

OVERVIEW
OF FOREST PLANNING
AND
PROJECT LEVEL DECISIONMAKING

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NOTE

The following "Overview of Forest Planning and Project Level Decisionmaking" has been a "working paper" for over 10 years. It describes the body of law that has built up on forest planning and project level decisionmaking through court decisions and other means, and is organized by specific topics.

The body of law set out in this Overview is based on the NFMA and the implementing regulations published in 1982. On November 6, 2000, a new NFMA rule was promulgated, but the 1982 regulation is likely to be relevant to forest plans and project decisions for some time to come. On May 17, 2001, the Department published in the Federal Register an "interim rule" that allows the Forest Service to initiate plan amendments and revisions under the 1982 rule or the 2000 rule until May 9, 2002 - this extension was extended again in May, 2002, to allow Forest managers to continue using the 1982 regulations for amendments and revisions until a new revised planning rule is promulgated. Also, litigation of forest plans and projects decided under the 1982 rule is expected to continue for some time and this Overview will continue to provide a reference to such litigation.

This Overview does not provide interpretations of the 2000 Rule, and refers to it or the Federal Register publications of the preceding 1991 Advanced Notice of Proposed Rulemaking, or the 1995 and 1999 Proposed Rules only where they are relevant with respect to general planning principles.

We will continue to update this Overview periodically.

Overview of Forest Planning and Project Level Decisionmaking

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Nature of Land and Resource Management Plans (LRMPs) also known as Forest Plans

An approved LRMP is the product of a comprehensive notice and comment process established by Congress in the National Forest Management Act (NFMA). The approval of a LRMP establishes direction so that all future decisions in the planning area will include an "interdisciplinary approach to achieve integrated consideration of physical, biological, economic and other sciences." 16 USC 1604(b), *see also*, 1604(f), 1604(g), and 1604(i). The LRMP provides direction to assure coordination of multiple-uses (outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness) and sustained yield of products and services. 16 USC 1604(e). Plan approval, amendment and revision does not authorize, fund or carry out any projects, unless specifically stated in the decision document.

LRMPs are never "completed," or "final," as NFMA requires Plans to be maintained, amended and revised. 16 USC 1604(a) and 1604(f). The emerging federal land management doctrines of an ecosystem approach and adaptive management require ongoing adjustment of standards and guidelines regulating land uses rather than one-time for a long time LRMPs. *See* 1995 Proposed 36 CFR 219, National Forest System Land and Resource Management Planning, 60 Fed. Reg. 18886 (April 13, 1995) Preamble, discussing ongoing incremental nature of National Forest management under ecosystem and adaptive management principles, at 18887-89, 18890 and 18894.

LRMP approval results in:

1. Establishment of forest multiple-use goals and objectives, 36 CFR 219.11(b);
2. Establishment of forest-wide management requirements (standards and guidelines) to fulfill the requirements of 16 USC 1604 applying to future activities (resource integration requirements, 36 CFR 219.13 to 219.27);
3. Establishment of management areas and management area direction (management area prescriptions) applying to future activities in that management area (resource integration and minimum specific management requirements), 36 CFR 219.11(c);
4. Designation of suitable timber land (16 USC 1604(k) and 36 CFR 219.14) and establishment of allowable timber sale quantity (16 USC 1611 and 36 CFR 219.16);
5. Nonwilderness allocations or wilderness recommendations where 36 CFR 219.17 applies; and
6. Establishment of monitoring and evaluation requirements, 36 CFR 219.11(d).

See, Citizens for Environmental Quality v. United States, 731 F. Supp. 970, 977-78 (D. Colo. 1989) repeating the Chief's statement as to what Plan approval constitutes.

The plans are adjustable through monitoring and evaluation, amendment and revision (plan level decisionmaking).

The LRMP management area prescriptions and forest-wide direction are the "zoning ordinance" under which future decisions are made.

Coupled with the laws and regulations applicable to the project level, the plans create a management system for future decisionmaking. Projects and activities are proposed, analyzed and carried out within the framework of the plan.

Forest Service Decisionmaking System

The Forest Service administers the National Forest System, which is 191 million acres or 8.5% of the U.S. There are 156 National Forests and Grasslands.

Each year, Forest Service line officers issue thousands of decisions which are accompanied by NEPA documentation (EIS, EA or CE) and subject to administrative appeal. There are currently three levels of Forest Planning and Decisionmaking:

Nationwide

RPA Program (every 5 years, no EIS 1990); RPA Assessment (every 10 years); not subject to administrative appeal.

Forest Plan

A Land and Resource Management Plan (LRMP) is required for each administrative unit of National Forest System and must be amended as needed; NFMA does not specifically require an EIS for forest plan approval and revision (16 USC 1604) but an EIS is required by Secretary's regulations (36 CFR 219). The area for an LRMP is forest administrative unit, usually about 1-2 million acres. The LRMPs must be revised every 10 to 15 years. The decision documents for LRMP approval, amendment and revision are subject to appeal under 36 CFR 217.

Litigation has been brought challenging the continued application of the Medicine Bow LRMP, which passed its 15 year statutory lifetime in November, 2000. Plaintiffs claim that projects on that forest cannot go forward in reliance on a 15+ year old LRMP and EIS. *Biodiversity Associates v. U.S. Forest Service*, Civ. No. 01-CV 078B (D. Wyo., filed May 2, 2001).

Project

Project decisions (critical decisions that change the environment) require additional NEPA and environmental law compliance (some uses such as oil and gas leasing, grazing and recreation developments have multi-step consideration at the project level). Project decision documents were appealable under 36 CFR 217. In 1992 Congress added requirements for notice and comment and administrative appeal of projects implementing LRMPs. Section 322, Interior Approp. Act 1992 (106 Stat. 1419). The 36 CFR 215 project notice, comment and appeal process went into effect January 4, 1994. 58 Fed. Reg. 58904, (November 4, 1993).

Note, until recently Regional Guides (one for each NFS Region) were required by the 1982 regulation (at former 36 CFR 219.4). The November, 2000 rule required each Regional Forester to withdraw the applicable Regional Guide by November 9, 2001, and identify the decisions in the Regional Guide to be transferred to a regional supplement of the Forest Service directive system or to one or more plans. 36 CFR 219.35 (e).

A Regional Guide established regional standards and guidelines. Unlike LRMPs, they had no set timeframe for revisions. The decision document for Regional Guide approval and amendment subject to administrative appeal under 36 CFR 217.

Planning is continuous at and between each level rather than sequential. Continuous monitoring, evaluation and adjustment of LRMPs through amendment and revision is required by NFMA. All projects remain subject to site-specific and continuing compliance with Federal environmental law such as ESA, NEPA, CWA and CAA despite the multiple levels of disclosure. Judicial review is available at those points that represent "final agency action" and present a justiciable controversy.

Forest Plan and Project Level Decisionmaking

1. Plan Versus Project Decisions.

Forest Plans set out management area prescriptions with standards and guidelines for future decisionmaking and are adjustable through monitoring and evaluation, amendment and revision. The LRMP management area prescriptions and forest-wide direction are the "zoning ordinances" under which future decisions are made. Forest Plan approval establishes multiple-use goals and objectives for the planning unit. Plan level actions are approval (16 USC 1604(d) and (j), amendment (16 USC 1604(f)(4)) and revision (16 USC 1604(f)(5)). Project decisions are not authorized, carried out or funded by Forest Plan approval, amendments or revisions except as specifically authorized in the Record of Decision or Decision Notice.

Projects and activities are proposed, analyzed and carried out within the framework of the LRMP.

2. Staged Decisionmaking.

The Forest Service Planning Handbook provides for systematic stepping down from the overall direction provided in the LRMP when making project or activity level decisions:

Planning for units of the National Forest System involves two levels of decisions. The first is the development of a Forest Plan that provides direction for all resource management programs, practices, uses, and protection measures. . . . The second level [of] planning involves the analysis and implementation of management practices designed to achieve the goals and objectives of the Forest Plan. This level involves site-specific analysis to meet NEPA requirements for decisionmaking. FSM 1922, 53 Fed. Reg. 26807, 26809 (July 15, 1988).

Congress has confirmed the LRMP and project level approach by enacting a statutory notice, comment and administrative appeal right for projects and activities implementing LRMPs. 16 USC 1612 note (106 Stat. 1419) Forest Service Decision Making and Appeals Reform (1992). For a discussion of the nature of Plan and project decisionmaking *see*, Advanced Notice of Proposed Rulemaking National Forest System Land and Resource Management Planning, 56 Fed. Reg. 6508, 6519-21 (February 15, 1991); Proposed Administrative Appeal Regulation, 36 CFR 215, 58 Fed. Reg. 19369, 19370-71 (April 14, 1993); Final Administrative Appeal Regulation, Preamble, 36 CFR 215, 58 Fed. Reg. 58904, 58909 (November 4, 1993); Proposed 36 CFR 219 National Forest System Land and Resource Management Planning, 60 Fed. Reg. 18886 (April 13, 1995), Preamble at 18897-18903; and proposed 36 CFR 219 National Forest System Land and Resource Management Planning, 36 CFR 219.3 (b), 219.7, 219.10, 219.36, 64 Fed. Reg. at 54098, 54100, 54101, 54111 (October 5, 1999). The Supreme Court cited the 1988, 1993 and 1995 Federal Register interpretations of the nature of Forest Plan and project decisionmaking in *Ohio Forestry Ass'n v. Sierra Club*, 118 S. Ct. 1665, 1668, 1671 (1998).

See, Idaho Conservation League v. Mumma, 956 F.2d 1508, 1511-12 (staged decisionmaking) and 1523 (Plan level EIS is merely programmatic) (9th Cir. 1992) and *Swan View Coalition v. Turner*, 824 F. Supp. 923, 935 (D. Mont. 1992). *See also*, Solicitor General statements of Forest Plan and Project Levels in filings before the Supreme Court: *Thomas v. Pacific Rivers Council*, Petition for Certiorari (February, 1995) pp. 2-4 and 15-17; *Ohio Forestry Ass'n v. Sierra Club*, Brief of Federal Respondents in Opposition (September, 1997) pp. 2-5 and 14-17; *Precision Pine v. Forest Guardians*, Response of Federal Government (September, 1997) pp. 2-4; *Ohio Forestry Ass'n v. Sierra Club*, Brief of Federal Respondents (December, 1997) pp. 1-4.

3. Staged Decisionmaking in the Courts

Courts Have Upheld Staged Decisionmaking -

Courts have long upheld the staged decisionmaking of forest plans and projects. In *Swan View Coalition v. Turner* the court noted the nature of Forest Plans:

the Forest Plan is a broad framework for the management of a National Forest which does not directly commit to development. Allowing for additional review at each subsequent stage of development recognizes both the managerial purpose of a Forest Plan to provide mechanisms for monitoring and regulating future development as well as its inherent limitations in predicting what development will actually occur.

824 F. Supp. at 935.

The *Swan View* court also stated:

[T]he standards and guidelines operate as parameters within which all future development must take place. If a development project cannot be maintained within those parameters, the safeguard mechanisms in the Plan will prevent such development from going forward.

* * *

Finally, Plaintiffs argue that FWS should be compelled to analyze the resource production objectives [included in LRMP] so that the Forest Service can look at the "big picture" before adopting the Plan. As stated above, these resource production objectives simply represent a ceiling on timber production and do not mandate that such quantities actually be harvested.

Id.

In *Sierra Club v. Robertson*, 28 F.3d 753, 758-59 (1994) the Eighth Circuit had held:

The mere existence of the Ouachita Forest Plan does not produce an imminent injury in fact. A forest plan, such as the Ouachita Plan, is a general planning tool. It provides guidelines and approved methods by which forest management decisions are to be made for a period of ten to fifteen years. Adoption of the Plan does not effectuate any on-the-ground environmental changes. Nor does it dictate that any particular site-specific action causing environmental injury must occur. Indeed, before an environmental change can come about, several events must transpire.

First, a site-specific action (e.g., a timber sale) must be proposed and found to be consistent with the Plan. Next, the action is subject to NEPA and NFMA analysis and public comment. Finally, the Forest Service must adopt the action. Finding an environmental injury based on the Plan alone, without reference to a particular site-specific action, would "take ... us into the area of speculation and conjecture." *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974).

* * *

... Thus, when a site-specific action in the Ouachita Forest, such as a timber sale, is proposed, and all administrative appeals are exhausted, persons threatened by an imminent injury in fact may seek judicial review of the proposed action. At that time, such persons may assert that the proposed site-specific action is not consistent with the Plan, or that the Plan as it relates to the proposed action is inconsistent with the governing statutes, or both. Here, however, as we already have emphasized, appellants mount their attack on the Plan per se, their arguments devoid of reference to the particularities of any proposed site-specific action that might give rise to an injury in fact.

For court decisions upholding the staged decision approach of Forest Plans and Project levels see, *National Wildlife Federation v. Coston*, 773 F.2d 1513, 1518 (9th Cir. 1985); *City of Tenakee Springs v. Block*, 778 F.2d 1402, 1406 (9th Cir. 1985); *Cronin v. USDA*, 919 F.2d 439, 447-49 (7th Cir. 1990); *Idaho Conservation League v. Mumma* 956 F.2d 1508, 1511-12 (9th Cir. 1992); *Resources Limited Inc. v. Robertson*, 789 F. Supp. 1529 (D. Mont. 1991) *aff'd in part (NEPA, NFMA), rev'd in part (ESA)*, 8 F.3d 1394 (9th Cir. 1993) *amended* 35 F.3d 1300 (9th Cir. 1994); *Inland Empire Public Lands Council v. U.S. Forest Service*, 88 F.3d 754, 757 (9th Cir. 1996); *ONRC v. Lowe*, 109 F.3d 521, 529-30 (9th Cir. 1997); *National Audubon Society v. Hoffman*, 132 F.3d 7, 13 (2d Cir. 1997); *Swan View Coalition v. Turner*, 824 F. Supp. 923 (D. Mont. 1992); *Sierra Club v. Robertson*, 810 F. Supp. 1021 (W.D. Ark 1992), *aff'd*, 28 F.3d 753 (8th Cir. 1994); and *Seattle Audubon Society v. Lyons*, 871 F. Supp. 1291, 1317-18 and 1323-24 (W.D. Wash. 1994) *aff'd* 80 F.3d 1401 (9th Cir. 1996).

Judicial Review of Staged Decisionmaking: Ripeness -

During the mid 1990's a conflict developed between the Sixth, Seventh, Eighth, Ninth and Eleventh Circuits as to whether an LRMP without a project decision presents a justiciable controversy. In 1994 the Eighth Circuit, having noted the staged decisionmaking of plans and projects, held that a challenge to a plan by itself was not justiciable:

We are aware that on several occasions the Ninth Circuit has entertained challenges to forest plans similar to the Plan here in issue [citations deleted].... We have difficulty in discerning that a 'concrete and particularized' injury in fact was alleged in any of these cases. We therefore are not persuaded by these decisions, and we decline to apply them as a basis for finding that the appellants have standing to attack the Plan outside the context of a proposed site-specific action that causes or threatens to cause injury in fact.

Sierra Club v. Robertson, 28 F.3d 753, 759-60 (8th Cir. 1994). *See also, Wilderness Society v. Alcock*, 867 F. Supp. 1026 (N.D. Ga. 1994) *aff'd* 83 F.3d 386 (11th Cir. 1996) (finding the Eighth Circuit's reasoning more persuasive and holding that plaintiffs' claims against approval of the Cherokee LRMP did not present a justiciable controversy). *But see rulings to the contrary: Idaho Conservation League v. Mumma*, 956 F.2d 1508 (9th Cir. 1992) *Sierra Club v. Marita*, 46 F.3d 606 (7th Cir. 1995) and *Sierra Club v. Dombeck*, 105 F.3d 248 (6th Cir. 1997) *rev'd. Ohio Forestry Ass'n v. Sierra Club*, 118 S. Ct. 1665 (1998).

In 1998 the Supreme Court resolved the split in the circuits as to judicial review of Forest Plans with respect to timber harvest projections. *Ohio Forestry Ass'n v. Sierra Club*, 118 S. Ct. 1665. The Supreme Court's ruling was almost twenty-two years after the enactment of NFMA, ten years of judicial decisions regarding Forest Plan approval or other Plan level timber issues and six years after the filing of the litigation challenging the timber harvest aspects of the forest plan for the Wayne National Forest in Ohio. The Supreme Court held the Plan level timber issues (NFMA and NEPA) presented without a specific timber sale also at issue were not ripe for judicial review, reversed the Sixth Circuit's ruling, and instructed that the complaint be dismissed.

The Supreme Court described the nature of the Plan:

Although the Plan sets logging goals, selects the areas of the forest that are suited to timber production, 16 U.S.C. § 1604 (k), and determines which "probable methods of timber harvest," are appropriate, §1604(f)(2), it does not itself authorize the cutting of any trees. Before the Forest Service can permit the logging, it must: (a) propose a specific area in which logging will take place and the harvesting methods to be used, Plan 4-20 to 4-25; 53 Fed. Reg. 26835-26836 (1988); (b) ensure that the project is consistent with the Plan, 16 U.S.C. § 1604 (i); 36 CFR §219.10(e) (1997); (c) provide those affected by proposed logging notice and an opportunity to be heard, 106 Stat. 1419 (note following 16 U.S.C. § 1612); 36 CFR pt. 215, §217.1(b) (1997); Plan 5-2; (d) conduct an environmental analysis pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332 *et seq.* ; Plan 4-14, to evaluate the effects of the specific project and to contemplate alternatives, 40 CFR §§1502.14, 1508.9(b)

(1997), Plan 1-2; and (e) subsequently take a final decision to permit logging, which decision affected persons may challenge in an administrative appeals process and in court, see 106 Stat. 1419-1420 (note following 16 U.S.C. § 1612); 5 U.S.C. § 701 *et seq.* See also 53 Fed. Reg. 26834-26835 (1988); 58 Fed. Reg. 19370-19371 (1993). Furthermore, the statute requires the Forest Service to "revise" the Plan "as appropriate" 16 U.S.C. § 1604(a). Despite the considerable legal distance between the adoption of the Plan and the moment when a tree is cut, the Plan's promulgation nonetheless makes logging more likely in that it is a logging precondition; in its absence logging could not take place. See *ibid.* (requiring promulgation of forest plans); §1604(i) (requiring all later forest uses to conform to forest plans).

Ohio Forestry Ass'n v. Sierra Club, 118 S. Ct. at 1667-68.

The Supreme Court found the Plan approval unripe for judicial review because:

[a]s this Court has previously pointed out, the ripeness requirement is designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967).

In deciding whether an agency's decision is, or is not, ripe for judicial review, the Court has examined both the "fitness of the issues for judicial decision" and the "hardship to the parties of withholding court consideration." *Id.*, at 149. To do so in this case, we must consider: (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented. These considerations, taken together, foreclose review in the present case.

First, to "withhol[d] court consideration" at present will not cause the parties significant "hardship" as this Court has come to use that term. *Ibid.* For one thing, the provisions of the Plan that the Sierra Club challenges do not create adverse effects of a strictly legal kind, that is, effects of a sort that traditionally would have qualified as harm. To paraphrase this Court's language in *United States v. Los Angeles & Salt Lake R. Co.*, 273 U.S. 299, 309-310 (1927) (Brandeis, J.), they do not command anyone to do anything or to refrain from doing anything; they do not grant, withhold, or modify any formal legal license, power or

authority; they do not subject anyone to any civil or criminal liability; they create no legal rights or obligations. Thus, for example, the Plan does not give anyone a legal right to cut trees, nor does it abolish anyone's legal authority to object to trees' being cut.

Nor have we found that the Plan now inflicts significant practical harm upon the interests that the Sierra Club advances— an important consideration in light of this Court's modern ripeness cases. *See, e.g., Abbott Laboratories, supra*, at 152-154. As we have pointed out, before the Forest Service can permit logging, it must focus upon a particular site, propose a specific harvesting method, prepare an environmental review, permit the public an opportunity to be heard, and (if challenged) justify the proposal in court. *Supra*, at 2-3. The Sierra Club thus will have ample opportunity later to bring its legal challenge at a time when harm is more imminent and more certain. Any such later challenge might also include a challenge to the lawfulness of the present Plan if (but only if) the present Plan then matters, *i.e.*, if the Plan plays a causal role with respect to the future, then-imminent, harm from logging. Hence we do not find a strong reason why the Sierra Club must bring its challenge now in order to get relief. *Cf. Abbott Laboratories, supra*, at 152.

Nor has the Sierra Club pointed to any other way in which the Plan could now force it to modify its behavior in order to avoid future adverse consequences, as, for example, agency regulations can sometimes force immediate compliance through fear of future sanctions. *Cf. Abbott Laboratories, supra*, at 152-153 (finding challenge ripe where plaintiffs must comply with Federal Drug Administration labeling rule at once and incur substantial economic costs or risk later serious criminal and civil penalties for unlawful drug distribution); *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 417-419 (1942) (finding challenge ripe where plaintiffs must comply with burdensome Federal Communications Commission rule at once or risk later loss of license and consequent serious harm).

The Sierra Club does say that it will be easier, and certainly cheaper, to mount one legal challenge against the Plan now, than to pursue many challenges to each site-specific logging decision to which the Plan might eventually lead. It does not explain, however, why one initial site-specific victory (if based on the Plan's unlawfulness) could not, through preclusion principles, effectively carry the day. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 894 (1990). And, in any event, the Court has not considered this kind of litigation cost-saving sufficient by itself to justify review in a case that would otherwise be unripe. The ripeness doctrine reflects a judgment that the disadvantages of a premature review

that may prove too abstract or unnecessary ordinarily outweigh the additional costs of — even repetitive — post-implementation litigation. See, *e.g.*, *ibid.* ("The case-by-case approach . . . is understandably frustrating to an organization such as respondent, which has as its objective across-the-board protection of our Nation's . . . forests But this is the traditional, and remains the normal, mode of operation of the courts"); *FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980); *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 24 (1974); *Petroleum Exploration, Inc. v. Public Serv. Comm'n*, 304 U.S. 209, 222 (1938).

Second, from the agency's perspective, immediate judicial review directed at the lawfulness of logging and clearcutting could hinder agency efforts to refine its policies: (a) through revision of the Plan, *e.g.*, in response to an appropriate proposed site-specific action that is inconsistent with the Plan, see 53 Fed. Reg. 23807, 26836 (1988), or (b) through application of the Plan in practice, *e.g.*, in the form of site-specific proposals, which proposals are subject to review by a court applying purely legal criteria. *Cf. Abbott Laboratories*, 387 U. S., at 149; *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 201 (1983). *Cf. Standard Oil Co.*, 449 U.S., at 242 (premature review "denies the agency an opportunity to correct its own mistakes and to apply its expertise"). And, here, the possibility that further consideration will actually occur before the Plan is implemented is not theoretical, but real. See, *e.g.*, 60 Fed. Reg. 18886, 18901 (1995) (forest plans often not fully implemented), *id.*, at 18905-18907 (discussing process for amending forest plans); 58 Fed. Reg. 19369, 19370-19371 (1993) (citing administrative appeals indicating that plans are merely programmatic in nature and that plan cannot foresee all effects on forest); Appeal Nos. 92-09-11-0008, 92-09-11-0009 (Lodging II) (successful Sierra Club administrative appeals against Wayne timber harvesting site-specific projects). Hearing the Sierra Club's challenge now could thus interfere with the system that Congress specified for the agency to reach forest logging decisions.

Third, from the courts' perspective, review of the Sierra Club's claims regarding logging and clearcutting now would require time-consuming judicial consideration of the details of an elaborate, technically based plan, which predicts consequences that may affect many different parcels of land in a variety of ways, and which effects themselves may change over time. That review would have to take place without benefit of the focus that a particular logging proposal could provide. Thus, for example, the court below in evaluating the Sierra Club's claims had to focus upon whether the Plan as a whole was "improperly skewed," rather than focus

upon whether the decision to allow clearcutting on a particular site was improper, say, because the site was better suited to another use or logging there would cumulatively result in too many trees' being cut. See 105 F. 3d at 250-251. And, of course, depending upon the agency's future actions to revise the Plan or modify the expected methods of implementation, review now may turn out to have been unnecessary. See *Standard Oil Co.*, 449 U.S., at 242.

This type of review threatens the kind of "abstract disagreements over administrative policies," *Abbott Laboratories*, 387 U.S., at 148, that the ripeness doctrine seeks to avoid. In this case, for example, the Court of Appeals panel disagreed about whether or not the Forest Service suffered from a kind of general "bias" in favor of timber production and clear-cutting. Review where the consequences had been "reduced to more manageable proportions," and where the "factual components [were] fleshed out, by some concrete action" might have led the panel majority either to demonstrate that bias and its consequences through record citation (which it did not do) or to abandon the claim. *National Wildlife Federation*, 497 U. S., at 891. All this is to say that further factual development would "significantly advance our ability to deal with the legal issues presented" and would "aid us in their resolution." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 82 (1978).

Finally, Congress has not provided for preimplementation judicial review of forest plans. Those plans are tools for agency planning and management. The Plan is consequently unlike agency rules that Congress has specifically instructed the courts to review "preenforcement." Cf. *National Wildlife Federation, supra*, at 891; 15 U.S.C. § 2618 (Toxic Substances Control Act) (providing pre-enforcement review of agency action); 30 U.S.C. § 1276(a) (Surface Mining Control and Reclamation Act of 1977) (same); 42 U. S. C §6976 (Resource Conservation and Recovery Act of 1976) (same); §7607(b) (Clean Air Act) (same); 43 U.S.C. § 1349(c)(3) (Outer Continental Shelf Lands Act); *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 592-593 (1980). Nor does the Plan, which through standards guides future use of forests, resemble an environmental impact statement prepared pursuant to NEPA. That is because in this respect NEPA, unlike the NFMA, simply guarantees a particular procedure, not a particular result. Compare, 16 U.S.C. § 1604(e) (requiring that forest plans provide for multiple coordinated use of forests, including timber and wilderness) with 42 U.S.C. § 4332 (requiring that agencies prepare environmental impact statements where major agency action would significantly affect the environment). Hence a person with standing who is injured by a failure to comply with the NEPA

procedure may complain of that failure at the time the failure takes place, for the claim can never get ripier.

Ohio Forestry Ass'n. Sierra Club, 118 S. Ct. at 1670-72.

Shortly after the *Ohio Forestry Ass'n.* decisions, the Ninth Circuit took particular note of that decision and seemed to question its earlier rulings as to judicial review of a Forest Plan without a project decision. See, *ONRC Action v. BLM*, 150 F.3d 1132, 1136-37 (9th Cir. 1998):

The recent Supreme Court case, *Ohio Forestry Assoc., Inc. v. Sierra Club*, 140 L. Ed. 2d 921, 118 S. Ct. 1665 (1998), calls into doubt a plaintiff's ability to challenge an agency's adoption of a plan without site-specific actions as the focus of the challenge. In *Ohio Forestry*, the Court concluded that the Sierra Club's challenge to a resource management plan adopted by the United States Forest Service was not ripe because the plan did not in itself authorize the agency to enter into logging agreements without a further review process. 118 S. Ct. at 1670. Thus, the Court determined that it would be necessary for the Sierra Club to wait for more site-specific proposals under the plan. Id. at 1670-71. We need not decide, however, to what extent the law of this circuit conflicts with *Ohio Forestry*. We conclude on the facts of this case that no plan was adopted by BLM and thus ONRC has not identified a final agency action.

See also, *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1068 (9th Cir. 1998) where the Ninth Circuit stated in footnote 4, "We are cognizant that in *Ohio Forestry Assoc., Inc. v. Sierra Club*, 140 L. Ed. 2d 921, 118 S. Ct. 1665 (1998), the Supreme Court concluded that certain provisions of the Wayne National Forest Land and Resource Management Plan did not create legal obligations. See 118 S. Ct. at 1670."

In *Wilderness Society v. Thomas*, 188 F.3d 1130 (9th Cir. August 24, 1999) the Ninth Circuit held that a Forest Plan grazing suitability determination by itself was not justiciable, but that such determination was justiciable in the context of a challenge to authorizations of grazing permits for specific allotments.

In *Kern v. US BLM*, 38 F. Supp 2d 1174, 1179 (D. Ore. 1999) *appeal pending* (9th Cir.) the District Court in the District of Oregon stated, "To the extent that plaintiffs mount a challenge to the RMP [BLM Resource Management Plan], such a challenge is not ripe for review. Unless plan level directives are to go forward without any additional consideration which would result in imminent concrete injury, a challenge to the plan is not ripe. See *Ohio Forestry Ass'n Inc. v. Sierra Club*, 523 U.S. 726, 118 S. Ct 1665, 1673, 140 L. Ed. 2d 921 (1998)." (But see further litigation history of *Kern*, below)

See also *Ecology Center v. U.S. Forest Service*, 192 F. 3d 922, 925 (9th Cir. 1999), where the Ninth Circuit held that an LRMP's monitoring requirements are not ripe: "although the Forest Service's monitoring duty is mandatory under the Plan, legal consequences do not necessarily flow from that duty, nor do rights or obligations arise from it [citing *Ohio Forestry Ass'n*]." The Fifth Circuit came to the same conclusion, *Sierra Club v. Peterson*, 228 F. 3d 559, 566 (2000) (*rehearing en banc*). (See Section 13, below). In *Peterson*, the Fifth Circuit also held that a wholesale challenge to a "program" of timber management was not justiciable, even though individual timber sales identified as examples by plaintiffs were ripe.

In *Coalition for Sustainable Resources, Inc. v. Forest Service*, 259 F. 3d 1244 (10th Cir. 2001) the Tenth Circuit held not ripe plaintiffs' claims that the Forest Service has failed in its obligation under the ESA section 7 (a)(1) duty on the Medicine Bow National Forest to "utilize [its] authorities in furtherance of [the ESA] by carrying out programs for the conservation of endangered species" 16 USC 1536 (a)(1). Plaintiffs claim the Forest Service has a duty to increase timber harvests to provide more water to the Platte River downstream from the Forest, to benefit endangered species. The court ruled that "The Forest Service is currently a cooperating agency in developing a conservation strategy for the Platte River species and is also revising its forest plan for the Medicine Bow. Because the agency has adopted a reasonable timeframe to study this problem, given the complexity and urgency of the issues, we conclude that judicial review is not warranted at this time." *Id.* at 1246. It is not clear whether the court will consider the issue ripe upon approval of the Medicine Bow's revised LRMP.

The District Court for Alaska did review the merits of the NFMA, NEPA, and other claims regarding the Revised Tongass LRMP in the consolidated decision for *Sierra Club v. Lyons*, No. J00-0009 CV (JKS) and *Alaska Forest Ass'n v. USDA*, No. J99-0013 CV (JKS) (March 30, 2001), having earlier rejected motions to dismiss on grounds of ripeness.

The requirement that a challenge be ripe has been applied to the RPA. In *Southwest Center for Biological Diversity v. Glickman*, 98-3444 (N.D. Cal. Sept. 22, 1999) plaintiffs alleged that they were injured by the Forest Service's failure to complete the 1995 RPA Program. Relying upon the Supreme Court's ruling in *Ohio Forestry Ass'n v. Sierra Club*, the district court agreed with the government's arguments, finding that

[p]laintiffs complain of no site-specific action that would be authorized or, for that matter, prohibited if the 1995 RPA Program were finalized. Ultimately, both kinds of documents are merely "tools for agency planning and management." 118 S. Ct. at 1672. Furthermore, plaintiffs do not show that any particular site-specific action depends on the issuance, or is prevented by the non-issuance, of the Program. This is not surprising because the Program is far more attenuated from any site-specific action than even the forest plan in *Ohio Forestry*. While the

forest plan in that case at least pertained to a specific National Forest, the 1995 Program would not relate to any particular region. In addition, any forest plan that might be developed based on a finalized 1995 RPA Program would still not be controlled by the Program.

Lack of ripeness has also defeated an ESA challenge regarding oil and gas leases on the Shoshone National Forest "because the regulatory process [in the instant case] only reached step five the sale of the leases - as opposed to the end of step six, the issuance of the leases - the court . . . holds that the plaintiffs' suit is premature." *Wyoming Outdoor Council v. Dombeck*, Civ. No. 00-0725 (RMU) (D.D.C. March 27, 2001).

Similarly, in *Park Lake Resources Limited Liability Co. v. USDA*, 197 F. 3d 448, (10th Cir. 1999) an APA challenge to the designation of a Research Natural Area (RNA) was held not ripe for review, because plaintiffs have not submitted a mining plan of operations that has been rejected; plaintiffs failed to show that the RNA designation alone had caused them an injury. In a challenge to a ski area master plan, the NFMA claims were held not to be ripe, as no action would occur until site-specific decisions were made, in *Friends of Mt. Hood v. U.S. Forest Service*, 2001 U.S. Dist. LEXIS 7829 (D. Ore. June 4, 2001); 2000 U.S. Dist. LEXIS 18309 (D. Ore. December 15, 2000); the Government did not argue ripeness with respect to the NEPA claims.

In one case since *Ohio Forestry Ass'n v. Sierra Club*, a district court has held that a challenge to an LRMP can be brought. In *Montana Snowmobile Ass'n v. Wildes*, (D. Mont. February 21, 2000), the district court ruled that the Lolo LRMP, not a letter closing the areas twelve years after approval of the LRMP, was the "final agency action on motorized use in [specific management areas]." The Court distinguished this situation from that in *Ohio Forestry Ass'n v. Sierra Club*, "since [plaintiffs'] legal right to operate snowmobiles were impact immediately upon adoption of the Forest Plan. Once the Forest Plan was adopted, using snowmobiles in areas —1 and —12 was illegal." The court concluded that the December, 1998 letter

was not an amendment to the plan nor was it a new decision. Rather, the letter reiterates that the decision to proscribe motorized use in the areas was made in 1986 when the Plan was adopted. The overdue enforcement of the Forest Plan is not an amendment to the Plan and it does not change the Plan.

The court then concluded that since the "triggering event" was the adoption of the Record of Decision for the Plan, in April, 1986, the six year statute of limitations in the APA barred plaintiffs' suit. The Ninth Circuit did not hold the statute of limitations applied, but upheld the closure order, ruling that closure was "compelled by law," as it was "required by the Forest Plan." (*Montana Snowmobile Ass'n v. Wildes*, 2002 U.S. App. LEXIS 2072 (9th Cir. February 5, 2002).

NEPA Challenges to Plans -

Judicial review of NEPA claims in the context of forest plans has presented specific issues: what is the standard of adequacy for programmatic NEPA documentation for plans - and is programmatic NEPA documentation ripe for review? Even before the Supreme Court's decision in *Ohio Forestry Ass'n* the Ninth Circuit had recognized that LRMP EISs are "an early stage, where the EIS is 'merely' programmatic." *Idaho Conservation League v. Mumma*, 956 F.2d at 1523. The Ninth Circuit had also held that when a programmatic EIS "is prepared, site-specific impacts need not be fully evaluated until a 'critical decision' has been made to act on site development." *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1357 (9th Cir. 1994).

In *Resources Limited v. Robertson*, 35 F.3d 1300, 1306 (9th Cir. 1994) the Ninth Circuit had stated:

We do not require non-Federal cumulative impacts in this programmatic EIS, on the condition that the Forest Service must analyze such impacts, including possible synergistic effects from implementation of the Plan as a whole, before specific sales.

and

We are convinced that such specific analysis [water quality] is better done when a specific development action is to be taken, not at the programmatic level. The analysis will be conducted before each particular project, and projects not found to meet Montana water quality standards "will be redesigned, rescheduled, or dropped."

The Supreme Court's curious paragraph in *Ohio Forestry Ass'n* regarding NEPA and ripeness has been cause for differing conclusions from the courts. Those sentences would appear to state a distinction between NEPA claims and NFMA claims with respect to ripeness of programmatic EISs and Plans, except that in the *Ohio Forestry Ass'n* decision itself the Court vacated both the NEPA and NFMA claims for lack of ripeness. The Court stated:

[T]he Plan, which through standards guides future use of forests, [does not] resemble an environmental impact statement prepared pursuant to NEPA. That is because in this respect NEPA, unlike the NFMA, simply guarantees a particular procedure, not a particular result. Compare 16 U.S.C. sec. 1604 (e) requiring that forest plans provide for multiple coordinated *use* of forests, including timber and wilderness) with 42 U.S.C. sec. 4332 (requiring that agencies prepare environmental impacts statements where major agency action would significantly affect the

environment). Hence a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get ripener.

Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 737 (1998).

The adequacy of the EIS for the Northwest Forest Plan amendments was found justiciable, although plaintiffs did not claim injury from any specific project, in *Hanson v. U.S. Forest Service*, No. 99-1050 (W.D. Wash. April 5, 2001). The district court held that

a final agency action need not have occurred, because the Supreme Court and the Ninth Circuit [in] have held that NEPA is an exception to the final agency action rule and is ripe at the time the alleged failure to act occurs. As for whether their grievance must be site-specific or may be with the entire plan, the Court . . . [concludes] that a plaintiffs may object to an entire plan. Because NEPA requires a procedure rather than a specific result, there is no need to wait for site-specific decisions. The claims are ripe for judicial review.

Ibid., Order Regarding Motions for Summary Judgment, at 5.)

Similarly, in *Center for Biological Diversity v. Dombeck*, 2001 U.S. Dist. LEXIS 22158, (D. Ariz. June 15, 2001) the district court denied the Government's motion to dismiss a lawsuit in which plaintiffs claimed that the EIS for amendments to eleven forest plans was inadequate. The court held that plaintiffs' claims were ripe, pursuant to "the plain language of Ohio Forestry as NEPA requires a procedure, rather than a specific result," and that plaintiffs' procedural injury was sufficient to afford them standing. See also the consolidated decision for *Sierra Club v. Lyons*, No. J00-0009 CV (JKS) and *Alaska Forest Ass'n v. USDA*, No. J99-0013 CV (JKS) (March 30, 2001).

In contrast, the district court denied a preliminary injunction where plaintiffs challenged the "timber management program" in a number of Sierra Nevada forests on both NEPA and NFMA grounds. *Earth Island Institute v. U.S. Forest Service*, Case No. CIV. S-00-2257 WBS/ DAD (E.D. Cal., PI denied February 5 and March 6, 2001; affirmed, 2001 WL 1173249 (9th Cir. October 3, 2001). The district court held that,

[T]he only final agency action relevant to [the claims in this case] is the adoption as amendments to the LRMPs for the region, and the court cannot review such programmatic decisions. See Ohio Forestry Association, Inc. v. Sierra Club, 523 U.S. 726, 739 (1998) (holding that challenges to forest plans, based on NEPA and NFMA claims, are not ripe for judicial review because they do not alter anyone's legal rights.)

The Ninth Circuit, with no more comment than emphasizing the deference it gives to district courts' preliminary injunction rulings, upheld this decision.

According to the District of Columbia Circuit Court of Appeals, whether NEPA documentation is ripe for review depends upon whether the agency has reached the final point of decisionmaking, where there will be on-the-ground action. *Wyoming Outdoor Council v. U.S. Forest Service*, 165 F.3d 43, 49 (D.C. Cir. 1999). The court held that adequacy of an EIS for oil and gas leasing was not justiciable until site-specific leasing decisions—"we conclude that WOC has not established the irreversible and irretrievable commitment of resources necessary to establish ripeness." The court concluded that, as in *Ohio Forestry Ass'n*, the possibility that further consideration will actually occur before implementation was not theoretical but real. *Ohio Forestry Ass'n*, 118 S. Ct. at 1671. This decision was the basis for the District Court's decision in a subsequent case that held ESA claims regarding leasing projects was not ripe, *Wyoming Outdoor Council v. Dombeck*, Civ. No. 00-0725 (RMU) (D.D.C. March 27, 2001).

In holding NEPA and ESA claims against the November, 2000 planning rule were not ripe, the District Court for the Northern District of California interpreted the *Ohio Forestry Ass'n* in this way:

[D]espite the language [in the NEPA paragraph of the Ohio Forestry Ass'n decision] the Court held that the Sierra Club's entire challenge to the forest plan was unripe, including its NEPA claims. It appears that the Court's intent was to defer all the Sierra Club's claims until such time as "the present Plan matters, i.e., [until] the Plan plays a causal role with respect to the future, then-imminent, harm from logging." One way to understand this apparent ambiguity is that, while a procedural injury may be ripe at the moment the failure to follow the relevant procedure occurs, this principle presupposes that the plaintiff has standing to bring the challenge in the first instance. In other words, if the plaintiff's injury from the challenged agency action is sufficiently imminent to support standing, then the plaintiffs' procedural challenge to the agency's failure to follow correct procedure is ripe.

Citizens for Better Forestry v. USDA, No. C 01-0728 MJJ (N. D. Cal. February 20, 2002), Slip Opinion at 10-11 (citations omitted), *appeal filed*.

The Ninth Circuit recently ruled, in the context of a lawsuit challenging BLM projects, that the BLM's Resource Management Plan is subject to judicial review for NEPA compliance. In ruling that the Plan was inadequate for lack of disclosure of the effects of about Port Orford Cedar guidelines, the court seemed to have "raised the bar" on the amount of cumulative effects analysis required for a programmatic EIS for a Plan: ‘

Kern v. BLM, 284 F. 3d. 1062, 1071-72; 1077-78 (9th Cir. 2002).

4. Ninth Circuit Applies Staged Approach to NFMA/NEPA but not to NFMA/ESA.

With regard to NFMA and NEPA, the courts have held that the Plan level is not the point of critical decision or irretrievable commitment and that resource output projections are just predictions, not mandates for development. Congress requires notice, comment and administrative appeal before implementation of the LRMPs (project decisionmaking). 16 USC 1612 note (106 Stat. 1419) "proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans" and 36 CFR 215.

In contrast, the Ninth Circuit has held LRMPs are "actions" with respect to the ESA. In *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1055 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1793 (1995) the Ninth Circuit relied on the "allowable sale quantity of timber as well as production targets and schedules for forage, road construction, and other economic commodities" to find that the existence of the LRMP is action (action authorized, funded or carried out) for purposes of ESA Section 7 consultation. *See also*, *Resources Limited v. Robertson*, 35 F.3d 1300 (9th Cir. 1994); *Pacific Rivers Council v. Thomas*, 873 F. Supp. 365 (D. Id. 1995); *Silver v. Thomas*, 924 F. Supp. 976 (D. Ariz. 1995); and *Kentucky Heartwood v. Worthington* (E.D. Ky. June 18, 1998). The *Pacific Rivers* cases (2 LRMPs in Oregon and 6 in Idaho - issued prior to salmon listing) and the *Silver* case (11 LRMPs-issued prior to Mexican spotted owl listing) dealt with multiple LRMPs and new species listing.

The Ninth Circuit's view of the nature of the LRMP for ESA Section 7 consultation is at odds with Ninth Circuit rulings regarding NEPA and NFMA. *See*, *National Wildlife Federation v. Coston*, 773 F.2d 1513, 1518 (9th Cir. 1985); *City of Tenakee Springs v. Block*, 778 F.2d 1402, 1406 (9th Cir. 1985); *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1511-12 (9th Cir. 1992); *Resources Ltd, Inc. v. Robertson*, 789 F. Supp. 1529 (D. Mont. 1991) *affirmed in part (NEPA, NFMA), reversed in part (ESA)*, 35 F.3d 1394 (9th Cir. 1994); *ONRC v. Lowe*, 109 F.3d 521, 529-530 (9th Cir. 1997). *See also*, *Cronin v. USDA*, 919 F.2d 439, 447-49 (7th Cir. 1990); *Swan View Coalition v. Turner*, 824 F. Supp. 923, 935 (D. Mont. 1992); *Sierra Club v. Robertson*, 810 F. Supp. 1021, 1026 (W.D. Ark 1992), *aff'd* 28 F.3d 753 (8th Cir. 1994) (Eighth Circuit found no standing and alternatively affirmed lower court on the merits); *Sierra Club v. Espy*, 38 F.3d 792 (5th Cir. 1994).

In the 1995 Petition for Writ of Certiorari seeking Supreme Court review of *Pacific Rivers Council v. Thomas* the Solicitor General stated:

Plan-level consultation may not be compelled by judicial decree ... where the plan does not have self executing features (i.e. the plan does not direct or authorize site-specific activities that will not be subject to further scrutiny).

Thomas v. Pacific Rivers Council, Feb. 3, 1995 Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit seeking Supreme Court review of *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994), *cert. denied* 131 L.Ed. 721, 63 U.S.L.W. 3771 (April 24, 1995). The continued viability of the *Pacific Rivers Council* and *Silver* cases as to Plan level ESA consultation and programmatic injunctions will have to be evaluated in light of the Supreme Court's ruling in *Ohio Forestry Ass'n v. Sierra Club*, 118 S. Ct. 1665 (1998).

While the Ninth Circuit compels ESA consultation on programmatic Forest Plans the Eighth and Eleventh Circuits have ruled that LRMPs are not even subject to judicial review on NFMA and NEPA grounds until a project decision is at issue. The Eighth Circuit in *Sierra Club v. Robertson* found Forest Plans are not "action-forcing" documents, but instead establish a protective measures that limits future actions. If a Forest Plan represents an "action" at all, it most closely resembles a "beneficial action" that limits future activities. The 1988 preamble to the ESA consultation regulations state that actions that impose beneficial restrictions on future activities, but do not authorize any habitat-disturbing activities, categorically qualify for a determination of "not likely to adversely affect." Such a determination does not require formal ESA consultation. *See*, 51 Fed. Reg. at 19948; 50 CFR 402.13.

5. Forest Service Regulatory System Requires Site-Specific Decisions in Addition to LRMPs.

The Forest Service's regulatory scheme in 36 CFR Part 200 contains several examples of the systematic, multi-level nature of national forest management and decisionmaking. The LRMP is a controlling consideration, but project decisions (irretrievable commitment of resources) are only made after site-specific review. Ongoing activities and uses are regulated through the continuing operation of 36 CFR 200-297. Examples of site-specific review before making the "irretrievable commitment" within 36 CFR Part 200 include reviews of: hardrock minerals operating plans (228.4); proposals for land exchanges (254.10), timber sales (223.30), special uses (251.54), closure orders and prohibitions to protect health, safety and natural resources (261.50) and uses in wilderness (293.3), off road motor vehicle use regulation and closures (295.5), authorization of grazing (222.2), and interim suspension of decisionmaking for road construction and reconstruction, (212.13, 64 Fed. Reg. 7290 (February 12, 1999)). These site or activity specific decisions must be consistent with applicable Forest Plan direction or the Plan may be amended to permit the activity. These site-specific or activity

regulations provide for notice and comment and most decisions authorizing or prohibiting use are subject to administrative appeal under 36 CFR 215 or 251.80.

6. Project Level May Have Multiple Steps.

Project decisionmaking level (level beneath the LRMP) is not always a single step, but may have stages also. Multi-stage decisionmaking at the project level is illustrated by:

- a. grazing allotment management plans and grazing permits (36 CFR 222.1 to 222.3): Chief's Appeal Decision Toiyabe National Forest LRMP #1694 and 1696, (May 3, 1988) and Proposed Rule, 36 CFR 222, 222.3, 59 Fed Reg. 22074, 22076-78, 22093 (April 28, 1994);
- b. multi-stage recreational development, such as ski areas: *Robertson v. Methow Valley Citizens Council*, 490 U.S. 322, 336-37 (1989); *Friends of Mt. Hood v. U.S. Forest Service*, 2001 U.S. Dist. LEXIS 7829 (D. Ore. June 4, 2001); 2000 U.S. Dist. LEXIS 18309 (D. Ore. December 15, 2000).
- c. hardrock mining operating plans for prospecting, exploration or development (36 CFR 228.1 to 228.15): *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 683-84 (D.C. Cir. 1982);
- d. the multiple decision points in oil and gas leasing, exploration and development (31 USC 226 (g) and (h)). *See*, USDA Oil and Gas Resource Regulations, 36 CFR 228, 228.102 (55 Fed. Reg. 10423, March 21, 1990) and Chief's Appeal Decision #0192, pp. 5-7, October 1, 1990 (Bridger-Teton LRMP); Chief's Appeal Decision #2042, pp. 5-7, October 1, 1990 (Custer LRMP). *See*, *Wyoming Outdoor Council v. U.S. Forest Service*, 165 F.3d 43 (D.C. Cir. 1999) NEPA claims against EIS regarding oil and gas leasing not reviewable until site-specific lease decisions.

7. Judicial Review of Project Level.

Administrative appeal or judicial review of higher levels of planning (Regional Guide or LRMP) does not preclude judicial review of project decisions. *See*, *Cronin v. USDA*, 919 F.2d 439 (7th Cir. 1990); *Sierra Club v. Marita*, 46 F.3d 606, 613, fn 5 (7th Cir. 1995); *Glisson v. U.S. Forest Service*, 876 F. Supp. 1016 (S.D. Ill. 1993), *aff'd* 51 F.3d 275 (Table Citation) (7th Cir. 1995); *Northern Alaska Environmental Center v. Lujan*, 961 F.2d 886, 891 (9th Cir. 1992); *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1357-58 (9th Cir. 1994); *Smith v. U.S. Forest Service*, 33 F.3d 1072, 1075 (9th Cir. 1994); *Inland Empire Public Lands Council v. Schultz*, 992 F.2d 977 (9th Cir. 1993); *Preston v. Yeutter* (D. Mont. August 24, 1993) *aff'd* 33 F.3d 59 (Table Citation) (9th Cir.

1994); *Sierra Club v. Espy*, 38 F.3d 792 (5th Cir. 1994); *Churchwell v. Robertson*, 748 F. Supp. 768 (D. Idaho 1990); and, 844 F. Supp. 1107, 1116 (W.D. Va. 1994) *aff'd* 61 F.3d 900 (Table Citation) (4th Cir. 1995) (some LRMP issues can be raised at project level and some cannot); *Ayers v. Espy*, 873 F. Supp. 455 (D. Colo. 1994); *Friends of the Bitterroot Inc. v. U.S. Forest Service*, 900 F. Supp. 1368 (D. Mont. 1995). These cases all illustrate how LRMP and NFMA issues may be raised in challenges to 'critical decisions' which change the environmental status quo (project decisions).

For a contrasting view regarding project level review *see, Sharps v. U.S. Forest Service*, 28 F.3d 851 (8th Cir. 1994); *Environment Now! v. Espy*, 877 F. Supp. 1397 (E.D. Cal. 1994); *Tulare County Audubon Society v. Espy* (E.D. Cal. August 10, 1993) Slip Op. 15-17; and *Hells Canyon Preservation Council v. U.S.*, 883 F. Supp. 534 (D. Ore. 1995), citing *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1516 (9th Cir. 1992) and finding "time to challenge an EIS for a Forest Plan is when the approval is given to the Plan, not later when a project is proposed." In *Inland Empire Public Lands Council v. U.S. Forest Service*, 88 F.3d 754, 760-61 (9th Cir. July 3, 1996) the Ninth Circuit rejected the reasoning of *Sharps* and *Environment Now!* in conducting judicial review upholding project level compliance with 36 CFR 219.19 (viability regulation).

The courts have repeatedly held that project decisions are reviewable, even if the plaintiff did not appeal or litigate the programmatic level. *Smith v. U.S. Forest Service*, 33 F.3d 1072, 1075 (9th Cir. 1994) and *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1357-58 (9th Cir. 1994). Congress provided a statutory right of notice, comment and administrative appeal of project decisions in the Section 322 of FY 93 Interior Appropriations Act (16 USC 1612 note, 106 Stat. 1419). In Section 322(d)(4) Congress connects the project notice, comment and administrative appeal process to Administrative Procedure Act judicial review of project decisions.

Congress requires administrative appeal of projects before a person may challenge a plan or project: "a person shall exhaust all administrative appeal procedures established by the Secretary or required by law before a person may bring an action in a court of competent jurisdiction" against any USDA defendant. 7 USC 6912(e), Federal Crop Insurance Reform and Department of Agriculture Reorganization Act 1994, 108 Stat. 3178, 3211 (1994). *See, Sierra Club v. Robertson*, 28 F.3d 753, 759 (8th Cir. 1994) (when a site-specific action is proposed and all administrative appeals are exhausted, persons threatened by an imminent action may seek judicial review of the proposed action) and *Ohio Forestry Ass'n v. Sierra Club*, 118 S. Ct. 1665, 1668 and 1671 (1998). In *Kleissler v. U.S. Forest Service* the Third Circuit relied upon 7 USC 6912(e) and 36 CFR part 215 to hold that plaintiffs may not challenge agency project decisions in court based on issues that plaintiffs had not raised in their administrative appeals of those decisions (3rd Cir. June 30, 1999). Citing *Ohio Forestry Ass'n v. Sierra Club*, the court also held that plan-level issues would not be justiciable unless they were first raised in the project administrative appeals.

8. Multiple-Use Sustained-Yield Mandate.

National Forest System lands are managed under a Congressional multiple-use and sustained-yield mandate. 16 USC 528-531, 16 USC 1604(e), 1607 and 1609. The courts have distinguished the multiple-use and sustained-yield mandate of national forests from other Congressional management mandates, such as national parks. *See, Cronin v. United States Department of Agriculture*, 919 F.2d 439, 444 (7th Cir. 1990) ("The national forests, unlike national parks, are not wholly dedicated to recreational and environmental values."); *Krichbaum v. Kelley*, 844 F. Supp. 1107, 1115 (W.D. Va. 1994) ("Every pro diversity command in the regulatory scheme is qualified to permit multiple-use goals"); *Resources Ltd. v. Robertson*, 789 F. Supp. 1529, 1540 (D. Mont. 1991) *aff'd in part and reversed in part* 35 F.3d 1300 (9th Cir. 1994) ("the Forest Service is faced with a nearly impossible task of serving many different interests"); *Sierra Club v. Espy*, 38 F.3d 792, 800 (5th Cir. 1994) ("Maintenance of a pristine environment where no species' numbers are threatened runs counter to the notion that NFMA contemplates both even- and uneven-aged timber management.... That protection means less than preservation of the status quo but more than eradication of species suggests that this is just the type of policy-oriented decision Congress wisely left to the discretion of experts--here, the Forest Service.").

9. Limited Judicial Review of Forest Service Decisions.

The complex and broad nature of the congressional delegation to the Secretary of Agriculture under the Property Clause, Article IV, Section 3, Clause 2, U.S. Constitution, to plan, manage, and administer uses of the national forests has generally led to limited judicial review. *See, Griffin v. Yeutter*, Civil No. 88-1415f (D. Cal. November 1, 1989) 20 ELR 20400 (1990), pages 3-4, *aff'd Griffin v. Yeutter* [sic] 944 F.2d 908 (9th Cir. 1991 (Table Citation) limited judicial review of Cleveland LRMP approval; *Sierra Club v. Hardin*, 325 F. Supp. 99, 123 (D. Alaska 1971), *rev'd on other grounds sub nom Sierra Club v. Butz*, 3 ELR 20,292 (9th Cir. 1973), limited review of preference between multiple uses; *Hi-Ridge Lumber Co. v. United States*, 443 F.2d 452, 455 (9th Cir. 1971), court deference to rejection of timber sales bids; *Ness Investment Corp. v. USDA*, 512 F.2d 706, 712 (9th Cir. 1975), court refrained from second guessing special use permit decision; *Perkins v. Bergland*, 608 F.2d 803 (9th Cir. 1979), limited review of grazing decision - the court stated that MUSYA "breathes discretion at every pore"; *United States v. Means*, 858 F.2d 404, 410 (8th Cir. 1988) *cert denied*, 492 U.S. 910 (1989) denial of special-use permit sustained by agency record; *Big Hole Ranchers Ass'n v. U.S. Forest Service*, 686 F. Supp. 256, 264 (D. Mont. 1988), Forest Service has wide discretion to weigh and decide proper uses; *Resources Limited, Inc. v. Robertson*, 789 F. Supp. 1529, 1540 (D. Mont. 1991) *aff'd in part and reversed in part*, 35 F.3d 1300 (9th Cir. 1994) Forest Service must consider the relevant factors, but the court is not to substitute its judgment as to alternative to select for Forest Plan; *Northwest Forest Resource Council v. Glickman*, 97 F.3d 1161 (9th Cir. 1996) court deferred to the Secretaries' interpretation of "known to be nesting" in Section 2001(k)(2) of 1995 Rescissions Act. *See also*, Wilkinson and Anderson, 64

Oregon L. Rev. 1, 52-75 (1985) for overview of judicial review of Forest Service decisions.

10. Project Consistency With LRMP.

The consistency requirement of NFMA, 16 USC 1604(i) and 36 CFR 219.10(e), acts as a control on all contracts, permits, licenses, resource plans and activities that arise in the planning area of the LRMP. Somewhat like a zoning ordinance, the LRMP allows or prohibits some uses and establishes standards and guidelines which regulate future resource use. The consistency requirement of NFMA requires the Forest Service to measure proposed activities against the forest-wide standards and guidelines and management area prescription of the LRMP. *See*, ANPR, 56 Fed. Reg. at 6519-20. Once the plan is in effect, a proposed action inconsistent with the LRMP direction may not be taken. The LRMP may be amended (36 CFR 219.10(f)) to allow the action. *See*, Preamble, 55 Fed. Reg. 10423, 10430 (March 21, 1990) 36 CFR 228.100 USDA Oil and Gas Resource Regulation for discussion of LRMP consistency. *See also*, Wilkinson and Anderson, 64 *Oregon L. Review* 1, 10-12. The 1991 ANPR preamble discusses the Forest Plan consistency test at 56 Fed. Reg. 6519-20. The 1995 Proposed 36 CFR 219.11 is discussed at 60 Fed. Reg. 18909. The NFMA Planning Regulations consistency provision is discussed in the Preamble for the Proposed Rule, 64 Fed. Reg. 54074, at 54083 and for the 2000 rule at 36 CFR 219.10, 64 Fed. Reg. at 54101 (October 5, 1999).

In *Forest Guardians v. Dombeck*, 967 F. Supp. 1536 (D. Ariz. 1997) *aff'd* 131 F.3d 1309 (9th Cir. 1997) the court held that the LRMP amendments regarding standards and guidelines for the Mexican spotted owl and northern goshawk did not have to be applied retroactively to existing projects and previous project decisions.

11. Diversity of Plant and Animal Communities.

The National Forest Management Act requires the Secretary of Agriculture to promulgate regulations "specifying guidelines for land management plans developed to achieve the goals of the Program which . . . (B) provide for a diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple use objectives" 16 USC 1604(g)(3)(B). The diversity provision is one of ten subsections of direction from Congress regarding the promulgation of planning regulations for Forest Plans to provide for multiple use and sustained yield. In accord with NFMA, the Secretary promulgated regulations which address the diversity provision. 36 CFR 219.3, 219.19, 219.26, 219.27(a)(5), 219.27(a)(6) and 219.27(g).

The fish and wildlife resource regulation, 36 CFR 219.19, is one part of the planning regulation to provide for diversity within multiple use objectives. The fish and wildlife resource regulation has seven provisions designed to meet the goal of managing National Forest habitat for viable populations of existing and non-native vertebrate species in the

planning area. Through 36 CFR 219.19 and other provisions of the planning regulations Forest Plans provide for diversity of plant and animal communities within multiple use objectives. The Forest Service uses the planning process and ongoing monitoring, evaluation and adjustment of fish and wildlife standards to prevent listing of species under the Endangered Species Act and avoid extirpation of species from its actions.

The NFMA diversity provision and the fish and wildlife resource regulation establish a goal to provide habitat for the continued persistence of vertebrate species in the planning area. The goal is met by following the provisions of 36 CFR 219.19(a)(1) through (a)(7). The bottom line is that the Forest Service may not adopt a plan that it knows or believes would through possible future Forest Service actions extirpate a vertebrate species. Viability assessments of all vertebrate species are not required. Compliance with 36 CFR 219.19 is not subject to precise numerical interpretation and cannot be set at a single threshold. *See*, Record of Decision, April 13, 1994 for amendments to Forest Plans in range of the northern spotted owl, pp. 42-47.

The fish and wildlife resource regulation does not require species-specific assessments to support a finding that a proposal is consistent with its terms. Rather the decision-maker may place reasonable reliance upon assessments of (1) species with habitat needs that are essentially the same; (2) a group of species generally thought to perform the same or similar ecosystem functions; and/or (3) the continued integrity and function of ecosystem(s) in which a species is found. Flexibility in selecting methodology is especially appropriate for species assessments, given the expertise and knowledge of local forest officials concerning the lands they manage, the variety of complex issues involved, and the often-limited resources available. As Judge Dwyer concluded, the system for providing for diversity "must be designed by the agencies, not by the courts" and a court cannot require a "degree of certainty that is ultimately illusory." *Seattle Audubon Society v. Lyons*, 871 F. Supp. 1291, 1321 (W.D. Wash. 1994) *aff'd* 80 F.3d 1401 (9th Cir. 1996).

The courts have upheld Forest Plans or project decisions from challenges on NFMA diversity and the fish and wildlife resource regulation grounds. *Sierra Club v. Espy*, 38 F.3d 792 (5th Cir. 1994); *Seattle Audubon Society v. Lyons*, 871 F. Supp. 1291, 1315 (W.D. Wash. 1994) *aff'd* 80 F.3d 1401 (9th Cir. 1996); *Sierra Club v. Robertson*, 784 F. Supp. 593, 609 (W.D. Ark. 1991); and 810 F. Supp. 1021, 1027-28 (W.D. Ark. 1992) *case dismissed and aff'd in the alternative* 28 F.3d 753 (8th Cir. 1994); *ONRC v. Lowe*, 836 F. Supp. 727 (D. Ore. 1993) *aff'd* 109 F.3d 521 (9th Cir. 1997); *Glisson v. U.S. Forest Service*, 876 F. Supp. 1016, 1027-1029 (S.D. Ill. 1993), *aff'd* 51 F.3d 275 (Table Citation) (7th Cir. 1995); *Sierra Club v. Marita*, 843 F. Supp. 1526 (E.D. Wis. 1994) and *Sierra Club v. Marita*, 845 F. Supp. 1317 (E.D. Wis. 1994) *aff'd* *Sierra Club v. Marita*, 46 F.3d 606 (7th Cir. 1995); *Krichbaum v. Kelley*, 844 F. Supp. 1107 (W.D. Va. 1994) *aff'd* 61 F.3d 900 (Table Citation) (4th Cir. 1995); *Seattle Audubon Society v. Moseley*, 80 F.3d 1401 (9th Cir. 1996); *Inland Empire Public Lands Council v. U.S. Forest Service*, 88 F.3d 754 (9th Cir. 1996); *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1153-1154 (9th

Cir. 1998); *Colorado Environmental Coalition v. Dombeck*, 185 F.3d 1162 (10th Cir. 1999); *American Lands Alliance v. Kenops*, 1999 U.S. Dist. Lexis 13910 (D. Or. Aug. 30, 1999); *Indiana Forest Alliance v. U.S. Forest Service*, 2001 U.S. Dist. LEXIS 11996 (S.D. Ind. July 5, 2001) *appeal pending*; *Northwoods Wilderness Recovery, Inc. v. U.S. Forest Service*, (W.D. Mich. September 25, 2001); *Northwoods Wilderness Recovery, Inc. v. U.S. Forest Service*, 2001 U.S. Dist. LEXIS 15973 (W.D. Mich.); *Center for Biological Diversity v. Andre*, CIV-01-1106 JP/WWE (D. N.M., November 29, 2001) (denial of motion for preliminary injunction).

Some courts have read the "viability" provision as only applying in the context of plan approval, and not as a limiting factor in project decisionmaking. *Sharps v. United States*, 28 F.3d 851, 855 (8th Cir. 1994); *Environment Now! v. Espy*, 877 F. Supp. 1397, 1422 (E.D. Cal. 1994) citing *Tulare County Audubon Society v. Espy* CV-90-628-OWW; *Superior Wilderness Action Network v. Forest Service* 2002 U.S. Dist. LEXIS 1703 (D. Minn.). The better view is expressed in *Inland Empire Lands Council v. U.S. Forest Service*, 88 F.3d 754, 760-61 (9th Cir. 1996) and *Sierra Club v. Martin*, 168 F.3d 1 (11th Cir. 1999) holding that 36 CFR 219.19 does apply in a project context or that Forest Plan compliance is reviewable through a project. In *Martin* the Eleventh Circuit stated:

We agree that the regulations refer to the formulation of Forest Plans rather than to specific projects proposed under already enacted Forest Plans. Section 219 begins by explicitly stating that '[t]he regulations in this subpart set forth a process for developing, adopting, and revising land and resource management plans for National Forest System,' 36 CFR 219.1, and the regulations make repeated reference to the Forest Plan's approval. However, the planning process does not end with the Forest Plan's approval. The obligations of the Forest Service with regard to the Forest Plan continue throughout the Plan's existence. The regulations require the Forest Service monitor the plan's impact and, when necessary, revise the plan. (Footnote omitted) Section 219.10(g) requires the forest plans be revised every ten years and also whenever the Forest Supervisor 'determines that conditions or demands in the area covered by the plan have changed significantly or when changes in . . . policies, goals, objectives would have a significant effect on forest level programs.' 36 CFR 219.10(g). One of the purposes of this constant oversight is to establish benchmarks in order to better assess the impact of specific actions upon the forest environment. *Sierra Club* is therefore entitled to challenge the Forest Service's compliance with the Plan as part of its site-specific challenge to the timber sales. See, *Wilderness Society v. Alcock*, 83 F.3d 386, 390 (11th Cir.1996) (court will not hear challenge to Forest Plan until site-specific action is proposed.) A contrary result would effectively make it impossible for a plaintiff to even seek review of the Forest Service's compliance with a Forest Plan.

Sierra Club v. Martin, 168 F.3d 1, 6 (11th Cir. 1999). *See also, Ohio Forestry Ass'n v. Sierra Club*, 118 S. Ct 1665, 1670-72 (1998) (alleged Forest Plan inadequacies as to timber harvesting not reviewable except through site-specific decisions).

The courts have recognized that NFMA does not create a concrete standard for diversity within multiple use objectives. In the northern spotted owl litigation Judge Dwyer stated:

The Forest Service argues that it should not be required to conduct a viability analysis as to every species. There is no such requirement. As in any administrative field, common sense and agency expertise must be applied.

Seattle Audubon Society v. Moseley, 798 F. Supp. 1484, 1490 (W.D. Wash. 1992). *See also Idaho Sporting Congress v. Alexander*, Civ. No. 99-217 (D. Idaho, December 16, 1999), which held challenge to Payette LRMP on viability grounds was not justiciable).

The Ninth Circuit endorsed the government's application of the diversity provision of NFMA and the viability provision in the NFMA regulations in its decision upholding the 1994 Northwest Forest Plan:

There is similarly little or no support for the environmental plaintiffs' contention that the selected alternative violates the applicable viability standards. The district court correctly explained that the selection of an alternative with a higher likelihood of viability would preclude any multiple use compromises contrary to the overall mandate of the NFMA. *See, SAS*, 871 F. Supp. at 1315-16; see also 16 U.S.C. S 1604 (g)(3)(B) (diversity is to be addressed in light of "overall multiple-use objectives"); 36 CFR 219.27(a)(6) (habitat maintained and improved "to the degree consistent with multiple-use objectives"); 219.26 (provide for diversity consistent with multiple-use objectives); 219.27(a)(5) (forest plans should "maintain diversity of plant and animal communities to meet overall multiple-use objectives"). Here, the record demonstrates that the federal defendants considered the viability of plant and animal populations based on the current state of scientific knowledge. Because of the inherent flexibility of the NFMA, and because there is no showing that the federal defendants overlooked any relevant factors or made any clear errors of judgment, we conclude that their interpretation and application of the NFMA's viability regulations was reasonable. *See Batterson v. Francis*, 432 U.S. 416, 425-26 (1977) (the Secretary's interpretation of a statutory term is entitled to substantial deference).

Seattle Audubon Society v. Moseley, 80 F.3d 1401, 1404 (9th Cir. 1996).

In contrast, in *Sierra Club v. USDA*, No. 94-4061 (D. Ill. Sept. 25, 1995) *aff'd* 116 F.3d 1482 (Table Citation, 7th Cir. 1997) the court was not satisfied that the Forest Service's cumulative effects analysis adequately addressed all potential effects under the Shawnee National Forest plan, including impacts on the viability of songbirds. The court also was concerned that the methodology and data used to develop management protection standards were not adequately explained.

The Ninth, Fourth, Tenth and Eleventh Circuit Courts are split on the question of whether the Forest Service may satisfy its obligation to inventory, collect and maintain quantitative data about sensitive, endangered and threatened species and management indicator species through inventory and analysis of wildlife habitat rather than population data. The Ninth Circuit's interpretation of these NFMA regulatory requirements is found in *Inland Empire Public Lands Council v. U.S. Forest Service*, 88 F.3d 754, 763 (9th Cir. 1996) regarding the Upper Sunday timber sales on the Kootenai National Forest. In that case the Forest Service timber sale EIS relied upon analyzing the amount of the species' habitat that would be reduced by each alternative rather than quantitative population data. The Ninth Circuit stated:

We therefore reject Plaintiffs' argument that the Service must assess population viability in terms of actual population size, population trends, or population dynamics of other species. We do not mean to suggest, however, that Plaintiffs' suggestions are in any way improper. Indeed, we would encourage such analyses and hold only that they are not required.

Inland Empire, 88 F.3d at 761, fn 8.

In the *Inland Empire* case the Ninth Circuit also considered and rejected an argument that the Forest Service must consider species population analysis on the species entire ecosystems:

We furthermore believe that adopting Plaintiffs' position as a rule of law would be impractical. Under such a rule, an agency would have to analyze separately each species to determine the area covered by its particular ecosystem and then analyze its population viability in that area; this task could become particularly burdensome if there are a number of different species to examine, each with a different population ecosystem area to analyze. See *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1312 (W.D. Wash.1994) ("[T]o plan based on different geographic boundaries for every species in the same ecosystem would be impractical."). NEPA does not require the government to do the impractical. *Kleppe*, 427 U.S. at 414, 96 S. Ct. at 2732 (noting that "practical considerations of feasibility might well necessitate restricting the scope of comprehensive statements"); *Krichbaum v. Kelley*, 844 F. Supp. 1107, 1118 (W.D. Va.1994) ("This

claim ... would require a level of analysis sufficient to stop all action in the Forest while every conceivable effect is catalogued.... [P]laintiff's insistence [on this action] ... is unavailing on an arbitrary and capricious standard."), *aff'd*, 61 F.3d 900 (4th Cir. 1995). We therefore hold that the Forest Service did all it was obligated to do.

* * *

Even if we were to assume that the Service could not confine its analyses to the project boundaries, the Forest Service's EIS is nevertheless valid. The Service never limited its analysis of cumulative effects to the Upper Sunday area. For the black-backed woodpecker, boreal owl, flammulated owl, lynx, and fisher, the Forest Service extended its analysis beyond the 12,345 acre Upper Sunday area to include the entire 28,485 acre Watershed. See Final EIS at IV:74, 77, 82, 83 (black-backed woodpecker, boreal owl, and lynx analyses cover Upper Sunday Watershed area); Biological Assessment, Addendum 2, at 5, 8 (same for flammulated owl and fisher analyses). To the extent that they challenge that the Service's decision not to extend its analysis beyond the Watershed, Plaintiffs have advanced no proof why this decision is arbitrary and capricious, as is their burden.

Inland Empire, 754 F.3d at 763-64 (footnotes deleted; *see also Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1153-1154 (9th Cir. 1998) (“[U]sing habitat as a proxy for population is not arbitrary and capricious.”)).

The Fourth Circuit also has rejected claims that 36 CFR 219.19 and 219.26 require quantitative population for all TES and management indicator species. *Krichbaum v. U.S. Forest Service*, 17 F. Supp.2d 549, 562 (W.D. Va. 1998) *dismissed as moot* (4th Cir. 1999) and *Krichbaum v. U.S. Forest Service*, 973 F. Supp. 585, 591-92 (W.D. Va. 1997) *aff'd* 139 F.3d 890 (4th Cir. 1998).

Likewise, the Tenth Circuit took into account the facts before it when it interpreted 36 CFR 219.19 with respect to the lynx, designated a sensitive species by the Forest Service but not an MIS on the forest in issue:

Congress never intended to require the Forest Service to collect population data and make data-based population viability assessments as a precondition to managing habitat if, despite good faith efforts to confirm the presence of lynx, no one has seen an actual lynx in the project area in over twenty-five years, and only a few sets of tracks have been documented in the past ten years. Under the circumstances, the best the Forest Service could do to comply with the Forest Plan mandate to develop additional

skiing opportunities at existing resorts *and* provide for diversity of plant and animal communities within Category III, was to provide and distribute lynx habitat based on the best information available, on the remote chance a population of reproductive lynx might reoccupy the area in the future.

Colorado Environmental Coalition v. Dombeck, 185 F.3d 1162, 1169-1171 (10th Cir. 1999) (footnote deleted).

The District Court for the District of New Mexico (in the 10th Circuit) recently noted that the Tenth Circuit "has not yet decided whether the National Forest Management Act's implementing regulations require population inventories for management indicator species" but ruled that in the timber sale challenge before it, "the Forest Service is obligated by the plain language of the [NFMA] implementing regulations to acquire and analyze hard population data of its selected management indicator species for the [timber sale at issue in the case]." (emphasis added). The court also ruled that the data must come from the project area. *Forest Guardians v. U.S. Forest Service*, 180 F. Supp. 2d 1273 (D. N.M. 2001), final judgment, April 19, 2002).

The Eleventh Circuit in *Sierra Club v. Martin*, 168 F.3d 1 (11th Cir. 1999) held that the Chattahoochee Forest Plan and 36 CFR 219.19(a)(6) and 219.26 required the Forest Service:

to gather population inventory data on PETS [proposed, endangered, threatened, or sensitive species of plants and animals] species occurring or with a high potential to occur within the project areas," 168 F. 3d at 5, and "to gather quantitative data on MIS [management indicator species 36 CFR 219.19(a)(1) and (a)(6) and 219.26] and use it to measure the impact on habitat changes on the Forest's diversity."

Id. at 7.

The Eleventh Circuit therefore found it was arbitrary and capricious for the Forest Service to have approved the seven timber sales at issue in *Sierra Club v. Martin* without gathering and evaluating inventory data on the PETS and MIS species. The Eleventh Circuit held that the Chattahoochee Forest Plan and 36 CFR 219.19(a)(1) and (a)(6) and 219.26 were violated by approval of timber sales without gathering and evaluating population data for PETS species and management indicator species. The Forest Service had approved the seven timber sales at issue with "no population inventory information and little in the way of population data for thirty-two of the thirty-seven vertebrate PETS species that inhabit the Forest." *Id.* at 4.

In *Sierra Club v. Glickman*, 974 F. Supp. 905 (E.D. Tex. 1997) *aff'd sub nom. Sierra Club v. Peterson*, 185 F. 2d 349 (5th Cir. 1999) *judgment vacated for lack of jurisdiction*, 28 F.

3d 559 (2000) (*rehearing en banc*), the district court ruled that the Forest Service must inventory and monitor management indicator species (MIS) by collecting and maintaining population data. 36 CFR 219.19(a)(1), (a)(2) and (a)(6). Rejecting an approach of tracking habitat of MIS and not populations, the district court stated, “Without actually collecting population data of MIS, the Forest Service cannot determine whether it is, in reality, maintaining viable populations of MIS.”

The Office of the USDA Under Secretary for Natural Resources addressed the statutory and regulatory requirements to insure diversity of plant and animal communities and viability of native and desired non-native vertebrate species in the Acting Deputy Secretary's discretionary review of three Chief's administrative appeal decisions, for the Arapaho and Roosevelt National Forests and Pawnee National Grasslands LRMP, the Rio Grande National Forest LRMP, and the Routt National Forest LRMP. (Appeal numbers 98-13-00-0020, 97-13-00-0057, and 98-13-00-0032 and 98-13-00-0037). The decisions stated the "basic principles on viability that have emerged over the years," pursuant to which the Acting Deputy Under Secretary reviewed the LRMPs, and which are to be used in future revisions (under the 1982 NFMA regulations).

Forest Service decisionmakers have considerable discretion regarding how to provide for viability, so long as relevant factors are not overlooked, no clear errors of judgment are made, a rationale is provided for using the approach taken, and the plain language requirements of the regulations are met.

Among the relevant factors to be considered are the overall multiple use objectives for the planning area, mitigation measures that can reasonably be expected to be developed at the project level, and the available scientific information on:

- Trends in the quantity, quality, and distribution of habitat for fish and wildlife species for which the Forest Service has determined that viability concerns exist;
- Trends in abundance and distribution of such species, to the extent such data are available;
- The habitat needs of such species and how they are affected by management activities; and
- Habitat and population trends of management indicator species, to the extent such data are available.

In considering these factors, Forest Service decisionmakers must determine how much additional scientific data should be gathered, and how rigorously the data should be analyzed to develop information useful for making management decisions. In keeping with the statutory requirement to provide for diversity “within the multiple-use objectives of a land management plan,” (16 USC 1604 (g)(3)(B)) the amount and quality of scientific information should be commensurate with the land management activities projected in the forest plan and the viability risks associated with those activities. In cases where population and habitat trends are believed to be in significant decline throughout the planning area, and substantial habitat disruption is allowed by the forest plan, a more rigorous approach to maintaining viability is indicated. In cases where habitat and population trends are believed to be within the range of historic variation, and the forest plan allows little additional habitat disturbance, a much less rigorous analysis is warranted. In such cases, a more qualitative approach to factors such as trend analysis may suffice, as long as the approach considers the relevant factors and demonstrates sound judgment, including a rational explanation for the level of analysis conducted.

There are thousands of species of wildlife on the national forests; trying to provide for diversity and viability on a species-by-species basis is virtually impossible. Instead, the scientific community has widely accepted the use of a coarse-filter/fine-filter process to address biodiversity issues

(Discretionary Review Decisions on the Chief's Appeal Decisions Regarding the Arapaho and Roosevelt National Forests and Pawnee National Grassland (#98-13-00-0020), pp. 6-7; the Rio Grande Revised Land and Resource Management Plan, (# 97-13-00-0057), pp. 5-6; and Routt National Forest Revised Land and Resource Management Plan, (#98-13-00-0032 and 98-13-00-0037), pp. 6-7.

12. The Allowable Sale Quantity.

Forest Plans set an allowable timber sale quantity (ASQ) for the administrative unit. 16 USC 1604(e)(2), 1604(f)(2) and 1611(a). The ASQ is the maximum level, or "ceiling," of timber that may be sold from the planning area during the ten year planning period, taking into account multiple use goals and other aspects of Forest Plan management.

Technically, the ASQ is "[t]he quantity of timber that may be sold from the area of suitable land covered by the forest plan for a time period specified by the plan." 36 CFR 219.3. Generally, the ASQ's time frame is associated with the first decade of the plan's base sale schedule. See, 36 CFR 219.16 and *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1052, 1055 (9th Cir. 1994). The ASQ is often expressed as an average annual allowable sale quantity. See, 36 CFR 219.3.

The ASQ is developed using a computer model, and is based on average or representative situations rather than complete inventories of the forest lands involved. As a result, the model often differs from what is found in site-specific examinations during project decisionmaking.

The ASQ does not represent a quantity that is required to be offered for sale, but is only an upper limit on sale offerings. In *Intermountain Forest Industry Ass'n v. Lyng*, 683 F. Supp. 1330 (D. Wyo. 1988), involving a pre-NFMA plan, the District Court for the District of Wyoming refused to order the Secretary of Agriculture to offer the plan's target quantity for production. *Id.* at 1342. The court ruled that neither the Organic Act, MUSYA, nor the RPA required the Forest Service to offer a specific quantity of timber for sale. *Id.* at 1337-39. Although the decision was based on a pre-NFMA plan, the court interpreted the terms "goal" and "objective" in a manner similar to their definitions in the NFMA regulations to reach its decision. *Id.* at 1343-44.

Several courts have made similar pronouncements regarding in NFMA plan cases. The Supreme Court stated that the Wayne LRMP "sets a ceiling on the total amount of wood that can be cut. *** Although the Plan sets logging goals, selects the areas of the forest that are suited to timber production, and determines which 'probable methods of harvest,' are appropriate, it does not itself authorize the cutting of any trees." *Ohio Forestry Assn. v. Sierra Club*, 118 S. Ct. 1665, 1668 (1998) (citations omitted). In *AWRTA v. Morrison*, 67 F.3d 723, 728 (9th Cir. 1995), the Ninth Circuit adopted the Forest Service's characterization of the Tongass plan as a "permissive plan, meaning it would allow harvest up to the maximum output goals but would not 'mandate' outputs at those levels...." See also *Alliance For The Wild Rockies v. U.S. Forest Service*, 1996 U.S. App. LEXIS 11591 (9th Cir.) finding that the Forest Service's deferral of whether salvage logging would count toward the "ten-year ASQ ceiling" does not violate NEPA. The Tenth Circuit in *Sierra Club v. Cargill*, 11 F.3d 1544, 1549 (10th Cir. 1993), recognized the limitations of the Bighorn National Forest's original estimate of the ASQ as "unrealistic." In *Region 8 Timber Purchasers Council v. Alcock*, 993 F.2d 800, 808 (1993) the Eleventh Circuit found that timber companies cannot force Forest Service to sell future timber. See also *Swan View Coalition v. Turner*, 824 F. Supp. 923, 935 (D. Mont. 1992) ("these resource production objectives represent a ceiling on timber production and do not mandate that such quantities actually be harvested.") and *California Forestry Assn. v. Thomas*, 936 F. Supp. 13, 18 (D.D.C. 1996) (stating USDA "retains full authority to determine the quantity of timber it will allow to be sold, if any, from the National Forests."). See also *Sierra Club v. Lyons*, Civ. No. J00-0009 CV (JKS) and *Alaska Forest Association v. USDA*, Civ. No. J99-0013 CV (JKS) (D. Alaska March 30, 2001) ("The allowable saleable quantity ("ASQ") for timber provides a ceiling for the amount of timber that may be sold, as projected over ten years." Slip Opinion at 16. The court also ruled that the Tongass Land and Resource Management Plan's sale schedule (which is the basis for the ASQ) was based on sufficient analysis).

Courts have interpreted Congressional attempts to add certainty to timber sale offerings in appropriations legislation in the same manner. For example, in *Gifford Pinchot Alliance v. Butruille*, 742 F. Supp. 1077 (D. Ore.1990), the District Court declined to order timber sales at the level set in the Forest Service's annual appropriation legislation. *Id.* at 1083. The court recognized Congress's intent to strike a balance between a predictable flow of timber from National Forest System lands and the preservation of old growth forest stands for spotted owl habitat. *Id.* at 1079. The court found that the Forest Service had made "every reasonable effort" to meet the Congressional target, but had numerous valid reasons for failing to do so, and thus the court refused to order the Forest Service to meet the target quantities. *Id.* at 1083.

A similar result was reached when the Alaska Forestry Ass'n unsuccessfully argued that the Tongass Timber Reform Act created an enforceable duty to provide timber. *See Alaska Forestry Ass'n v. United States*, J94-007 CV(JKS) (D. Alaska October 19,1995) (finding that the absence of any enforceable duty under the TTRA to make timber available for sale precludes a finding that AFA suffered the injury in fact necessary to support standing). In August, 2001, the District Court for the District of Alaska k

13. Monitoring and Evaluation.

If the standards and guidelines of the LRMPs are the 'heart' of Forest Plans, then monitoring and evaluation should be regarded as the 'lifeblood.' Sound National Forest management is contingent on monitoring, evaluation and adaptive management through LRMP amendments, revisions and project decisionmaking. *See* 16 USC 1603, 1604(f)(4) and (5), 1604(g)(2)(B), 1604(g)(3)(c) and 36 CFR 219.10 (a)(3), (f) and (g), 219.11(d), 219.12(k).

An illustration of the importance of monitoring and evaluation can be found in the Northwest Forest Plan Amendments (NWFPA) of April 13, 1994. *See* Record of Decision, pp. 57-58. With regard to the NWFPA the district court stated that "[m]onitoring is central to the plan's validity. If it is not funded, or not done for any reason, the plan will have to be reconsidered." *Seattle Audubon Society v. Lyons*, 871 F. Supp. 1291, 1321, 1324 (W.D. Wash. 1994) *aff'd* 80 F.3d 1401 (9th Cir. 1996).

Case law concerning monitoring and evaluation is evolving:

In the LRMP context, the Ninth Circuit has held that Forest Plan monitoring is not judicially enforceable (not final agency action): *Ecology Center v. U.S. Forest Service*, 192 F. 3d 922 (9th Cir. 1999), *Friends of The Kalmiopsis v. U.S. Forest Service*, (9th Cir., October 15, 1999) Prior to the Ninth Circuit decision, the Central District of California had also reached the same conclusion, *Forest Preservation Society v. USDA*, (C.D. Cal. February 10, 1993).

However, in a challenge to the Shawnee LRMP, the Seventh Circuit held that the plan's monitoring provisions did not comply with 36 CFR 219.12(k). *Sierra Club v. USDA*, (S.D. Ill. September 25, 1995) *aff'd*, 116 F.3d 1482 (7th Cir. Table Citation); this decision predated the Supreme Court's decision in *Ohio Forestry Ass'n*.

The Ninth Circuit has held that monitoring - or the lack of it - by itself is not justiciable, *Ecology Center v. U.S. Forest Service*, 192 F. 3d 922 (9th Cir. 1999) and *Friends of the Kalmiopsis v. U.S. Forest Service*, (9th Cir., October 15, 1999). In both cases Plaintiffs alleged that Forest Service failed to monitor, evaluate, and report the effects of the monitoring in accordance with the provisions of the Forest Plan. The Ninth Circuit ruled that the alleged monitoring failures did not meet the Supreme Court's test for final agency action: "monitoring does not 'consummate' any agency process," (192 F. 3d 922, 925) and legal consequences do not flow from the alleged failure to monitor. The court concluded that complaints of inadequate monitoring had to be brought as part of a challenge to a final decision, such as a timber sale.

The Fifth Circuit has also held that monitoring requirements are not justiciable where specific project decisions are not in issue. In earlier rulings the district court, and a majority of the three-judge panel had found a violation of NFMA and 36 CFR 219 monitoring requirements in a challenge to past on-the-ground actions on the National Forests in Texas. In vacating the judgment *en banc* the Fifth Circuit ruled that

The environmental groups' challenge is precisely the type of programmatic challenge that the Supreme Court struck down in *Lujan [v. National Wildlife Federation]*, 497 U.S. 871 (1990)]. The environmental groups challenged past, ongoing, and future timber sales approved by the Forest Service, and they argued that the Forest Service failed to monitor and inventory properly in conducting these sales. This challenge sought "wholesale improvement" [citation omitted] of the Forest Service's "program" of timber management in the Texas forests, objecting to Forest Service practices throughout the four National Forests in Texas and covering harvesting from the 1970s to timber sales which have not yet occurred. This is not a justiciable challenge because the program of timber management to which the environmental groups object does not "mark the 'consummation' of the agency's decisionmaking process' or constitute "an identifiable action or event [citation omitted].

Sierra Club v. Peterson, 228 F. 3d 559, 566 (2000) (*rehearing en banc*), (See discussion under point 11, Diversity, above).

The District of Idaho has rejected claims brought to challenge inventory, monitoring and viability claims where the claims were not made with respect to specific projects. In *Idaho Sporting Congress v. Alexander*, Civ. No. 98-0223-E-MHW (D. Idaho) dismissed in

part November 23, 1998; affirmed (9th Cir. March 23, 1999), the district court dismissed broad claims that the Payette failed to keep adequate inventory and failed to meet viability requirements. The District Court did the same in a later case where plaintiffs again "drafted counts one and two [regarding inventory, monitoring, and viability] so broadly that they fall within the proscriptive terms of *Ohio Forestry* and *Ecology Center*." *Idaho Sporting Congress v. Alexander*, Civ. No. 99-0217-S-BLW (D. Idaho, December 16, 1999; *reversed on other grounds*, August 17, 2000 (9th Cir.) summary judgment for Government on remand, March 26, 2001).

In a project context, the Fourth, Ninth and Tenth Circuits have held that the agency may fulfill its legal monitoring obligations by inventorying and analyzing habitat and need not maintain wildlife population data. *Krichbaum v. U.S. Forest Service*, 973 F. Supp. 585, 591-92 (W.D. Va. 1997) *aff'd* 139 F.3d 890 (4th Cir. 1998); *Inland Empire Public Lands Council v. Forest Service*, 88 F.3d 754, 760-762 (9th Cir. 1996); *Colorado Environmental Coalition v. Dombeck*, 185 F.3d 1162, 1169-1171 (10th Cir. 1999). However, the Eleventh Circuit in *Sierra Club v. Martin*, 168 F.3d 1 (11th Cir. 1999) found the Forest Service did have a duty under 36 CFR 219.19 to obtain quantitative data regarding management indicator species.

Although the government has been generally successful in defending Forest Service plan and project monitoring, these cases demonstrate the uncertainty involved in interpreting the legal obligations concerning monitoring and evaluation. Nevertheless, these cases indicate that monitoring, evaluation and adjustment (whether Plan amendment or revision, or project adjustment to the extent modification rights retained) are also very important in the meeting the continuing and site-specific duties under Federal environmental law (NEPA, CWA, ESA, etc.).

14. Project Compliance With Other Laws.

In addition to consistency with the LRMP each project must be in compliance with NEPA, CWA, CAA and other laws. Simply being consistent with the LRMP does not fulfill the site-specific requirements of Federal law. Project level analysis is to "determine findings for NFMA, to ensure compliance with NEPA, and to meet other appropriate laws and regulations." Forest Service Land and Resource Management Planning, FSM 1920 and Forest Service Handbook 1909.12, 5.31. 53 Fed. Reg. 26807, 26836 (July 15, 1988).

Regional Guide and Forest Plan Amendments

Forest Plan amendments, and until recently, Regional Guide amendments (*see* Forest Service Decisionmaking System, above) are used to keep the management direction up to date. NFMA provides three action points at the Plan Level: approval (16 USC 1604(d) and 1604(j)), amendment (16 USC 1604(f)(4)) and revision (16 USC 1604(f)(5)). The

amendment process includes compliance with NEPA. If a proposed amendment is determined to be a significant change in the Forest Plan an Environmental Impact Statement (EIS) must be prepared. 36 CFR 219.9 and 219.10. The current standards for determining "significance" of a change in a Forest Plan for NFMA purposes are found in Forest Service Planning Handbook 1909.12, 5.32. 53 Fed. Reg. 26807, 26836 (July 15, 1988).

All amendments must receive public notice to be effective. For more information regarding amendments *see*, 16 USC 1604(f)(4) and Forest Service Planning Manual and Handbooks FSM 1920 and FSH 1909.12. 53 Fed. Reg. 26807 (July 15, 1988). While there is no provision in the Forest Planning Regulations (36 CFR 219) regarding citizen requests or "petitions" to change (amend) Forest Plans, citizens groups do request and the Forest Service does consider requests to change Forest Plan direction.

The Ninth Circuit has held that the amendment procedures of 36 CFR 219 may not be satisfied or avoided by Federal Register notice. *Seattle Audubon Society v. Evans*, 771 F. Supp. 1081 (W.D. Wash. 1991) *aff'd* 931 F.2d 590 (9th Cir. 1991). *See especially, Seattle Audubon Society v. Evans* (W.D. Wash. March 7, 1991) unpublished Opinion pp.15-21. Two other courts have held that NFMA requires that "direction or policy" controlling future project decisions must be "promulgated" as Forest Plan amendments. *Prairie Wood Products v. Espy* (D. Ore., October 21, 1994) and *House v. U.S. Forest Service*, 974 F. Supp. 1022, 1032-34 (E.D. Ky. 1997).

There are also situations in which groups have alleged "new information" and urged supplementation of the Forest Plan EIS and amendment of the Forest Plan. When this position has prevailed in administrative appeals or in court the remedy has been an order to go through the Forest Plan amendment process. *See, Citizens for Environmental Quality v. United States*, 731 F. Supp. 970 (D. Colo. 1989) and *Sierra Club v. Cargill*, 732 F. Supp. 1095 (D. Colo. 1990).

The Tenth Circuit has held that the Forest Service is not required to cease all non-significant amendments once a significant amendment of a Forest Plan has begun. In *Sierra Club v. Cargill*, 11 F.3d 1545, 1549 (10th Cir. 1993) the Tenth Circuit concluded that prohibiting non-significant amendments during the pendency of a significant amendment would "improperly tie the hands of the Forest Service in plan management and thereby thwart the purpose of the regulations."

An amendment to the Deerlodge and Helena plans to incorporate ecosystem management principles was held to be a significant amendment by the District Court in Montana, *American Wildlands v. Forest Service*, (D. Mont. April 14, 1999). The court found that although the amendment covered a small percentage of each forest, it changed the goals objectives and outputs for an entire 160,000 acre area that had been a wildlife management unit prior to amendment.

Some environmental issues are best treated at one time and across the entire geographical area in which they arise rather than being treated in individual LRMPs. Ecosystem approaches to environmental issues often compel a broader than single LRMP approach, especially for plant and animal issues. The Forest Service has used an ecosystem approach to promulgate new protection standards, guidelines and land allocations at higher levels of planning rather than a single LRMP approach. There is administrative precedent for issuance of multiple LRMP amendments through a NEPA document and a decision document. Examples of multiple LRMP amendments are:

Southern Pine Beetle Control ROD and EIS amending LRMPs throughout Forest Service Southern Region 8 (April 7, 1987).

1990 Red-cockaded Woodpecker (RCW) Interim Standards and Guidelines Environmental Assessment, Finding of No Significant Impact and Decision Notice amending LRMPs with RCWs except Texas. *See, Southern Timber Purchasers Council v. Alcock*, 736 F. Supp. 267 (N.D. Ga. 1990) *aff'd on standing grounds sub nom Region 8 Forest Service Timber Purchasers Council v. Alcock*, 993 F.2d 800 (11th Cir. 1993) *cert. denied* 114 S. Ct. 683 (1994).

1995 (longterm) Standards and Guidelines for the Management of the Red-Cockaded Woodpecker and its Habitat on National Forests in the Southern Region Environmental Impact Statement and Record of Decision amending the Southern Regional Guide and LRMPs with RCWs.

Northern spotted owl and related species. Record of Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents Within the Range of the Northern Spotted Owl-Standards and Guidelines for Management of Habitat for Late-Successional and Old-Growth Forest Related Species within the Range of the Northern Spotted Owl, April 13, 1994 (amending 13 LRMPs). In *Seattle Audubon Society v. Lyons*, 871 F. Supp. 1291, 1310-1312 and 1317 (W.D. Wash. 1994) *aff'd* 80 F.3d 1401 (9th Cir. 1996) the court sustained the multiple LRMP amendment approach. The District Court noted, "Given the current condition of the forests, there is no way the agencies could comply with environmental laws without planning on an ecosystem basis." *Lyons*, 871 F. Supp. at 1311.

California Spotted Owl Interim Standards and Guidelines Environmental Assessment, Finding of No Significant Impact and Decision Notice (1993) amending all California spotted owl Region 5 LRMPs. In *California Forestry Ass'n v. Thomas*, 936 F. Supp. 13 (D.D.C. 1996) the district court held that plaintiffs lacked standing to bring a lawsuit challenging the amendments on NEPA and NFMA grounds. On March 6, 2001, denying a motion for preliminary injunction against the timber programs in the California spotted owl forests, the District Court for the Eastern District of California ruled "Nothing in the language

of the guidelines or anything else offered by plaintiffs establishes that the guidelines expired." *Earth Island Institute v. U.S. Forest Service*, Case No. CIV. S-00-225 WBS DAD (E.D. Cal., PI denied February 5 and March 6, 2001; affirmed, 2001 U.S. App. Lexis 21838 (9th Cir. October 3, 2001).

Interim Strategies for Managing Anadromous Fish-Producing Watersheds (PACFISH) on Federal Lands in Eastern Oregon, et al., Notice of Availability of Environmental Assessment and Proposed Finding of No Significant Impact, March 25, 1994 (59 Fed. Reg. 14356). Proposed amendments to 15 LRMPs in four Forest Service Regions and interim management direction for certain BLM Districts. The Decision Notice for was signed February 24, 1995 and the notice published in the Federal Register on March 2, 1995. The PACFISH LRMP amendments were a key feature of the Biological Opinion of March 1, 1995 for eight LRMPs which satisfied injunctions in Idaho and Oregon arising from *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994) cert. denied 115 S. Ct. 1793 (1995). PACFISH LRMP amendments were challenged in *Prairie Wood Products v. Glickman*, 971 F. Supp. 457 (D. Ore. 1997). In *Prairie Wood Products* the district court rejected allegations of violations of NEPA and NFMA as to PACFISH and the "Eastside Screen" multiple LRMP amendments. On May 2, 1997 the district court for Oregon held that PACFISH amendments did not ensure viability of bull trout and scheduled further proceedings regarding bull trout. *Friends of the Wild Swan v. U.S. Forest Service*, 966 F. Supp. 1002 (D. Ore. 1997). After the Forest Service provided the court with an assessment that, despite the fact that it was adopted for anadromous species, PACFISH did indeed, as an interim strategy, provide for the viability of bull trout the district court ruled PACFISH adequate, but stated that at some point the Forest Service's failure to adopt a permanent strategy (ICBEMP) to replace INFISH and PACFISH will "at some point become unreasonable."

Amendments to LRMPs of Forest Service Region 3 for Mexican spotted owls (ESA listing as threatened) and northern goshawks. In June, 1996, the Regional Forester amended all 11 Region 3 LRMPs to adopt direction for Mexican spotted owls and northern goshawks. The Ninth Circuit has held that the new protective measures do not have to be retroactively applied. *Forest Guardians v. Dombeck*, 131 F.3d 1309 (9th Cir. 1997). In *Arizona Cattle Growers Ass'n v. Cartwright*, 29 F. Supp.2d. 110, 1119 (D. Ariz. 1998) the district court sustained forest plan amendments incorporating Mexican spotted owl and northern goshawk standards and guidelines against a NEPA, NFMA challenge by grazing interests in part because the standards "would not be enforced prior to a new project decision on a specific site."

Sierra Nevada Framework. 2001 amendments to LRMPs for eleven national forests in the Sierra Nevada. Amendments focus focused on five

problem areas: old forest ecosystems; riparian, aquatic, and meadow ecosystems; fire & fuels; noxious weeds; and lower westside hardwood forests. The amendments supersede the California spotted owl interim standards and guidelines. See website at <http://www.r5.fed.us/sncf/>.

In *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059 (9th Cir. 1998) the Ninth Circuit rejected the government's argument that a requirement of the 1979 Tongass LRMP for "area analysis" before site-specific NEPA and project decisionmaking was eliminated by a 1997 amendment of the Tongass LRMP. The Ninth Circuit rejected the amendment interpreting the NFMA "consistency provision," 16 USC 1604(i), as requiring the project decision to be consistent with a single Forest Plan not selected parts of two Forest Plans. The Ninth Circuit stated that it could not find, based on the record in the case, whether the timber sale "is permissible under the amended Plan."

The ESA and court orders such as *Seattle Audubon Society v. Evans*, 771 F. Supp. 1081 (W.D. Wash. 1991) *aff'd* 952 F.2d 297 (9th Cir. 1991) have compelled protective measures for the entire range of the northern spotted owl. NFMA's individual planning unit focus must be harmonized with the ecosystem view promoted by NEPA and ESA. See, *Seattle Audubon Society v. Espy*, 998 F.2d 699, 704 (9th Cir. 1993) regarding the "gap in planning that cannot closed." In rejecting NEPA challenges to the adequacy of the 1994 SFEIS for the range of the northern spotted owl Judge Dwyer noted there were limits to higher level plans and EISs:

The plan must designed by the agencies, not by the courts. The question for judicial review is whether NEPA's requirements have been met. A disagreement among scientists does not itself make agency action arbitrary or capricious, nor is the government held to a 'degree of certainty that is ultimately illusory.' (citation omitted).

Seattle Audubon Society v. Lyons, 871 F. Supp. 1291, 1321 (W.D. Wash. 1994), *aff'd* 80 F.3d 1401 (9th Cir. 1996).

The "ripeness" of Plan level amendments and revisions for judicial review will likely need to be reconsidered in light of the Supreme Court's decision in *Ohio Forestry Ass'n v. Sierra Club*. See, Forest Plan and Project Level Decisionmaking, Section 3 above.

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