Failing to See the Forest for the Trees: Standing to Challenge the National Forest Management Plans

Part 1

by

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NOTES

FAILING TO SEE THE FOREST FOR THE TREES: STANDING TO CHALLENGE NATIONAL FOREST MANAGEMENT PLANS

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I. INTRODUCTION

The management of our country's national forests is a highly contentious matter. Environmentalists want to preserve the forests for recreational, aesthetic, scientific, and other purposes. Resource development interests, primarily the timber and oil and gas industries, and the localities whose economies they drive, want to expand the levels of resources they may take from the forests. In response to these multiple demands, the United States Forest Service ("the Forest Service" or "the Service" or "the agency") manages the forests for "multiple use." But, of course, the Service cannot satisfy all of the people all of the time.

The structure of national forest planning is regulated by the National Forest Management Act of 1976 (NFMA),[1] and its implementing regulations.[2] In accordance with the NFMA, the Forest Service develops a Land and Resource Management Plan (LRMP) for each national forest. LRMPs are highly detailed documents which provide for how an individual forest will be managed over a ten to fifteen year period. For example, the plans determine the approximate amount of timber harvesting, road and trail construction, grazing, mineral development, and wildlife habitat improve-

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1 Pub. L. No. 94-588, 90 Stat. 2949 (1976) (codified at 16 U.S.C. §§ 1600-1614 (1994) and other scattered sections of Title 16).

2 36 C.F.R. pt. 219 (1996).

ments that will occur over the course of the plan period. The Service then implements the plans through individual, site-specific projects.

Because the plans determine what development may occur far into the future, their content is often a subject of dispute among the multiple interests that wish to use the forests. These disputes are often confined to the administrative level, but they sometimes end up in court. The Forest Service has responded to plan challenges by asserting that plaintiffs bringing such claims lack standing to sue and that their claims are not yet ripe for review. The Service reasons that the plaintiffs could not have been injured prior to implementation of the plans via site-specific projects because a plan itself has no definite results. That is, a plan simply lays out general information and results in no on-the-ground impacts.

Four United States Courts of Appeals have addressed this issue but have not reached a uniform result. The Seventh and Ninth Circuits have held that plaintiffs do have standing to challenge LRMPs, that their claims are ripe, and, therefore, that forest plan challenges are justiciable.[3] The Eleventh and Eighth Circuits, on the other hand, have held that plan challenges are not justiciable.[4]

This Note concludes that challenges to national forest plans are justiciable under both the standing and ripeness doctrines. Part II provides some of the historical background of national forest planning, describes the specific requirements of the NFMA and its implementing regulations, and discusses some of the different types of procedural and substantive claims that may be brought pursuant to the statute. Part III discusses the Supreme Court's standing and ripeness jurisprudence and analyzes which of these doctrines may be the more appropriate analytical approach in the forest plan context. Part IV describes the specific issues at stake in forest plan challenges and outlines the reasoning of the Courts of Appeals that have decided this issue. Finally, Part V sets out three arguments in support of the conclusion that forest plan challenges are justiciable.

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[3] *See* Sierra Club v. Marita, 46 F.3d 606, 613-14 (7th Cir. 1995); Idaho Conservation League v. Mumma, 956 F.2d 1508, 1518-19 (9th Cir. 1992).

[4] *See* Wilderness Soc'y v. Alcock, 83 F.3d 386, 390-91 (11th Cir. 1996) (denying justiciability on ripeness grounds); Sierra Club v. Robertson, 28 F.3d 753, 760 (8th Cir. 1994) (denying justiciability on standing grounds).

II. National Forest Management

A. Brief History

The original authority for federal management of national forest lands was the Organic Administration Act of 1897.[5] The Organic Act gave the Forest Service authority to manage the national forests to protect "favorable . . . water flows" and "to furnish a continuous supply of timber."[6] This limited mandate was sufficient to allow the agency to manage the forests for more than sixty years. As the century progressed, however, demand for timber increased, as did general appreciation of the national forests for uses more diverse than water supply and timber production.[7] In 1960, with the agency's support, Congress passed the Multiple-Use Sustained-Yield Act (MUSYA),[8] which placed the consideration of "outdoor recreation, range, . . . and wildlife and fish purposes" on equal footing with "timber [and] watershed."[9] The MUSYA required equal "consideration" of all resources, but did not require equal administration of them.[10] Thus, the agency was authorized to protect these other resources when it so desired.

After passage of the MUSYA, the Forest Service entered a new era of forest planning, voluntarily adopting many approaches that would later be mandated by statute, such as developing plans for multiple resources and "zoning" the forest to emphasize different uses in different areas.[11] But this period of relatively unregulated decisionmaking did not last, as diverse interests continued to lobby the agency and as the nation's environmental consciousness began to blossom.[12]

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[5] 16 U.S.C. §§ 473-82, 551 (1994). *See* Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests*, 64 Or. L. Rev. 1, 18 (1985). This article is commonly referred to as the seminal review of the NFMA's enactment and its relation to our country's history of national forest planning and management. Part II of this Note gives only a thumbnail description of the history of forest planning in order for readers new to this subject to get the minimal background necessary to understand how the process works. To begin to develop a comprehensive understanding of modern Forest Service planning and national forest management, the Wilkinson & Anderson article is a must-read.

[6] 16 U.S.C. § 475; *see* Wilkinson & Anderson, *supra* note 5, at 18.

[7] *See* Wilkinson & Anderson, *supra* note 5, at 28-29.

[8] 16 U.S.C. §§ 528-31 (1994).

[9] 16 U.S.C. §§ 528-29; *see* Wilkinson & Anderson, *supra* note 5, at 29-30.

[10] *See* Wilkinson & Anderson, *supra* note 5, at 30.

[11] *See id.* at 31.

[12] *See id.* at 41-42.

In addition to the Organic Act and the MUSYA, the Forest and Rangeland Renewable Resources Planning Act of 1974 (RPA)[13] also governs Forest Service management of individual national forests. The RPA imposed national planning and reporting requirements on the Forest Service, but did not contain specific directives for action at the national forest level.[14] The RPA was designed in large part to help the Forest Service increase and sustain its annual appropriation so it could implement its own plans, all of which was deemed more likely if the agency began reporting to Congress on a regular basis.[15] Thus, while the agency retained its traditional discretion to develop local plans, the RPA did require the agency to develop and report on broad national goals and plans.

Increasingly thereafter, however, the traditional deference to Forest Service discretion was a subject of dispute. Conservationists stepped up efforts to end the environmentally destructive practice of clearcutting, for example, and the Forest Service was forced to face the issue head-on after the Fourth Circuit Court of Appeals ruled in 1975 that clearcutting violated the Organic Act.[16] In the wake of this decision, the Forest Service sought legislation authorizing clearcutting,[17] while at the same time environmental interests continued to push for reform legislation to improve timber development techniques.[18]

Congress responded to these competing pressures by passing the National Forest Management Act. Born in a "a bitterly-contested referendum on Forest Service timber harvesting practices" and accomplished in a time of "turbulence,"[19] the Act attempted a compromise. It ratified certain traditional timber harvesting methods, permitting clearcutting, for example, when it was determined to be the most appropriate method of harvesting, but it also effected important environmental reform.[20] As Senator Hubert H. Humphrey, sponsor of the NFMA, optimistically declared:

> The days have ended when the forest may be viewed only as trees and trees viewed only as timber. The soil and the

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[13] 16 U.S.C. §§ 1600-1614 (1994), *as amended by* the National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949 (1976).

[14] *See* 16 U.S.C. §§ 1601-1603.

[15] *See* Wilkinson & Anderson, *supra* note 5, at 37.

[16] *See* West Virginia Izaak Walton League v. Butz, 522 F.2d 945 (4th Cir. 1975); *see also* Wilkinson & Anderson, *supra* note 5, at 41-42.

[17] *See* Wilkinson & Anderson, *supra* note 5, at 41-42.

[18] *See id.*

[19] *Id.* at 40.

[20] *See id.* at 40-45.

> water, the grasses and the shrubs, the fish and the wildlife, and the beauty that is the forest must become integral parts of resource managers' thinking and actions.[21]

In reality, however, it has proved difficult to integrate the NFMA's conflicting goals into forest resource planning.

B. The NFMA Requirements

The NFMA ended the tradition of unfettered deference to Forest Service planning in the national forests.[22] The Act is a blend of both procedural and substantive requirements that are judicially enforceable.[23] As the Act requires, the Forest Service has promulgated regulations to implement the requirements of the NFMA.[24] The regulations provide specific rules for application of the Act, and clarify its procedural and substantive mandates.[25]

Procedurally, the NFMA requires the Forest Service to develop individual forest plans[26] to direct the management of each forest.[27] Once a plan is approved, it is binding on all management activities within the forest for at least ten years,[28] and must be revised at least every fifteen years.[29] The NFMA regulations outline a ten-step process that the Service must follow when developing a forest plan,[30] which can be boiled down into three stages: (1) data collection and inventory of all forest resources, (2) development of the

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[21] *Id.* at 70 (quoting 122 Cong. Rec. 5618-19 (1976)).

[22] *See id.* at 72.

[23] *See id.* at 74.

[24] *See* 16 U.S.C. § 1604(g) (1994) (requiring the Secretary of Agriculture to promulgate regulations). The regulations may be found at 36 C.F.R. part 219. The current regulations, a modification of the original regulations, became effective in 1982. *See* 47 Fed. Reg. 43,037 (1982). Some of the regulations were subsequently modified in 1983. *See* 48 Fed. Reg. 29,122 (1983); 48 Fed. Reg. 40,383 (1983). The Forest Service has recently proposed overhauling these regulations. Proposed revisions may be found at 60 Fed. Reg. 18,886 (1995).

[25] The Forest Service has also promulgated a Forest Service Manual and a Forest Service Handbook in the Federal Register. These agency directives, which further enumerate how the NFMA and its regulations are to be implemented, are adopted in a piecemeal fashion. The original handbook can be found at 44 Fed. Reg. 53,928 (1979). Recent pertinent modifications may be found at 53 Fed. Reg. 26,807 (1988). The Forest Service has also proposed revisions to the Forest Service Manual. *See* 61 Fed. Reg. 22,784, 22,786 (1996).

[26] While the RPA is the official title of the statute, the provisions requiring development of LRMPs were enacted by the NFMA. References to those provisions specifically, as well as to the other sections of the statute, are commonly referred to as NFMA sections.

[27] *See* 16 U.S.C. § 1604(a); 36 C.F.R. § 219.4(b)(3) (1996).

[28] *See* 16 U.S.C. § 1604(i); 36 C.F.R. § 219.10(e); *see also* Wilkinson & Anderson, *supra* note 5, at 7.

[29] *See* 16 U.S.C. § 1604(f)(5); 36 C.F.R. § 219.10(g).

[30] *See* 36 C.F.R. § 219.12; *see also* Wilkinson & Anderson, *supra* note 5, at 44.

plan including land classification, and (3) plan implementation.[31] During this planning process, the Forest Service must comply with several requirements which are technically procedural, but which have substantive implications. For example, the NFMA requires that all of the forest's resources, including "outdoor recreation (including wilderness), range, timber, watershed, wildlife and fish," shall be coordinated, and that specific management guidelines consider all of those resources.[32] The Act also requires that the Service inventory these resources and, more specifically, that it identify lands as suitable or unsuitable for resource management (specifically timber harvesting).[33] While these provisions clearly impose procedural burdens on the Forest Service, they should be seen as creating substantive requirements as well. By affecting what an agency must consider in its decisionmaking process, the Act affects the decisions which result.

The NFMA also requires the Service to comply with the National Environmental Policy Act (NEPA).[34] The NEPA is an entirely procedural statute that governs how the environmental impacts of government actions are analyzed, accounted for, and publicly scrutinized. The NEPA requires the government to prepare an environmental impact statement (EIS) before it undertakes any "major Federal actions" that will have a significant effect on the environment.[35] The NFMA regulations, in turn, require that an EIS be completed for each forest plan, which implies that forest plans are "major Federal actions" significantly affecting the environment.[36] The requirement that NFMA forest plans comply with the NEPA has proven to be highly significant, as often the challenges brought against forest plans have included allegations of non-compliance with NEPA procedural mandates.[37]

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[31] *See* Wilkinson & Anderson, *supra* note 5, at 10.

[32] 16 U.S.C. § 1604(g)(3)(A); *see also id.* § 1604(e); 36 C.F.R. § 219.18-.25, .27. Note that "wilderness" concerns have been added to the list of resources to be considered since passage of the MUSYA. This addition reflects passage of the Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136 (1994), and the subsequent increase in wilderness planning in national forests. *See* Wilkinson & Anderson, *supra* note 5, at 32. The NFMA also incorporates specific procedural and substantive requirements on national forest planning from the Wilderness Act. *See* 16 U.S.C. § 1604(e), (g)(3)(A); 36 C.F.R. § 219.18.

[33] *See* 16 U.S.C. § 1604(g)(2), (k); 36 C.F.R. § 219.14, .27.

[34] *See* 16 U.S.C. § 1604(g)(1); 36 C.F.R. § 219.12(a), (f), (g). The NEPA is codified at 42 U.S.C. §§ 4321-4370d (1994).

[35] 42 U.S.C. § 4332(2)(C).

[36] *See* 36 C.F.R. § 219.12(a) (1996).

[37] *See, e.g., infra* notes 72-73 and accompanying text.

In addition to its procedural provisions, the NFMA also contains several explicitly substantive requirements. The most important of these provides that a forest plan, once adopted, is the law for management of that individual forest.[38] As the Act states, all actions taken to implement forest plans "*shall* be consistent with the land management plans"[39] themselves. Thus, the substantive decisions approved as part of the plan are binding on all subsequent implementing management procedures.

Other substantive provisions of the NFMA place restraints on the use of specific forest resources. Regarding timber production, for example, the NFMA authorizes the Forest Service to clearcut, but only in specific, justifiable circumstances.[40] Additional examples of how the NFMA substantively confines timber production include requirements to: (1) harvest timber only on suitable lands and to identify lands that are not suitable for timber production,[41] (2) cut trees only in areas that have reached a specific level of growth potential,[42] and (3) cut no more trees than can be perpetually taken from the forests on a sustained basis.[43]

Another important substantive constraint on forest planning is the NFMA's biological diversity provision, which requires that NFMA regulations include guidelines "for 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."[44] Two leading commentators have described this requirement as "one of the [NFMA's] most perplexing provisions."[45] To implement this mandate, the NFMA regulations require habitat to

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[38] *See* 16 U.S.C. § 1604(i) (1994); 36 C.F.R. §219.10(e); *see also* Wilkinson & Anderson, *supra* note 5, at 74.

[39] 16 U.S.C. § 1604(i) (emphasis added).

[40] *See* 16 U.S.C. § 1604(g)(3)(F); 36 C.F.R. § 219.27(d); *see also supra* notes 17-21 and accompanying text.

[41] 16 U.S.C. § 1604(k) and 36 C.F.R. § 219.14 require the Forest Service to identify those lands not suitable for timber production. Section 1604(g)(3)(E) mandates that timber may only be harvested where (i) the lands "will not be irreversibly damaged," (ii) the Forest Service will be able to restock the land with timber successfully within five years, and (iii) water resources will be protected. These "suitability guidelines" have been described as "some of the strongest medicine that Congress prescribed in the NFMA." Wilkinson & Anderson, *supra* note 5, at 159. Land not meeting the guidelines must be classified as unsuitable. *See* 16 U.S.C. § 1604(k); *see also* Wilkinson & Anderson, *supra* note 5, at 160. NFMA also requires that lands economically unsuitable for timber production be so identified, and that timber production not occur on those lands for at least 10 years. *See* 16 U.S.C. § 1604(k); *see also* Wilkinson & Anderson, *supra* note 5, at 162, 169.

[42] *See* 16 U.S.C. § 1604(m).

[43] *See id.* § 1611; 36 C.F.R. § 219.16.

[44] 16 U.S.C. § 1604(g)(3)(B).

[45] Wilkinson & Anderson, *supra* note 5, at 170.

be managed to ensure that "viable populations" of vertebrate species are maintained.[46] The regulations require, for example, that sufficient habitat be "well distributed so that those individuals can interact with others in the planning area."[47] The regulations require that these objectives be accomplished by identifying "management indicator species" (MIS), and then ensuring that the plans provide for adequate habitat for those species.[48] While the Forest Service has some discretion in the selection of MIS, all endangered and threatened species must be listed as MIS, and a special, protective section is included to ensure that their habitat is not at risk.[49]

The NFMA regulations also enforce the maintenance of biological diversity by way of a procedural requirement: the regulations require that biological diversity "be considered throughout the planning process," and that each plan provide "for diversity of plant and animal communities and tree species consistent with the overall multiple-use objectives of the planning area."[50] These provisions are another example of how procedural rules can affect the substance of agency action.

Another example of how the NFMA places substantive restraints on the Forest Service is the Act's protection of visual resources in the forests. As previously noted, the NFMA requires that the outdoor recreation resource be considered during, and coordinated into, national forest planning.[51] The NFMA regulations expand on this notion by requiring that the "visual resource" be a part of forest planning, and that "[m]anagement prescriptions

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[46] 36 C.F.R. § 219.19 (1996).

[47] *Id.*

[48] *Id.*

[49] *See id.* § 219.19(a)(1), (7). The NFMA regulations further provide that "[a]ll management prescriptions shall . . . [i]nclude measures for preventing the destruction or adverse modification of critical habitat for threatened and endangered species." *Id.* § 219.27(a)(8). Although, these two NFMA provisions directly implicate the goals and requirements of the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544 (1994), the NFMA's diversity requirements and the requirements of the ESA are distinct. Specifically, the NFMA's diversity requirements are broader than those in the ESA, while the ESA's provisions address more than just diversity. Moreover, notwithstanding the language of the NFMA, the Forest Service must comply with the ESA. Section 7 of the ESA specifically requires federal agencies to ensure that their actions do not jeopardize an endangered or threatened species or adversely affect its habitat. *See* 16 U.S.C. § 1536(a)(2).

It should be noted that the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1994), and the Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-26 (1994), are also incorporated into the NFMA by its regulations, although, unlike the ESA, they are made applicable by name. *See* 36 C.F.R. § 219.23(d).

[50] 36 C.F.R. § 219.26; *see* 36 C.F.R. §§ 219.27(a)(5), (a)(6), (a)(8), .27(g).

[51] *See* 16 U.S.C. § 1604(e)(1), (g)(3)(A) (1994).

. . . include visual quality objectives" (VQOs).[52] Since an adopted plan has the force of law, once the VQOs are established they thereafter impose legal limits on the use of the forest.[53]

C. How Forest Plans Control and Direct Forest Development

An LRMP generally divides a forest into several Management Areas (MAs) and provides different resource emphases and development restrictions for each area. The plan then enumerates specific "standards and guidelines" to control how and what kind of development is to occur within each type of MA. This "zoning" approach to forest management began prior to the passage of the NFMA,[54] and has since been incorporated into NFMA planning.[55] "Once [forest] plans become final and are determined to be valid, they themselves become law,"[56] and "are the engines that drive the management process,"[57] "[m]uch like zoning requirements or administrative regulations."[58]

Once land is zoned into a specific MA the Forest Service proceeds to implement projects, such as timber sales, other vegetation management, or gas exploration, which are consistent with that MA's standards and guidelines. If, for example, an area is designated unsuitable for timber production, it will never be cut, absent a complete reevaluation and amendment of the plan.[59]

D. Amending Forest Plans

The NFMA's amendment procedures also reveal the binding nature of forest plans. The Act requires that any "significant" changes in a plan be made in accordance with the same procedures

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[52] 36 C.F.R. § 219.21(f). The regulation further requires that the visual resource be evaluated "addressing both the landscape's visual attractiveness and the public's visual expectation." *Id.*

[53] *See* Wilkinson & Anderson, *supra* note 5, at 328.

[54] *See id.* at 31.

[55] Although not specifically enumerated in detail in the NFMA or its regulations, the regulations clearly anticipate that this "zoning" approach will be the norm. For example, the regulations provide that "[t]he forest plan shall contain . . . [m]ultiple-use prescriptions and associated standards and guidelines for each management area including proposed and probable management practices such as the planned timber sale program . . . ." 36 C.F.R. § 219.11(c) (1996). This is the only explicit reference in the regulations to "management areas." The concept is alluded to, however, in §§ 219.12(e)(1)(iii), 219.14(b), and 219.27.

[56] Wilkinson & Anderson, *supra* note 5, at 74.

[57] *Id.* at 12.

[58] *Id.* at 74; *see* 16 U.S.C. § 1604(i) (1994) ("Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans.").

[59] *See* 36 C.F.R. § 219.14(d) (1996).

required for adoption of the full plan.[60] The NFMA regulations iterate this requirement and provide that the Forest Supervisor is to make the decision as to whether a change is "significant," but do not provide any specific measures to determine what "significant" means in practice.[61] The only practical guidelines given are those provided in the Forest Service Manual and the Forest Service Handbook, which essentially provide that plan changes are significant if they will have forest-wide effects.[62] Any time the Service proposes such a change, it must follow the same public notice, hearing, and adoption procedure that it followed in adopting the plan initially.[63] One can infer that such changes, like the plans, are legally enforceable once adopted.

Even changes that are not "significant" are bound by the NEPA's environmental review, which provides an opportunity for public comment and administrative challenges.[64] Thus, they too have a stronger binding effect than a Forest Supervisor's routine policy decision. But such changes clearly do not have the binding effect of the plan itself or of major changes to the plan.

E. Judicial Review of Forest Service Actions on the Merits

With this background in place, I may now proceed to the central question addressed by this Note: whether forest management plans are judicially enforceable and, if so, how? More than ten years ago a noted authority stated that "the plans are controlling and judi-

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[60] 16 U.S.C. § 1604(f)(4).

[61] 36 C.F.R. § 219.10(f).

[62] The relevant portions of these documents were adopted at 53 Fed. Reg. 26,807, 26,812-13, 26,836-37 (1988). Specifically, the agency is to consider four factors: (1) timing (whether the change will occur within the 10 years that the plan is applicable), (2) location and size (larger actions are usually more significant), (3) goals, objectives, and outputs (as compared to those of the plan, if the change will affect these factors, the action is significant), and (4) management prescription (if the change will apply to future decisions in the planning area, it is more significant). *See id.* at 26,836-37. In addition, "[c]hanges that may have an important effect on the entire forest plan or affect land and resources throughout a large portion of the planning area during the planning period," are significant. *Id.* at 26,813.

[63] *See id.* at 26,813.

[64] *See* 36 C.F.R. § 219.10(f) (1996). The Forest Supervisor's decision regarding significance, like most agency discretionary decisions, is reviewed under the arbitrary and capricious standard. Thus, while court challenges can still be successful, the Forest Service usually prevails. *See* Sierra Club v. Cargill, 11 F.3d 1545, 1548-49 (10th Cir. 1993) [hereinafter *Cargill II*]; Southern Timber Purchasers Council v. Alcock, 779 F. Supp. 1353, 1361 (N.D. Ga. 1991), *aff'd in part and vacated in part on other grounds sub nom.*, Region 8 Forest Serv. Timber Purchasers Council v. Alcock, 993 F.2d 800 (11th Cir. 1993), *cert. denied*, 510 U.S. 1040 (1994).

cially enforceable until properly revised."[65] But judicial enforceability depends on courts' acknowledging, first, that a plaintiff's claims are justiciable, and, second, that the plaintiff has a case on the merits. While the topic of this note is the former, a brief discussion of the latter will show why the justiciability question is so important. Although it is difficult to challenge a forest plan successfully, it is possible. In other words, if a plaintiff can clear the justiciability hurdles, there is a good chance of obtaining relief in many instances. This section provides basic background on the types of claims that have been brought challenging both the elements of forest plans generally and particular site-specific actions.

Unlike many other environmental statutes, the NFMA does not contain a citizen suit provision.[66] Thus, judicial review is accomplished via certain provisions of the Administrative Procedure Act (APA),[67] and all of the accompanying judicial rules and standards apply. The record used in court, for example, is limited to the record the parties developed during administrative proceedings.[68] The basic standard of review is the "arbitrary and capricious" standard,[69] and courts generally defer to the administrative agency's factual determinations and the agency's interpretation of statutes and regulations.[70]

The cases have involved both challenges to forest plans and to site-specific Forest Service actions. Many have involved substantive NFMA claims,[71] while others have involved claims of proce-

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[65] Wilkinson & Anderson, *supra* note 5, at 74.

[66] *See* Jack Tuholske & Beth Brennan, *The National Forest Management Act: Judicial Interpretation of a Substantive Environmental Statute*, 15 PUB. LAND L. REV. 53, 106 (1994). The Tuholske & Brennan article is a useful recitation of many of the substantive NFMA issues and discusses the types of NFMA claims that are being fought out in court. The author relied heavily on the article in this section of this Note.

[67] *See* 5 U.S.C. §§ 701-706 (1994).

[68] *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971); *see also* Tuholske & Brennan, *supra* note 66, at 121. The record is subject to appropriate supplementation under standard principles of administrative law.

[69] 5 U.S.C. § 706(2)(a); *see* Tuholske & Brennan, *supra* note 66, at 124.

[70] *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984); *see also Cargill II*, 11 F.3d 1545, 1548-49 (10th Cir. 1993) (deferring to agency's factual determinations); Big Hole Ranchers Ass'n v. United States Forest Serv., 686 F. Supp. 256, 263-64 (D. Mont. 1988) (deferring to interpretation of statutes and regulations); Tuholske & Brennan, *supra* note 66, at 125.

[71] *See, e.g.*, Seattle Audubon Soc'y v. Moseley, 80 F.3d 1401 (9th Cir. 1996); Sierra Club v. Marita, 46 F.3d 606 (7th Cir. 1995); Sierra Club v. Espy, 38 F.3d 792 (5th Cir. 1994); Seattle Audubon Soc'y v. Evans, 952 F.2d 297 (9th Cir. 1991); Wilderness Soc'y v. Alcock, 867 F. Supp. 1026 (N.D. Ga. 1994); Krichbaum v. Kelly, 844 F. Supp. 1107 (W.D. Va. 1994); Oregon Natural Resources Council v. Lowe, 836 F. Supp. 727 (D. Or. 1993); Sharps v. United States Forest Serv., 823 F. Supp. 668 (D.S.D. 1993); Sierra Club v. Cargill, 732 F.

dural failure under the NEPA (and therefore the NFMA, because, as discussed above, the NFMA requires compliance with the NEPA).[72] Frequently, the cases involve a mixture of such claims.[73] Examples of the types of substantive NFMA issues that have been litigated include biological diversity,[74] timber suitability determinations,[75] and the excessive use of even-aged management techniques (i.e. clearcutting).[76] These substantive NFMA-based challenges, as well as challenges based on the Endangered Species Act (ESA) or the NEPA, frequently lose on the merits due to the difficulty of proving that the Forest Service acted arbitrarily or capriciously.[77]

When the Forest Service has blatantly disregarded statutory or regulatory requirements, however, or otherwise disregarded information it was required to consider, courts have ruled in favor of plaintiffs. For example, in *Sierra Club v. Cargill,*[78] the Forest Service blatantly violated an NFMA requirement in the Bighorn (Wyoming) National Forest forest plan. The NFMA permits tim-

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Supp. 1095 (D. Colo. 1990); Citizens for Envtl. Quality v. United States, 731 F. Supp. 970 (D. Colo. 1989); *see also* Tuholske & Brennan, *supra* note 66, at 66-95.

[72] *See, e.g.*, Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346 (9th Cir. 1994); Resources Ltd. v. Robertson, 35 F.3d 1300 (9th Cir. 1993); Seattle Audubon Soc'y v. Espy, 998 F.2d 699 (9th Cir. 1993); Idaho Conservation League v. Mumma, 956 F.2d 1508 (9th Cir. 1992); National Audubon Soc'y v. Hoffman, 917 F. Supp. 280 (D. Vt. 1995); Leavenworth Audubon Adopt-A-Forest Alpine Lakes Protection Soc'y v. Ferraro, 881 F. Supp. 1482 (W.D. Wash. 1995) [hereinafter *Leavenworth Audubon*].

[73] *See, e.g., Moseley*, 80 F.3d at 1404-05; *Marita*, 46 F.3d at 614-16; *Resources Ltd.*, 35 F.3d at 1305-07; *Hoffman*, 917 F. Supp. at 286-89; *Leavenworth Audubon*, 881 F. Supp. at 1487-94; *Krichbaum*, 844 F. Supp. at 1111-12; *Lowe*, 836 F. Supp. at 729-30 .

[74] *See, e.g., Moseley*, 80 F.3d at 1404; *Marita*, 46 F.3d at 614; *Evans*, 952 F.2d at 301; *Alcock*, 867 F. Supp. at 1034-36; *Krichbaum*, 844 F. Supp. at 1111; *Lowe*, 836 F. Supp. at 729; *Sharps*, 823 F. Supp. at 678. These claims are brought pursuant to 16 U.S.C. § 1604(g)(3)(B) (1994), and the NFMA's other diversity requirements. *See supra* note 44 and accompanying text.

[75] *See, e.g.*, Sierra Club v. Robertson, 28 F.3d 753, 760 (8th Cir. 1994) (holding that the Sierra Club did not have standing to bring the claim, but ruling in dicta on the plaintiffs' substantive suitability claim, among other claims); *Leavenworth Audubon*, 881 F. Supp. at 1490; *Alcock*, 867 F. Supp. at 1032-33; *Citizens for Envtl. Quality*, 731 F. Supp. at 983-85; *Cargill*, 732 F. Supp. at 1102. These claims are usually brought pursuant to 16 U.S.C. § 1604(f)(2), (g)(3)(E), (k).

[76] *See, e.g., Espy*, 38 F.3d at 800; *Resources Ltd.*, 35 F.3d at 1307. These claims are based on 16 U.S.C. § 1604(g)(3)(F).

[77] *See, e.g., Marita*, 46 F.3d at 619; *Espy*, 38 F.3d at 802; *Resources Ltd.*, 35 F.3d at 1305-08 (holding that an EIS was adequate but setting aside the Forest Service's determination that its forest plan would not jeopardize endangered species); *Salmon River Concerned Citizens*, 32 F.3d at 1357-60 (losing on NEPA claims); Nevada Land Action Ass'n v. United States Forest Service, 8 F.3d 713, 717-18 (9th Cir. 1993); Sierra Club v. United States Forest Serv., 878 F. Supp. 1295, 1314-15 (D.S.D. 1993) *aff'd*, 46 F.3d 835 (8th Cir. 1995); *Krichbaum*, 844 F. Supp. at 1113-19; *Lowe*, 836 F. Supp. at 734-36; Big Hole Ranchers Ass'n v. United States Forest Serv., 686 F. Supp. 256, 264 (D. Mont. 1988).

[78] 732 F. Supp. 1095, 1102 (D. Colo. 1989).

ber cutting only on lands that can be restocked with timber within five years of harvesting.[79] The Bighorn forest plan provided for lodgepole pine timber harvesting on a seven-year regeneration schedule.[80] The District Court held that the Forest Service was in violation of the NFMA and enjoined all Bighorn timber sales until the Service revised the forest plan.[81]

Not all cases are as cut-and-dried as *Cargill.* Many involve multiple claims and require the court to apply the arbitrary and capricious standard to complicated facts. In *Citizens for Environmental Quality v. United States*,[82] for example, the court assessed more than six separate NFMA claims. *Citizens* involved a challenge to the Rio Grande (Colorado) National Forest forest plan,[83] and the court held for the plaintiffs on four issues: (1) use of the technology exception to the rule against timber development in areas with unstable soils,[84] (2) the need to explain adequately the economic factors considered during planning and the use of timber production goals to control the timber suitability analysis,[85] (3) the lack of consideration of a broad range of alternatives,[86] and (4) the absence of any statement that the plan conformed with the Clean Water Act.[87] The court held for the Forest Service, however, on several other issues, ruling that: (1) a forest plan may provide for on-going, site-specific soil studies rather than providing a thorough study of all soils in the plan;[88] (2) the agency may conduct eco-

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[79] *See* 16 U.S.C. § 1604(g)(3)(E)(ii) (1994); 36 C.F.R. § 219.14(a)(3) (1996).

[80] *See Cargill II*, 11 F.3d 1545, 1547 (10th Cir. 1993).

[81] *See Cargill*, 732 F. Supp. at 1102.

[82] 731 F. Supp. 970, 981-82 (D.Colo. 1989) [hereinafter *Citizens*].

[83] *See id.* at 976.

[84] *See id.* at 981, 985-86; 16 U.S.C. §§ 1604(g)(3), (g)(3)(E)(i), (k); 36 C.F.R. § 219.14(a)(2). These provisions permit the Forest Service to harvest timber in areas with unstable soils if they can show that there are technologies available to mitigate the damage of such harvesting and ensure that the areas can be regenerated with timber. The court held that the Forest Service failed to identify the technology that would be used to prevent irreversible soil damage. *See Citizens*, 731 F. Supp. at 981, 985.

[85] *See Citizens*, 731 F. Supp. at 981, 988; 16 U.S.C. § 1604(k) (1994); 36 C.F.R. § 219.14(b) (1996) (requiring an economic efficiency analysis). The court's reasoning regarding the use of timber production goals to control the suitability analysis was based on the notion that several factors are to be considered equally in making suitability decisions. The Forest Service must provide adequate reasons for giving any one factor greater weight than other factors required by § 1064(k) and the regulations. *Citizens*, 731 F. Supp. at 988.

[86] *See Citizens*, 731 F. Supp. at 990; 36 C.F.R. § 219.12(f). The court reasoned that the Forest Service had constrained its alternative development process by only developing alternatives that would meet the production goals which it had already established. *See Citizens*, 731 F. Supp. at 990.

[87] *See Citizens*, 731 F. Supp. at 982, 991; 36 C.F.R. § 219.23(d).

[88] *See Citizens*, 731 F. Supp. at 981, 985.

nomic feasibility analyses for timber sales on a project-by-project basis rather than in the forest plan;[89] (3) the agency "adequately considered the environmental effects [of the plan] on visual resources and water quality";[90] (4) the Forest Service's EIS for the plan was sufficient;[91] and (5) the plaintiffs had failed to state a claim under the ESA.[92]

Plaintiffs have also based a successful challenge on the NFMA's diversity requirement. In *Seattle Audubon Society v. Evans,*[93] the court required the Forest Service to fulfill its obligation to maintain viable populations of threatened and endangered species. The court rejected the Forest Service's argument that its duty to ensure the viability of the northern spotted owl ended when the species was listed as endangered, and the court sustained the lower court's injunction against all timber sales.[94]

In short, many NFMA-based claims, including challenges to both forest plans and site-specific actions, can succeed on the merits, despite the high level of deference with which courts review Forest Service actions. Whether the court in fact reaches the merits of these claims, therefore, is a matter of great importance. In fact, courts often do not reach the merits, ruling that the plaintiffs' claims are not justiciable because the plaintiffs have suffered no "injury-in-fact," and therefore do not satisfy the constitutional requirement of standing or ripeness or both.[95] The next section examines these justiciability issues in depth.

III. Justiciability and "Injury in Fact"

Standing and ripeness are justiciability doctrines that limit access to court. The judiciary uses these doctrines to determine "whether the litigant is entitled to have the court decide the merits of the

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[89] *See id.* at 982, 991.

[90] *Id.* at 981-82; *see id.* at 991; 36 C.F.R. §§ 219.12(g), (h); 40 C.F.R. §§ 1502.14, 1502.16.

[91] *See Citizens*, 731 F. Supp. at 982, 994-95 (ruling on the plaintiff's NEPA claim).

[92] *See id.* at 982, 986.

[93] 952 F.2d 297 (9th Cir. 1991).

[94] *See id.* at 301-02, 304-05; *see also* Resources Ltd. v. Robertson, 35 F.3d 1300, 1305 (9th Cir. 1993) (sustaining a challenge to a forest plan because the Forest Service's assessment of the plan's effects on threatened or endangered species was inadequate); Pacific Rivers Council v. Thomas, 873 F. Supp. 365, 372 (D. Idaho 1995) (granting a preliminary injunction to ban "any *new* timber sales, range activities, mining activities, or road building projects [on six national forests in the Pacific Northwest] until [the Forest Service conducted a] formal consultation" with the National Marine Fisheries Service regarding endangered salmon species).

[95] *See* Wilderness Soc'y v. Alcock, 83 F.3d 386, 390-91 (11th Cir. 1996); Sierra Club v. Robertson, 28 F.3d 753, 758-60 (8th Cir. 1994).

dispute or of particular issues."[96] Each doctrine involves both prudential and constitutional concerns.[97] Obviously, the determination of whether to apply prudential limitations on court access is an issue of broad judicial discretion, for that is part of the very definition of "prudence." But the constitutional limits, of course, are mandatory. Thus, the standards by which courts apply those limits are vitally important to potential litigants. If the standing and ripeness rules are not easily administrable and based on clear standards, judges will have excessive discretion in deciding who will be heard in court and will exercise this discretion under the guise of a constitutional mandate.[98]

As will be developed below, the source of the standing doctrine is well settled in the courts, but the source of the ripeness doctrine is somewhat less settled. The Supreme Court has unpacked the constitutional elements of the standing and ripeness doctrines out of Article III's "case" or "controversy" requirement,[99] and endorses a view of these doctrines as "cluster[ing] about Article III."[100] Although scholars have roundly criticized the Court's constitutional standing jurisprudence,[101] that Article III is the basis for the doctrine has become a generally accepted and ingrained principle in the courts.

Like the standing principle, the ripeness doctrine began as a prudential limitation on access to the courts, and has only been identified with the "case" or "controversy" requirement in the past few decades.[102] In the case of ripeness, however, although constitu-

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[96] Warth v. Seldin, 422 U.S. 490, 498 (1974).

[97] *See id.*; Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 162-63 (1987).

[98] In a worst-case scenario, there will be room for judges' views of the merits of an action to affect their decision with respect to justiciability.

[99] U.S. CONST. art. III, § 2.

[100] Allen v. Wright, 468 U.S. 737, 750-51 (1984) (quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring)).

[101] *See, e.g.*, William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988); Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68 (1984); Jonathan Poisner, *Environmental Values and Judicial Review after Lujan*, 18 ECOLOGY L.Q. 335 (1991); Cass R. Sunstein, *What's Standing after* Lujan?, 91 MICH. L. REV. 163 (1992); Mark. V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977); Stanley E. Rice, Note, *Standing on Shaky Ground: The Supreme Court Curbs Standing for Environmental Plaintiffs in* Lujan v. Defenders of Wildlife, 38 ST. LOUIS U. L.J. 199 (1993).

[102] *See* Nichol, *supra* note 97, at 162-63. Professor Nichol criticizes this tendency of the Supreme Court to use the ripeness doctrine to limit access to the courts. He argues that "ripeness analysis carries the banner of prudence rather than power." *Id.* at 174. This approach may be the most coherent method of analyzing the issues of standing and ripeness. Taking such an approach, perhaps the split in the circuits is not so remarkable; each court is exercising its prudential powers to different degrees. If so, this analysis is never-

tional principles are undoubtedly a part of its justification, the doctrine's mixed history has led lower courts to some confusion about the specific justification for the doctrine.[103]

A. Standing to Sue

In *Lujan v. Defenders of Wildlife*, the Supreme Court summarized the constitutional elements of the standing doctrine:[104]

> [T]he irreducible constitutional minimum of standing contains three elements[:] First, the plaintiff must have suffered an "injury in fact" — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be fairly trace[able] to the challenged action of the defendant, and not th[e] result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[105]

These three parts of the standing test are referred to as: (1) injury in fact, (2) traceability (or causation), and (3) redressability. The first of these is the critical issue with respect to the standing of parties wishing to challenge national forest plans.[106] The Forest Service has not disputed the traceability or redressability of the alleged injury in any of the plan challenges; and, in any case, if an injury were in fact inflicted, proving these two elements would likely be perfunctory.[107]

Lujan v. Defenders of Wildlife is the leading case addressing the injury in fact requirement, and is particularly relevant to national forest plan challenges because it involved an environmentally-

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theless disconcerting because, as previously mentioned, it may allow different courts to let their determinations of justiciability be affected by their views of the claim's merits.

[103] *See, e.g.*, Travelers Ins. Co. v. Obusek, 72 F.3d 1148, 1154 (3rd Cir. 1995) ("While we have noted that there is some disagreement as to whether the ripeness doctrine is grounded in the case or controversy requirement or is more properly viewed as a 'prudential limitation on the federal jurisdiction,' we recognize that the doctrine is at least partially grounded in the case or controversy requirement." (citation omitted)).

[104] 504 U.S. 555 (1992) [hereinafter *Defenders*].

[105] *Id.* at 560-61 (internal citations and quotation marks omitted).

[106] *See, e.g.*, Sierra Club v. Marita, 46 F.3d 606, 611 (7th Cir. 1995); Sierra Club v. Robertson, 28 F.3d 753, 758 (8th Cir. 1994); Idaho Conservation League v. Mumma, 956 F.2d 1508, 1514-17 (9th Cir. 1992).

[107] *See* cases cited *supra* note 106.

minded challenge to agency action.[108] According to the rule announced in *Defenders*, the injury in fact rule has two components: first, that the injury be "concrete and particularized," and, second, that it be "actual or imminent, not conjectural or hypothetical."[109]

In *Defenders,* a group of plaintiffs claimed that the Endangered Species Act's consultation requirement applied to actions the federal government took outside the United States.[110] The plaintiffs claimed they would suffer three types of injury if consultation were not required: first, they claimed that failure to consult would lead to the extinction of endangered and threatened species, which would injure them because they planned to travel overseas to view and study those species and would lose opportunity if the animals became extinct.[111] Second, the plaintiffs made three "nexus" theory claims of injury, arguing that anyone who uses any part of a contiguous ecosystem, who is interested in studying or directly observing any endangered species, or who has a vocational interest in a species is hurt when species become extinct.[112] Third, the plaintiffs claimed that the ESA's citizen suit provision created a procedural right to consultation.[113] The Court of Appeals accepted the third proposition, and held that anyone could file suit based on a claim of procedural injury when a procedural requirement of the Act had been violated.[114]

The Supreme Court reversed, rejecting all of the plaintiffs' arguments regarding injury.[115] With respect to the first and second claims, the Court ruled that the alleged injury was neither actual nor imminent.[116] The Court held that a plaintiff must actually utilize the specific "area affected by the challenged activity" in order to claim injury from that activity.[117] General, non-specific plans to use an area will not support a finding of actual injury.[118] As to the imminence of the claimed injuries, the Court stated:

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[108] *See Defenders*, 504 U.S. at 559.

[109] *Id.* at 560.

[110] *See id.* at 558-59. The ESA requires all federal agencies to consult with the Secretary of the Interior before taking any action to insure that the action will not jeopardize any threatened or endangered species or their habitat. *See* 16 U.S.C. § 1536(a)(2) (1994).

[111] *See Defenders*, 504 U.S. at 562-63.

[112] *See id.* at 565-66.

[113] *See id.* at 572.

[114] *See* Defenders of Wildlife v. Lujan, 911 F.2d 117, 121-22 (8th Cir. 1990).

[115] *See Defenders*, 504 U.S. at 564-67.

[116] *See id.* at 564.

[117] *Id.* at 566; *see also* Lujan v. National Wildlife Fed'n, 497 U.S. 871, 887-89 (1990).

[118] *See Defenders*, 504 U.S. at 564.

> Although "imminence" is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes — that the injury is *certainly* impending. It has been stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control. In such circumstances we have insisted that the injury proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all. . . . Where there is no actual harm, however, [the injury's] imminence (though not its precise extent) must be established.[119]

Thus, the Court's holding with respect to the first two types of injury claimed by the plaintiffs can be reduced to a requirement that plaintiffs must actually use or have concrete plans to use the specific areas that will be affected by the government action.[120] That is, the Court required a geographical nexus and did not speak to the temporal imminence issue.[121]

With regard to the third claim, the Court held that a plaintiff would have standing if she suffered concrete harm as the result of a violation of procedural rights, but that the plaintiffs in the case before it did not meet the requirements for such standing.[122] The Court emphasized that an individual can enforce procedural rights, but only so long as "the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing."[123] The key to having such standing, in other words, is that the violated procedural requirement be one that pro-

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[119] *Id.* at 564-65 n.2 (emphasis in original) (citations and internal punctuation omitted).

[120] It should be noted that the Court's opinion in Defenders was a plurality opinion, written by Justice Scalia and signed onto by only three other Justices (Rehnquist, White, and Thomas). Justice Kennedy, joined by Justice Souter, concurred in part and concurred in the judgment. While Kennedy agreed with most of the Court's reasoning, he refused to "foreclose the possibility . . . that in different circumstances a nexus theory . . . might support a claim to standing." *Id.* at 579 (Kennedy, J., concurring). Justice Stevens concurred in the judgment on the merits, having found that plaintiffs had standing. *Id.* at 581-82 (Stevens, J., concurring). J. Blackmun, joined by J. O'Connor, dissented. *Id.* at 589 (Blackmun, J., dissenting).

[121] *See* Sierra Club v. Marita, 46 F.3d 606, 612 (7th Cir. 1995).

[122] *See Defenders*, 504 U.S. at 572 n.7, 573.

[123] *Id.* at 573 n.8 (emphasis in original). Noting that procedural rights are "special," the Court also stated that plaintiffs do not need to meet the normal requirements of redressability and immediacy when claiming injuries based on procedural violations. *See id.* at 572 n.7.

tects an underlying, separate, concrete interest.[124] The Court ruled that the plaintiffs in *Defenders* had no concrete interests at stake because they did not live near or use the area that would be affected by the government action.[125]

As with the holdings on the first two injury theories, this holding may be reduced to the fact that the plaintiffs were not directly, concretely threatened by the government action, in that they could not prove that they would be visiting the sites affected by that action.[126] Thus, as with its analysis regarding substantive claims, the Court did not specifically reach the temporal imminence question when it addressed the procedural claims.

Defenders thus left open the question whether the threatened harm must be equally imminent to establish injury in fact for both procedural and substantive claims. The answer will have serious implications in the context of forest plan challenges, for, as we have seen, such challenges often involve both types of claims.

In my view, there are good reasons, especially in the case of forest plan challenges, why courts should apply a more relaxed imminence requirement when a plaintiff complains of a procedural violation than when the complaint is a substantive one. In the case of a procedural violation — such as, for example, a failure by the Forest Service to consider the environmental consequences of a proposed timber harvest — any action that occurs necessarily injures the underlying interest which the procedural requirements are meant to protect, namely, the avoidance of taking action without knowing the full environmental consequences. On the other hand, until a proposed action is actually taken, it is not clear which, if any, substantive rights will in fact be violated. In such a case, until the specific substantive action which will occur is more definitely known, and injury more imminent, the action should not be before a court.

Though *Defenders* did not specifically reach this imminence issue, it can be read to support the view that procedural and substantive claims are different in the respect just described. The

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[124] *See id.* at 572 ("e.g., . . . the procedural requirement for an environmental impact statement before a federal facility is constructed next door to [the plaintiffs.]").

[125] *See id.* at 572 n.7.

[126] *See* Warth v. Seldin, 422 U.S. 490, 500 (1975) ("Although standing in no way depends on the merits of the plaintiff's contention . . . it often turns on the nature and source of the claim asserted. The actual or threatened injury required by Article III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . . .'") (quoting Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973)); Sierra Club v. Morton, 405 U.S. 727, 732 (1972).

example cited by the Court to show that procedural rights can protect underlying concrete interests explains: "[O]ne living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement . . . even though the dam will not be completed for many years."[127] As previously described, the Court's focus in this example is clearly on the physical proximity to the site of the proposed action — the potential plaintiff lives next door. But the Court adds the caveat that the *proposed* construction will not be complete, and thus the on-the-ground physical injury will not occur, "for many years." It seems doubtful that Justice Scalia would be willing to grant standing to a similar plaintiff claiming she has been substantively injured by a proposal that may not inflict any on-the-ground harm until years in the future.[128]

Before moving on to a discussion of the ripeness doctrine, it must be noted that the Administrative Procedure Act imposes two other standing requirements that must be met before a plaintiff may challenge an agency action.[129] First, the challenged action must be a "final agency action,"[130] and, second, the alleged injury must be a legal wrong or result in an adverse effect "within the meaning of [the underlying] statute."[131] More specifically, the second prong requires that the injury to the plaintiff "fall[ ] within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint."[132] Forest plans are final agency actions within the meaning of the APA, so the first prong will always be satisfied in plan challenges.[133] Furthermore, it is well established that recreational and professional use of the forests, as well as aesthetic enjoyment of them, are within the interests that the NFMA was intended to protect.[134]

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127 *Defenders*, 504 U.S. at 572 n.7.

128 It should also be noted that Justice Scalia's example involves the challenge of a project license. A license, like a plan, does not commit the agency to any further action. It may well be that economic or political factors later prevent the government from building the dam at all. Yet it is a concrete enough declaration of intent that Scalia believes a plaintiff would have standing to challenge the action based on imminent harm to a concrete interest protected by a procedural right.

129 Challenges of agency action under the APA are brought pursuant to 5 U.S.C. § 702.

130 5 U.S.C. § 704 (1994).

131 *Id.* § 702.

132 Lujan v. National Wildlife Fed'n, 497 U.S. 871, 883 (1990).

133 *See, e.g.*, Wilderness Soc'y v. Alcock, 83 F.3d 386, 388 (1996).

134 *See* 16 U.S.C. § 1604(e)(1) (1994); *see also Defenders*, 504 U.S. 555, 562-63 (1992); *National Wildlife Federation*, 497 U.S. at 886; Sierra Club v. Morton, 405 U.S. 727, 734 (1972).

Accordingly, these statutory standing requirements will never preclude a forest plan challenge, and the justiciability issue in this context should be seen as turning entirely on the presence or absence of constitutional standing, which, as shown above, really means the presence or absence of a concrete and imminent injury.

B. Ripeness

The most commonly cited statement of the ripeness doctrine was made in *Abbott Laboratories v. Gardner,*[135] in which the Supreme Court wrote that the "basic rationale" of the doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."[136] Although this justification does not explicitly rely on the Article III "case" or "controversy" requirement, the Court, as previously described, has incorporated the ripeness doctrine into the panoply of justiciability issues emanating from the Constitution.[137] This dual lineage continues to confuse the application of the doctrine. At times courts seem to be applying a prudential version of the doctrine, and other times a constitutional version.

The constitutional approach to the ripeness inquiry is closely akin to the standing doctrine's injury inquiry. While some commentators have criticized this approach for needlessly infusing constitutional justiciability concerns,[138] others have defended it,[139] on the ground that the two inquiries are distinct. While the standing inquiry is focused on the identity of the party bringing suit, that is, on whether *this* person is the one who has been injured, the ripeness injury inquiry focuses on *when*, if at all, the injury will occur — whether the harm is too speculative.[140] From this perspective,

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135 387 U.S. 136 (1967).

136 *Id.* at 148-49.

137 *See* Regional Rail Reorganization Act Cases, 419 U.S. 102, 138 (1974); Nichol, *supra* note 97, at 162-63.

138 *See* Nichol, *supra* note 97, at 163-75.

139 *See* Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement,* 93 HARV. L. REV. 297, 298-99 (1979).

140 *See id.*; Nichol, *supra* note 97, at 175 (citing DAVID P. CURRIE, FEDERAL COURTS: CASES AND MATERIALS 71 (3d ed. 1982) for the proposition that "while standing asks *who* is a proper party to litigate, ripeness asks '*when* a proper party may litigate'" (emphasis in original)); Wilderness Soc'y v. Alcock, 83 F.3d 386, 390 (11th Cir. 1996) (noting that the "important distinction between the two doctrines" is that "[w]hen determining standing a court asks whether these persons are the proper *parties* to bring the suit, thus focusing on

the crucial justiciability question involved in forest plan challenges appears to be ripeness and not standing.

Only the Eleventh Circuit has adopted the proposition just stated.[141] Arguably, however, the lack of focus on ripeness can be attributed to the Supreme Court's failure to enumerate and label as such the elements of the ripeness doctrine's injury standard. While *Defenders* and other decisions have set down a clear procedure for analyzing the standing question,[142] on the ripeness question, lower courts must piece together their analyses from several different decisions, some invoking only prudential considerations, others invoking constitutional ones. This has resulted in different federal circuits adopting slightly different approaches to ripeness analysis, or at least describing their approaches in different terms.[143]

If nothing else, however, the starting point for all ripeness discussions is clearly *Abbott Laboratories,*[144] in which the Court described the ripeness inquiry as having two parts: (1) an evaluation of the "fitness of the issues for judicial decision," and (2) a determination of whether there would be "hardship to the parties of withholding court consideration."[145] By their terms, these requirements seem to implicate only prudential considerations. The fitness prong, however, has been interpreted by federal courts of appeals as encompassing three separate components: (1) the controversy must be "definite and concrete rather than hypothetical or abstract,"[146] (2) the parties must be adverse, and (3) the

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the qualitative sufficiency of the injury and whether the complainant has personally suffered the harm," while "[w]hen determining ripeness, a court asks whether this is the correct *time* for the complainant to bring suit" (citing ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.4.1 (1989)); *see also* Hallendale Fire Fighters Local 2238 v. City of Hallandale, 922 F.2d 756, 760 n.3 (11th Cir. 1991).

[141] *See Alcock*, 83 F.3d at 390. Other courts that have addressed these issues in forest plan challenges have focused on the standing issue first, and covered the ripeness issue very briefly, if at all, stating that for the "same reason" as the plaintiff has or does not have standing, the claim is or is not ripe. *See* Sierra Club v. Marita, 46 F.3d 606, 614 (7th Cir. 1995); Idaho Conservation League v. Mumma, 956 F.2d 1508, 1518 (9th Cir. 1992). The question of whether this issue is primarily a ripeness question, not a standing question, is discussed further in Parts III, IV, and V *infra*.

[142] *See Defenders*, 504 U.S. at 560-61; *supra* notes 104-07 and accompanying text.

[143] *See, e.g.,* Travelers Ins. Co. v. Obusek, 72 F.3d 1148, 1154-55 (3d Cir. 1995); Riva v. Commonwealth of Massachusetts, 61 F.3d 1003, 1009-10 (1st Cir. 1995); Freehold Cogeneration Assocs. v. Board of Regulatory Comm'rs, 44 F.3d 1178, 1188 (3rd Cir. 1995); *Hallendale Fire Fighters Local 2238*, 922 F.2d at 760.

[144] 387 U.S. 136 (1967).

[145] *Id.* at 149.

[146] *Hallendale Fire Fighters Local 2238*, 922 F.2d at 760 (citing Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979)). The cited portion of the *Babbitt* opinion

factual record must be complete enough to allow for a meaningful judicial resolution of the matter.[147]

It is interesting to compare these three requirements to the elements of the standing analysis.[148] First, ripeness requires a concrete controversy while standing requires a concrete and imminent injury. Thus, the first element in both analyses, concreteness, is nearly identical. The standing inquiry clarifies this issue somewhat by adding the "imminent" requirement, but the notion of imminence is, to a degree, inherent in both concreteness and, obviously, in ripeness itself. Ripeness is simply a way to ask whether facts have occurred, or are likely to occur, to make judicial resolution of a case meaningful — are they imminent? Second, ripeness requires adverseness where standing requires traceability. These elements can also be viewed as the same. Both are designed to insure that the two parties are really in dispute. Did the defendant's action really harm the plaintiff? If so, then it is traceable and the parties are adverse. The third elements, capacity for meaningful judicial resolution and standing's redressability, are also functionally equivalent.

The elements of the two doctrines, in short, are very nearly identical, especially as concerns their respective injury requirements, and this explains why courts analyzing whether an injury has occurred often lump the two doctrines together.[149] The consequences of using the two doctrines may not be identical, however. In fact, analyzing the issue under one doctrine or the other may have important implications. For example, one potential implication of analyzing the injury question under the ripeness rubric is that forest management plans may not ever be ripe for comprehensive review.[150] This issue will be discussed further in Part IV.C below.

In summary, the key question to determine if forest plan challenges are ripe is whether the issue is concrete enough for judicial

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does not explicitly state that it is addressing the ripeness doctrine at all, and seems to use language akin to standing requirements. *See* 442 U.S. at 298 (plaintiff must "demonstrate a realistic danger of sustaining a direct injury"). The lower courts seem to be confusing the two.

147 *See, e.g.*, *Riva*, 61 F.3d at 1009-10. Some lower courts have only adopted two of these requirements, others all three. The requirement that the controversy be concrete, however, is a part of all of their analyses. *See* cases cited *supra* note 143.

148 *See supra* notes 104-07 and accompanying text.

149 *See, e.g.*, Sierra Club v. Marita, 46 F.3d 606, 614 (7th Cir. 1995); Wilderness Soc'y v. Alcock, 867 F. Supp. 1026, 1042 (N.D. Ga. 1994).

150 *See* Lujan v. National Wildlife Fed'n, 497 U.S. 871, 892-93 (1990).

review — that is, whether the injury is too speculative or uncertain. As with the injury inquiry under standing analysis, an imminent, predictable injury is enough to satisfy this requirement. As the Supreme Court has written, "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough."[151] The Court elaborated on this requirement in *Lujan v. National Wildlife Federation*:

> [A] regulation is not ordinarily considered . . . "ripe" for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him.[152]

In *National Wildlife Federation*, the plaintiffs challenged a broad, general rule, adopted by the Department of the Interior and applicable nationwide, regarding the process by which public lands were classified as available or not for mining and other development.[153] The Court held that this rule was not ripe for review because it was not a "final agency action" within the meaning of the APA and because the rule did not directly harm the plaintiffs.[154] Furthermore, the Court questioned whether even a specific implementation of such a general rule would satisfy the injury requirement, stating that "even those individual actions [may] not be ripe for challenge until some further agency action or inaction more immediately harming the plaintiff occurs."[155] The Court went on to state that, even if an individual action were ripe for review, plaintiffs would still be unable to get "wholesale correction [of the general rule] under the APA, simply because one of [the site-specific actions that] is ripe for review adversely affects one of [the plaintiffs]."[156]

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151 Pacific Gas & Elec. v. Energy Resources Comm'n, 461 U.S. 190, 201 (1983) (quoting Pennsylvania v. West Virginia, 262 U.S. 553, 593 (1923)).

152 *National Wildlife Fed'n*, 497 U.S. at 891.

153 *See id.* at 875, 879.

154 *See id.* at 890-92.

155 *Id.* at 892.

156 *Id.* at 893.

C. The Separation of Powers and Justiciability

In *Allen v. Wright*[157] the Supreme Court described the Article III "case" or "controversy" requirement as follows: "[It] defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded. The several doctrines that have grown up to elaborate that requirement are 'founded in concern about the proper — and properly limited — role of the courts in a democratic society.'"[158] The Court continued its explanation by quoting a Court of Appeals opinion by Judge Robert Bork:

> All of the doctrines that cluster about Article III — not only standing but mootness, ripeness, political question, and the like — relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.[159]

The Court insisted, in conclusion, that "the case-or-controversy doctrines state fundamental limits on federal judicial power."[160]

Both the standing and ripeness doctrines, in other words, are founded on the principle of separation of powers. Stated briefly, the principle is that generalized grievances against government must be remedied within the political process and not the courts.[161] Accordingly, courts must not be converted into political fora.[162] The theory rests, in part, on the view that the proper role of the courts is to protect individuals who have been distinctly harmed due to the unfair application of the laws, and not to protect the majority from general harm resulting from actions by Congress and the President.[163] It is for this reason that the "concrete injury" requirement is the "indispensable prerequisite of standing."[164]

The theory also rests on a belief that, if the federal courts were to involve themselves in such generalized grievances, they would be usurping power from the executive branch in favor of the legis-

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[157] 468 U.S. 737 (1984).

[158] *Id.* at 750 (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)).

[159] *Id.* (quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring)).

[160] *Id.*

[161] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-74 (1992).

[162] *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881-83, 892 (1983).

[163] *See id.* at 894.

[164] *Id.* at 895.