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FOREST GUARDIANS V. FORSGREN AND NFMA PLANNING REFORM: THE RETURN OF MAXIMUM FOREST SERVICE DISCRETION

INTRODUCTION

In *Forest Guardians v. Forsgren*,[1] the Tenth Circuit Court of Appeals held United States Forest Service "forest plans" do not constitute ongoing agency action sufficient to confer standing under the Endangered Species Act ("ESA"),[2] except at adoption, amendment, revision, or when authorizing site-specific decisions.[3] *Forest Guardians* is the latest in a line of cases limiting federal court jurisdiction over claims challenging federal land management plans, including *Ohio Forestry Association v. Sierra Club*[4] and *Norton v. Southern Utah Wilderness Alliance* ("Norton").[5] Opposing this line of cases limiting standing in plan challenges is a body of case law, generally coming out of the Ninth Circuit, broadly interpreting ESA's "action" requirement.[6] This comment contrasts the *Forest Guardians* decision and other pertinent case law with the wider push by the Forest Service to maximize its discretion through rulemaking. The Forest Service will soon adopt planning regulations limiting its legal obligations to a greater degree than that contemplated by the Tenth Circuit in *Forest Guardians*.

Part I briefly outlines the basic legal and factual issues surrounding the *Forest Guardians* controversy. Part II examines in more detail the statutory background to the case and the forest planning reform process, discussing the National Environmental Policy Act ("NEPA"), ESA, and the National Forest Management Act ("NFMA"). Part III reviews the *Forest Guardians* opinion. Part IV assesses some proposed revisions to Forest Service planning regulations, arguing that the proposed rules go too far in weakening legal obligations and public oversight constraining national forest management. This part also discusses some likely implications of the new planning regulations and suggests a proper balance between Forest Service managerial discretion and public accountability. This comment concludes by contrasting the likely impact of *Forest Guardians* and the new planning regulations on national forest manage-

1. 478 F.3d 1149 (10th Cir. 2007).
2. 16 U.S.C.A. §§ 1531-1544 (2008).
3. 478 F.3d at 1154-56, 1159-60.
4. 523 U.S. 726 (1998).
5. 542 U.S. 55 (2004).
6. *See generally* Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv., 340 F.3d 969 (9th Cir. 2003); Pac. Rivers Council v. Thomas, 30 F.3d 1050 (9th Cir. 1994); Citizens for Better Forestry v. USDA, 481 F. Supp. 2d 1059, 1095 (N.D. Cal. 2007); *see also* Sierra Club v. U.S. Dep't of Energy, 255 F. Supp. 2d 1177, 1189 (D. Colo. 2002).

ment in coming years and briefly revisiting the controversy over protections for the lynx in New Mexico.

I. REINTRODUCTION OF THE CANADA LYNX AND THE *FOREST GUARDIANS* CONTROVERSY

Forest Guardians involved the refusal of Forest Service managers in New Mexico to initiate consultation over the 1999 reintroduction and 2000 ESA listing of the Canada lynx (lynx canadensis) as threatened just across the state line in southern Colorado. In early 1999, the Colorado Division of Wildlife ("DOW") began to reintroduce the lynx in Colorado.[7] Although historical evidence indicated a lynx presence in Colorado,[8] considerable controversy surrounded both state reintroduction efforts[9]and the national movement to protect the lynx under the Endangered Species Act ("ESA").[10] The U.S. Fish and Wildlife Service ("FWS") issued a final rule listing a Distinct Population Segment ("DPS") of Canada lynx as threatened in 14 states, including Colorado but excluding New Mexico, in 2000.[11] In time, some lynx released in Colorado emigrated to neighboring states. Colorado DOW tracked released lynx into Nebraska, Utah, and New Mexico by 2001.[12]

In 2004, Forest Guardians,[13] an environmentalist group, filed suit against the United States Forest Service for failing to review its forest management plans in the Carson and Santa Fe National Forests[14] to en-

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7. *See* TANYA SHENK, GENERAL LOCATIONS OF LYNX (LYNX CANADENSIS) REINTRODUCED TO SOUTHWESTERN COLORADO FROM FEBRUARY 4, 1999 THROUGH FEBRUARY 1, 2005, 1 (2005), http://wildlife.state.co.us/NR/rdonlyres/F92E6FCD-BCB5-4711-8EE6-A9398EA77999/0/LynxLocations_Feb2005.pdf.

8. *See, e.g.*, Colo. Env't Coal. v. Dombeck, 185 F.3d 1162, 1168-69 (10th Cir. 1999); Final Rule Determining Threatened Status for the Canada Lynx, 65 Fed. Reg. 16052 (2000) (to be codified at 50 C.F.R. pt. 17) [hereinafter *2000 Listing*]; Erika Trautman, *Will Listing Hurt the Colorado Lynx?*, HIGH COUNTRY NEWS, Jan. 21, 2002, *available at* http://www.hcn.org/servlets/hcn.Article?article_id=10963.

9. *See, e.g.*, Mindy Sink, *The Long-Elusive Lynx Is Returned to Colorado*, N.Y.TIMES, Feb. 4, 1999, at A20; *see also* Allen Best, *Lynx Reintroduction Links Unexpected Allies*, HIGH COUNTRY NEWS, May 10, 1999, *available at* http://www.hcn.org/servlets/hcn.Article?article_id=4976.

10. 16 U.S.C.A. §§ 1531-1544 (2008); *see* Mark Matthews, *Case of the Missing Lynx Sparks Studies, Debate*, WASHINGTON POST, Nov. 16, 1998, at A3.

11. 2000 Listing, *supra* note 8.

12. *See* TANYA M. SHENK, POST-RELEASE MONITORING OF LYNX REINTRODUCED IN COLORADO: ANNUAL PROGRESS REPORT FOR THE U.S. FISH AND WILDLIFE SERVICE DECEMBER 2001 (2001), *available at* http://www.cde.state.co.us/artemis/nr6/nr62l9920054internet.pdf.

13. *See* Forest Guardians, http://www.fguardians.org (last visited Feb. 2, 2008).

14. *See* Forest Guardians v. Forsgren, 478 F.3d 1149 (10th Cir. 2007). The Carson National Forest covers 1.5 million acres of land in northern New Mexico ranging from 6,000 to 13,161 feet in elevation, including mountainous terrain similar to that designated as critical lynx habitat across its northern border, the Colorado state line. Parts of the forest are located in a portion of the southern San Juan Mountains geographically contiguous with the portion of the San Juans in which lynx were originally released in Colorado. *See* Carson National Forest, http://www.fs.fed.us/r3/carson/index.shtml [hereinafter *Carson National Forest Homepage*] (last visited Feb. 2, 2008). The Santa Fe National Forest is located on 1.6 million acres generally located on the southern borders of the Carson, and is comprised of similar terrain, including the southern end of the San Juan Mountains. *See* Santa Fe National Forest, http://www.fs.fed.us/r3/sfe/about/about_forest.html [hereinafter *Santa Fe National Forest Homepage*] (last visited Feb. 2, 2008).

sure activities authorized under the plans did not harm lynx inhabiting these northern New Mexico forests.[15] In the suit, Forest Guardians argued the ESA listing required the Forest Service to review the impact of its forest plans for the Carson and Santa Fe forests on the lynx and to consult with Fish and Wildlife on how to mitigate any harm caused to the lynx, or lynx habitat, in the forests.[16]

The U.S. District Court for the District of New Mexico rejected Forest Guardians' claims.[17] Forest Guardians appealed to the Tenth Circuit, which affirmed the trial court ruling on different grounds.[18] The Tenth Circuit failed to reach the issue of the 2000 DPS listing's exclusion of New Mexico,[19] holding instead that national forest management plans developed pursuant to NFMA[20] do not constitute "ongoing agency action" under Section 7(a)(2) of the ESA.[21] Section 7(a)(2) requires federal agencies contemplating action to consult with FWS (or the National Marine Fisheries Service, "NMFS") concerning the potential impacts of the action on threatened and endangered wildlife and critical habitat.[22] The Tenth Circuit's decision relied on the U.S. Supreme Court's 2004 holding in *Norton* that Bureau of Land Management land management plans were not ongoing agency action under the National Environmental Policy Act ("NEPA");[23] the court used the *Norton* holding to limit the instances in which plaintiffs could challenge agency inaction with regard to forest plans and the ESA duty to consult.[24]

The Tenth Circuit's consideration of the planning issue in *Forest Guardians* occurred during a lengthy process of Forest Service rulemaking likely to result in removal of significant substantive and procedural standards for developing forest plans.[25] The Forest Service's proposed planning rules maximize agency flexibility in the planning process, eschewing the more prescriptive, accountability-oriented approach of the recent past.[26] Although the Forest Service claims its new managerial approach will enable it to better manage the national forests in the future, removal of protections embedded in the forest planning process threatens to purchase managerial flexibility and decisional efficiency at the price

15. Adam Rankin, *Groups' Suit Says Lynx Not Protected*, ALBUQUERQUE JOURNAL, Feb. 11, 2004, at 5.
16. *Id.*
17. *Forest Guardians*, 478 F.3d at 1152.
18. *Id.*
19. *Id.*
20. 16 U.S.C.A. §§ 1600-1687 (2008).
21. *Forest Guardians*, 478 F.3d at 1159.
22. 16 U.S.C.A. § 1536(a)(2) (2008).
23. Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 73 (2004); 42 U.S.C.A. §§ 4321-4370f (2008).
24. *See Forest Guardians*, 478 F.3d at 1152-56.
25. *See generally* UNITED STATES DEPT. OF AGRIC., USDA FOREST SERVICE STRATEGIC PLAN FY 2007-2012 (2007), *available at* http://www.fs.fed.us/publications/strategic/fs-sp-fy07-12.pdf.
26. *See id.*

of binding legal obligation and effective public oversight of national forest management.[27]

II. SOURCES OF STATUTORY OBLIGATION: NEPA, ESA, AND NFMA

Forest Guardians involves two statutes—ESA[28] and NFMA.[29] Accordingly, this Part focuses on federal agencies' duty to consult under ESA and the Forest Service's planning obligations under NFMA. Discussion of the impacts of NEPA on forest planning, to the extent this comment discusses such impacts in any depth, is limited to Section IV; however, a brief introduction to some general NEPA requirements is appropriate at this point.

A. NEPA: The Duty to Assess Environmental Impacts

NEPA requires federal agencies to "take a hard look at the environmental consequences of their actions."[30] To this end, NEPA requires federal agencies to prepare "a detailed environmental impact statement ("EIS") for 'all major Federal actions significantly affecting the quality of the human environment.'"[31] Given the qualified language of the statute and the complexity of environmental factors involved in forest management and planning, the EIS requirement has generated an enormous amount of litigation involving the Forest Service.[32] In addition to imposing procedural requirements on federal agencies, NEPA also vests agencies with some discretion as to the manner of complying with those requirements. NEPA permits the agency to complete an environmental assessment ("EA") "as a preliminary step in determining whether the environmental impact of the proposed action is significant enough to warrant an EIS."[33] If the EA leaves questions "as to whether the project may cause a significant degradation of some human environmental factor," the agency must prepare an EIS.[34] If the agency finds no such impact is likely to occur, it may issue a "finding of no significant impact" ("FONSI") and proceed with the project.[35]

Regulations promulgated by the Council on Environmental Quality ("CEQ") have provided agencies a third, more controversial means of

27. *See id.*
28. 16 U.S.C.A. §§ 1531-1544 (2008).
29. 16 U.S.C.A. §§ 1600-1687 (2008).
30. Citizens for Better Forestry v. USDA, 481 F. Supp. 2d 1059, 1080 (N.D. Cal. 2007) (quoting High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 639 (9th Cir. 2004)).
31. *Id.* at 1080 (quoting 42 U.S.C.A. § 4332(2)(C) (2008)).
32. *See, e.g.*, Nat'l Audubon Soc. v. Hoffman, 132 F.3d 7, 18 (2d Cir. 1997) (Forest Service's decision not to prepare EIS in conjunction with building of a logging road was arbitrary and capricious where the agency ignored substantial evidence in the administrative record that significant impacts were likely); Sierra Club v. Marita, 46 F.3d 606, 615-17 (7th Cir. 1995) (Forest Service required to prepare EIS prior to adoption of forest plan).
33. *Citizens*, 481 F. Supp. 2d at 1080.
34. *Id.* at 1081.
35. *Id.*

NEPA compliance, the categorical exclusion ("CE"). An agency may "categorically exclude" from NEPA analysis categories "of actions which do not individually or cumulatively have a significant effect on the human environment."[36] Perhaps unsurprisingly, federal agencies have attempted to use CEs to exclude major projects from NEPA analysis, with mixed results.[37] Given the complexity of NEPA's environmental analysis requirements,[38] litigation arising from Forest Service compliance efforts has been a perennial thorn in the side of the agency.

B. ESA: Agencies' Duty to Consult

Congress passed the Endangered Species Act in 1973[39] in order to protect threatened and endangered species and their habitat.[40] The ESA authorizes the Secretary of the Interior (through the federal wildlife agencies) to designate species as endangered or threatened and to designate "critical habitat" for such species.[41] Upon designation and "listing," federal agencies contemplating action must develop and implement "recovery plans" as appropriate for aiding in species recovery.[42] Listing also triggers applicability of a number of enumerated offenses involving takings of the listed species,[43] although parties may obtain "incidental take permits" for listed species.[44] Likewise, federal agencies may apply for exemption from ESA mandates under provisions added in 1978 and 1979.[45] The ESA also contains a broad citizen-suit provision.[46]

Section 7(a)(2) of the ESA requires federal agencies to consult with federal wildlife authorities to insure proposed actions are "not likely to jeopardize the continued existence of any endangered species or result in the destruction or adverse modification of [the critical] habitat of such species."[47] Upon determining a species may be present in the area of a proposed action, the agency must prepare a biological assessment to

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36. *Id.*

37. *Compare* West v. U.S. Dep't of Trans., 206 F.3d 920, 928-29 (9th Cir. 2000) (holding Federal Highway Administration's application of a CE for "changes in access control" to construction of a major highway interchange was arbitrary and capricious) *with* Alaska Ctr. for the Env't v. U.S. Forest Serv., 189 F.3d 851, 853-54 (9th Cir. 1999) (affirming Forest Service's application of CE for "approval, modification, or continuation of minor short-term . . . special uses of National Forest land" to issuance of commercial helicopter permits).

38. *See* 42 U.S.C.A. §§ 4321-4370f (2008).

39. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 159 (1978).

40. 16 U.S.C.A. §§ 1531(b) (2008) ("The purposes of this [Act] are to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species . . . .").

41. 16 U.S.C.A. §§ 1533(a)-(b) (2008).

42. § 1533(f).

43. 16 U.S.C.A. §§ 1538, 1540 (2008).

44. 16 U.S.C.A. § 1539(a)(1)(B) (2008).

45. 16 U.S.C.A. § 1536(g) (2008); *see also* Jared des Rosiers, *The Exemption Process under the Endangered Species Act: How the "God Squad" Works and Why,* 66 NOTRE DAME L. REV. 825 (discussing ESA exemption process).

46. 16 U.S.C.A. § 1540(g) (2008).

47. § 1536(a)(2).

identify "any endangered species or threatened species" likely to be affected by the proposed action.[48] If the agency's biological assessment concludes that the proposed action is likely to produce adverse effects, it must initiate formal consultation.[49] Formal consultation culminates with issuance of a biological opinion by the responsible wildlife agency.[50] The biological opinion expresses the wildlife agency's opinion as to whether the proposed action is likely to have adverse impacts on threatened or endangered species or critical habitat, and provides alternatives to the proposed action that will allow the acting agency to avoid violating Section 7(a)(2)'s substantive "no jeopardy" mandate.[51] If the agency goes forward with the action over a biological opinion finding adverse impacts or jeopardy are likely to result, it will be in violation of the Section 7(a)(2) mandate.[52]

Given that an agency must contemplate some "action" in order to trigger Section 7(a)(2)'s consultation and "no-jeopardy" requirements, the question of precisely what constitutes "action" under the ESA has generated significant litigation.[53] ESA regulations define action as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas"[54] but also state that Section 7 requirements apply only to "actions in which there is discretionary involvement or control."[55] The regulations list specific categories of agency "action" including actions "intended to conserve listed species or their habitat" or "directly or indirectly causing modifications to the land, water, or air," agency rulemaking, contracting, licensing, and so on.[56] The Supreme Court's recent decision in *National Association of Home Builders* reads Section 7(a)(2) narrowly where actions arguably non-discretionary in nature are con-

48. § 1536(c)(1).

49. *See* § 1536(a)(2); Thomas v. Peterson, 753 F.2d 754, 763 (9th Cir. 1985).

50. § 1536(b)(3).

51. *See id.*

52. *Thomas*, 753 F.2d at 763 (noting agency failure to adopt prudent alternative to proposed action as outlined in biological opinion likely to constitute a violation of ESA); Am. Rivers v. U.S. Army Corps of Eng'rs, 271 F. Supp. 2d 230, 257-58 (D.D.C. 2003) (agency in violation of ESA where failure to adopt prudent alternatives outlined in biological opinion rendered significant take of threatened species imminent).

53. *See generally* Citizens for Better Forestry v. USDA, 341 F.3d 961 (9th Cir. 2003) (agency decision to relax forest planning requirements an "action" under § 7(a)(2)); Pac. Rivers Council v. Thomas, 30 F.3d 1050 (9th Cir. 1994) (forest plan an agency action requiring consultation with FWS under § 7(a)(2)); Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978) (agency decision to complete construction and commence operation of a dam constituted "action" under § 7(a)(2)); *but see* Nat'l Assoc. of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518 (2007) (§ 7(a)(2) consultation requirement does not apply where agency action is non-discretionary and required by statute); Cal. Sportfishing Prot. Alliance v. FERC, 472 F.3d 593 (9th Cir. 2006) (operation of project under FERC license not agency action under § 7(a)(2)); Envir. Prot. Info. Ctr. v. Simpson Timber Co., 255 F.3d 1073 (9th Cir. 2001) (FWS lacked sufficient discretionary control over previously issued incidental take permit to require re-initiation of § 7(a)(2) consultation).

54. 50 C.F.R. § 402.02 (2007).

55. § 402.03.

56. § 402.02.

cerned;[57] other circuits have adopted this approach as well.[58] However, past cases where the meaning of agency "action" under the ESA was at issue show the courts formerly took a broader view on what constitutes "action" under Section 7(a)(2).[59]

1. *Pacific Rivers Council v. Thomas*[60]

In *Pacific Rivers*, the Ninth Circuit Court of Appeals relied on the U.S. Supreme Court's *Tennessee Valley Authority ("TVA") v. Hill*[61] opinion to support its holding that a Forest Service land and resource management plan constituted ongoing agency action under Section 7(a)(2) of the ESA.[62] In *TVA v. Hill*, the Court held that the ESA instituted a discretion-constraining policy of "institutionalized caution" that required federal agencies, "in the plainest of words," to ensure their actions did not adversely impact threatened or endangered species or their critical habitat.[63] Relying on the *TVA v. Hill* opinion, the Ninth Circuit affirmed a district court preliminary injunction on future Forest Service actions in the Wallowa-Whitman and Umatilla National Forests of Oregon pending consultation with the NMFS on potential impacts on the recently listed Snake River Chinook salmon, and reversed the lower court's denial of a requested injunction against ongoing projects in the two forests.[64]

The Forest Service urged the Ninth Circuit to recognize that forest plans constitute agency action for Section 7(a)(2) purposes only when adopted, amended, or revised, as opposed to on an ongoing basis.[65] The Ninth Circuit flatly disagreed, adopting a rule that forest plans are "ongoing agency action" under the ESA because they have an "ongoing and long-lasting effect" on individual projects implemented in a forest unit, even after adoption, amendment, or revision.[66] The court stated that the plain language of both the statute[67] and corresponding regulations[68] indicated clear congressional intent to define agency action broadly,[69] backing its claim by citing *TVA v. Hill*'s "institutionalized caution" discussion.[70] Consistent with its view that forest plans "have ongoing effects

57. *Home Builders*, 127 S. Ct. at 2536 (2007); *but see id.* at 2542 (Stevens, J., dissenting).
58. *See, e.g.*, Sierra Club v. Babbitt, 65 F.3d 1502, 1509 (9th Cir. 1995) (holding § 7(a)(2) consultation duty not triggered where agency action was non-discretionary in nature).
59. *See, e.g.*, Tenn. Valley Auth. v. Hill, 437 U.S. 153, 172-73 (1978).
60. 30 F.3d 1050 (9th Cir. 1994).
61. *Id.* (agency decision to complete construction and commence operation of a dam constituted "agency action" triggering ESA § 7(a)(2) consultation requirements).
62. *Id.* at 1053.
63. *Tenn. Valley Auth.*, 437 U.S. at 172-74, 194.
64. *Pac. Rivers*, 30 F.3d at 1051-52.
65. *Id.* at 1053.
66. *Id.*
67. *Id.* at 1054.
68. *Id.*
69. *Id.*
70. *Id.* at 1054-55.

extending beyond their mere approval,"[71] the court held that forest plans are ongoing agency action under Section 7(a)(2) of the ESA.[72]

2. *National Association of Home Builders v. Defenders of Wildlife*[73]

In *National Association of Home Builders* ("*Home Builders*"), the Supreme Court held that the Section 7(a)(2) consultation and "no-jeopardy" requirements were not triggered by agency actions non-discretionary in nature.[74] *Home Builders* concerned a challenge by environmentalist groups to FWS's determination that transferal of pollution discharge permitting authority from the Environmental Protection Agency ("EPA") to the State of Arizona did not require the EPA to consider "indirect impacts" of the transfer on threatened and endangered species in the consultation process.[75] As the EPA was bound by the Clean Water Act ("CWA")[76] to transfer permitting authority to the state upon state compliance with nine criteria contained in the statute,[77] the Court treated the transfer as a non-discretionary act within the meaning of ESA regulations,[78] holding the transfer did not trigger Section 7(a)(2)'s consultation and "no-jeopardy" requirements.[79]

3. Summary: Scope of the Agency Duty to Consult and Forest Planning

In general, the ESA offers protections to threatened and endangered species and their critical habitat, and offers citizens standing to challenge agency actions and inactions, but both the substantive protections and standing conferred are limited by the terms of the statute, corresponding regulations, and case law.[80] On the other hand, the issue of Forest Service discretion in land use management and planning is far broader than ESA compliance, which deals exclusively with species preservation and protection.[81] To the extent *Forest Guardians* uses the issue of Section 7(a)(2) requirements as a starting point for analyzing the legal effect of forest plans, the opinion hinges on legal sources of obligation extraneous to the ESA.[82] The Forest Service, to a greater extent than any other federal land management agency, is subject to a myriad of statutory and

71. *Id.* at 1055.
72. *Id.* at 1056.
73. 127 S. Ct. 2518 (2007).
74. *Id.* at 2533-36.
75. *Id.* at 2528-29.
76. 33 U.S.C.A. §§ 1251-1387 (2008).
77. *See Home Builders*, 127 S. Ct. at 2531.
78. *Id.* at 2535-36.
79. *Id.* at 2536, 2538.
80. 16 U.S.C.A. § 1531 (2008).
81. *See* Forest Guardians v. Forsgen, 478 F.3d 1149, 1151 (10th Cir. 2007).
82. *See id.* at 1151-52.

regulatory authorities.[83] Primary among these, perhaps, is the Forest Service's "second" organic act, NFMA.[84]

C. NFMA, Planning, and Forest Service Discretion

Timber is the central character in the story of the Forest Service and NFMA. Timber resources in the United States were exploited at an incredible rate during the 19th century.[85] In 1891, Congress moved to stop the alarming "collapse" of the nation's timber supply, passing legislation permitting the President to "reserve" forestlands in the federal public domain.[86] In 1897, after several years of haggling over statutory language,[87] Congress passed the "Forest Service Organic Act" ("FSOA"),[88] which created a national forest reserve system to provide for watershed protection and timber conservation and supply.[89] The Forest Service focused, from the outset, on ensuring a stable and perpetual commercial timber supply.[90] Gifford Pinchot, the first chief of the Forest Service,[91] viewed the national forests as a vast warehouse of natural resources, and viewed "sustained yield" timber production as their central purpose.[92] Pinchot's "multiple use" philosophy, which argued that the forests could successfully accommodate logging, watershed protection, grazing, wildlife habitat, and recreation through scientific management, did not come into conflict with the sustained yield mandate during the early years when timber demand was low.[93] Multiple use initially translated into maximized Forest Service discretion, which "in practice meant freedom to log wherever logging could be accommodated."[94] War demand and the postwar housing boom, which coincided with a decline in private timber reserves, led to an explosion in timber demand and harvesting on the national forests during the 1940s and 1950s,[95] with large-scale harvesting peaking in the 1960s and 1970s.[96] As part of a new "intensive management" approach to maximizing production,[97] the Forest Service

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83. Robert Breazeale, *Is Something Wrong with the National Forest Management Act?*, 21 J. LAND RESOURCES & ENVTL. L. 317, 323 (2001).

84. 16 U.S.C.A. §§ 1600-1614 (2008).

85. *See* W. Va. Div. of Izaak Walton League of Am. v. Butz, 522 F.2d 945, 950 (4th Cir. 1975) (noting only 500 million acres out of approximately one to one and one quarter billion acres of American forests existing at the end of the 18th century remained uncut in 1893).

86. PAUL W. HIRT, A CONSPIRACY OF OPTIMISM: MANAGEMENT OF THE NATIONAL FORESTS SINCE WORLD WAR TWO xvii (1994).

87. *Izaak Walton League*, 522 F.2d at 950-52.

88. *Id.* at 952 (also known as the "Pettigrew Amendment"); *see also* 16 U.S.C.A. § 476 (repealed 1976).

89. *Izaak Walton League,* 522 F.2d at 950-52; *see also* 16 U.S.C.A. § 476 (repealed 1976); HIRT, *supra* note 86, at 32.

90. *See* HIRT, *supra* note 86, at 31-32.

91. *Id.* at 31-33.

92. *Id.* at 32, 34.

93. *Id.* at 35-36.

94. *Id.* at 36.

95. *See id.* at 45, 50-53.

96. *See id.* at xxiv.

97. *See id.* at 55-57.

instituted "even-aged management," including major clear-cutting, on a wide scale, beginning in the western forests and then moving east.[98]

Simultaneous to the spike in timber harvesting was a dramatic increase in recreational use of the national forests,[99] inevitably leading to use conflicts and straining the multiple use concept.[100] In reaction to these developments, Congress passed the Multiple Use-Sustained Yield Act ("MUSYA") in 1960.[101] As its name indicates, the law attempted to reconcile the evolving policies of managing the forest for multiple uses[102] and sustained yield of its renewable surface resources.[103] Section 528 of MUSYA required the administration of forests for "range, timber [and] watershed" uses, but also for "outdoor recreation" and "fish and wildlife purposes."[104] MUYSA also provided that the listed purposes were "supplemental to, but not in derogation of, the purposes for which the national forests were established,"[105] (i.e., timber production and watershed protection).[106]

Perhaps because it left so much discretion in the Forest Service, MUYSA failed to ameliorate growing use conflicts.[107] In the wake of MUSYA, the stage was set for passage of NFMA:

> During the 1960s the Forest Service had continued to increase timber sales and also had expanded the use of clearcutting. These practices generated severe criticism [across] the country. Critics of the Forest Service called for remedial action by Congress. The agency's legal authority to clearcut was also challenged in court. On August 21, 1975, the Court of Appeals for the Fourth Circuit ruled in the famous *Monongahela* case that the 1897 [FSOA] effectively prohibited clearcutting in the national forests. The Forest Service and timber interests sought congressional relief to correct the offending language in the [FSOA].[108]

Congress passed NFMA[109] in 1976, ostensibly to rein in the Forest Service's timber-centric management practices.[110] NFMA repealed the

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98. *See* W. Va. Div. of Izaak Walton League of America v. Butz, 522 F.2d 945, 955 (4th Cir. 1975).

99. *See* HIRT, *supra* note 86, at 52-53 (discussing dramatic increase in recreational use of the national forests during 1940s and 1950s).

100. *Id.* at 53.

101. 16 U.S.C.A. §§ 528-531 (2008); *see* CHARLES F. WILKINSON & H. MICHAEL ANDERSON, LAND AND RESOURCE PLANNING IN THE NATIONAL FORESTS 29-30 (1987).

102. § 531.

103. *Id.*

104. § 528.

105. *Id.*

106. United States v. New Mexico, 438 U.S. 696, 714-15 (1978); *see also* 16 U.S.C.A. § 476 (repealed 1976).

107. *See* WILKINSON & ANDERSON, *supra* note 101, at 69-70.

108. *Id.* at 41-42; *see also* W. Va. Div. of Izaak Walton League of Am. v. Butz, 522 F.2d 945, 955 (4th Cir. 1975).

109. 16 U.S.C.A. §§ 1600-1614 (2008).

FSOA[111] and implemented a planning regime to guide forest management[112] and required the Forest Service to develop a comprehensive management plan for each national forest ("forest plan").[113] The forest plan serves as a statement of policy and information to guide future management decisions in the forest[114] and designates which areas within a unit are suitable for timber harvesting[115] and a myriad of other uses.[116] NFMA also requires forest plans be "implemented" through "site-specific" projects such as timber sales, area closures, orders changing approved uses of specific sections of the forest, and so on,[117] and that all site-specific activities be consistent with the forest plan for the forest unit where they take place.[118]

Section 6 of NFMA outlines substantive and procedural requirements for Forest Service forest plans,[119] requiring forest managers to "develop, maintain, and, as appropriate, revise" a written forest plan for each unit in the system.[120] Forest managers must use "a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences,"[121] and must develop regulations governing the development and revision of forest plans.[122] Regulations must provide for NEPA compliance,[123] ensure plans contain information on use designation[124] and biological diversity,[125] and require the agency to study the impacts of the forest plan management system on forest productivity.[126] A temporarily convened "committee of scientists" appointed by the Secretary of Agriculture aids the agency in developing these regulations.[127] Plan development is subject to public notice and comment requirements[128] and plans must conform to a number of specific restrictions on timber harvesting.[129] Unlike the ESA,[130] NFMA

110. *See* Citizens for Better Forestry v. USDA, 481 F. Supp. 2d 1059, 1064 (N.D. Cal. 2007); *see also Izaak Walton League*, 522 F.2d at 953; GAIL L. ACHTERMAN, K. NORMAN JOHNSON & SUSAN K. STEVENS, *NFMA and FLMPA: Fifteen Years of Planning, in* PUBLIC LAND LAW 5-1, 5-13 (Rocky Mountain Mineral Law Foundation 1992); WILKINSON & ANDERSON, *supra* note 101, at 70-72; HIRT, *supra* note 85, at 260-65.

111. HIRT, *supra* note 86, at 263.

112. *See Citizens*, 481 F. Supp. 2d at 1064.

113. *See id.* (forest plans are also referred to as "land resource management plans" or "LRMPs"); *see also* § 1604(a).

114. *Citizens*, 481 F. Supp. 2d at 1064; *see* § 1604(f)-(g), (i).

115. § 1604(k).

116. *See* § 1604(e)(1).

117. *Citizens*, 481 F. Supp. 2d at 1064.

118. *Id.*; § 1604(i).

119. *See* § 1604.

120. § 1604(a), (f)(2).

121. § 1604(b).

122. § 1604(g).

123. § 1604(g)(1).

124. § 1604(g)(2).

125. § 1604(g)(3)(B).

126. § 1604(g)(3)(C).

127. § 1604(h)(1).

128. §§ 1604(d), 1612(a).

129. *See* § 1604(g)(3).

lacks a citizen-suit provision, and thus challenges to NFMA forest plans have generally been made under the Administrative Procedure Act ("APA").[131] Because agency action is a threshold question for standing and reviewability under the APA, the success or failure of claims challenging NFMA planning, like Section 7(a)(2) ESA claims, often turns on how courts define "agency action."

1. *Ohio Forestry Association v. Sierra Club*[132]

In *Ohio Forestry Association v. Sierra Club*, the Supreme Court endorsed the proposition that forest plans do not constitute "ongoing" agency action sufficient to confer APA standing. In *Ohio Forestry*, the Sierra Club challenged a forest plan developed for the Wayne National Forest in southeastern Ohio, which permitted extensive logging and clear-cutting in the forest.[133] Sierra Club variously alleged the plan violated NFMA, NEPA, and the APA.[134] The Court rejected the claim, holding forest plans do not constitute agency "action" for standing purposes.[135] The Court determined that adoption of the plan did not create any immediate legal or practical harm necessitating review,[136] that the agency was entitled the opportunity to revise or refine plan provisions through site-specific proposals before review,[137] and that the plan did not provide an adequate factual basis for review.[138] The Court noted the inconvenience of challenging plan-level prescriptions via individual site-specific actions, but instructed plaintiffs to wait until such projects were proposed before trying to challenge provisions within a forest plan.[139]

2. *Norton v. Southern Utah Wilderness Alliance*[140]

In *Norton*, the Supreme Court held that BLM resource management plans do not generally impose legally binding requirements on the agency.[141] The Federal Land and Policy Management Act ("FLPMA")[142] requires the BLM to prepare unit-level "land management plans" for

130. *See* 16 U.S.C.A. § 1536(a)(2) (2008).

131. *See, e.g.*, Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 731 (1998). Claims under NFMA and NEPA are usually made under § 702 of the APA, which provides a right of action to any person "adversely affected or aggrieved" by or "suffering legal wrong because of" agency action. 5 U.S.C.A. § 702 (2008). Section 706 permits the courts to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C.A. § 706(1) (2008). Section 704 reads, in pertinent part, "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C.A. § 704 (2008).

132. 523 U.S. 726 (1998).

133. *Id.* at 729-30.

134. *Id.* at 731.

135. *Id.* at 732-39.

136. *Id.* at 733-35.

137. *Id.* at 735-36.

138. *Id.* at 736-37.

139. *Id.* at 733-35.

140. 542 U.S. 55 (2004).

141. *Id.* at 72.

142. 43 U.S.C.A. §§ 1701-1785 (2008).

BLM lands[143] just as NFMA requires the Forest Service to prepare unit-level forest plans for the national forests.[144] The Southern Utah Wilderness Alliance ("SUWA") claimed the BLM's land management plan for the Henry Mountains unit of central Utah required the agency to develop and implement an intensive, formal monitoring program for off-road vehicle ("ORV") use in the Factory Butte area.[145]

The Court rejected this argument, concluding that "a land use plan is generally a statement of [agency] priorities,"[146] not a prescriptive document imposing affirmative obligations on the agency.[147] Acknowledging that land use plans constrained the range of actions an agency could take,[148] the Court concluded that plan language that seemed to require specific agency actions only "projected" future agency actions.[149] Plans could "guide and constrain" agency action, but could not prescribe such action.[150] The Court reasoned that judicial interference with agency planning would simply lead agencies to create deliberately vague plans to limit grounds for legal challenges, "ultimately operat[ing] to the detriment of sound environmental management."[151] Overall, the *Norton* Court viewed land management plans as non-binding, aspirational documents.[152]

3. *Citizens for Better Forestry v. USDA*[153]

The Northern District of California considered the forest planning issue in early 2007 in *Citizens for Better Forestry v. USDA* ("*Citizens*"), which involved a challenge to a Forest Service planning rule, the 2005 Final Rule ("2005 Rule").[154] Adopted without public notice and comment, completion of an EIS, or ESA consultation or study,[155] the 2005

143. *See Norton*, 542 U.S. at 58-60.

144. *See* 16 U.S.C.A. § 1604 (2008); *see also* WILKINSON & ANDERSON, *supra* note 101, at 64 (citing 43 U.S.C. §§ 1715, 1716, 1751-1753 (1982)) (noting FLMPA contains sections applicable to the Forest Service, including provisions on "acquisition of land, exchanges of land, and grazing within the national forests.").

145. *Norton*, 542 U.S. at 68.

146. *Id.* at 71.

147. *Id.* at 69-71.

148. *Id.* at 69.

149. *Id.*

150. *Id.* at 71.

151. *Id.* at 71-72. *But see* Justin C. Konrad, *Comment: The Shrinking Scope of Judicial Review in* Norton v. Southern Utah Wilderness Alliance, 77 U. COLO. L. REV. 515, 540 (2006) (arguing that clear legal obligations increase quality of federal land management).

152. *Compare Norton*, 542 U.S. at 71, *with* Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 733 (1998), *and* 2005 Final Rule, 70 Fed. Reg. 1023, 1031 (Jan. 5, 2005) (to be codified at 36 C.F.R. pt. 219). *See also* 2005 Final Rule, 70 Fed. Reg. at 1032 (citing *Ohio Forestry* for the proposition that "timber management provisions of land management plans are tools for further agency planning and guide, but do not direct future development.").

153. 481 F. Supp. 2d 1059 (N.D. Cal. 2007).

154. 2005 Final Rule, 70 Fed. Reg. 1023 (Jan. 5, 2005).

155. *Citizens*, 481 F. Supp. 2d at 1067. Simultaneously, the Forest Service issued a separate categorical exclusion exempting "all proposals to develop, amend, or revise land use plans which did not approve particular projects or site-specific activities." *Id.*

Rule relaxed forest planning requirements to a far greater degree than earlier planning rules.[156] Although the *Citizens* controversy centered on planning rules as opposed to plans themselves, the case crystallized competing interpretations of forest planning. An assortment of environmentalist plaintiffs argued the Forest Service's failure to provide for public notice and comment, complete NEPA analysis, or conduct ESA consultation on the 2005 Rule violated NFMA, NEPA, and ESA. The Forest Service argued these requirements were inapplicable because planning rule changes had a "practical effect"[157] that was "minimal" and the 2005 Rule "simply establishe[d] a process for planning" and was "not an action having a direct effect on threatened or endangered species."[158]

This take on the nature of planning regulations mirrors the Forest Service's position on forest plans in *Ohio Forestry* - that planning has minimal impact on forest conditions and is basically administrative and "aspirational" in nature. The Ninth Circuit rejected this argument and ordered the Forest Service to resubmit the 2005 Rule for APA, NEPA, and ESA compliance; the agency responded by essentially re-issuing the 2005 Rule as a "2007 Proposed Rule."

III. *FOREST GUARDIANS V. FORSGREN*[159]

A. Facts/Procedural History

In *Forest Guardians v. Forsgren*, Forest Guardians argued the Forest Service was required under the ESA to consult with Fish and Wildlife regarding impacts on the Canada lynx under the Carson and Santa Fe forest plans.[160] To support its position, Forest Guardians argued the Carson and Santa Fe forest plans constituted consultation-triggering "ongoing agency action,"[161] relying on the Ninth Circuit's holding in 1994's *Pacific Rivers Council*.[162]

The U.S. District Court for the District of New Mexico granted the government's motion to dismiss the complaint.[163] Because the 2000 listing of the lynx as threatened did not include New Mexico, where the entirety of the Carson and Santa Fe National Forests are located, the district court held that the Forest Service was not obligated to consult with FWS on the potential impacts of the forest plans on the lynx.[164] Forest

156. *See id.* at 1067, 1073-74, 1076.
157. *Id.* at 1075.
158. *Id.* at 1068.
159. 478 F.3d 1149 (10th Cir. 2007).
160. *Id.* at 1151.
161. *Id.* at 1152.
162. Pac. Rivers Council v. Thomas, 30 F.3d 1050, 1051-52 (9th Cir. 1994).
163. *Forest Guardians*, 478 F.3d at 1152.
164. *Id.*

Guardians appealed the dismissal to the Tenth Circuit Court of Appeals.[165]

B. Opinion

In considering whether the Forest Service was required under Section 7(a)(2) of the ESA to consult on the impacts of the forest plans, the Tenth Circuit began with the Supreme Court's holding in *Norton* that BLM land use plans do not constitute agency action once adopted.[166] The court then reviewed provisions in NFMA and Forest Service planning regulations.[167] The court noted the regulations define a "plan" as "a document or set of documents that integrates and displays information relevant to management of a unit of the National Forest System."[168] The court further noted that forest plans had to be implemented by site-specific projects consistent with their terms[169] and were subject to NEPA analysis.[170] Although the court expressed "little doubt" that forest plans could constitute agency action under the ESA at adoption, amendment or revision, or when approving a site-specific decision, the court concluded that forest plans were not "ongoing, self-implementing action under § 7(a)(2)" of the ESA.[171]

The court noted that if forest plans did not constitute ongoing agency action and Forest Guardians failed to allege any other agency action triggering Section 7(a)(2)'s consultation requirement, then the Forest Service was not required to consult with FWS on the impact of the Carson and Santa Fe plans on the lynx.[172] The court noted that Forest Guardians failed to cite "an authorized program, practice, project, or activity that might amount to 'action' threatening the continued existence of the lynx" and sustaining the complaint.[173] For this reason, the Tenth Circuit affirmed the district court's dismissal of the complaint.[174]

Acknowledging that "policies, directions, and allowances" contained in a forest plan might have "indirect" adverse impacts on wildlife and critical habitat, the court concluded that such effects did not transform forest plans into agency "action" triggering Section 7(a)(2) consultation.[175] As the court noted, "[p]olicies and directions only guide the Forest Service in determining whether an 'action' may be properly un-

165. *See id.* at 1152.
166. Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 73 (2004); *Forest Guardians*, 478 F.3d at 1153.
167. *Forest Guardians*, 478 F.3d at 1153.
168. *Id.*; 36 C.F.R. § 219.16 (2005).
169. *Forest Guardians*, 478 F.3d at 1154.
170. *Id. Compare id.*, *with* Citizens for Better Forestry v. USDA, 481 F. Supp. 2d 1059, 1067-68 (N.D. Cal. 2007), *and* 2005 Rule, 70 Fed. Reg. 1023-01, 1032, 1040 (Jan. 5, 2005).
171. *Forest Guardians*, 478 F.3d at 1154-55.
172. *See id.* at 1156.
173. *Id.* at 1157.
174. *Id.* at 1160.
175. *Id.* at 1157.

dertaken" under a given plan and do not "commit the Forest Service to anything."[176] Designations of permitted uses in certain unit areas likewise did not constitute agency action under Section 7(a)(2), as these designations were subject to change through revision or amendment of the forest plan.[177]

The court rejected the Ninth Circuit's holding in *Pacific Rivers Council* that forest plans constitute ongoing agency action under Section 7(a)(2) of the ESA.[178] The court argued that site-specific decisions constituted the "action" contemplated by Section 7(a)(2), not the plans themselves, and that the Ninth Circuit erred in concluding otherwise.[179]

IV. *FOREST GUARDIANS*, NFMA PLANNING REFORM, AND THE AGENCY DISCRETION QUESTION

Forest Guardians stands for two basic propositions: that forest plans are not "ongoing" agency action for purposes of the ESA, and that citizens necessarily lack standing under the ESA to challenge forest plans except at adoption, amendment, or revision, limiting the scope of agency "action" under which citizens can seek review. The Tenth Circuit's decision to affirm on these grounds transplanted the rule that land management plans are not challengeable "ongoing agency action" from the NEPA context in *Norton* to the ESA context,[180] adopting the Forest Service's interpretation of forest plans as not legally binding on an ongoing basis. *Forest Guardians* supports the treatment of forest plans consistent with increased managerial discretion in federal land agencies like the Forest Service.[181]

There are good arguments to be made on both sides of the "a plan is just a plan" debate. As the Ninth Circuit recognized in *Pacific Rivers*, forest plans guide project-level activities on an ongoing basis.[182] Because NFMA requires all site-specific actions to be consistent with the guidelines and provisions of an individual forest plan,[183] forest plans clearly exercise some ongoing, constraining influence on forest man-

176. *Id.*
177. *Id.* at 1158.
178. *Id.* at 1159.
179. *Id.*
180. *Compare id.* at 1158, *with* Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 71 (2004).
181. *Forest Guardians*, 478 F.3d at 1153; *see also id.* at 1156 n.9. Interestingly, the court also declined to rely on *Ohio Forestry* for its holding that forest plans are unchallengeable except at adoption, amendment, or revision, even though the Supreme Court essentially laid out the same rule in the same context–NFMA forest planning, as opposed to BLM planning at issue in *Norton*. The explanation for reliance on *Norton* instead of *Ohio Forestry* likely lies in the nature of the agency "action" challenged. In *Norton*, agency *in*action was at issue, whereas the challenge in *Ohio Forestry* was to the forest plan's authorization of specific harvesting practices. The Tenth Circuit likely chose to rely on *Norton* instead of *Ohio Forestry* because Forest Guardians sought to compel the Forest Service to initiate consultation rather than revise a specific provision of the plan (i.e., to compel specific action in the face of agency inaction rather than enjoin an agency action).
182. *See* Pac. Rivers Council v. Thomas, 30 F.3d 1050, 1051-52 (9th Cir. 1994).
183. 16 U.S.C.A. § 1604(i) (2008).

agement actions.[184] If forest plans legally bind the Forest Service on an ongoing basis, it is reasonable to argue they confer standing under the applicable statutory citizen-suit provisions (e.g., APA and ESA) *on an ongoing basis* as well. On the other hand, the inconsistency of a site-specific decision with the applicable forest plan is perhaps best addressed by challenging the decision itself rather than the plan.[185]

Forest Guardians is the latest in a line of cases limiting citizen standing to challenge forest and other federal land use plans.[186] The Forest Service's revision of its forest planning regulations over the last several years, by contrast, noticeably weakens the agency's statutory obligations to a greater degree than *Forest Guardians*.[187] Contrasting in detail some major differences between the 1982 Forest Service planning regulations, under which the vast majority of forest plans currently in place were developed, and new proposed regulations likely to take effect within the next year illuminates the agency's use of rulemaking to maximize its discretion.

A. Revising NFMA Planning Regulations

In 1996, legal scholar and historian Charles Wilkinson reviewed the evolution of Forest Service management in the twenty years since passage of NFMA, noting improvements in the Service's technical approach, changes in the makeup of agency leadership and personnel, the slow decline of the timber industry's influence on the agency, the central role of biodiversity in modern Forest Service land management, and the agency's success in democratizing the planning process by engaging the public in management decisions.[188] The Forest Service, which essentially exercised "unquestioned professional judgment" over forest management prior to passage of NFMA in 1976,[189] has pointed to these and other developments to justify its push toward maximizing its managerial discretion.[190]

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184. *Pac. Rivers*, 30 F.3d at 1051-56.

185. *See* Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 734 (1998).

186. *See, e.g., id.* at 734-35.

187. *See, e.g.*, 2007 Proposed Rule, 72 Fed. Reg. 48514, 48526-27 (Aug. 23, 2007) (to be codified at 36 C.F.R. pt. 219) (authorizing categorical exclusion of forest plans from environmental analysis under NEPA); Robert B. Keiter, *Ecological Concepts, Legal Standards, and Public Land Law: An Analysis and Assessment*, 44 NAT. RESOURCES J. 943, 950 (2004).

188. Charles Wilkinson, *The National Forest Management Act: The Twenty Years Behind, the Twenty Years Ahead*, 68 U. COLO. L. REV. 659, 673-74 (1997).

189. Martin Nie, *The 2005 National Forest System Land and Resource Management Planning Regulations: Comments and Analysis*, 27 PUB. LAND & RESOURCES L. REV. 99, 105 (2006).

190. *See id.* at 100. The Forest Service has also cited project delays caused by litigation under various federal statutes as justification for its regulatory reforms. *See* U.S. FOREST SERVICE, THE PROCESS PREDICAMENT: HOW STATUTORY, REGULATORY, AND ADMINISTRATIVE FACTORS AFFECT NATIONAL FOREST MANAGEMENT 7, 19 (2002) [hereinafter PROCESS PREDICAMENT], *available at* http://www.fs.fed.us/projects/documents/Process-Predicament.pdf (discussing litigation related delays to California timber salvage project and wildfire recovery project).

Although parts of the 1982 Planning Rule mirrored the broader, less prescriptive language of NFMA,[191] other provisions subjected planners to meaningful substantive constraints;[192] the rule required each forest plan to embody meaningful limits on timber harvesting[193] and to provide for species viability[194] and biodiversity,[195] and required the agency to complete a comprehensive EIS for each forest plan.[196] By the 1990s, however, the Forest Service was chafing under what it viewed as unreasonable and unnecessary administrative burdens imposed by the 1982 Rule.[197] The Clinton Administration provided the political will to follow through on developing a new rule in the late 1990s.[198]

The resulting 2000 Planning Rule controversially placed biodiversity at the heart of agency planning priorities.[199] The 2000 Rule simplified and streamlined the planning process by updating planning standards to reflect changes in the Service's scientific knowledge and technical capabilities,[200] but did not abandon the standards-based approach of the 1982 Rule.[201] Whatever its merits, the 2000 Rule had no impact on forest planning.[202] The Bush Administration suspended the 2000 Rule pending administrative review in early 2001.[203] The Forest Service subsequently decided the 2000 Rule failed to sufficiently simplify and streamline the planning process[204] and issued a transitional rule in 2002 pending opening of notice and comment on new planning regulations.[205] The agency then issued a final planning rule on January 5, 2005, without doing NEPA or ESA compliance.[206] In contrast to the 2000 Rule, the 2005 Rule relaxed existing planning requirements considerably.[207] The North-

191. *See, e.g.*, Keiter, *supra* note 187, at 946.

192. *See, e.g., id.* at 946-47.

193. *See, e.g.*, 1982 Rule, 36 C.F.R. §§ 219.14-.27 (1982).

194. *Id.* § 219.19.

195. *Id.* § 219.26.

196. *Id.* § 219.12.

197. *See, e.g.*, 2007 Proposed Rule, 72 Fed Reg. 48514-01, 48515 (Aug. 23, 2007) (to be codified at 36 C.F.R. pt. 219); 2005 Rule, 70 Fed. Reg. 1023-01, 1024, 1027 (Jan. 5, 2005).

198. *See* Keiter, *supra* note 187, at 948 (noting the Clinton Administration's commitment to "instilling a new ethic in the public land agencies . . . .").

199. *See id.* at 964.

200. *See* 2000 Rule, 65 Fed. Reg. 67514, 67516 (Nov. 9, 2000); *see also* Citizens for Better Forestry v. USDA, 481 F. Supp. 2d 1059, 1065 (N.D. Cal. 2007); Wilkinson, *supra* note 188, at 672-73.

201. *See* Keiter, *supra* note 187, at 962.

202. *See* Utah Envtl. Cong. v. Bosworth, 483 F.3d 1127, 1132 (10th Cir. 2007) (noting the transitional provision of the 2000 Rule permitted forest planners to base site-specific decisions on a "best available science" standard instead of the substantive provisions of the 2000 Rule); Ecology Ctr. v. U.S. Forest Serv., 451 F.3d 1183, 1190-91 (10th Cir. 2006) (noting the substantive provisions of the 2000 Rule were never implemented).

203. *Citizens*, 481 F. Supp. 2d at 1065.

204. *See* 2007 Proposed Rule, 72 Fed. Reg. 48514-01, 48515 (Aug. 23, 2007) (to be codified at 36 C.F.R. pt. 219).

205. *Ecology Ctr.*, 451 F.3d at 1190; 2002 Proposed Rule, 67 Fed. Reg. 72770 (Dec. 6, 2002) (to be codified at 36 C.F.R. pt. 219).

206. *Citizens*, 481 F. Supp. 2d at 1067-68.

207. *See infra* notes 187-272 and accompanying text.

ern District of California, however, invalidated the new rule in 2007, ordering the agency to comply with the APA, NEPA, and ESA when developing new planning rules.[208] The Forest Service complied with the court order by essentially re-proposing the same rule.[209] Notice and comment on the proposed rule ran until October 22, 2007.[210] A brief review of some of the changes proposed in the 2007 Rule is appropriate.

1. Species Viability and Monitoring

Section 219.19 of the 1982 Rule required forest planners to provide for the management of fish and wildlife habitat by devising plans geared toward "maintain[ing] viable populations of existing native and desired non-native vertebrate species in the planning area."[211] Section 219.19 specifically defined a "viable population" as "one which has the estimated numbers and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area," and required plans to provide for habitat sufficient "to support, at least, a minimum number of reproductive individuals . . . well distributed so that those individuals can interact with others in the planning area."[212]

Section 219.19(a)(1) required the Forest Service to monitor the effects of forest management on "management indicator species" ("MIS").[213] MISs were to be selected, "where appropriate," from federal and state endangered and threatened species, species with "special habitat needs," species "commonly hunted, fished, or trapped," "non-game species of special interest," and "additional plant or animal species selected because their population changes are believed to indicate the effects of management activities on other species of selected biological communities or on water quality."[214]

Section 219.19(a)(1) further required that the agency analyze the effects of management practices on species viability "*on the basis of* available scientific information".[215] By contrast, the 2007 Rule requires only that monitoring "take into account" the best available science, weakening the standard.[216] The 2007 Rule also relaxes procedures for changing a

208. *Citizens*, 481 F. Supp. 2d at 1100.
209. 2007 Proposed Rule, 72 Fed. Reg. at 48515.
210. *Id.*
211. 1982 Rule, 36 C.F.R. § 219.19 (1982).
212. *Id.*
213. *Id.* § 219.19(a)(1).
214. *Id.*
215. *Id.* (emphasis added).
216. *Compare id.*, *with* 2007 Proposed Rule, 72 Fed. Reg. 48514-01, 48536, 48538 (Aug. 23, 2007) (to be codified at 36 C.F.R. pt. 219). The term "best" is wholly subjective and practically meaningless; because courts will be especially reluctant to second-guess agency discretion on technical matters, this term is likely to allow the Service to substitute science consistent with its preferred policies for more valid science that contradicts those policies. Second, "available" narrows further the range of science the Service must account for—namely, to the science the Service chooses to avail itself of prior and up to adoption of a plan. Third, "take into account" is vague and lends itself to an interpretation of implied discretion more than "on the basis of." The latter phrase

plan monitoring program; whereas such changes formerly required plan amendment (triggering public participation and NEPA analysis requirements),[217] the new rule permits agency officials to change a monitoring program by administrative correction.[218] The 2007 Rule dispenses with the species viability and MIS requirements entirely, replacing these requirements with broad language requiring plans "describe the monitoring program" to be adopted for a planning area.[219]

2. Adaptive Management and Environmental Management Systems ("EMS")

The 2007 Rule embraces adaptive management,[220] a cyclic approach to natural resource management that "contemplates contingent or provisional resource management decisions, which are then subject to revision to accommodate scientific uncertainty."[221] To this end, the 2007 Rule requires that managers "establish an environmental management system [EMS] for each unit of the National Forest System."[222] EMS is a "procedure designed to audit an individual forest's overall environmental performance,"[223] and is based on environmental standards developed by the International Organization for Standardization ("ISO").[224] Many scientists have argued in favor of adaptive management,[225] citing the problematic nature of "the one-time decision, prediction based NEPA model."[226] Others believe the agency's adoption of "adaptive management" is a pretext for a return to policies maximizing timber harvests.[227] The "ISO 14001" standard on which EMS is to be based[228] notably "does not specify levels of environmental performance,"[229] a fact which lends credence to these reservations. The Forest Service's historical predilection for

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implies agency decision making driven by science as opposed to agency politics, budgetary pressures, or public opinion. If plans are to be "based on" available science, the Service is, at least, tied to a specific methodology with regard to the role of science in planning. On the other hand, the "take into account" language does not imply such constraints on agency discretion, for better or worse.

217. 1982 Rule, 36 C.F.R. § 219.10(f) (1982) (requiring responsible official to follow ordinary plan adoption procedures where proposed plan amendment would "result in a significant change in the plan").

218. 2007 Proposed Rule, 72 Fed. Reg. at 48528.

219. *Id.* at 48536; *see also* PROCESS PREDICAMENT, *supra* note 190, at, 24.

220. 2007 Proposed Rule, 72 Fed. Reg. at 48535; PROCESS PREDICAMENT, *supra* note 190, at 23.

221. Keiter, *supra* note 187, at 975.

222. 2007 Proposed Rule, 72 Fed. Reg. at 48535.

223. Keiter, *supra* note 187, at 951.

224. *See* International Organization for Standardization 14000 Essentials, *available at* http://www.iso.org/iso/iso_14000_essentials (last visited Feb. 2, 2008) [hereinafter *ISO 14000 Essentials*].

225. Nie, *supra* note 189, at 106 (discussing the Committee of Scientists report and "dozens of scholarly books and articles" calling for adoption of adaptive management by the Forest Service).

226. *Id.*; *see also* PROCESS PREDICAMENT, *supra* note 190, at 23-24.

227. *See, e.g.*, Nie, *supra* note 189, at 106.

228. 2007 Proposed Rule, 72 Fed. Reg. 48514-01, 48535 (Aug. 23, 2007) (to be codified at 36 C.F.R. pt. 219); *ISO 14000 Essentials*, *supra* note 224.

229. *ISO 14000 Essentials*, *supra* note 224.

placing timber harvesting above all other uses[230] lends credence to concerns about a potential return to intensive timber harvesting. Although adaptive management may be a good idea, there is reason to fear agency misuse of the considerable flexibility the approach provides.

3. Biodiversity

Congress inserted a biodiversity provision in NFMA[231] requiring the Forest Service to provide for "diversity of plant and animal communities" in planning and adoption of planning regulations.[232] This provision was subject to qualifying language, however, as planning remained tied to satisfaction of "overall multiple-use objectives" and the adoption of guidelines for preservation of tree species diversity was required only "where appropriate" and "to the degree practicable."[233] Section 219.26 of the 1982 Rule adopted the NFMA language almost verbatim, though notably omitting some of the qualifying language.[234]

Section 219.26, and the species viability requirement of Section 219.19,[235] imposed meaningful substantive requirements on forest planners to provide for both species and ecosystem diversity. By contrast, the 2007 Rule transfers specific requirements for species diversity from the planning regulations to Forest Service manuals,[236] authorizes but does not require forest plan provisions for species diversity,[237] and couches both ecosystem and species diversity language in a "sustainability" provision instructing the Service to balance "[s]ocial, economic, and ecological" dimensions of sustainability in developing forest plans.[238] Diversity provisions in the new planning regulations leave the agency with a significant amount of discretion to determine how, and to what extent, plans must include provisions ensuring biodiversity; although the proposed rule "acknowledge[s]" the agency's "diversity obligations," it does not impose "specific and, thus, enforceable protective duties" on the agency at "either the planning or project levels."[239]

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230. *See supra* notes 88-130 and accompanying text.
231. 16 U.S.C.A. § 1604(g)(3)(B) (2008).
232. Keiter, *supra* note 187, at 946.
233. §1604(g)(3)(B).
234. *Compare id.*, *with* 1982 Rule, 36 C.F.R. § 219.26 (1982).
235. 1982 Rule, 36 C.F.R. § 219.19.
236. *See* 2007 Proposed Rule, 72 Fed. Reg. 48514-01, 48530 (Aug. 23, 2007) (to be codified at 36 C.F.R. pt. 219).
237. *Id.* at 48538.
238. *Id.* This approach is antithetical to the 2000 rule, which exalted biodiversity above other values. *See* sources cited *supra* note 199-201.
239. Keiter, *supra* note 187, at 963. Although Keiter writes about the now-enjoined 2005 Rule, his discussion is entirely applicable to the 2007 Rule, as the latter's biodiversity language is borrowed from the language of the former word for word. *Compare* 2005 Rule, 70 Fed. Reg. 1023, 1059 (2005), *with* 2007 Proposed Rule, 72 Fed. Reg. at 48538.

4. Public Participation and Collaboration

Section 219.6 of the 1982 Rule contemplated forest planning decisions made on an "information base . . . broaden[ed]" by public participation.[240] The rule provided for public input in the earliest stages of planning,[241] imposing clear procedural requirements for public participation during the NEPA process[242] in addition to NFMA-specific notice and comment requirements, which included "meetings, conferences, seminars, workshops, tours, and similar events designed to foster public review and comment."[243] The rule also required the Forest Service to analyze public input by issue and geographical area, noting "the variety and intensity of viewpoints about ongoing and proposed planning and management standards and guidelines."[244] By contrast, the 2007 Rule provisions on public participation are more permissive, requiring the Forest Service to use "a collaborative and participatory approach"[245] in planning and provide for public notice and comment periods but leaving the "methods and timing of public involvement opportunities" to the agency.[246] Because the new rules categorically exclude forest planning from NEPA analysis,[247] they relieve the agency of public participation obligations triggered by completion of an EIS.[248]

5. NEPA Compliance

Where the 1982 Rule explicitly required completion of an EIS for forest plans,[249] the new rule permits the responsible official to categorically exclude forest plan approval, amendment, or revision from in-depth environmental analysis requisite for completion of an EIS or an EA.[250] Although the new rule provides that completion of an EIS or EA may still be required at the project level,[251] this requirement is illusory, as the Forest Service is legally authorized to categorically exclude site-specific projects.[252] Because the 2007 Proposed Rule also eliminates regional

240. 1982 Rule, 36 C.F.R. § 219.6(a)(1).
241. *Id.* §§ 219.6(b)-(c).
242. *See id.* § 219.6(b).
243. *See id.* § 219.6(d).
244. *See id.* § 219.6(e).
245. *See* 2007 Proposed Rule, 72 Fed. Reg. at 48537.
246. *See id.*
247. *See id.* at 48526.
248. *See* 40 C.F.R. §§ 1501.7, 1502.9, 1502.19, 1503.4, 1506.6 (2007).
249. *See* 1982 Rule, 36 C.F.R. §§ 219.12(a), (f)-(k).
250. *See* 2007 Proposed Rule, 72 Fed. Reg. at 48535.
251. *See id.*
252. *See* Colo. Wild. v. U.S. Forest Serv., 435 F.3d 1204, 1221-22 (10th Cir. 2006) (affirming agency's categorical exclusion of major timber sales where agency decision not to do EISs was not arbitrary and capricious); Joshua Nathaniel, Survey, *Forests on Fire: The Role of Judicial Oversight, Forest Service Discretion, and Environmental Regulations in a Time of Extraordinary Wildfire Danger,* 84 DENV. U. L. REV. 923, 937-39 (discussing 2003 announcement of the Healthy Forests Initiative [HFI] and passage of the Healthy Forests Restoration Act [HFRA] and categorical exclusions of major timber harvests from NEPA analysis under HFI and HFRA); Nie, *supra* note 189, at 102 (discussing Forest Service's categorical exclusion of major timber sales).

planning[253] required under the 1982 Rule,[254] categorical exclusion of both forest plans and site-specific projects may eliminate scientific evaluation of cumulative impacts from the planning process entirely, providing only for piecemeal review of individual parts of the management scheme without any review of large-scale environmental effects.[255] The 2007 Proposed Rule's provision permitting changes to forest plans by administrative correction gives the agency another potential opportunity to evade in-depth NEPA analysis.[256]

6. Timber Management

The 2007 Rule's dramatic attempt to increase Forest Service planning discretion is reflected in its elimination of the diversity provision of the 1982 Rule covering "tree species."[257] The 1982 Rule regulated silvicultural practices to a significant degree,[258] and required the Forest Service to study the ecological effects and economic implications of its timber harvesting practices in detail.[259] By contrast, the 2007 Rule lacks specific timber harvesting standards, continuing to require the agency to designate areas suitable for timber harvesting but removing most detailed information, such as the method for determining harvest volumes, to Forest Service directives.[260] Taken together with the 2007 Rule's categorical exclusion of forest plans from NEPA analysis,[261] and the increasingly frequent categorical exclusion of substantial site-specific timber harvests,[262] the timber provisions of the 2007 Rule leave the Forest Service remarkable discretion to determine the proper scope of timber harvesting in the national forests.

7. Overview of Planning Reforms

It is fair to say the 2007 Rule weakens the Forest Service's planning obligations considerably in comparison to the 1982 Rule. Specific requirements in the 1982 Rule on NEPA compliance,[263] biodiversity,[264] and timber harvest practices[265] are absent from both the 2005 Rule and the 2007 Proposed Rule. In total, the 2005 and 2007 Rules contain more

253. *See* 2007 Proposed Rule, 72 Fed. Reg. at 48535.
254. *See* 1982 Rule, 36 C.F.R. § 219.4(b)(2).
255. *See* Keiter, *supra* note 187, at 970-71.
256. *See* 2007 Proposed Rule, 72 Fed. Reg. at 48537.
257. *See* 1982 Rule, 36 C.F.R. § 219.26.
258. *See id.*
259. *See* 1982 Rule, 36 C.F.R. § 219.14.
260. *See* 2007 Proposed Rule, 72 Fed. Reg. at 48530.
261. *See supra* notes 248-57 and accompanying text.
262. *See, e.g., supra* note 253 and accompanying text.
263. The 1982 Rule required completion of an EIS for each forest plan adopted. *See* 1982 Rule, 36 C.F.R. § 219.12(a), (f)-(g), (j).
264. *See* 1982 Rule, 36 C.F.R. § 219.26.
265. 1982 Rule, 36 C.F.R. § 219.14. The 1982 Rule mandated cost-benefit review of production on lands identified for potential timber harvest. *See* § 219.14(b).

generalized language intended to afford the agency greater flexibility,[266] eschewing the prescriptive standards that guided planning, to a greater or lesser degree, under the 1982 Rule.[267] Where planners were formerly constrained by substantive requirements embedded in the planning regulations,[268] the new rule transfers considerable discretion on "whether and how to change" unit-level forest plans[269] to agency officials.[270]

These changes may have dangerous effects on the political relationship between Forest Service management and budgeting: agency managers will be tempted to use their new discretion to curry favor among political factions in Congress, and broad agency planning discretion will help these interests maximize returns on political capital, encouraging political interference with the agency.[271] As Wilkinson notes, concepts like sustainability, ecosystem management, and biodiversity really only "gain specific meaning when they are applied in discrete contexts."[272] Whether the dangers raised by the 2007 Rule's adoption of a flexibility-oriented "adaptive management" approach lead to irresponsible practices will depend on future interpretations of the new rule's wide-open language.[273]

B. Assessing Some Potential Effects of the 2007 Proposed Planning Rule

Forest planning is essential to effective management of an administrative unit as massive as the National Forest System.[274] NFMA's implementation of comprehensive land use planning fairly revolutionized forest management, for good or ill.[275] On the other hand, the view of the 2007 Rule that forest plans are purely aspirational and make no management decisions raises serious questions as to the value of public participation in the planning process and the scope of agency discretion in the future. The dramatic and controversial changes to planning proposed in the 2007 Rule are virtually certain to trigger litigation as expanded discretion in the agency raises reasonable fears abuse.[276]

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266. *See, e.g.*, 2007 Proposed Rule, 72 Fed. Reg. 48514, 48515-16 (Aug. 23, 2007) (to be codified at 36 C.F.R. pt. 219); *see also*, Nie, *supra* note 189, at 100.

267. *See* Keiter, *supra* note 187, at 249-50.

268. *See, e.g.*, 1982 Rule, 36 CFR § 219.19 (imposing species viability and management indicator species requirements on Forest Service).

269. 2007 Proposed Rule, 72 Fed. Reg. at 48536.

270. *See id.* at 48535.

271. *See* HIRT, *supra* note 85, at 295-96.

272. Wilkinson, *supra* note 188, at 679; *see also* Keiter, *supra* note 187, at 960-61 (discussing the open-ended nature of statutory language in federal public land and wildlife laws and the agencies' role in defining the scope of statutory terminology); Nie, *supra* note 189, at 104.

273. *See* Nie, *supra* note 189, at 104.

274. *See, e.g.*, Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 728 (1998) (noting Forest Service jurisdiction encompasses "nearly 300,000 square miles of land located in 44 states, Puerto Rico, and the Virgin Islands.").

275. *See* Wilkinson, *supra* note 188, at 669-77 (discussing changes in national forest management and forest conditions since passage of NFMA).

276. *See, e.g.*, HIRT, *supra* note 86 and accompanying text.

1. Public Policy: Improving the Utility of Forest Planning Under the 2007 Rule

Development and adoption of a forest plan is a costly, time-consuming, and remarkably complex undertaking.[277] The Forest Service estimates its annual planning and assessment costs to be roughly $250 million, more than twenty percent of its yearly budget.[278] Planners currently engage in extensive scientific analysis and documentation; repeated, lengthy public comment periods over the course of the planning process are the norm. Adoption of forest plans used to require completion of an EIS,[279] an enormous undertaking in itself given an EIS must consider in painstaking and voluminous detail multiple alternatives to the proposed plan.[280] ESA requirements also generate impact studies, consultations, and additional planning.[281] Simply because plan development requires such a massive investment of agency resources, the process raises questions as to its own value.[282]

Forest planning under the old regulations presented other problems. Plans must be revised at least once every fifteen years[283] but can take almost as long to complete.[284] The science supporting plan content becomes outdated relatively quickly.[285] The "one-time decision approach" embodied in adoption of a fifteen-year forest plan is arguably incompatible with forest-level planning given the dynamic nature of forest conditions.[286] Completing an EIS presents a host of problems. The agency must expend considerable resources analyzing the ecological effects of hypothetical projects under hypothetical forest conditions, lacking sufficient data on conditions and projects fifteen years in the future.[287] Data

277. *See, e.g.*, Roger A. Sedjo, *Streamlining Forest Service Planning*, *in* NEW APPROACHES ON ENERGY AND THE ENVIRONMENT 101 (Richard D. Morgenstern and Paul R. Portney, eds., 2004) *available at* http://www.fs.fed.us/ems/includes/article3.pdf.

278. *See* PROCESS PREDICAMENT, *supra* note 190, at 34; *see also* Jodi Peterson, *The End of 'Analysis Paralysis'?*, HIGH COUNTRY NEWS, Feb. 19, 2007, *available at* http://www.hcn.org/servlets/hcn.Article?article_id=16838 ("Each [forest] plan took five to seven years of effort and cost around $5 million to $7 million.").

279. *See* Citizens for Better Forestry v. USDA, 481 F. Supp. 2d 1059, 1067-68 (N.D. Cal. 2007). *Compare* 1982 Rule, 36 C.F.R. § 219.10(b) (1983), *with* 2005 Rule, 70 Fed. Reg. 1023, 1032, 1056 (Jan. 5, 2005), *and* 2007 Proposed Rule, 72 Fed. Reg. 48514, 48535 (Aug. 23, 2007) (to be codified at 36 C.F.R. pt. 219).

280. *See* 40 C.F.R. §§ 1502.12-1502.16 (2008).

281. *See supra* notes 52-58 and accompanying text.

282. *See* William J. Wailand, *Note: A New Direction? Forest Service Decisionmaking and Management of National Forest Roadless Areas*, 81 N.Y.U. L. REV. 418, 428 (2006); Wilkinson, *supra* note 188, at 681.

283. *See* 16 U.S.C.A. § 1604(f)(5) (2008); 1982 Rule, 36 C.F.R. § 219.10(g).

284. Interview by Ray Suarez with Rick Cables, U.S. Forest Service Regional Forester, Region 2, *Newshour with Jim Lehrer: Forest Rules* (PBS television broadcast Dec. 23, 2004) (transcript available at http://www.pbs.org/newshour/bb/environment/july-dec04/forest_12-23.html).

285. *See, e.g.*, 2005 Rule, 70 Fed. Reg. 1023, 1041 (Jan. 5, 2005).

286. *See id.* at 1031 (discussing 1997 Committee of Scientists criticisms of the use of EIS at the forest plan level).

287. *Id.* (discussing the speculative nature of plan content where agency realizes "over the 15-year life of a plan it can only expect the unexpected.").

collection on present conditions is difficult to obtain given the size of forest units and detail necessary to make forest-level environmental analysis useful at the project level; planning-level NEPA analysis is typically duplicated at the project level.[288] These are precisely the practical difficulties the agency wishes to address by revising its planning rules for maximum discretion and flexibility.

2. Public Participation in the Planning Process Under the 2007 Proposed Rule

Because the 2007 Rule leaves so much of the planning process solely to the Forest Service's discretion,[289] it calls into question the value of public participation in plan development. Aside from legal obligations imposed by NFMA (and NEPA, ESA, etc.) and the planning rules, the Forest Service has maintained considerable discretion to determine rule and plan content regardless of the tenor of public comments on a given issue.[290] Obviously, that discretion is significantly broadened where sources of legal obligation are weakened or abandoned. The public participation obligations in the 2007 Rule are fairly hollow. Typical notice and comment is provided for at plan adoption, amendment, and revision, but the agency is under no obligation to base the plan on that input.[291] Despite requirements to consult with and provide for open and meaningful participation by the public in the planning process, the rule also gives the responsible official "the discretion to determine the methods and timing of public involvement opportunities."[292] Transforming forest plans from prescriptive, theoretically enforceable instruments into purely "aspirational," non-binding documents allows the Forest Service to maximize flexibility without visibly shutting the public out of the planning process. Unfortunately, marginalizing public input may encourage capture of the planning process by the interest groups whose input the agency has tried to manage in the past.[293]

C. *Future Implications and the Agency Discretion Question*

Following *Ohio Forestry* and *Norton*, the Forest Service realizes the planning issue is an important key to maximizing its managerial discre-

288. *See id.* (noting difficulties with data collection over the breadth of national forest system and management units and duplication of NEPA analysis at planning and project levels).

289. *See* 2007 Proposed Rule, 72 Fed. Reg. 48514, 48516 (Aug. 23, 2007) (to be codified at 36 C.F.R. pt. 219) ("Land management plans are strategic" and "do not command anyone to do anything or to refrain from doing anything . . . do not grant, withhold, or modify any formal legal license, power, or authority . . . do not subject anyone to any civil or criminal liability [or] create legal rights or obligations.").

290. *See* Nie, *supra* note 189, at 104.

291. *See* 2007 Rule, 72 Fed. Reg. at 48537-38.

292. *Id.*

293. Interview by Ray Suarez with Rick Cables, U.S. Forest Service Regional Forester, Region 2, *The Newshour with Jim Lehrer: Forest Rules* (PBS television broadcast Dec. 23, 2004) (transcript available at http://www.pbs.org/newshour/bb/environment/july-dec04/forest_12-23.html). These are the "paid gladiators" Cables mentions.

tion.[294] The 2007 Proposed Rule vests the agency with unprecedented planning discretion, categorically exempting plans from NEPA,[295] insulating the agency from plan-level challenges under that statute, and *expressly* categorizing plans as "non-actions,"[296] possibly blocking the ESA challenges upheld in the Ninth Circuit and other challenges made under the APA. Where *Forest Guardians* boxes off the timing of triggering of the consultation obligation, limiting the list of triggering events to adoption, amendment, or revision of a plan or plan approval of a site-specific decision,[297] the new Forest Service rule renders forest plans potentially unreviewable.

Where project-level categorical exclusions are upheld on review, or expressly authorized by Congress or the Executive Branch,[298] maximizing agency discretion may mean agency actions evade all in-depth NEPA review. NEPA "guarantees a particular procedure, not a particular result."[299] Because an agency's failure to comply with NEPA procedures injures potential litigants as soon as it occurs, NEPA can provide a strong basis for satisfying standing.[300] Categorically excluding major projects from NEPA analysis under color of law potentially eliminates this reliable and important means of obtaining review. The Forest Service will not hesitate to categorically exclude site-specific projects of considerable magnitude from NEPA analysis.[301]

To the extent the 2007 Rule removes important plan content to the administrative directive level,[302] courts may view that content as "interpretive" and intended to "clarify" policy, engaging in very deferential review and frustrating citizen challenges to unit-level management.[303] Standing issues arising under federal land management statutes are likely

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294. *See* 2007 Rule, 72 Fed. Reg. at 48516 (citing *Ohio Forestry* and *Norton* for the proposition that forest plans are not agency action).

295. *Id.* at 48535.

296. *Id.* at 48516.

297. *See* Forest Guardians v. Forsgren, 478 F.3d 1149, 1154, 1156 (10th Cir. 2007).

298. *See* Nathaniel, *supra* note 252, at 937-39 (discussing categorical exclusions of major timber harvests under HFI and HFRA).

299. Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 737 (1998). *But see* Thomas v. Peterson, 753 F.2d 754, 763 (9th Cir. 1985).

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

301. *See* National Environmental Policy Act Documentation Needed for Limited Timber Harvest, 68 Fed. Reg. 44598 (July 29, 2003) (authorizing categorical exclusion of three types of site-specific actions: 70 acre live tree harvests with ½ mile of road construction; 250 acre salvage of dead/dying trees with ½ mile of road construction; and 250 acre commercial harvest "of any trees necessary to control the spread of insects and disease" with ½ of road building); Nie, *supra* note 189, at 103 (discussing HFRA's authorization of project-level NEPA categorical exclusions).

302. *See, e.g.*, 2007 Proposed Rule, 72 Fed. Reg. 48514, 48537 (Aug. 23, 2007) (to be codified at 36 C.F.R. pt. 219) (providing for changes to monitoring program and program information by administrative correction); *Id.* at 48536 (providing for a variety of changes to plan content by administrative correction, including timber management projections and other "non-substantive" changes).

303. *See* Citizens for Better Forestry v. USDA, 481 F. Supp. 2d 1059, 1078-80 (N.D. Cal. 2007) (holding Forest Service did not violate APA by issuing a 2004 rule without notice and comment as that rule clarified applicability of various planning regulations to agency planning and was interpretive in nature).

to suffer scrutiny in the courts, given standing falls squarely within the scope of traditional jurisprudential concerns,[304] but agency statutory interpretations and administrative decisions are commonly afforded deference on review.[305] Although the Ninth Circuit continues to view forest plans as challengeable on an ongoing basis,[306] the court is in the minority.[307] The Supreme Court weighed in on this issue in *Ohio Forestry* (originating in the Fourth Circuit), reaching an opinion contrary to the Ninth Circuit's view, albeit in a slightly different context.[308] Various federal circuits, in addition to the Tenth Circuit, have adopted the *Ohio Forestry-Norton* position that forest plans generally do not constitute ongoing agency action.[309] The Forest Service's 2005 and 2007 Rules leave no doubt as to the agency's position on forest planning. *Ohio Forestry* and *Norton* provide the federal circuits ample authority to disallow "ongoing action" challenges to forest plans as the Tenth Circuit did in *Forest Guardians*. Were the Supreme Court to review *Forest Guardians*, its decisions in *Ohio Forestry* and *Norton* strongly indicate it would affirm the Tenth Circuit's holding, and perhaps go further and adopt the Forest Service's position that plans are never agency action.

The new rule does not entirely abandon the older planning approach. Forest plans under the 2007 Rule will continue to address desired conditions and plan objectives, provide guidelines for project-level decisionmaking, and identify suitable uses for specific areas within the planning unit.[310] For all the 2007 Rule's faults, "the streamlining and discretion [it includes] . . . may prove . . . an ingenious way of practicing the theory of adaptive management in the messy administrative state."[311] Cutting the red tape involved in plan development is intended to put

304. *See* Allen v. Wright, 468 U.S. 737, 750-51 (1984).

305. *See* Norton v. S. Utah Wild. Alliance, 542 U.S. 55, 66-67 (2004); Chevron v. Natural Res. Def. Council, 467 U.S. 837, 844 (1984); Sierra Club v. Marita, 46 F.3d 606, 619 (7th Cir. 1995) (noting scope of review of agency action is narrow and that "court is not permitted to submit its judgment for that of the agency"); Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1702-03 (2004); Keiter, *supra* note 187, at 961 (distinguishing agency regulations and policies and discussing the application of *Chevron* deference to agency decisions).

306. *See, e.g.*, *Citizens*, 481 F. Supp. 2d at 1095 (noting forest plans are ongoing agency action under § 7(a)(2) of the ESA).

307. *See* Michael J. Gippert & Vincent L. DeWitte, *The Nature of Land and Resource Management Planning Under the National Forest Management Act*, 3 ENVTL. LAW 149, 182-83 (1996) (noting Eighth Circuit only other to have "expressly found that Forest Plans are reviewable" on an ongoing basis).

308. *Compare* Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 733 (1998) (holding challenge to forest plan unripe where "delayed review would [not] cause plaintiffs hardship . . . judicial intervention would inappropriately interfere with further administrative action [and] . . . [where] the courts would benefit from further factual development of the issues presented"), *with* Pac. Rivers Council v. Thomas, 30 F.3d 1050, 1053-56 (9th Cir. 1994) (holding forest plans constitute ongoing agency action under the ESA).

309. *See* Gippert & DeWitte, *supra* note 307, at 183-86.

310. *See* 2007 Proposed Rule, 72 Fed. Reg. 48514, 48536 (Aug. 23, 2007) (to be codified at 36 C.F.R. pt. 219).

311. Nie, *supra* note 189, at 106.

more agency personnel "on the ground" in the national forests, hopefully improving agency performance and forest health.[312] Maximized discretion under the new planning rules logically opens the possibility of a more ecologically sensitive forest management, not just unenlightened management geared toward extractive industry.[313]

Unfortunately, the Forest Service wants to streamline the planning process and simultaneously enact in law the idea that plans have no legal effect, claiming unprecedented discretion in the process. Perhaps if the agency took one tack or the other, it might come closer to achieving the elusive balance between accountability and discretion it has sought over the years since NFMA's passage. Reforming the planning process to maximize flexibility and planning effectiveness and efficiency is a good idea in the abstract, but using forest planning reform as a means to transfer greater authority to the agency, and the planning process as a venue for unilaterally exercising that authority, is the wrong approach. NFMA was enacted to constrain Forest Service discretion, not expand it.[314]

The Tenth Circuit's approach in *Forest Guardians* avoids permitting too much agency discretion by preserving judicial review of forest plans at certain critical times in the planning process.[315] Where *Forest Guardians* balances consideration of both the purpose and perils of forest management, the managerial "paradigm shift"[316] proposed by the Forest Service raises the possibility of a return to the unlimited discretion of years past.[317] Lynx in both New Mexico and Colorado would be imperiled in such an event.

Future plans for Colorado forests are likely to be excluded from NEPA analysis,[318] removing a significant, program-level layer of managerial protection for critical habitat of the lynx and other threatened and endangered wildlife. The Forest Service will amend forest plans by administrative correction[319] rather than formal notice-and-comment procedures contemplated by NFMA and NEPA. Given that the 2007 Rule expressly disclaims any binding effects of forest plans,[320] the agency will probably be able to convince the Tenth Circuit that its forest plans do not constitute ESA Section 7(a)(2) action *even at* adoption, amendment, or

312. *See* Interview by Ray Suarez with Rick Cables, U.S. Forest Service Regional Forester, Region 2, *Newshour with Jim Lehrer: Forest Rules* (PBS television broadcast Dec. 23, 2004) (transcript available at http://www.pbs.org/newshour/bb/environment/july-dec04/forest_12-23.html).

313. *See* Nie, *supra* note 189, at 106.

314. *See supra* notes 108-130 and accompanying text.

315. *See* Forest Guardians v. Forsgren, 478 F.3d 1149, 1154-56 (10th Cir. 2007) (noting forest plans are subject to judicial review at adoption, amendment, or revision, or when making site-specific decisions).

316. *See* 2005 Rule, 70 Fed. Reg. 1023, 1033 (Jan. 5, 2005).

317. *See supra* notes 92-111 and accompanying text.

318. *See* 2007 Proposed Rule, 72 Fed. Reg. 48514, 48535 (Aug. 23, 2007) (to be codified at 36 C.F.R. § 219.4(b)).

319. *Id.* at 49536 (permitting plan amendment by administrative correction).

320. *Id.* at 48535.

revision: in other words, that forest plans are legally meaningless. To the extent *Forest Guardians* symbolizes a cautious approach to limiting Forest Service statutory obligations, there is no guarantee this approach will be the primary one the court uses in the future.

CONCLUSION

Forest Guardians provides a bright-line rule respecting the legal function (or lack thereof) of forest plans, consistent in kind, if not degree, with the Forest Service's admittedly radical[321] approach to the new rules but free of the rules' excesses. Under *Forest Guardians*, citizens seeking to challenge forest management as environmentally inadequate must base their claims on site-specific projects (or plans approving such projects) as opposed to unit-level plans, or on adoption, amendment, or revision of a plan.[322] The 2007 Rule, by contrast, may be easily read to preclude *any* substantive review of forest plans. It categorically excludes all facets of planning from NEPA, and will result, in many if not most cases, in plan content so vague as to be of little practical or legal effect. Assuming the 2007 Proposed Rule is adopted as a final rule, it now appears Forest Service actions under the new management regime will determine whether the new discretion benefits our national forests or revives the irresponsible, timber-centric practices of years past.

Following the Tenth Circuit decision, Forest Guardians petitioned FWS to list the lynx under ESA in New Mexico.[323] The group's petition noted that suitable lynx habitat extends along the San Juan Mountains from the release areas in Colorado into New Mexico, and that at least six of approximately 81 lynx to enter New Mexico have been killed.[324] Given FWS's 2003 Clarification of the Listing, which explicitly rejected listing the lynx in New Mexico, the chances for the petition's success are questionable.[325] Should FWS reject the petition, lynx in New Mexico will have run out of options for acquiring federal protection, at least at the present time, since *Forest Guardians* foreclosed a major avenue for review. Perhaps local Forest Service officials will incorporate special protections for lynx in the Carson and Santa Fe national forests in their respective forest plans. On the other hand, such action is unlikely to bind the Forest Service under present case law, and certainly will not bind the agency once the 2007 Rule is finalized. Pending judgment on the peti-

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321. *See* Citizens for Better Forestry v. USDA, 481 F. Supp. 2d 1059, 1067 (N.D. Cal. 2007) ("By the USDA's admission, the 2005 Rule 'embodies a paradigm shift in land management planning.'").

322. *See* Forest Guardians v. Forsgren, 478 F.3d 1149, 1159-60 (10th Cir. 2007).

323. *See* FOREST GUARDIANS, PETITION TO CHANGE THE LISTING STATUS OF CANADA LYNX TO ENCOMPASS THE MOUNTAINOUS REGION OF NORTH-CENTRAL NEW MEXICO 3 (2007), *available at* http://www.fguardians.org/support_docs/petition_canada-lynx_8-1-07.pdf.

324. *Id.* at 1-2.

325. *See* Notice of Remanded Determination of Status for the Contiguous United States Distinct Population Segment of the Canada Lynx, 68 Fed. Reg. 40076, 40083 (2003).

tion, the Forest Service now holds the cards concerning survival of the lynx in New Mexico. In the coming years, concerned citizens seeking to preserve lynx on federal wild lands will have to rely on the agency's good judgment, as whatever actions the Forest Service takes—or declines to take—are likely to evade judicial review as the agency strives for maximum discretion.

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