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Judicial Enforcement of Forest Plans in the Wake of *Ohio Forestry*

Trent Baker*

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I. INTRODUCTION

In *Ohio Forestry Association, Inc. v. Sierra Club*,¹ 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.² 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.³ 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.

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

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1. 523 U.S. 726 (1998).

2. *Id.* at 731.

3. *Id.* at 732.

Court would consider 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 effect of the *Ohio Forestry* ruling on various challenges involving LRMPs.

This article provides background on the ripeness doctrine, LRMPs, previous cases challenging forest plans, and then examines the Wayne National Forest case in detail. An analysis of the decision's implications follows, illustrated by recent cases that consider LRMPs and interpret *Ohio Forestry*. This article concludes that recent LRMP 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' creation and implementation of LRMPs, without requiring allegations of imminent site-specific injuries. Courts also apply the *Ohio Forestry* requirement of site-specific allegations of imminent harm in cases that do not challenge the LRMP itself, but an agency's failure to follow the plan's mandatory requirements. This article concludes that in cases challenging an agency's failure to follow its own LRMP, reliance on *Ohio Forestry* is misplaced and serves only to confuse the issue.

II. BACKGROUND

A. *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."⁴ The source of 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.⁵ Though ripeness is frequently associated with Article III, it is often characterized by the Supreme Court as a prudential limit.⁶ 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*

4. 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)).

5. *Id.* at 159.

6. Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 155 (1987).

supports the proposition that ripeness is a prudential and discretionary limitation.⁷

Despite their differing sources, the doctrines of standing and ripeness are so closely related that “[f]ew courts draw meaningful distinctions between the two.”⁸ 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.⁹ 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.¹⁰ Some courts recognize the ripeness doctrine as a more appropriate tool to determine the justiciability of injuries that have not yet occurred.¹¹

*Abbott Laboratories v. Gardner*¹² is the leading case on the ripeness doctrine as applied to challenges to administrative actions. The Supreme Court stated that the ripeness doctrine’s “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.”¹³ 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 issues for judicial decision, and the hardship to the parties of withholding court consideration.”¹⁴

B. Land and Resource Management Plans

The Forest Service’s current system of forest planning originated in the Forest and Rangeland Renewable Resources Planning Act,¹⁵ which was eventually amended by the National Forest Management Act (NFMA).¹⁶ NFMA incorporated the Resources Planning Act’s requirement that the Forest Service

7. Steven P. Quarles & Thomas R. Lundquist, *The Supreme Court Restricts the Availability of Forest-Wide Judicial Review in Ohio Forestry Ass’n v. Sierra Club*, 28 ENVTL. L. REP. 10621, 10626 (1998) (citing *Ohio Forestry*, 523 U.S. at 732. Quarles represented the petitioner, Ohio Forestry Association, in *Ohio Forestry*).

8. *Wilderness Soc’y v. Alcock*, 83 F.3d 386, 389 (11th Cir. 1996).

9. *Id.* at 390. 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. *Id.*

10. *Id.*

11. *Id.*

12. 387 U.S. 136 (1967).

13. *Id.* at 148-49.

14. *Id.* at 149.

15. 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, 231 (1996); Garrahan, *supra* note 4, at 147-149.

16. 16 U.S.C. §§ 1600-1614 (1994).

develop integrated LRMPs for each unit of the National Forest System.¹⁷ LRMPs are analogous to city zoning regulations, because they identify appropriate uses for different areas within a national forest, but do not necessarily instigate any activities. Once approved, all management activities must be consistent with the LRMP.¹⁸ Revision is required at least every fifteen years, or more often as needed.¹⁹

NFMA also requires that the Forest Service comply with the National Environmental Policy Act²⁰ (NEPA), a procedural statute that provides for government analysis and public scrutiny of the environmental impacts of agency decision-making.²¹ NEPA requires preparation of an Environmental Impact Statement (EIS) for any major federal action that significantly affects the quality of the human environment.²² NFMA requires forest plans be prepared in accordance with NEPA, generally including preparation of an accompanying EIS for every forest plan.²³

However, neither NFMA nor NEPA contains a citizen suit provision, so judicial review of agency decisions under these acts is accomplished through provisions of the Administrative Procedure Act (APA).²⁴ Section 10(a) of the APA provides that "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."²⁵

The APA incorporates the ripeness doctrine by allowing judicial review of agency action only when it is a "final agency action."²⁶ 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.²⁷ Failure of an agency to act are also reviewable,²⁸ and courts may "compel agency action unlawfully withheld or unreasonably delayed."²⁹

17. 16 U.S.C. § 1604(a).

18. 16 U.S.C. § 1604(i).

19. 16 U.S.C. § 1604(f)(5).

20. 42 U.S.C. §§ 4321-4370 (1994).

21. 16 U.S.C. § 1604(g)(1).

22. 42 U.S.C. § 4332(2)(C) (1994 & Supp. III 1997).

23. 16 U.S.C. § 1604(g)(1).

24. 5 U.S.C. §§ 551-559, 701-706 (1994).

25. 5 U.S.C. § 702 (1994 & Supp. III 1997).

26. 5 U.S.C. § 704 (1994).

27. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal citations omitted).

28. *See* 5 U.S.C. § 551(13) (expanding the definition of "agency action" to include a "failure to act").

29. 5 U.S.C. § 706(1) (1994 & Supp. III 1997).

C. Previous Challenges to LRMPs Decided on Ripeness Grounds

In 1990 the Supreme Court in *Lujan v. National Wildlife Federation*³⁰ construed the scope of judicial review under the APA of public land management plans.³¹ *Lujan* involved an environmental group's challenge to the Bureau of Land Management's (BLM) land withdrawal review program.³² The complaint was based on alleged violations to the Federal Land Policy and Management Act of 1976³³ (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.³⁴ 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.³⁵

The Court reasoned that the program of "land withdrawal" "does not refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations," but simply refers to "the continuing (and thus constantly changing) operations of the BLM."³⁶ The Court continued that "a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA until the scope of the controversy has been reduced 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 to harm him."³⁷

A major exception to the ripeness standard noted in *Lujan* "is a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately." The Court stated that this type of agency action is ripe for review.³⁸ The Court acknowledged that the "case-by-case approach that this requires is understandably frustrating to [environmental organizations seeking] across-the-board protection of [natural resources]." However, the Court stated that such a limitation is the "traditional" and "normal mode of operation of the courts."³⁹ 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."⁴⁰

30. 497 U.S. 871 (1990).

31. Beth Brennan & Matt Clifford, *Standing, Ripeness, and Forest Plan Appeals*, 17 PUB. LAND & RES. L. REV. 125, 133-35 (1996).

32. *Lujan*, 497 U.S. at 875.

33. 43 U.S.C. §§ 1701-1784 (1994).

34. *Lujan*, 497 U.S. at 882.

35. *Id.* at 890.

36. *Id.*

37. *Id.* at 891.

38. *Id.* (citing *Abbott Lab.*, 387 U.S. at 152-54).

39. *Id.* at 894.

40. *Id.* (citing *Gardner v. Toilet Goods Ass'n*, 387 U.S. 158, 164-66 (1967)).

By the mid-1990s the federal appeals courts' varying interpretations of *Lujan* resulted in a 3-2 circuit split regarding the reviewability of LRMPs.⁴¹ The Seventh⁴² and Ninth Circuits⁴³ 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 Eighth⁴⁴ and Eleventh Circuits⁴⁵ 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,⁴⁶ and is likely the reason the Supreme Court accepted the case for review.

III. OHIO FORESTRY

The planning process for the Wayne National Forest began in 1981.⁴⁷ Two environmental groups, the Sierra Club and the Citizens Council on Conservation and Environmental Control participated in the planning process and the public comment period following publication of the proposed Plan and the draft EIS.⁴⁸ In 1988, the Forest Service adopted the final plan and accompanying final EIS.⁴⁹ Both groups complained of the Plan's designation of suitable

41. Garrahan, *supra* note 4, at 172-74; Quarles & Lundquist, *supra* note 7, at 10622; Murphy, *supra* note 15, at 243-50; Brennan & Clifford, *supra* note 31 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).

42. *Sierra Club v. Marita*, 46 F.3d 606 (7th 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 in this case the Forest Service had issued a final, appealable plan. *Id.* at 614.

43. *See Idaho Conservation League v. Mumma*, 956 F.2d 1508 (9th Cir. 1992). This court similarly distinguished *Lujan* on both standing and ripeness grounds. *Id.* at 1517-19. *See also Resources Ltd., Inc. v. Robertson*, 8 F.3d 1394 (9th 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 (9th 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).

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

45. *Wilderness Soc'y*, 83 F.3d at 390 (holding that the LRMP was not ripe for review prior to a second stage site-specific decision).

46. *Sierra Club v. Thomas*, 105 F.3d 248 (6th Cir. 1997), *rev'd and vacated by Ohio Forestry*, 523 U.S. 726 (1998).

47. *Sierra Club v. Robertson*, 845 F. Supp. 485, 489 (S.D. Ohio 1994), *rev'd by Thomas*, 105 F.3d 248.

48. *Robertson*, 845 F. Supp. at 489.

49. *Id.*

timber lands and harvest methods, and appealed the adoption of the Plan through administrative channels.⁵⁰ The Chief of the Forest Service denied the groups' appeals in 1992 and affirmed adoption of the Plan, and the environmental groups instigated legal action two months later.⁵¹

The complaint included three counts.⁵² First, the groups alleged that approval of a plan that permits below-cost timber sales accomplished by clearcutting violates NFMA, NEPA, and the APA.⁵³ Second, they claimed that by permitting below-cost timber sales, the Forest Service violated its duty as a public trustee.⁵⁴ Third, the plaintiffs alleged that in selecting lands suitable for timber production, the Forest Service failed to follow regulations requiring it to properly identify "economically unsuitable lands," and as a result, the agency categorized "economically unsuitable lands" as suitable for timber production.⁵⁵ Thus, the plaintiffs alleged that the regulations violated NFMA and the APA as an arbitrary and capricious abuse of discretion, not in accordance with law.⁵⁶

The plaintiffs requested a declaratory judgment that the plan and the below-cost timber sales and clearcutting it authorized were unlawful, and sought an injunction prohibiting the Forest Service from allowing further timber harvest or below-cost timber sales pending revision of the Plan.⁵⁷

A. Procedural History

At the district court level, the parties did not raise the issue of justiciability, and Judge James L. Graham granted summary judgment for the Forest Service on the merits.⁵⁸ Judge Graham held that 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 law."⁵⁹

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.⁶⁰ The decision first addressed the threshold issue of justiciability with a discussion of standing. The court stated that "[i]n cases involving Land Resource Management Plans, the most controverted standing issue is whether the injury is immi-

50. *Id.*

51. *Id.*

52. *Ohio Forestry*, 523 U.S. at 731.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 731-32.

58. *Robertson*, 845 F. Supp. at 503.

59. *Id.*

60. *Thomas*, 105 F.3d at 250.

ment.”⁶¹ 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.’”⁶² 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.”⁶³

Turning to the merits of the plaintiffs’ first and third claims, the court found that 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.”⁶⁴ The court 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.⁶⁵ In a concurring opinion, Judge Batchelder wrote that “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.”⁶⁶ In conclusion, the court found the Forest Service “failed to comply with the protective spirit of the [NFMA],” and that this noncompliance violated § 1604(g)(3)(F)(v) of the Act.⁶⁷

B. 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.⁶⁸ 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.⁶⁹ 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.⁷⁰

61. *Id.*

62. *Id.* (quoting *Idaho Conservation League*, 956 F.2d at 1516).

63. *Id.*

64. *Id.* at 251

65. *Id.* at 251-52.

66. *Id.* at 252 (Batchelder, J., concurring).

67. *Id.* See 16 U.S.C. § 1604(g)(3)(F)(v) (1994) (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).

68. Quarles & Lundquist, *supra* note 7, at 10624.

69. *Id.*

70. *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.⁷¹ 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.⁷²

C. Reasoning and Analysis

In reaching its decision in *Ohio Forestry*, the Court relied primarily on two prior ripeness decisions, *Abbott Laboratories* and *Lujan*. The Court modified the two-prong ripeness test from *Abbott Laboratories*,⁷³ and distilled it into three factors.⁷⁴ The first factor asks whether delayed review would cause the plaintiff hardship. The second factor requires a determination of whether judicial intervention would inappropriately interfere with further administrative action by the defendant. The third factor asks whether the courts would benefit from further factual development of the issues presented.⁷⁵

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."⁷⁶ To illustrate, the Court said "the Plan does not give anyone a legal right to cut trees, nor does it abolish anyone's legal authority to object to trees' being cut."⁷⁷ 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.⁷⁸ Plaintiffs contended that the expense of multiple site-specific challenges required by delayed review, would constitute hardship.⁷⁹ 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.⁸⁰

71. *Id.*

72. *Id.* See also *supra* note 7 and accompanying text.

73. See *supra* note 14 and accompanying text.

74. *Ohio Forestry*, 523 U.S. at 733.

75. *Id.*

76. *Id.* (paraphrasing *U.S. v. Los Angeles & Salt Lake R.R. Co.*, 273 U.S. 299, 309-10 (1927)).

77. *Id.*

78. *Id.* at 734.

79. *Id.*

80. *Id.* at 735. The Court then quoted *Lujan* for further justification of the case-by-case approach.

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.⁸¹ The Court added that "further consideration will actually 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."⁸²

Third, the Court found that immediate review "would require time-consuming judicial consideration of the details of an elaborate, technically based plan" with effects that may change over time.⁸³ 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 the legal issues presented."⁸⁴

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.⁸⁵ 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 particular result."⁸⁶ The purpose of NEPA is to insure that environmental effects of government actions are discovered and considered before action is taken.⁸⁷ 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.⁸⁸ 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."⁸⁹

81. *Id.* (quoting *FTC v. Standard Oil Co.*, 449 U.S. 232, 242 (1980)).

82. *Id.* at 735-36.

83. *Id.* at 735.

84. *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)).

85. *Id.* at 737.

86. *Id.*

87. 42 U.S.C. § 4321 (1994).

88. *Idaho Conservation League*, 956 F.2d at 1514.

89. *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, 572 n.7 (1992).

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 recreation in areas designated for logging are harms that will occur now.⁹⁰ However, the complaint did not include these claims, so the Court declined to address them.⁹¹ 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.⁹² The Court pointed to the Government's concession 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."⁹³ 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,"⁹⁴ implicitly recognizes that when a plaintiff can show a forest plan forces such a modification, the plan, or a part of it, may be ripe for review. *Lujan* supports this view, finding that elements of a plan that require claimants to immediately adjust their behavior are ripe.⁹⁵ 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."⁹⁶

Despite the Court's closing out review of substantive provisions of LRMPs on the facts presented, *Ohio Forestry* expressed dicta that leave 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 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 site-specific allegations of imminent harm are required.

IV. LRMP CASES INTERPRETING *OHIO FORESTRY*

In recent cases involving LRMP challenges, several federal courts have found claims of procedural harm and substantive claims of imminent, site-specific harm justiciable in light of *Ohio Forestry*. The Ninth Circuit has

90. *Ohio Forestry*, 523 U.S. at 738.

91. *Id.*

92. *Id.* at 739.

93. *Id.* at 738.

94. *Id.* at 734.

95. See *supra* note 38 and accompanying text.

96. *Ohio Forestry*, 523 U.S. at 734.

declined to join these courts, 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 LRMPs. Strict adherence to *Ohio Forestry* is misplaced in the Ninth Circuit cases due to the simple distinction that they do not involve challenges to a substantive provision of an LRMP, but rather challenge the agency's failure to adhere to a forest plan. Further, if *Ohio Forestry* is correctly applied, such challenges should be characterized as procedural claims and allowed without requiring site-specific allegations.

A. Federal District Court Cases

In *Kentucky Heartwood, Inc. v. Worthington*,⁹⁷ 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.⁹⁸ The plaintiffs asserted four separate claims. First, they alleged the agency violated the ESA's requirement of consultation with the Fish and Wildlife Service in adopting the Plan, nine amendments to the Plan and three management policies which authorized projects that could have affected listed species.⁹⁹ 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 accompanied the Forest Plan.¹⁰⁰ Third, the plaintiffs argued that 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.¹⁰¹ 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.¹⁰²

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 that their ESA and NEPA challenges to the Forest Plan were ripe, and that their NFMA claim was also ripe "as it relates to defendants' failure to comply with a particular procedure."¹⁰³ However, Judge Forester dismissed the NFMA challenge to the Forest Plan's authorization of clearcut-

97. 20 F. Supp. 2d 1076 (E.D. Ky. 1998).

98. *Id.* at 1088.

99. *Kentucky Heartwood*, 20 F. Supp. 2d at 1088. The duty to consult with the Fish and Wildlife Service is found at 16 U.S.C. § 1536 (Supp. 1999) and 50 C.F.R. § 402.11,-14 (1999). The Daniel Boone Forest is home to at least thirty-three threatened or endangered species of plants and animals. *Id.* at 1081-82.

100. *Id.* at 1088.

101. *Id.*

102. *Id.*

103. *Id.* at 1090.

ing 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*.¹⁰⁴

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* made a rough distinction between NEPA claims as procedural and NFMA claims as substantive, this court found that NFMA and ESA claims may also be procedural in nature.

The plaintiffs in *Oregon Natural Resources Council Action v. United States Forest Service and Bureau of Land Management*¹⁰⁵ claimed that the federal agencies violated their own LRMP.¹⁰⁶ 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.¹⁰⁷ The Plan sought to ensure the viability of certain rare species by requiring surveys for those species before any ground-disturbing activities implemented after a specific cut-off date.¹⁰⁸ The agencies issued memoranda exempting a timber sale from survey requirements when the sale's EIS was completed before the applicable cut-off date, or when the sale was to take place in an area of abundant red tree volé habitat or isolated watersheds under private ownership.¹⁰⁹ The plaintiffs claimed that the agencies' authorization of certain timber sales without first conducting surveys for certain species of wildlife, as required by the LRMP,¹¹⁰ violated NFMA and FLPMA and their implementing regulations which require timber sales be consistent with guiding LRMPs.¹¹¹ 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 EIS¹¹² as required by NEPA and its implementing regulations.¹¹³

District Court Judge Dwyer characterized the plaintiffs' claims as procedural because they sought to enforce a procedural requirement that, if disre-

104. *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. *Ohio Forestry*, 523 U.S. at 737).

105. 59 F. Supp. 2d 1085 (W.D. Wash. 1999).

106. *Id.* at 1087.

107. *Id.*

108. *Id.* at 1088.

109. *Id.*

110. *Id.*

111. See 16 U.S.C. § 1604(i) (1994), and 36 C.F.R. § 219.10(e) (1999); 43 U.S.C. § 1732(a) (1994); 43 C.F.R. § 1610.5-3 (1999).

112. *ONRC*, 59 F. Supp. 2d at 1088.

113. 42 U.S.C. §§ 4321-4370d (1994), 40 C.F.R. § 1502.9(c) (1999).

garded, could impair their concrete interests.¹¹⁴ The agencies and intervening timber companies argued that these claims were not final agency actions and not ripe for review under *Ohio Forestry*.¹¹⁵ Judge Dwyer found the NEPA claims ripe for review under section 706(1) of the APA, which has been characterized as “an exception to the final agency action requirement.”¹¹⁶ The agencies’ decision to authorize the timber sales without surveys constituted final agency actions under section 704 of the APA.¹¹⁷ Judge Dwyer also found the plaintiffs’ challenge to specific timber sales rendered the claim ripe in light of *Ohio Forestry*.¹¹⁸

Like *Kentucky Heartwood, Oregon Natural Resources Council Action* 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, the case shows 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 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.

In *Kern v. United States Bureau of Land Management*,¹¹⁹ the plaintiffs challenged the BLM’s Resource Management Plan (RMP) for the Coos Bay district of federal lands managed by the agency in Oregon.¹²⁰ The plaintiffs alleged violations of FLPMA and the APA, arguing that the BLM’s environmental review procedures were inadequate with regards to the threat that logging and road-building activities would spread a root disease that is fatal to Port Orford cedar trees.¹²¹ The plaintiffs had previously challenged the BLM management guidelines for these same trees for failure to consider as alternatives the prohibition of logging and road building in watersheds infected with the disease.¹²² However, the Court of Appeals for the Ninth Circuit dismissed the challenge stating that the guidelines did not pose site-specific activ-

114. *ONRC*, 59 F. Supp. 2d at 1089. The court found that 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.*

115. *Id.* at 1090

116. *Id.* (quoting *ONRC v. BLM*, 150 F.3d 1132, 1137 (9th Cir. 1998)).

117. *Id.* (citing *Bennett v. Spear*, 520 U.S. 154, 178 (1997)).

118. *Id.* (citing *Sierra Club v. Martin*, 168 F. 3d 1, 6 (11th 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” *Id.*)).

119. 38 F. Supp. 2d 1174 (D. Or. 1999).

120. *Id.* at 1176.

121. *Id.*

122. *Id.* at 1177.

ities or call for any action which would directly impact the physical environment.¹²³

In this case, District Court Judge Hogan characterized the plaintiffs' FLPMA claims as general challenges to the RMP asserting that the BLM failed to perform duties required by the Act and the Plan itself.¹²⁴ Judge Hogan found the claims were not focused on any site-specific project and held that they were not ripe for review.¹²⁵ He also stated that in this case the BLM must conduct an environmental review before any site-specific projects go forward.¹²⁶ However, Judge Hogan cited *Ohio Forestry* for the proposition that such a challenge would be ripe where plan level directives would go forward without additional consideration and would result in imminent concrete injury.¹²⁷ The opinion also stated that "to the extent that the RMP plays a role in site-specific decisions challenged elsewhere in the complaint, the court will consider the adequacy of the RMP to the extent that it plays a causal role with respect to the alleged harm."¹²⁸ *Kern*, like *Oregon Natural Resources Council Action*, demonstrates that courts read *Ohio Forestry* as absolutely requiring a site-specific complaint. In line with the dicta of *Ohio Forestry*, this decision also expressly recognizes the potential ripeness of challenges to aspects of a LRMP that will cause immediate injury to a plaintiff's interests.

B. Federal Circuit Court Cases

1. D.C. Circuit

In *Wyoming Outdoor Council v. United States Forest Service*¹²⁹, 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.¹³⁰ 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.¹³¹

The Federal Onshore Oil and Gas Leasing Reform Act of 1987 governs the issuance of oil and gas leases in national forests.¹³² In 1990, the Forest Service

123. *Northcoast Environmental Center v. Glickman*, 136 F.3d 660, 670 (9th Cir. 1998).

124. *Kern*, 38 F. Supp. 2d at 1179.

125. *Id.*

126. *Id.*

127. *Id.* (citing *Ohio Forestry*, 523 U.S. at 738-39).

128. *Id.* (citing *Ohio Forestry*, 523 U.S. at 734).

129. 165 F.3d 43 (D.C. Cir. 1999).

130. *Id.* at 45.

131. *Id.*

132. *Wyoming Outdoor Council*, 165 F.3d at 45 (citing 30 U.S.C. § 226(g)-(h) (Supp. 1999)).

promulgated regulations implementing its responsibilities under the Act.¹³³ The regulations require that Forest Service authorization of leases be subject to three site-specific factual findings made by the agency.¹³⁴ 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.¹³⁵ 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.¹³⁶ Second, the agency must ensure that conditions of surface use are stipulated in any resulting lease.¹³⁷ Third, the Forest Service must determine that the proposed surface use is allowable somewhere on the land subject to leasing.¹³⁸

In the EIS and the record of decision (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.¹³⁹ The plaintiffs challenged the agency's failure to include the required findings in the EIS and ROD in district court, claiming this violated the agency's regulations and NEPA.¹⁴⁰ The district court found for the defendants, deferring to the agency's interpretation of its own regulations and finding that the Forest Service's EIS was sufficiently site-specific that it did not violate NEPA.¹⁴¹ This appeal by the plaintiffs followed. Before the appeal was heard, the agency completed the NEPA process, made the required findings, and authorized the BLM to lease three parcels in the Shoshone National Forest.¹⁴²

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.¹⁴³ 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.¹⁴⁴ The court went on to say that the plaintiffs could challenge the Service's NEPA compliance after the BLM issued the leases.¹⁴⁵

133. *Id.*

134. *Id.*

135. *Id.* (citing 36 C.F.R. § 228.102(e)(1) (1999)).

136. *Id.*

137. *Id.* (citing 36 C.F.R. § 228.102(c)(1), (e)(2)).

138. *Id.* (citing 36 C.F.R. § 228.102(e)(3)).

139. *Id.* at 47.

140. *Id.* See *Wyoming Outdoor Council v. United States Forest Serv.*, 981 F. Supp. 17,18 (D.D.C. 1997).

141. *Id.*

142. *Id.*

143. *Id.* at 47-49. See *Ohio Forestry*, 523 U.S. at 726.

144. *Id.* at 49.

145. *Id.* at 50.

In contrast, the court characterized the plaintiffs' claim that the agency violated its own regulations by issuing the EIS and ROD without completing the required findings as procedural.¹⁴⁶ 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.¹⁴⁷ Then, quoting *Ohio Forestry*, the court went on to say that 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.¹⁴⁸

Wyoming Outdoor Council treats ripeness as a prudential requirement and shows that all NEPA-based challenges to LRMPs are not necessarily ripe in light of *Ohio Forestry*. However, this decision explicitly recognizes 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.

2. Eleventh Circuit

In *Sierra Club v. Martin*,¹⁴⁹ 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.¹⁵⁰ The proposed timber sales would cover roughly 2,000 acres, require the construction of eighteen miles of roads, and release over 155 tons of sediment into nearby streams.¹⁵¹ The LRMP under which the timber sales were approved was adopted in 1985 and amended in 1989.¹⁵² Prior to any timber sale, the plan required the Forest Service to conduct a site-specific study to determine whether the sale would harm the area or its resident species.¹⁵³ After studying the area of the proposed sales, the agency determined there would be no adverse impact and approved the sales.¹⁵⁴

The plaintiffs alleged that the agency's 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 and the agency's own regula-

146. *Id.* at 51.

147. *Id.* (quoting *Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996)).

148. *Id.* (quoting *Ohio Forestry*, 523 U.S. at 737).

149. 168 F.3d 1 (11th Cir. 1999) *reh'g denied*, *Sierra Club v. Martin*, 181 F.3d 111 (11th Cir. 1999).

150. *Id.* at 2.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 2-3.

tions.¹⁵⁵ The plaintiffs claimed the failure to acquire population data violated NFMA's implementing regulations as well.¹⁵⁶ 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.¹⁵⁷

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.¹⁵⁸ With respect to the first claim, the Court of Appeals for the Eleventh Circuit held that the Service's failure to gather the population data was contrary to the Forest Plan and consequently that the decision to authorize the sales without the data was arbitrary and capricious.¹⁵⁹ In response to the second claim, the Forest Service argued that NFMA's implementing regulations could not be challenged at the site-specific level because they apply only to the forest planning process.¹⁶⁰ Further, the agency argued that the plan itself was not a final agency action and could not be challenged.¹⁶¹ 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.¹⁶² Then without citing *Ohio Forestry*, the court held that 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.¹⁶³ 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.¹⁶⁴ Instead of relying on *Ohio Forestry*, the court looked to its own 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.¹⁶⁵ The decision did not address the plaintiffs' challenge to the plan itself.

Martin also treats a Forest Service decision to ignore its own LRMP's monitoring requirements, which derive from regulations implementing NFMA, as final for purposes of judicial review under APA. 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

155. *Id.* at 3.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 5.

160. *Id.* at 6.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* (citing *Wilderness Soc'y*, 83 F.3d at 390).

adopted. While the court also required a site-specific complaint, it did so in reliance on a case other than *Ohio Forestry*.

3. Fifth Circuit

In *Sierra Club v. Peterson*,¹⁶⁶ the United States Court of Appeals for the Fifth Circuit addressed the same issue in a case virtually identical to *Martin*. In fact, the Fifth Circuit expressly agreed with the holding and reasoning of its "sister circuit" in *Martin*.¹⁶⁷ While the Eleventh Circuit declined the opportunity to reconcile the holding with *Ohio Forestry*, the Fifth Circuit had no choice. In response to a vigorous dissent on the ripeness issue, the majority was forced to distinguish the instant case from *Lujan* and *Ohio Forestry*.¹⁶⁸

Peterson is the most recent decision in a fourteen-year dispute between environmental groups and the Forest Service over the management of four National Forests in eastern Texas.¹⁶⁹ In 1985, the environmental groups first challenged the Forest Service's management of these National Forests in response to the agency's timber cutting in wilderness areas to control the spread of the southern pine beetle.¹⁷⁰ In 1987, the groups' efforts diverged into two distinct tracks of litigation.¹⁷¹ The first involved claims that clearcutting violated NFMA and its associated regulations.¹⁷² The second involved attempts by the environmental groups to protect the habitat of the red-cockaded woodpecker.¹⁷³ This case sits at the end of the first track.¹⁷⁴

The environmental groups claimed that the Forest Service's use of clearcutting in site-specific areas violated NFMA with respect to its mandate that the agency protect the diversity of plant and animal communities and protect resources in the national forests.¹⁷⁵ The plaintiffs also argued that 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.¹⁷⁶ The district court found that it had jurisdiction to review the Forest Service's failure to implement timber sales in compliance with NFMA and its regulations and concluded this failure was a final agency action for the purposes of the APA.¹⁷⁷ The plaintiffs prevailed on the merits

166. 185 F.3d 349 (5th Cir. 1999), *reh'g en banc granted*, *Sierra Club v. Peterson*, 240 F.3d 580 (5th Cir. 2000).

167. *Id.* at 372-73.

168. *Id.* at 362-64.

169. *Id.* at 353.

170. *Id.* at 355.

171. *Id.* at 356.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 357. See 16 U.S.C. §§ 1604(g)(3)(B), (F)(v) (1994).

176. *Id.*

177. *Id.* at 358 (citing *Sierra Club v. Glickman*, 974 F. Supp. 905, 914-15 (E.D. Tex. 1997)).

and the district court enjoined future timber harvest until the Forest Service complied with NFMA. The agency and intervening timber interests appealed.¹⁷⁸

After upholding the district court's finding that the environmental groups had standing, the majority opinion for the Court of Appeals commenced a lengthy discussion of ripeness and final agency action, in which it distinguished the present case from *Lujan* and *Ohio Forestry*.¹⁷⁹ 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."¹⁸⁰ Here, the plaintiffs "pointed to specific activities on specific plots . . . and challenged the mechanism by which the Forest Service determined how to approve those discrete logging practices."¹⁸¹ 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.¹⁸²

Ohio Forestry, according to the majority, was both easily distinguished and supportive of finding the present case ripe for review.¹⁸³ In the present case, the plaintiffs alleged that 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.¹⁸⁴ 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.¹⁸⁵ The majority opined that *Ohio Forestry* supports the proposition that "disagreements over final, specific action are necessarily ripe."¹⁸⁶

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 approval of the timber sales) as the final agency action that rendered the claim justiciable.¹⁸⁷ The majority recognized the Forest Service's decision not to follow the inventory and monitoring

178. *Id.* at 359.

179. *Id.* at 361-73.

180. *Id.* at 363.

181. *Id.*

182. *Id.* (quoting *Lujan*, 497 U.S. at 894).

183. *Id.* at 362 n.16.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 371-72 n.31.

requirements of the LRMP as an “adjudication” representing a “failure to act” which satisfies the “final agency action” requirement of the APA.¹⁸⁸ 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.¹⁸⁹

Accordingly, *Peterson* 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 it is the decision itself that is important, not the “on-the-ground” effects of the Service’s decision not to monitor.¹⁹⁰ 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.

4. Ninth Circuit

*Ecology Center, Inc. v. United States Forest Service*¹⁹¹ 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.¹⁹² This challenge was similar to *Martin* and *Peterson*, but the plaintiffs did not complain of site-specific timber sales made under the LRMP. In a brief opinion, the Ninth Circuit affirmed the dismissal of the Ecology Center’s action, holding that the court lacked subject matter jurisdiction because the challenge was not ripe for adjudication since the Forest Service’s failure to perform certain moni-

188. *Id.*

189. *Id.* at 370-71 (additional emphasis added).

190. *Id.* at 370-72.

191. 192 F.3d 922 (9th Cir. 1999).

192. *Id.* at 925.

toring tasks was not a final agency action or a justiciable failure to act under the APA as interpreted by *Ohio Forestry*.¹⁹³

Under the APA, the plaintiffs challenged the Forest Service's failure to comply with monitoring duties imposed by NFMA, its implementing regulations, and the Kootenai National Forest Plan.¹⁹⁴ The plan was adopted in 1987 and required 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.¹⁹⁵ In 1996, the Ecology Center filed suit alleging that the agency failed to publish the required reports in 1988 and 1993, and that the required monitoring was insufficient in the reports it did file.¹⁹⁶ 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.¹⁹⁷ However, the magistrate judge for the district court dismissed the action for lack of subject matter jurisdiction and never reached the merits of the dispute.¹⁹⁸

For the Ninth Circuit, resolution of the jurisdictional 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.¹⁹⁹ The court classified monitoring and reporting as advisory steps leading to an agency decision.²⁰⁰ The court recognized that monitoring was mandatory under the LRMP, but relying on *Ohio Forestry*, found that legal consequences did not flow and rights or obligations did not arise from the decision not to follow the requirements of the plan.²⁰¹ *Ohio Forestry*, the court suggested, requires plaintiffs to withhold their challenge until "a time when harm is more imminent and more certain."²⁰² While the plaintiffs' 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 effectively oversee agency activities provided for by NFMA.²⁰³ The court countered that NFMA does not provide for public oversight of monitoring, only of the formation, amendment and revision of LRMPs.²⁰⁴ The plaintiffs argued that denial of this claim would essentially

193. *Id.* at 925-26.

194. *Id.* at 923.

195. *Id.* at 924.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 924-26.

200. *Id.* at 925.

201. *Id.*

202. *Id.* (citing *Ohio Forestry*, 523 U.S. at 734).

203. *Id.* at 925.

204. *Id.* at 926 and n. 7.

prevent judicial review of inadequate monitoring by the agency²⁰⁵ The court stated that such claims would be justiciable when linked to an APA challenge to a final agency action like a timber sale.²⁰⁶

The court then addressed the Ecology Center's claim that the failure to monitor was ripe for review under the APA as an agency action unlawfully withheld or unreasonably delayed.²⁰⁷ 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."²⁰⁸

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. Application of this requirement is misplaced when the plaintiffs' claim in this case could easily be characterized as an allegation of procedural harm, which even *Ohio Forestry* recognizes to be ripe upon occurrence, and not dependant on further allegations of site-specific harm. The agency's failure to monitor, as mandated by the Forest Plan, will prevent effective amendment and revision of the Plan, as well as informed resource allocation decisions like timber sales.

*Wilderness Society v. Thomas*²⁰⁹ required the Court of Appeals for the Ninth Circuit to decide whether the Forest Service violated NFMA in preparing a LRMP for the Prescott National Forest in central Arizona.²¹⁰ The final Prescott National Forest Plan identified a total amount of land not physically "capable" of sustaining commercial grazing.²¹¹ A coalition of environmental groups filed suit, claiming in count one that the Plan violated 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 account economic and environmental considerations, as well as alternative uses for the land.²¹² 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.

205. *Id.* at 926 n. 6.

206. *Id.* at 926 (citing *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1153 (9th 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)).

207. *Id.* at 926.

208. *Id.*

209. 188 F.3d 1130 (9th Cir. 1999).

210. *Id.* at 1132.

211. *Id.*

212. *Id.* at 1132-33.

The district court granted summary judgment for the defendants and the appeal followed.²¹³

The Ninth Circuit began its discussion by applying the *Ohio Forestry* three-part test to determine the ripeness of the plaintiffs' claims.²¹⁴ 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.²¹⁵ 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 its causal relationship to the site-specific injuries alleged in counts two and three.²¹⁶ The court then found counts two and three ripe for judicial 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."²¹⁷

Wilderness Society suggests that *Ecology Center* would have been decided differently had it included allegations of site-specific injury. 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. Contrary to the holding in *Ecology Center*, this suggests that noncompliance with the mandates of a forest plan is a final agency action or justiciable failure to act for purposes of the APA. The *Wilderness Society* decision 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*²¹⁸ 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.²¹⁹ 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 manage-

213. *Id.* at 1133.

214. *Id.* (citing *Ohio Forestry*, 523 U.S. at 733).

215. *Id.* at 1133-34 (citing *Ohio Forestry*, 523 U.S. at 738-39).

216. *Id.* at 1134.

217. *Id.*

218. 198 F.3d 253 (9th Cir. 1999).

219. *Id.* at 253.

ment plan. Finally, the environmental groups claimed that the agency's violation of its own wet-season road closure was arbitrary and capricious.²²⁰

The court found the agency's "lax monitoring unlikely to expose potential problems caused by ORVs."²²¹ 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.²²² The agency and the court conceded 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.²²³ In this case, however, the court found no imminent agency action that hinged on the result of the allegedly deficient monitoring results and annual plan review.²²⁴

In *Friends Of The Kalmiopsis*, the Ninth Circuit again 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 actually focused 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 an LRMP may indeed benefit from the focus provided by imminent site-specific harm, challenges to agency interpretation and implementation of regulations are more akin to the procedural claims that *Ohio Forestry* recognizes as ripe when they occur.

V. 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, 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* reaffirms, from *Lujan*, the justiciability of challenges to LRMPs based on claims of procedural harm. Though *Ohio Forestry* explic-

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* (citing *Ohio Forestry*, 523 U.S. 726).

224. *Id.*

itly 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 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 that 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, some variation should be expected in courts' 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 decision-making. 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 agencies for failure to properly follow or implement portions of LRMPs, because they are only tangentially related to *Ohio Forestry* and are easily distinguishable on the simple fact that they are not 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*.

If anything, *Ohio Forestry* and *Lujan* stand for the proposition that cases regarding a failure to monitor or otherwise follow LRMP guidelines do not require allegations of site-specific harm. While *Ohio Forestry* equated procedural challenges with NEPA, subsequent courts 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 follow monitoring procedures is also 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.²²⁵ If the failure to monitor is properly characterized as a procedural claim, *Ohio Forestry* and *Lujan* stand for the proposition that further site specific allegations are unnecessary

Absent the misplaced requirements of site-specific allegations, *Peterson*, *Martin*, *Wyoming Outdoor Council*, and *Oregon Natural Resources Council Action* demonstrate more workable resolutions of agencies' failures to 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.

On the other hand, *Ecology Center* represents an overly restrictive reading of *Ohio Forestry* that allows 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 basing them in 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.

225. *Idaho Conservation League*, 956 F.2d at 1514

