 S. Ct. 2786 (1993).

admissibility of scientific evidence.<sup>326</sup>

For years, general acceptance was the only criterion used by courts in evaluating scientific evidence.<sup>327</sup> In *Daubert*, the Court held this judicially created test was superceded by the adoption of the Federal Rules of Evidence, and interpreted those rules to require additional considerations, including: testability, peer review and publication, and known or potential rate of error.<sup>328</sup> These guidelines are flexible, based on the scientific method, and intended for courts to use in assessing whether the reasoning or methodology underlying proffered evidence is scientifically valid (i.e. reliable), and whether it can be applied to the facts in issue (i.e. relevant).<sup>329</sup>

Though *Daubert* addressed the proper standard for admissibility of scientific testimony at trial, some argue the same standard can and should be applied to the question of the validity of scientific evidence before an administrative agency.<sup>330</sup> The last of the *Daubert* criteria, known or potential rate of error, goes primarily to questions concerning the reliability of specific measurement techniques, and could be readily applied to assess the reliability of the Forest Service's habitat viability analysis, compared to that of the more traditional methods of population viability analysis. Despite numerous federal court opinions stating that judges do not have the requisite expertise to evaluate agency choices of methodology, the Court in *Daubert* said, "we are confident that federal judges possess the capacity to undertake this review."<sup>331</sup> Indeed, as the following section will show, some federal judges have done just that.

---

<sup>326</sup> King, *supra* note 321 at 156.

<sup>327</sup> *Frye v. United States*, 239 F. 1013, 1014 (D.C. Cir. 1923).

<sup>328</sup> 113 S. Ct. at 2786, and 2796-97.

<sup>329</sup> *Id.* at 2796-97.

<sup>330</sup> King, *supra* note 321 at 153.

<sup>331</sup> *Daubert*, 113 S. Ct. at 2796.

## D. Deference in Species Monitoring Cases

### 1. *Inland Empire Public Lands Council v. United States Forest Service*

In 1996, *Inland Empire Public Lands Council v. United States Forest Service* directly confronted the Ninth Circuit with the question of whether habitat viability analysis satisfied NFMA's biodiversity requirement, or whether collecting and monitoring actual population data was needed.<sup>332</sup> The case arose in the Kootenai National Forest in northwestern Montana, when the Forest Service produced an EIS and Biological Opinion addressing the effects of eight timber sales on the surrounding environment and resident wildlife, and subsequently approved the sales, all without gathering actual population data.<sup>333</sup> After unsuccessful administrative appeals, the environmental group filed suit and lost when the district court granted summary judgment to the Forest Service, characterizing the case as a dispute over the agency's choice of scientific methodology.<sup>334</sup> The environmental groups appealed claiming that the agency's failure to collect actual population data violated NFMA and section 219.19 of the implementing regulations.<sup>335</sup>

The Ninth Circuit recognized that while 219.19 applies to forest planning rather than site-specific management activities, the site-specific activities must comply with the forest plan.<sup>336</sup> Using the arbitrary and capricious standard of review, the court said it would uphold the agency's use of habitat viability analysis unless it was "plainly erroneous or inconsistent" with section 219.19.<sup>337</sup> The court also stressed that it would

---

<sup>332</sup> 88 F.3d 754 (9<sup>th</sup> Cir. 1996)

<sup>333</sup> *Id.* at 758.

<sup>334</sup> *Id.*

<sup>335</sup> *Id.* at 759.

<sup>336</sup> *Id.* at 760.

<sup>337</sup> *Id.*

not overturn this approach even if another may have been preferable.<sup>338</sup>

Thus under the banner of agency deference, the court allowed the Forest Service to rely on the broad assumptions underlying habitat viability analysis, finding that analysis which “uses all the scientific data currently available is a sound one.”<sup>339</sup> The court based this finding on the plaintiff’s admission that alternative approaches can be used where population-specific information is not available, and on a Ninth Circuit decision upholding a viability analysis that was “based on the current state of scientific knowledge.”<sup>340</sup>

The court then addressed the application of section 219.19 to management indicator species (MIS), misstating that section’s requirement of selection of appropriate MIS as permissive.<sup>341</sup> However, the court did quote language from section 219.19(a)(2) which obligates the agency to evaluate management alternatives’ effects on population trends<sup>342</sup> – an obligation that cannot be fulfilled without actual population data. The court continued that it did not believe the Forest Service acted arbitrarily or capriciously when it estimated the effects of the alternatives on the population of MIS by analyzing the effect of the alternative on MIS habitat.<sup>343</sup>

Taking this stretch a step further, the court finds the same analysis supports the conclusion that the Forest Service satisfied its obligations under section 219.19(a)(6), which states that “[p]opulation trends of the [MIS] will be monitored and relationships to habitat determined.”<sup>344</sup> In so ruling, the court relies on the agency’s finding that there is

---

<sup>338</sup> *Id.* at 761 n. 8.

<sup>339</sup> *Id.* at 762 (citing *Seattle Audubon Soc’y v. Moseley*, 80 F.3d 1401, 1404 (9<sup>th</sup> Cir. 1996)).

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> *Id.*

<sup>343</sup> *Id.* at 763.

<sup>344</sup> *Id.*

no technically reliable and cost-effective method of counting individual members of species like the pileated woodpecker.<sup>345</sup> Impliedly recognizing the mandatory nature of the duty to monitor MIS populations under section 219.19, the court concludes that “[i]n light of the Service’s alternative method of population trend analysis, its failure to monitor the actual population of the pileated woodpecker is not dispositive or unreasonable.”<sup>346</sup>

There are several flaws in the reasoning of the *Inland Empire* court. First, the court upholds as reasonable the assumption underlying habitat viability analysis, without any supporting evidence that wildlife populations remain viable in the face of widespread timber harvesting simply because a number of trees are left standing.<sup>347</sup> This runs contrary to the hard look doctrine’s requirement that an agency support its decision with a rational connection to known facts.

Second, despite the court’s misstatement as to the permissiveness of the MIS requirement, the opinion seems to recognize the mandatory nature of gathering actual population data once MIS are selected. However, the court allows the agency to shirk this duty on the basis of an unsupported Forest Service finding that there is no reliable or cost-effective method for counting MIS like the one chosen in this case – the pileated woodpecker. The assertion that there was no reliable method to count these animals in 1996 is highly suspect. Further, nothing in the regulations suggests cost-effectiveness should affect this duty. Besides, the fact remains that there was no support for these assertions, again contrary to the hard look requirement.

Finally, the characterization of the agency’s habitat viability analysis as being

---

<sup>345</sup> *Id.*

<sup>346</sup> *Id.*

<sup>347</sup> *See Orlemann, supra* note 23 at 365.

based on the “current state of scientific knowledge” suggests that this is the best the agency can do – another dubious assertion. The court also seems to place some emphasis on the fact that because actual population data is not currently available, use of habitat viability analysis, based on readily available information, is reasonable. The reasoning is circular, finding that the agency’s failure to gather the actual population data justifies their continuing failure to gather that same data.

## 2. *Sierra Club v. Martin*

*Martin*, like *Inland Empire*, involved an appeal of a district court decision which granted summary judgment to the Forest Service, holding that the agency was not required under section 219.19 to collect actual population data before approving specific timber sales, and therefore, that the Forest Service did not act arbitrarily or capriciously.<sup>348</sup> On appeal, the Sierra Club argued that in conducting the biological evaluation (BE) and environmental analysis (EA) for the proposed timber sales, the Forest Service was required by the forest plan and its own regulations to collect baseline population data on proposed, endangered, threatened and sensitive species of plants and animals (PETS species).<sup>349</sup> Sierra Club also argued that the decision to approve the sales violated sections 219.12, 219.19, and 219.26 of the implementing regulations, because the Forest Service lacked the population data required by those regulations as well.<sup>350</sup>

In response to the first argument, the Forest Service acknowledged that PETS species do occur within the project areas and that individuals would be destroyed by timber harvest.<sup>351</sup> The agency argued that because those species also exist elsewhere

---

<sup>348</sup> *Martin*, 168 F.3d at 3. See *supra* notes 207-25 and accompanying text for additional facts and procedural background.

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> *Id.* at 4.

within the forest, the timber sales would not significantly impact the species' diversity or viability.<sup>352</sup> The court notes that the Service reached this conclusion without gathering any inventory or population data on many PETS species, and that nothing in the record indicated that the agency possessed baseline population data from which to measure the impact destruction of PETS species in the project area would have on overall populations.<sup>353</sup>

Responding to the Forest Service's request that the court defer to its conclusion that the timber sales will not have a significant impact on PETS species populations, the court states that it cannot do so absent support in the record for these assertions.<sup>354</sup> The court continues, stating that in this case the agency acted arbitrarily and capriciously in that it failed to "examine relevant data and articulate a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made.'"<sup>355</sup> Further, the court found that contrary to the agency's argument, the forest plan does require collection of population inventory information, and that the information the Service deems "adequate," is actually "no information at all in terms of many of the PETS species."<sup>356</sup> Since the agency's position was contrary to the clear language of the plan, the court found that it was entitled to no deference at all.<sup>357</sup>

The court then considered the Sierra Club's argument that approval of the timber sales violated NFMA's implementing regulations because the Forest Service failed to collect actual population data for MIS (as required by section 219.19), and for "all

---

<sup>352</sup> *Id.*

<sup>353</sup> *Id.* at 4-5.

<sup>354</sup> *Id.* at 5.

<sup>355</sup> *Id.* (quoting *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43).

<sup>356</sup> *Id.* at 5.

<sup>357</sup> *Id.*

affected species” (as required by sections 219.26 and 219.12).<sup>358</sup> The agency countered that the section 219.19 does not explicitly require the agency to gather data on MIS, merely to monitor population trends and determine relationships to habitat changes.<sup>359</sup> Also, the Service contended that to interpret sections 219.26 and 219.12 to require data be kept on “all affected species” makes nonsense out the concept of MIS.<sup>360</sup>

The court agreed with the Forest Service that the regulations, when read together, require only collection of inventory data on MIS.<sup>361</sup> However, the court found the Service’s argument actual population data was not required to be inconsistent with the plain language of the regulations, stating that “[i]t is implicit that population data must be collected before it can be monitored and its relationships determined,” and that before inventories of quantitative data can be used to evaluate the effect of management alternatives on forest diversity (as required by section 219.26), those inventories “have to be collected.”<sup>362</sup> To read these regulations otherwise, the court noted, would be to rob them of all meaning, contrary to the established rules of statutory construction.<sup>363</sup>

In finding the agency’s failure to gather actual population data on MIS violated sections 219.19 and 219.26, the court quoted *Sierra Club v. Glickman* to support the position that “[t]he unambiguous language of the MIS regulations requires collection of population data.”<sup>364</sup> In a footnote, the court stated that “we respectfully differ with Ninth Circuit’s conclusion in *Inland Empire*, 88 F.3d at 761, that habitat analyses suffice to satisfy the requirements of 36 C.F.R. § 219.19 . . . which requires evaluation of ‘both

---

<sup>358</sup> *Id.* at 5-6. See *supra* note 49 and accompanying text regarding the 219 regulations.

<sup>359</sup> *Id.* at 6.

<sup>360</sup> *Id.*

<sup>361</sup> *Id.* at 7.

<sup>362</sup> *Id.* at 6.

<sup>363</sup> *Id.* at 7 (citing *Scott v. City of Hammond, Ind.*, 741 F.2d 992, 998 (7<sup>th</sup> Cir. 1984) (noting a strong presumption against agency interpretation that renders a statute “wholly ineffective”).

<sup>364</sup> *Id.* (quoting *Sierra Club v. Glickman*, 974 F.Supp. 905, 936 (E.D. Tex. 1997)).



amount and quality of habitat and of animal population trends of the [MIS].”<sup>365</sup> The *Martin* court did recognize, however, that in *Inland Empire*, the Forest Service had conducted a more in-depth EIS and “detailed field studies,” as opposed to the less involved EA and BE conducted in this case.<sup>366</sup> In concluding that Forest Service approval of timber sales without gathering and considering population data on MIS is arbitrary and capricious, the court stated that since the agency had no population data for half of the MIS in the forest, it could not “reliably gauge the impact of the timber projects on these species.”<sup>367</sup>

In *Martin*, the Eleventh Circuit addressed and corrected many of the shortcomings, as discussed above, in the Ninth Circuit’s *Inland Empire* decision. Primarily, *Martin*’s reading of the regulations is more logical, recognizing that their plain language requires collection of actual population data, and without it, the regulations are meaningless and their purpose is frustrated. Additionally, the Eleventh Circuit recognizes that the hard look doctrine mandates that an agency articulate a reasoned and supportable basis for its management decisions, and that a decision made in the absence of data to support it, is unreasonable.<sup>368</sup>

### 3. *Sierra Club v. Glickman* (affirmed by *Peterson I*)

*Sierra Club v. Glickman* (*Glickman*), the predecessor of the *Peterson* decisions, involved the environmental group’s challenge to Forest Service management practices in Texas’s national forests.<sup>369</sup> Among numerous complaints was the plaintiffs’ contention that the Forest Services habitat viability approach and consequent failure to gather actual

---

<sup>365</sup> *Id.* at n. 10.

<sup>366</sup> *Id.*

<sup>367</sup> *Id.* at 7.

<sup>368</sup> See Orlemann, *supra* note 23 at 370.

<sup>369</sup> *Glickman*, 974 F.Supp. at 911.

population data was arbitrary and capricious and not in compliance with NFMA's diversity provision or the implementing regulations under section 219.<sup>370</sup> In what is by far the most exhaustive treatment of this issue in a federal court decision or elsewhere, the court finds for the plaintiffs and enjoins the agency from conducting future timber harvest until further order of the court.<sup>371</sup>

In rendering its decision, the court first finds that section 219.19 mandates both selection of MIS and monitoring of their populations.<sup>372</sup> The court also finds that an interpretation of the regulations "requiring collection of population data [is] consistent with the NFMA that requires collection of inventory data."<sup>373</sup> The Forest Service's interpretation of section 219.19, the court notes, requires only habitat for MIS, rather than collection of population data on MIS.<sup>374</sup> Then the court recognized *Inland Empire's* validation of that interpretation, stating, "[t]he court reasoned that the Forest Service's central assumption was reasonable, i.e., that 'maintaining the acreage of habitat necessary for survival would in fact assure [sic] a species' survival.'"<sup>375</sup> The *Glickman* court expressly disagreed with *Inland Empire*, stating that the "decision does not support the Forest Service's interpretation," and that "the assumption that merely providing habitat will ensure viable populations of MIS and relieve the Forest Service of collecting population data is not reasonable."<sup>376</sup> While scientific analysis requires making certain

---

<sup>370</sup> *Id.*

<sup>371</sup> *Id.* at 931-46.

<sup>372</sup> *Id.* at 936-37 (quoting 36 C.F.R. § 219.19(a)(1) "In order to estimate the effects of each alternative on fish and wildlife populations, [MIS] . . . shall be identified and selected. . . ." and 36 C.F.R. 219.19(a)(6) "Populations trends of the [MIS] will be monitored and relationships to habitat changes identified.").

<sup>373</sup> *Id.* at 937 (citing 16 U.S.C. § 1604(g)(2)(B); and *Seattle Audubon Soc'y v. Lyons*, 871 F.Supp. 1291, 1316 (W.D. Wash. 1994) *aff'd sub nom. Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401 (stating that "[t]he viability regulation [section 219.19] requires the agencies to look to species populations -- not merely to habitat for hypothetical populations.")).

<sup>374</sup> *Id.*

<sup>375</sup> *Id.* (quoting *Inland Empire* 88 F.3d at 761).

<sup>376</sup> *Id.*

assumptions, noted the court, “the scientific method requires testing and verification of those assumptions from time to time,” and “[c]ontinually testing assumptions upon which forest management decisions are based is exactly what Congress had in mind when it required the Forest Service to collect inventory data.”<sup>377</sup>

The court based its disapproval of this use of habitat viability analysis in part on the Agency’s own communications regarding the methodology. The Forest Service’s 1992 Five Year Review discusses HABCAP,<sup>378</sup> the computer model on which habitat viability analysis depends, and reads:

\* \* Important Note: HABCAP does not or should not be used to derive wildlife target projections, populations, or estimates. Many other factors effect populations that are not considered within HABCAP. HABCAP merely serves to assess the potential for specific population based on habitat availability in an area. The value of actual population monitoring for effectiveness or validation of assumptions in land management cannot be stressed enough as its importance in the overall [management indicator] process.<sup>379</sup>

This same review stated that “HABCAP detects trends in habitat capability but not population or population trends,” and an EIS prepared for the forest in 1996 noted that these models “track capability rather than presence.”<sup>380</sup>

The court determined that the Forest Service’s interpretation of section 219.19 is “plainly erroneous and inconsistent with the regulation itself and section 1604(g)(2)(B)” of NFMA.<sup>381</sup> In order to comply with its statutory mandate and act within its discretion in evaluating diversity, the court finds that the Forest Service must adequately inventory and monitor properly selected MIS, as well as tree and plant species, if not adequately

---

<sup>377</sup> *Id.*

<sup>378</sup> HABCAP, an acronym for habitat capability, is a computer generated model that utilizes habitat management and condition to assess the capability of the forest to support certain species that require a readily definable forest type and age class. *Id.* at 932.

<sup>379</sup> *Id.* at 932-33.

<sup>380</sup> *Id.* at 933.

<sup>381</sup> *Id.* at 938.

represented among MIS.<sup>382</sup>

On appeal in *Peterson I*, the Forest Service argued that the fact finding done by the *Glickman* court was improper and that the court had improperly engaged in de novo review.<sup>383</sup> Fifth Circuit upheld the *Glickman* decision, finding that the district court correctly employed the arbitrary and capricious standard of review, that its conduct of additional fact-finding was proper, and that its decision was warranted by the facts.<sup>384</sup> When *Peterson I* was reheard en banc and vacated, the *Peterson II* court decided the case on the procedural issue of ripeness, and thus never reached or discussed the holdings of *Peterson I* or *Glickman* regarding the monitoring issue.<sup>385</sup>

#### 4. *ONRC v. United States Forest Service*

Regarding the standard of review, *ONRC* recognized that while an agency action is presumptively valid and that substantial deference is afforded to an agency's interpretation of its own regulations, the court should not defer to an agency interpretation that contradicts the plain language of a regulation.<sup>386</sup> In this case, as in *Martin*, *Glickman*, and *Peterson I*, the monitoring requirements in the plan were found to be plain and unambiguous, and the agencies' failures to follow them were held unlawful.<sup>387</sup>

#### E. Conclusion

Though review under the arbitrary and capricious standard is often viewed as fatal, per se, to plaintiffs claims, the cases above demonstrate that the standard does have teeth and can overturn an agency decision that conflicts with its statutory mandate. Such is the case with regards to monitoring requirements. The better reasoned cases hold that

---

<sup>382</sup> *Id.*

<sup>383</sup> *Peterson I*, 185 F.3d at 368.

<sup>384</sup> *Id.*

<sup>385</sup> *Peterson II*, 228 F.3d at 570.

<sup>386</sup> *Id.* at 1090(citing *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994)).

<sup>387</sup> *Id.*

the plain language of section 219.19, especially when read in the context of other 219 regulations, NFMA and the purpose of the statute, requires that actual population data be collected. Without it, the Forest Service will not be able to determine the actual effects of its management activities on resident wildlife.

On the other hand, courts that have deferred to Forest Service claims that habitat viability analysis serves the same purpose and is allowed under the regulations, ignore the requirement of the hard look doctrine that an agency have a reasonable factual basis for its determinations. In the cases that allow habitat viability analysis, the Agency does not supply and the court does not require support for the Service's assertions. Indeed, *Glickman* suggests this is because the Forest Service itself recognizes that habitat viability analysis was not intended or effective as a substitute for gathering actual population data. The often criticized concept of MIS is itself a rather large assumption, to stack an even larger assumption, habitat viability analysis, on top of that, renders decisions made with these tools highly speculative at best.

## **V. Conclusion**

The success of judicial challenges attempting to force the Forest Service to adequately perform the species surveying and monitoring requirements contained in federal environmental laws, regulations and individual forest plans has been inconsistent, but the better reasoned cases have surmounted the two primary barriers to judicial enforcement of monitoring requirements.

First, *Martin*, *Peterson I* and *ONRC* rightly recognize the judicial doctrine of ripeness and the associated requirement of final agency action are satisfied when agencies ignore procedural information gathering steps intended to guide their decisions.

However, these opinions still fail to recognize that site-specific allegations, intended to

demonstrate harm to the court, are unnecessary when the injury is to a procedural right. This is especially true in the case of a failure to monitor, which should impact decisions throughout the planning area. Agency noncompliance with species monitoring requirements is ripe for judicial review as final agency actions or failures to act

Second, *Martin*, *Glickman*, *Peterson I* and *ONRC* properly apply the standard of review, the concept of agency discretion, and the hard look doctrine. While these decisions recognize the degree to which a court must defer to a land management agency's scientific expertise and its interpretation of its regulations, they require that agency decisions regarding scientific methods have some support and that an agency interpretation of its own regulations have a reasonable basis in the language and purpose of regulations. While an agency is entitled to deference in interpreting and carrying out these regulations, an agency's failure to collect the required data is contrary to the law and renders arbitrary and capricious any decision based on inadequate data.

Though the success of these challenges in federal courts has been inconsistent, judicial enforcement of monitoring requirements is legally and scientifically supportable, and remains a viable method to ensure that federal agencies make fully informed resource development decisions that consider and protect habitat, species, and biodiversity on our public lands. To this end, the agency must monitor both management indicator species numbers, and demographic rates, as well as habitat quantity and quality. Monitoring is required by NFMA and its attendant regulations, and this requirement should be enforced by courts.