No Time Is the Right Time: The Supreme Court's Use of Ripeness to Block Judicial Review of Forrest Plans for Environmental Plaintiff's in Ohio Forestry Ass'n v. Sierra Club

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NO TIME IS THE RIGHT TIME: THE SUPREME COURT'S USE OF RIPENESS TO BLOCK JUDICIAL REVIEW OF FOREST PLANS FOR ENVIRONMENTAL PLAINTIFFS IN OHIO FORESTRY ASS'N V. SIERRA CLUB

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INTRODUCTION

Continuing what one commentator has called the "equivalent of Sherman's march through Georgia"1 with respect to the justiciability of claims filed by environmental groups, the Supreme Court decided Ohio Forestry Ass'n v. Sierra Club2 in May 1998. The case involved a challenge by the Sierra Club and various other environmental groups against the United States Forest Service over the Land and Resource Management Plan ("Forest Plan") that the Forest Service adopted for Wayne National Forest.3 The Sierra Club argued that the Forest Plan allowed too much logging of the forest in general and too much clearcutting in particular.4 The plaintiffs sought to challenge the Forest Plan because it dictated an overall management procedure that was unsatisfactory and they believed that they should not have to wait until actual logging was proposed in order to seek judicial review.5

The lawsuit raised the question of whether planning regulations rather than site-specific actions were suitable for review by the Court. The issue had arisen in several courts, resulting in a split over whether

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3. See id. at 728.
5. See id. at 488.
or not these Forest Plans were justiciable at the planning stage. In a unanimous decision, the Supreme Court held that they were not justiciable, agreeing with the Eighth and Eleventh Circuits that without site-specific, on-the-ground activities the Forest Plans were not ripe for judicial review.

This Comment contends that Forest Plans do constitute final agency actions that are ripe for review even without site-specific actions implementing them. The Supreme Court's decision, therefore, reflects the continuing use of justiciability doctrines as barriers to restrict environmental groups' access to the courts. Part I explains the ripeness doctrine and sets forth the test generally used by courts to evaluate whether or not a claim is fit for judicial review. The doctrine arose in the context of suits against a regulatory agency by a regulated entity and, therefore, can be difficult to apply fairly in environmental cases. Part II discusses the type of Plan in controversy, a Forest Plan, and how the various circuits have addressed the question of whether these Plans are final agency actions ripe for judicial review. Part III details the factual and procedural history of the Ohio Forestry case. Part IV argues that the Supreme Court incorrectly held that the case was unripe and, as a result of this holding, effective and efficient judicial review of agency actions could be eliminated.

I. RIPENESS AND ENVIRONMENTAL LAWSUITS

A. The Ripeness Doctrine

Ripeness is a doctrine that relates to the timing of judicial review, asking if the court is equipped to adjudicate the issues before it. The basic rationale of the ripeness doctrine is "to prevent 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."  

Ripeness began as a judicially created prudential concern
supported by policy considerations, pragmatism; and the courts’
desire to avoid judicial review of agency actions that may be modified
or never enforced. The Supreme Court expressed these prudential
considerations by developing a two-part ripeness test. The first step
involved an evaluation of “the fitness of the issues for judicial
decision” and the second, “the hardship to the parties of withholding
court consideration.”

Courts evaluate several factors in determining whether the
fitness requirement of the test is met. One is that the issues involved
should be legal ones. Another is whether the agency action at issue
constitutes “final agency action” as mandated under the
Administrative Procedure Act (“APA”), a concept often referred to
as finality. Indeed, it has been suggested that finality may be the key
element in determining not only fitness, but ripeness as a whole.

court dockets and overall efficiency and, as such, are entirely discretionary in nature. The
Supreme Court began to incorporate constitutional considerations into the ripeness inquiry in a
series of cases beginning in the mid-1970s. See Gene R. Nichol, Jr., Ripeness and the
Constitution, 54 U. Chi. L. Rev. 153, 162-63 (1987). Ripeness was viewed as “a ‘threshold’
determination designed to measure whether the ‘actual controversy’ . . . requirement imposed
by Article III of the constitution is met.” Id. at 163. For a discussion of the constitutional
aspects of ripeness, see generally R. George Wright, The Timing of Judicial Review of
Administrative Decisions: The Use and Abuse of Overlapping Doctrines, 11 AM. J. TRIAL
ADVOC. 83 (1987) (arguing that ripeness has an Article II as well as an Article III component);
cf. Nichol, supra (arguing that, because of the implied rigidity and formalism of the
constitutionalized version, ripeness should have remained a purely prudential doctrine).


Abbott Lab., 387 U.S. at 149. Inconsistencies arise in courts applying the Abbott Labs
test over (1) whether an issue must be both fit and cause hardship and (2) how severe the
hardship must be in order to be ripe and how imminent the proposed action must be before
review is possible. See Caldwell, supra note 8, at 356-57. Most courts have taken a flexible
approach and simply balance the various elements. See id. at 357.

Courts consider, for example, if the record before the Court is complete enough to
provide sufficient information about the relevant issues. See Cristiano, supra note 11, at 467-68
n.115.

See Abbott Lab., 387 U.S. at 149.


Technically, the statutorily based finality is a separate doctrine from judicially created
ripeness. See Wright, supra note 10, at 87. However, there is great confusion and inconsistency
in judicial application of the two doctrines such that finality has essentially been amalgamated
into the ripeness doctrine. See Caldwell, supra note 8, at 354. Some courts treat the two as
separate, see, e.g., Public Citizen Health Research Group v. Commissioners, 740 F.2d 21 (D.C.
Cir. 1984), others incorporate finality into the Abbott Labs test for ripeness, see, e.g., NRDC v.
EPA, 859 F.2d 156 (D.C. Cir. 1988), while others view the two doctrines as the same thing, see,
e.g., Sierra Club v. Gorsuch, 715 F.2d 653 (D.C. Cir. 1983). It has been suggested that there is
no need to distinguish the two doctrines, particularly since the Supreme Court has apparently
ceased to distinguish between them. See Matthew Porterfield, Agency Action, Finality and
Geographical Nexus: Judicial Review of Agency Compliance with NEPA’s Programmatic EIS
(1994).

See Wright, supra note 10, at 87; see also, E. Gates Garrity-Rokous, Note, Preserving
The hardship aspect of the ripeness test focuses on the practical effects of the agency action and essentially involves a balancing of the interests involved.\textsuperscript{18} In environmental cases, the balancing is usually between the validity of the agency's desire to avoid judicial interference and the possibility that withholding review will injure the plaintiff or ultimately preclude a remedy.\textsuperscript{19} Here, the inquiry becomes one of harm or injury rather than hardship.\textsuperscript{20} This part of the test, therefore, is used to determine whether the "asserted harm is real and concrete rather than speculative and conjectural."\textsuperscript{21}

\textbf{B. Abbott Laboratories v. Gardner}

Generally regarded as the beginning of the modern ripeness era,\textsuperscript{22} \textit{Abbott Labs} involved a challenge by drug manufacturers to Food and Drug Administration regulations that imposed labeling requirements on prescription drug packaging and advertising.\textsuperscript{23} The Supreme Court formulated the two-part test for determining ripeness and, after applying that test, concluded that the claim was ripe for review.\textsuperscript{24} Emphasizing that "finality" was to be interpreted in a pragmatic way, the Court determined that the regulations constituted final agency action as required under the APA because they were formally promulgated, were effective upon publication, were authorized directly by the statute, and had the status of law.\textsuperscript{25} The

\textit{Review of Undeclared Programs: A Statutory Redefinition of Final Agency Action}, 101 \textsc{Yale L.J.} 643, 647 n.31 (1991) (stating that finality is an essential precondition to ripeness and courts look to finality to determine ripeness).


\textsuperscript{19} See Bridget Hust, \textit{Ripeness Doctrine in NEPA Cases: A Rotten Jurisdictional Barrier}, 11 \textsc{L. \& Ineq.} 505, 520 (1993).

\textsuperscript{20} See Marla Mansfield, \textit{Standing and Ripeness Revisited: The Supreme Court's "Hypothetical" Barriers}, 68 \textsc{N.D. L. Rev.} 1, 23 (1992). The \textit{Abbott Labs} analysis differs in the environmental setting. Rather than recognizing direct hardship to the plaintiffs, the analysis has "more in common with an equitable irreparable injury inquiry." \textit{Id.}

\textsuperscript{21} Nichol, \textit{supra} note 10, at 162. This aspect of the ripeness doctrine parallels the standing analysis' "injury-in-fact" requirement. \textit{See id.} The similarities between ripeness and standing have served to complicate the application of both doctrines and has lead one court to conclude that "because courts don't draw meaningful distinctions between standing and ripeness, this aspect of justiciability is one of the most confused areas of the law." \textit{Wilderness Soc'y v. Alcock}, 83 \textsc{F.3d} 386, 389-90 (11th Cir. 1996); see also \textit{infra} note 104.

\textsuperscript{22} See Nichol, \textit{supra} note 10, at 161.

\textsuperscript{23} 387 \textsc{U.S.} 136, 137-38 (1967).

\textsuperscript{24} \textit{See id.} at 155. For a reiteration of the two-part test, see \textit{supra} note 12 and accompanying text.

\textsuperscript{25} \textit{See id.} at 149, 151.
issues were therefore fit for judicial review.\textsuperscript{26}

In evaluating the hardship component, the Court focussed on the actual effects that the regulations would have on the plaintiffs.\textsuperscript{27} The Court reasoned that, because the regulations governed the business affairs of the industry and affected daily business activities,\textsuperscript{28} the plaintiffs would feel a significant, direct and immediate impact while the government had no countervailing interest in denying judicial review.\textsuperscript{29} Moreover, while the Court recognized the importance of unimpeded agency administration of federal statutes, it stated that a preenforcement challenge by the plaintiffs would work to speed enforcement because it would produce a binding judgment that would finally resolve the validity of the challenged regulations.\textsuperscript{30} Since both the fitness of the issues and the hardship analysis weighed in favor of judicial review, the regulations were ripe.\textsuperscript{31}

The \textit{Abbott Labs} test arose from, and is therefore most easily applied to, cases involving a regulated entity suing over a regulation that directly affects its behavior.\textsuperscript{32} Environmental cases, on the other hand, generally involve challenges to agency actions by persons who are not part of the regulated community. Consequently, the plaintiff's behavior will not be directly impacted by the challenged

\textsuperscript{26} See id. at 151.
\textsuperscript{27} See id. at 152.
\textsuperscript{28} See id.
\textsuperscript{29} See id. at 152-54.
\textsuperscript{30} See id. at 154.
\textsuperscript{31} See id. at 153. In an opinion handed down on the same day as \textit{Abbott Labs}, in Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967), the Supreme Court applied the \textit{Abbott Labs} test to find that the challenged regulations were not ripe for review. \textit{Toilet Goods} involved a regulation that allowed immediate suspension of certification service to businesses that refused to admit FDA employees to the facilities for inspection. \textit{Id.} at 161. While the Court conceded that the case presented a legal question and that the regulation was a final agency action, see \textit{id.} at 162-63, the Court found that other factors outweighed those supporting judicial review. The first was that the regulation was promulgated under a statute delegating authority to adopt regulations "for the efficient enforcement" of the regulatory program. \textit{See id.} at 163. The Court concluded that its evaluation would therefore be more effective in the context of a specific enforcement proceeding. \textit{See id.} at 163-64. Hardship was further lacking because the impact of the regulation did not immediately effect the primary conduct of the association. \textit{See id.} at 164. In this case, a failure to comply would only result in punitive measures that could be administratively appealed and are subject to judicial review. \textit{See id.} at 165.

The final case in the \textit{Abbott Labs} trilogy, Gardner v. Toilet Goods Ass'n, 387 U.S. 167 (1967), involved regulations issued by the Secretary of Health, Education and Welfare and the Commissioner of the FDA. Plaintiffs challenged the authority to issue the regulations that increased the number of products that had to conform to the Act's "premarketing clearance procedure." \textit{Id.} at 169. The Court found that the case involved a legal issue concerning a "self-executing" regulation with an "immediate and substantial impact" on the plaintiff for which noncompliance would result in penalties. \textit{Id.} at 170-72. The case was therefore ripe for review. \textit{See id.} at 174.

\textsuperscript{32} See Mansfield, \textit{supra} note 20, at 23.
agency action in the same manner as illustrated in *Abbott Labs*. This aspect makes the application of the doctrine in environmental cases more problematic. Ripeness, however, was not originally a serious jurisdictional barrier for environmental plaintiffs following *Abbott Labs*, as no defendant had successfully argued that the finality requirement precluded judicial review of an agency program. Then came the Supreme Court's opinion, authored by Justice Scalia, in *Lujan v. National Wildlife Federation*, which offered an extremely formalistic approach to the ripeness doctrine.

C. *Lujan v. National Wildlife Federation*

*Lujan v. NWF* involved a challenge filed by the National Wildlife Federation in 1985 against the United States Department of the Interior, the Secretary of the Interior, and the Director of the Bureau of Land Management (“BLM”) over the BLM’s “land withdrawal review program.” The “program” involved 1250 consistent decisions issued by the BLM over several years regarding the declassification determinations of government lands from a protected status. These decisions resulted in large tracts of land covering over 180 million acres being opened to mining and other extraction activities. The suit was brought under the APA with the plaintiffs alleging violations of the Federal Land Policy and Management Act (“FLPMA”) and the National Environmental Policy Act (“NEPA”), claiming that the reclassifications would cause widespread environmental damage.

33. It has even been argued that in environmental cases the categorization of a case as ripe or unripe cannot be reduced to an orderly, principled, or predictable test. See Hust, supra note 19, at 521.

34. See Garrity-Rokous, supra note 17, at 644. Even the standing doctrine, which was once used to limit the justiciability of claims for systematic redress, was expanded by the courts in a series of decisions during the 1960s and 1970s. See id. at 644 n.11. The expansion of standing culminated in the landmark case of *Sierra Club v. Morton*, 405 U.S. 727 (1972), and reached its most liberal point with the decision in *United States v. Students Challenging Regulatory Agency Procedures* (“SCRAP”), 412 U.S. 669 (1973). See Weinberg, supra note 1, at 2-3; see also infra note 104.


36. See Hust, supra note 19, at 521. Several commentators have stated that Justice Scalia’s reasoning in *Lujan v. NWF* seemed to be geared towards inhibiting environmental litigation. See, e.g., Cristiano, supra note 11, at 487; Mansfield, supra note 20, at 4.

37. 497 U.S. at 875.

38. See Cristiano, supra note 11, at 448 n.15.

39. See id.


41. Id. §§ 4321–4361 (1994).

42. See *Lujan v. NWF*, 497 U.S. at 879.
The Supreme Court found that the agency decisions challenged in the case were not ripe for review. In reaching this conclusion, the Court asserted that the “so-called ‘land withdrawal review program’” was not an agency action, let alone a final agency action within the meaning of the APA. In the Court’s view, the phrase “program” did not indicate a single order or regulation but was merely a term of art employed by the plaintiffs to refer to the activities undertaken by the BLM in accordance with FLPMA regulations. Instead, the program was more akin to “rules of general applicability” which may or may not threaten harm in the future. This was not final agency action and the decisions were therefore not ripe for review.

The Court further asserted that, absent statutory provisions, broad regulations are not “ripe for review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action... that harms or threatens to harm.” Abbott Labs, generally taken as the seminal statement on ripeness, was mentioned only as “the major exception” to this rule. In conclusion, the Court stated that the plaintiff could not seek “wholesale improvement of the program from the Court” but would have to rely on Congress or the agency itself for redress. “Except where Congress explicitly provides for our correction of the administrative process at a higher level of generality, we intervene in the administration of the laws only when...a specific final agency action has actual or immediately threatened effect.”

43. See id. at 892. The Court announced two holdings. The first was that the affidavits were not specific enough, and the second was that the “program” was not a final agency action under the APA. See id. at 891 n.2. It is also interesting to note that Lujan v. NWF was technically a standing case yet the justices decided the standing issue by using ripeness. Id. at 891.

44. Id. at 890.
45. See id.
46. Id. at 892.
47. See id. at 891.
48. Id.
49. Id.
50. Id.
51. Id. at 894. This statement by the Court has been characterized as “somewhat myopic and possibly inconsistent with both precedent and the spirit of APA review, particularly with regard to environmental law.” Lynn Robinson O’Donnell, Casenote, New Restrictions in Environmental Litigation: Standing and Final Agency Action After Lujan v. NWF, 2 VILL. ENVTL. L.J. 227, 245 (1991). Another critic stated that “there is no rule of standing nor any notion stemming from separation of powers doctrine that subjects only... site-specific government acts to court review. SCRAP belies this limiting construction, as do numerous other decisions reviewing major far reaching activities of federal agencies.” Weinberg, supra
Lujan v. NWF has been interpreted by numerous commentators as heralding the end of programmatic environmental relief for agency actions with widespread environmental impacts. The case has been positively cited by agencies seeking to escape judicial scrutiny of their actions, and has been criticized and distinguished by those trying to protect the environment. While the holding of Lujan v. NWF does seem to preclude review of undeclared agency programs, its effects on other types of programs are not clear. There has even been some controversy about whether the Court's discussion of agency action and finality was holding or dicta.

II. JUDICIAL REVIEW OF FOREST PLANS

The APA limits the scope of judicial review to "final agency action for which there is no other adequate remedy." The APA, however, does not define what exactly constitutes "final agency action." The matter, for the most part, has been left to the courts, which have struggled to decide what agency actions are final enough to warrant review. Additionally, the determination of finality is

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52. See Porterfield, supra note 16, at 620.
54. See Garrity-Rokous, supra note 17, at 645.
55. See Porterfield, supra note 16, at 622.
56. See id. at 650 n.169. The dissent implies that it was dicta, see Lujan v. NWF, 497 U.S. at 913 (Blackmun, J., dissenting) ("Since the majority concludes in other portions... that the Federation lacks standing... it is not clear to me why the Court engages in [this] hypothetical inquiry..."), while it has been taken as holding by some courts and commentators. See Garrity-Rokous, supra note 17, at 645.
57. 5 U.S.C. § 704 (1994). The full sentence states: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." Id.
58. The phrase has been taken to mean that the agency has "announced, solidified, and embraced" a particular position. Edward Sears, Note, Lujan v. National Wildlife Federation: Environmental Plaintiffs Are Tripped Up on Standing, 24 CONN. L. REV. 293, 313 (1991). Agency action has also been deemed "final" when it is a definitive statement of the agency's position or policy that reached the status of law through the imposition of obligations or determinations of legal rights and is not a temporary or procedural decision. See U.S. DEPT OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 101-03 (1947).
59. See Hust, supra note 19, at 519.
more difficult when the challenge is to a policy that is the basis for agency action but not to a specific act by the agency. Such becomes the issue when a program or plan is the target of the suit. Following the decision in Lujan v. NWF, the courts were faced with the question of whether Land Resource Management Plans ("LRMPs") promulgated pursuant to the National Forest Management Act ("NFMA") constituted final agency action that was ripe for review.

A. Forest Planning and LRMPs

Forest Plans are prepared by the Forest Service as part of the management of the national forest system. The broad management framework of Forest Service operations is guided by the Organic Act and the Multiple-Use Sustained-Yield Act ("MUSYA"), while the NFMA and NEPA dictate how local resource management and public participation are handled. The NFMA requires the Forest Service to develop individual LRMPs to direct the management of each forest. Once approved, these highly detailed plans are binding on all activities within the forest for ten to fifteen years.

The planning process has several steps. First, all forest resources are inventoried and data are collected. Next, the Forest Plan is

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60. A program is "an agency decision calling for the consistent application of a general policy to individual parties." Garrity-Rokous, supra note 17, at 644.
63. See id. at 223. The following discussion is only a brief overview. For a more extensive analysis of the history of forest management, see generally CHARLES WILKENSON & H. MICHAEL ANDERSON, LAND & RESOURCE PLANNING IN THE NATIONAL FORESTS (1987).
64. 16 U.S.C. §§ 473-482 (1994). The Organic Act was the statute that provided the mandate for the management of the forest reserves in 1897. See Jack Tuholske & Beth Brennan, The National Forest Management Act: Judicial Interpretation of a Substantive Environmental Statute, 15 PUB. LAND L. REV. 53, 57 (1994). The Organic Act still plays a part in Forest Service operations even though it was repealed by the NFMA. See Murphy, supra note 62, at 232 n.46.
66. See Murphy, supra note 62, at 232.
68. See 16 U.S.C. § 1604(f); 36 C.F.R. § 219.10(g). Revisions are made: "(1) from time to time when the Secretary finds conditions in a unit have significantly changed, but at least every 15 years, and (2) in accordance with the provisions of subsection (e) and (f) of this section and public involvement comparable to that required by subsection (d) of this section." 16 U.S.C. § 1604(f)(5). The regulations also require revision if changes in policies, goals, or objectives would have a significant impact on forest projects. See 36 C.F.R. § 219.10(g).
69. See 36 C.F.R. § 219.12(d).
developed by an interdisciplinary team, a process that includes analyzing the productivity potential of the forest unit, formulating alternative management scenarios, estimating the effect of such alternatives, and performing detailed evaluation of those effects. The forest supervisor then recommends one of the alternatives to the regional forester. Public participation occurs during this stage and the proposed Forest Plan is opened to public comment for at least three months. If the proposed Forest Plan and final environmental impact statement ("EIS") are approved, the regional forester must prepare a Record of Decision ("ROD") explaining the decision. The decision to approve the LRMP then becomes subject to administrative appeal. Finally, the Forest Plan is implemented in site-specific projects.

While the specifics are left to the discretion of the agency, the NFMA requires that Forest Plan development regulations take into account program goals such as maintaining plant and animal diversity, ensuring that timber harvesting will not cause irreversible soil and watershed damage, and protecting water resources. Though clearcutting is recognized as a legitimate method of timber harvesting, it may only be used if it is the "optimum method" available.

The Forest Plans control and direct forest development by dividing the forest into several Management Areas ("MAs") akin to a zoning map. The Forest Plan provides development restrictions and resource emphases for each area and sets the guidelines to control the type of development that is to occur within each type of MA.

70. See id. § 219.10(3).
71. See id. § 219.12(e).
72. See id. § 219.12(f).
73. See id. § 219.12(g).
74. See id. § 219.12(h).
75. See id. § 219.12(i).
76. See id. § 219.10(b).
77. See id. § 219.12(j).
78. See id. § 219.10(d).
79. See id. § 219.12(e).
81. Id. § 1604(g)(3)(E).
82. Id. § 1604(g)(3)(E)(iii).
83. See id. § 1604(g)(3)(F)(i).
84. See Tuholske & Brennan, supra note 64, at 65.
85. While not specified exactly in the NFMA or its regulations, certain provisions in the regulations anticipate the "zoning" approach. See, e.g., 36 C.F.R. §§ 219.11(c), 12(e).
86. See id. §§ 219.13-.27.
After the land is zoned into a specific MA, site-specific projects are proposed which must be consistent with that MA's standards.87

In addition to the procedural provisions, the NFMA also contains several explicit substantive requirements.88 The most important is that the Forest Plan, once adopted, is the law for management of that individual forest.89 "Once forest plans become final and are determined to be valid, they themselves become law,' and 'are the engines that drive the management process,' [m]uch like zoning requirements or administrative regulations."90 The NFMA states that all actions taken to implement forest plans "shall be consistent with the land management plans."91 Therefore, any substantive decision approved as part of the Forest Plan is binding on all subsequent management procedures.92

The amendment process further demonstrates the binding nature of the Forest Plans.93 Under the NFMA, any "significant" change in a Forest Plan may be made only after following the same procedure required for the adoption of the full Forest Plan.94 Thus, whenever a change is proposed, it must go through the same inventory and data collection, development, public notice, hearing, and adoption procedure that the full Forest Plan went through initially.95

B. The Circuit Split

Four circuit courts of appeals had addressed the issue of whether environmental plaintiffs may challenge national Forest Plans at the plan stage prior to the Supreme Court's decision.96 Two circuits decided in favor of the environmental plaintiffs with respect to the justiciability of their claims,97 while the other two dismissed the

88. See Tuholske & Brennan, supra note 64, at 66.
89. See 16 U.S.C. § 1604(i); 36 C.F.R. § 219.10(e).
91. 16 U.S.C. § 1604(i).
92. See id.
93. See id. § 1604(f)(4).
94. Id. § 1604(f)(4).
95. See 36 C.F.R. § 219.10(f).
96. See infra notes 97-98.
97. The courts which granted judicial review of the Forest Plans were in the Seventh and Ninth Circuits. See Sierra Club v. Marita, 46 F.3d 606 (7th Cir. 1995); Resources Ltd. v. Robertson, 35 F.3d 1300 (9th Cir. 1993); Idaho Conservation League v. Mumma, 956 F.2d 1508 (9th Cir. 1992).
All of the cases involved similar issues. The plaintiffs, various environmental groups and organizations, challenged the LRMPs and their accompanying EISs, for their failure to consider or implement more environmentally sound policies. These challenges, brought under the APA, alleged various violations of the NFMA and NEPA. The Forest Service in turn argued that the plaintiffs lacked standing to sue and that their claims were not ripe for review because the Forest Plans did not constitute final agency action.

While two of the circuits emphasized standing rather than ripeness in their discussion, the analyses are similar. Indeed, the courts' conflation of these doctrines is understandable considering that the questions and concerns involved in a determination of the two issues are closely interconnected. One court stated that, while the doctrines of standing and ripeness ostensibly involve different inquiries, they "are closely related, and in cases like this one perhaps overlap entirely." Moreover, the standing question hinges on

98. The courts that denied review were located in the Eleventh and Eighth Circuits. See Wilderness Soc'y v. Alcock, 83 F.3d 386 (11th Cir. 1996); Sierra Club v. Robertson, 28 F.3d 753 (8th Cir. 1994).
99. All of the plaintiffs in the various cases alleged that the LRMP for that specific forest violated the NFMA and NEPA, though their suits focused on different harms such as excessive logging or failing to adequately protect biodiversity.
100. When an environmental statute does not contain a citizen suit provision, judicial review is generally available under the APA, which allows review to any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702.
101. The exception is Alcock, which only had a NFMA claim.
102. The Forest Service has consistently taken the position that Forest Plans do not have on-the-ground effects and are immune from judicial review. See Tuholske & Brennan, supra note 64, at 96.
103. See Sierra Club v. Robertson, 28 F.3d at 753 (discussing the issue in terms of standing alone); Alcock, 83 F.3d at 386 (addressing only ripeness).
104. The concept of standing arose from the "case or controversy" requirement in Article III of the Constitution. See Mansfield, supra note 20, at 64. The doctrine has both constitutional and prudential elements. See id. at 66. The three central constitutional requirements needed to establish standing are: (1) injury-in-fact (2) causation and (3) redressability. See id. at 65. The primary prudential requirement is that the plaintiff's injury must fall within the "zone of interest" protected by the statute in question. See id. at 66.
105. While there has been much confusion surrounding standing and ripeness, see supra note 21, they are different doctrines. Standing clearly is derived from the Constitution with prudential limitations added later by the judiciary. See, e.g., Mansfield, supra note 20, at 66. Its inquiry focuses on the identity of the parties bringing suit and the nature of the injury. See Garrahan, supra note 90, at 181-82. Ripeness, on the other hand, presumably began as a prudential concern with constitutional dictates added later. See supra note 10. Its focus is on the timing of the injury as well as its substantiality, and the harm that delayed review will cause. See Garrahan, supra note 90, at 182.
106. Sierra Club v. Marita, 46 F.3d 606, 610 (7th Cir. 1995) (quoting Smith v. Wisconsin Dep't of Agric., 23 F.3d 1134, 1141 (7th Cir. 1994)); see also Idaho Conservation League v. Mumma, 956 F.2d 1508, 1518 n.20 (9th Cir. 1992) ("The standing question... bears close
finality, which is an important consideration in both the fitness and hardship prongs of the Abbott Labs ripeness test. The following discussion, therefore, will focus on ripeness.

1. Courts Finding that Forest Plans Are Ripe

The courts that found the Forest Plan challenges justiciable rejected the argument that the issue would not be ripe until site-specific action occurred. Instead, these courts held that the release of the LRMP by the Forest Service constituted a final agency action capable of judicial review. These courts concluded that the Forest Plans, even if programmatic in nature, caused harm. In Idaho Conservation League v. Mumma, for example, the Court asserted that the fact that the injury was threatened and contingent rather than actual or certain, or that it would result from a chain of events, was not enough to defeat the claim. Waiting for on-the-ground activity would make little sense for, as the Court in Sierra Club v. Marita stated, "one does not have to await the consummation of threatened injury to obtain preventative relief." The courts were also sensitive to the numerous problems that would arise if plaintiffs had to wait until site-specific projects were proposed. For example, a challenge to a specific project would not provide an adequate remedy because area designations would already be final, or implementation may have progressed too far. Furthermore, any future site challenge "would lose much [of its] force once the overall plan has been

affinity to questions of ripeness—whether the harm asserted has matured sufficiently to warrant judicial intervention.

106. See, e.g., Mumma, 956 F.2d at 1519.
107. See, e.g., Marita, 46 F.3d at 611. The court gave several reasons for finding the Forest Plans mandatory: (1) the regulations regarding planning are mandatory; (2) they guide all natural resource management activities and establish management standards and guidelines for the national forest; (3) Forest Plans determine management practices, resource production levels, and suitability of land for timber production; and (4) all permits, contracts, and licenses issued must be consistent with the plan. See id.
108. 956 F.2d at 1510. Six environmental groups challenged the LRMP for the Idaho Panhandle. While they made several claims, the court only addressed the Forest Service's decision to recommend 43 of 47 roadless areas in the forest against wilderness designation.
109. Id. at 1515.
110. 46 F.3d at 612 (quoting Pennsylvania v. West Virginia, 262 U.S. 553, 593 (1923)).
111. See Mumma, 956 F.2d at 1516 n.16. The Mumma court recognized that even an eventual "no-action" course for a project would not grant the areas the affirmative protection that wilderness designation would. Id.
112. See, e.g., Marita, 46 F.3d at 612 ("If the Sierra Club had to wait until the project level to address... a broad issue like biological diversity, implementation... might have progressed too far to permit proper redress.")
These circuit courts recognized that, if the problem was with the Forest Plan as a whole, waiting until an actual timber sale occurred would not clarify the issues any further. As the Marita court asserted, "arguments over the plan's sufficiency as a whole are as concrete now as they will ever become." Moreover, since the Forest Plans direct all actions within the forest, in essence "predetermin[ing] the future," they represent a final agency action that is ripe for judicial review now.

2. Courts Finding that Forest Plans Are Not Ripe

In contrast to the courts that allowed the plaintiffs' claims, the courts that denied justiciability did not engage in a detailed discussion of the issues. As far as these courts were concerned, the "mere existence" of a Forest Plan could not produce an imminent injury and the inquiry ended there. In Sierra Club v. Robertson, for example, the Court decided that the Forest Plan was only a general planning tool that did not effectuate any changes or dictate any specific action; without reference to a site-specific action, an attempt to find an injury by the Forest Plan alone would take the court into the realm of "speculation and conjecture." At least one of the courts that dismissed the claims as unjusticiable did require that when a site-specific action is proposed the plaintiff may assert that the Forest Plan is inconsistent with the governing statutes as it relates to the proposed action.

III. THE OHIO FORESTRY CASE

In 1981, the Forest Service began the process of developing a Forest Plan, pursuant to the NFMA, for the management of the

113. Mumma, 956 F.2d at 1519 (quoting Portland Audubon Soc'y v. Babbitt, 998 F.2d 705, 708 (9th Cir. 1993)).
114. 46 F.3d at 613.
115. Resources Ltd. v. Robertson, 35 F.3d 1300, 1304 (9th Cir. 1993). The case involved a challenge to Flathead National Forest on the basis that implementation of the Forest Plan would jeopardize the survival of endangered species in the forest in northern Montana. In addition, this case also confirmed the continuing validity of Mumma which was questioned by defendants in the wake of Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).
116. See, e.g., Sierra Club v. Robertson, 28 F.3d 753, 758 (8th Cir. 1994).
117. Id. (quoting O'Shea v. Littleton, 414 U.S. 488, 497 (1974)).
118. See Wilderness Soc'y v. Alcock, 83 F.3d 386, 390 (11th Cir. 1996). The court made its decision contingent on the concession that the plan could be challenged along with the site action.
177,701 acres of federally owned land in Wayne National Forest located in southeastern Ohio. Following the procedure set out in the NFMA, the Forest Service adopted the final Forest Plan, along with a final EIS and ROD, which would control the activity within the forest for a ten-year period beginning in 1988.

The Forest Plan divided Wayne into fifteen MAs within which the silvicultural systems and harvest methods were specified. Approximately 126,107 acres of the land were designated for logging, with 80% using an "even-edged" management harvesting technique, which, in the majority of cases, means clearcutting. The other 20% percent would be harvested using uneven-edged management. The Forest Plan projected that approximately 8000 acres would be logged, 5075 acres by clearcutting. Over the ten-year life of the Forest Plan, logging would be permitted for up to 7.5 million board feet of timber per year.

The Sierra Club and the Citizens Council on Conservation and Environmental Control participated extensively in the initial planning process and the public comment period, and appealed the decision to adopt the final Forest Plan. When the Chief of the Forest Service twice issued decisions denying their appeal in 1990 and 1992, the two groups filed suit in District Court. The groups argued that the

119. Sierra Club v. Robertson, 845 F. Supp. 485, 488-89 (S.D. Ohio 1994). The federally owned acres are divided into three forest units that comprise 21% of the total forest. Private tracts of land, some of which the Forest Service plans to purchase eventually, are interspersed with the federal land. See id. at 488.

120. The Forest Service must identify the issues that the Forest Plan should address; a cost-benefit analysis must be done on several alternative management plans and their EIS; and the regional forester for the region picks the best alternative. See 36 C.F.R. § 219.6, .10, .12.

121. See Sierra Club v. Robertson, 845 F. Supp. at 489.


123. A silvicultural system is "a management process whereby forests are tended, harvested, and replaced, resulting in a forest of distinctive form. Systems are classified according to the method of carrying out the fellings that remove the mature crop and provide for regeneration and according to the type of forest thereby produced." 36 C.F.R. § 219.3.

124. See Sierra Club v. Robertson, 845 F. Supp. at 490. Each management area has a management prescription which consists of those practices scheduled to be applied on a specific area to attain multiple-use and other statutory objectives. See id.

125. Clearcutting involves the removal of all trees within areas ranging in size from 15 to 30 acres. See Thomas, 105 F.3d at 249.


127. See Ohio Forestry, 523 U.S. at 729.


129. See Thomas, 105 F.3d at 249.


131. See id.
Forest Service had "illegally and arbitrarily" adopted clearcutting as the routine method of forest management and that this decision failed to consider the impacts that clearcutting had on the environment.\textsuperscript{132} Not only did clearcutting have detrimental effects on the plant life and water run-off, but it also caused erosion and soil instability, effects for which the Forest Plan did not address mitigation techniques.\textsuperscript{133} The plaintiffs, therefore, challenged the LRMP for the Wayne National Forest and the final EIS under the APA, alleging violations of the NFMA, MUSYA and NEPA.\textsuperscript{134}

\textbf{A. The District Court}

The district court found that the plaintiffs had standing to sue and that the matter was ripe for review. The court did not engage in a discussion of these issues but instead proceeded directly to identifying the appropriate standard of review for the agency decision.\textsuperscript{135} Indeed, the court seemed to automatically assume that the case involved "final agency action" that was ripe for review.\textsuperscript{136} The court recognized that the Forest Plan was "programmatic in nature" and that implementation would not occur until later in individual site-specific projects.\textsuperscript{137} However, this fact only influenced the court's decision that detailed analysis of specific impacts was not required.\textsuperscript{138} The court ruled on the merits and granted summary judgment to the Forest Service.\textsuperscript{139} The plaintiffs appealed the judgment pursuant to the district court's review of the Forest Plan.\textsuperscript{140}

\textbf{B. The Sixth Circuit Court of Appeals}

The court of appeals explicitly addressed the issue of justiciability and disagreed with the defendant's claims that the issue was not ripe for review.\textsuperscript{141} The court reasoned that the Forest Plan

\begin{itemize}
\item \textsuperscript{132} See \textit{id}. at 490.
\item \textsuperscript{133} See \textit{id}. at 490-91.
\item \textsuperscript{134} See \textit{id}. at 488.
\item \textsuperscript{135} See \textit{id}.
\item \textsuperscript{136} A court may decide whether or not the agency acted arbitrarily or capriciously only after finding the requisite finality in the agency action and that the issue is ripe.
\item \textsuperscript{137} \textit{Sierra Club v. Robertson}, 845 F. Supp. at 491.
\item \textsuperscript{138} See \textit{id}.
\item \textsuperscript{139} See \textit{id}. at 503. The court held on the merits that the Forest Service's actions were not arbitrary and that the Forest Plan was not contrary to law. \textit{See id}.
\item \textsuperscript{140} \textit{See Sierra Club v. Thomas}, 105 F.3d 248, 249 (6th Cir. 1997).
\item \textsuperscript{141} See \textit{id}. at 250.
\end{itemize}
"represent[ed] significant and concrete decisions that play a critical role in future Forest Service actions." Denying review at the Forest Plan level may mean that it "would forever escape review." The court, furthermore, agreed with the district court that the controversy was ripe, stating that "plaintiffs need not wait to challenge a specific project when their grievance is with an overall plan." Finding the claim justiciable, the court reached the merits of the case, stating that the Forest Service had a history of preferring timber production to other uses. The court held that the planning process was improperly predisposed towards clearcutting and that the resulting LRMP was not in compliance with the NFMA. The case was reversed and remanded and the Forest Service appealed the decision to the Supreme Court, which granted certiorari.

C. The Supreme Court

In a rather succinct opinion by Justice Breyer, the Supreme Court held that the plaintiffs' claim was not ripe for judicial review, thus dismissing the suit without reaching the merits of the case. The Court began by reiterating the general purpose behind the ripeness doctrine and the test set forth in Abbott Labs. The Court then reformulated the two-part test into a three-part inquiry: (1) whether review could be delayed without causing hardship to the plaintiffs, (2) whether judicial intervention would inappropriately interfere with further administrative action, and (3) whether the case would benefit from further factual development. The Court answered each question affirmatively.

In deciding that no significant hardship would befall the plaintiffs if review were withheld, the Court focused on the fact that several further administrative steps had to occur before logging actually occurred. The Court reasoned that no "significant practical harm"

142. Id.
143. Id. (quoting Idaho Conservation League v. Mumma, 956 F.2d 1508, 1516 (9th Cir. 1992)).
144. Id.
145. See id. at 251.
146. See id. at 252.
148. See id. at 728.
149. See id. at 732-33.
150. See id. at 733.
151. See id. at 733-37.
152. See id. at 733-34.
would occur until a particular site proposal was made and the plaintiffs would have ample time to bring their claim later.\textsuperscript{153} The Court also noted that the Forest Plan did not create any adverse, strictly legal effects\textsuperscript{154} or force the plaintiffs to modify their behavior in order to avoid future adverse consequences such as sanctions.\textsuperscript{155} The Court stated that one site-specific victory could potentially invalidate the Forest Plan on the basis of preclusion,\textsuperscript{156} but the Court also indicated that site-specific challenges could include a challenge to the Forest Plan as a whole only if the Forest Plan was still relevant at that point.\textsuperscript{157}

The Court next determined that judicial intervention would interfere with the agency's ability to refine the Forest Plan through revision, amendment, or implementation,\textsuperscript{158} essentially denying the agency the "opportunity to correct its own mistakes"\textsuperscript{159} and interfering with the administrative system set up by Congress.\textsuperscript{160} The Court also emphasized the fact that Congress had not provided for pre-implementation judicial review of Forest Plans, as it has in a number of environmental statutes, and therefore the plaintiffs' suit could not be ripe.\textsuperscript{161}

153. \textit{Id.}

154. The Court stated that the Forest Plan does not command "anyone to do anything or to refrain from doing anything . . . [and] create[s] no legal rights or obligations." \textit{Id.} at 733 (citing U.S. v. Los Angeles & Salt Lake R. Co., 273 U.S. 299, 309-10 (1927)). The use of this case as precedential authority for the assertion that the Sierra Club would not suffer harm has been questioned by some commentators. \textit{See}, e.g., Kristin N. Reyna, \textit{Ohio Forestry Association v. Sierra Club: The United States Supreme Court Reexamines Ripeness in the Context of Judicial Review of Agency Action}, 12 TUL. ENVTL. L.J. 249, 260 (1998) (arguing that this older opinion's pronouncements have been misused by some courts and should be moderated in light of more recent decisions, citing \textit{Louis L. Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION} 395, 398 (1965)).

155. \textit{See Ohio Forestry}, 523 U.S. at 734. According to one critic, the Court's use of \textit{Abbott Labs} and \textit{Columbia Broadcast Systems, Inc. v. United States}, 316 U.S. 407 (1942), to support the inference that sanctions are a necessary requirement was inappropriate because neither case stood for such an idea. \textit{See Reyna, supra note 154, at 261.}

156. \textit{See Ohio Forestry}, 523 U.S. at 734-35. The Court in \textit{Lujan v. NWF} stated that a "program" may have to be revisited by the agency in order to avoid the unlawful result that a court could find at a site-specific level. 497 U.S. 871, 894 (1990).

157. The Court stated that the Forest Plan could be challenged if and only if "the present Plan then matters, i.e. if the Plan plays a causal role with respect to the future, then-imminent harm." \textit{Ohio Forestry}, 523 U.S. at 734.

158. \textit{See id.} at 735.


160. \textit{See id.} at 736.

161. \textit{See id.} at 737. In \textit{Abbott Labs}, a case the Court relied heavily on, the defendants also argued that preenforcement review was unavailable. The \textit{Abbott Labs} Court, however, rejected the argument, stating that "the mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent." \textit{Abbott Lab.}, 387
The Court further stated that review would necessarily be abstract and time-consuming without the focus of on-the-ground activities. The Court reasoned that, if the issues were “reduced to more manageable proportions” and “fleshed out by some concrete action,” then the lower courts and the Supreme Court would be better able to deal with the legal questions presented.

IV. WHY THE FOREST PLANS ARE RIPE FOR REVIEW

The Court’s decision to deny review to the Sierra Club because the claim was not ripe was incorrect because it failed to adequately account for the real effects that Forest Plans have on the forests and neglected to consider the negative ramifications of delayed review. The LRMPs are an example of final agency action that can cause harm due to their mandatory nature. Because Forest Plans cause identifiable injury, and because policy considerations favor review, challenges at the Forest Plan level are ripe.

A. Forest Plans Cause Injury

Contrary to the Court’s position, Forest Plans do inflict serious harm on environmental plaintiffs because they significantly affect later decisions and activities. The Forest Plans are mandatory and legally binding. While they are subject to revision and amendment, the process is a time-consuming one; the Forest Service must follow the entire procedural framework required for the adoption of the original Forest Plan and— even minor variations have to be announced and opened to public comment. The NFMA, forest service regulations, and administrative rules all require that on-the-ground

162. See Ohio Forestry, 523 U.S. at 736.
163. See id. at 736-37 (citing Lujan v. NWF, 497 U.S. 871, 891 (1990)).
164. See 36 C.F.R. § 219.1(b). The Court’s refusal to grant legal status to LRMPs is also puzzling in light of the fact that the Court has allowed suits against nonbinding agency actions. For example, biological opinions were always considered nonbinding and, thus, not a final agency action because the acting agency retained the legal authority to accept or reject the recommendations contained therein. See Sam Kalen, Standing on Its Last Legs: Bennett v. Spear and the Past and Future of Standing in Environmental Cases, 13 J. LAND USE & ENVTL. L. 1, 36 n.219, 41 n.249 (1997). Nevertheless, the Supreme Court reached the conclusion that biological opinions “alter the legal regime to which the action agency is subject,” Bennett v. Spear, 520 U.S. 154, 178 (1997), and are final agency actions. Id. This view, except for a statement in the Bennett Petitioner’s brief, is “otherwise wholly unsupported.” Kalen, supra, at 40 n.246. See also infra note 220.
165. See 36 C.F.R. § 219.10(f).
projects be consistent with the Forest Plan.\textsuperscript{166} The Forest Plan, in turn, is implemented to a significant degree.\textsuperscript{167} Site-specific decisions must be based on the Forest Plan's directions,\textsuperscript{168} and the Forest Service Chief even stated that the Forest Service "[e]xpects every project to be in full compliance with standards and guidelines as set forth in Forest Plans."\textsuperscript{169} Moreover, this compliance requirement has been enforced by the courts.\textsuperscript{170}

In essence, the LRMPs are far more than merely programmatic frameworks, a fact which makes \textit{Ohio Forestry} crucially distinguishable from \textit{Lujan v. NWF}.\textsuperscript{171} Whereas \textit{Lujan v. NWF} involved numerous broad regulations that the Court decided needed to "be reduced to more manageable proportions,"\textsuperscript{172} at issue here is a concrete document that represents the Forest Service's final planning process for the management of a particular forest.\textsuperscript{173} The Forest Service's assertion that Forest Plans do not impact on-the-ground activities\textsuperscript{174} is, therefore, ridiculous. As one Forest Plan challenger stated:

\begin{quote}
[T]he agency has . . . spent hundreds of millions of dollars and countless employee hours on this planning effort. Planning participants, Forest Service employees, and taxpayers alike must be quite chagrined to learn that, after huge expenditures of time, money, and effort, the Forest Service views forest plans as having an "extremely conjectural" influence over subsequent forest management activities.\textsuperscript{175}
\end{quote}

LRMPs dictate how the forest will be managed; projects and

\textsuperscript{166} See Murphy, supra note 62, at 251.
\textsuperscript{167} See Garrahan, supra note 90, at 187.
\textsuperscript{168} See Murphy, supra note 62, at 251 (quoting \textsc{Forest Serv. Dep't of Agric, Land & Resource Management Planning Handbook} ch. 53).
\textsuperscript{169} Garrahan, supra note 90, at 186 (quoting F. Dale Robertson, Forest Plan Implementation (Feb. 23, 1990) (memorandum to regional foresters)).
\textsuperscript{170} See id. at 186 n.274.
\textsuperscript{171} Several commentators felt that \textit{Ohio Forestry} did not need to be distinguished. Believing that \textit{Lujan v. NWF} was the beginning of a series of wrongfully decided environmental cases, the hope was that \textit{Ohio Forestry} would start to reverse the damage done by \textit{Lujan v. NWF}. See, e.g., Weinberg, supra note 1, at 11 ("The Court missed a chance to mitigate some of the damage done by \textit{NWF} . . . and to uphold . . . justiciability in a genuine controversy brought by a plaintiff with a genuine stake in the outcome.").
\textsuperscript{172} \textit{Lujan v. NWF}, 497 U.S. 871, 891 (1990).
\textsuperscript{173} See Beth Brennan & Matthew Clifford, \textit{Standing, Ripeness, and Forest Plan Appeals}, 17 \textsc{Pub. Land & Resources L. Rev.} 125, 148 (1996). The challenge here is not to broad administrative regulations but to the product of those regulations, not to general agency operations but specific agency decisions, manifested in the form of a Forest Plan, which could cause forest-wide injury. See id. at 149.
\textsuperscript{174} See \textit{ supra} note 102.
\textsuperscript{175} Murphy, supra note 62, at 254 (quoting the Reply Brief of Appellant's Reply at n.2, Resources Ltd. v. Robertson, 8 F.3d 1394 (9th Cir. 1994) (No. 92-35047)).
activities are proposed, analyzed, and carried out within the framework of the Forest Plan.\textsuperscript{176} The Forest Plan requires that harvesting occur in those MAs that have been designated as suitable for timber development.\textsuperscript{177} Once an area is classified under the Forest Plan, that designation is permanent.\textsuperscript{178} Therefore, the fact that additional administrative steps occur, or that third parties would have to act before actual development takes place, is immaterial.\textsuperscript{179} Even if a "no-action" alternative is accepted for that particular project, the area is still not granted a protected status.\textsuperscript{180} The injury, logging in this case, is therefore threatened by the very existence of the Forest Plan itself,\textsuperscript{181} and even a threatened harm may be sufficiently actual and imminent to warrant judicial review.\textsuperscript{182}

\textbf{B. The Decision Will Impede Appropriate Judicial Review}

The Supreme Court's decision has the potential of completely precluding judicial review of Forest Plans, a result that is contrary to the ideals of the NFMA and APA. While the Court recognized that a site challenge could also include a challenge to the lawfulness of the Forest Plan,\textsuperscript{183} in practical terms such a challenge could be impossible. Common sense implies that a Forest Plan, after going through the course of administrative appeals and the considerable passage of time between adoption and implementation, is not likely to receive an objective or thorough hearing by a court.\textsuperscript{184} As one commentator argued, "it seems likely that a court would treat the plan at [the site-specific level] as a \textit{fait accompli}, especially since the court may not be privy to the administrative record that was developed during the administrative appeal stage."\textsuperscript{185} Two of the circuit courts recognized the existence of this Catch-22 situation.\textsuperscript{186} In \textit{Mumma}, for example,

\begin{itemize}
\item \textsuperscript{176} See United States Forest Service Department of Agriculture, Nature of Land and Resources Management Plans (LRMPs) also known as Forest Plans (visited March 20, 1999) <http://www.fs.fed.us/forum/nepa/decisionm/p2.html>.
\item \textsuperscript{177} See Garrahan, \textit{supra} note 90, at 186.
\item \textsuperscript{178} See \textit{id.} at 153. In order to effect such a change, the Forest Plan would have to be reevaluated and amended. See 36 C.F.R. \textsection 219.14(d).
\item \textsuperscript{179} See Idaho Conservation League v. Mumma, 956 F.2d 1508, 1515-16 (9th Cir. 1992).
\item \textsuperscript{180} See \textit{id.} at 1516 n.16.
\item \textsuperscript{181} See Brennan & Clifford, \textit{supra} note 173, at 150.
\item \textsuperscript{182} See \textit{id.}
\item \textsuperscript{183} See Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 734 (1998).
\item \textsuperscript{184} See Garrahan, \textit{supra} note 90, at 191.
\item \textsuperscript{185} \textit{Id.}
\item \textsuperscript{186} The term "Catch-22" is derived from the novel by Joseph Heller by the same name and means a problematic situation for which the only solution is denied by a circumstance inherent
\end{itemize}
the Ninth Circuit astutely observed that a challenge at the project level would lose most of its force if the overall Forest Plan had already been approved. 187 With the Forest Service declaring that "management decisions . . . which were made at the Forest Planning level are excluded' from appeals of decisions made [at the site-specific level]." 188 and that land allocation decisions made in the Forest Plan will not be revisited 189 without judicial review, the end result is an authorization that is, essentially, immune from any kind of review. 190

Rather than interfering, judicial review would advance the policies behind the NFMA and APA. The planning process under the NFMA, as set up by Congress, invited public participation and was not meant to be insulated from review. 191 Indeed, the NFMA was a direct result of congressional concern over the dominance of timber production in forest management and represented a shift away from the deference that was once given to the Forest Service. 192 The NFMA's procedural and substantive requirements, and the history of its passage, 193 all suggest that LRMPs are meant to be concrete and reviewable decisions, not merely a planning framework without legal effect. 194 As the appellate court in Thomas stated, judicial review was intended to be a check on the Forest Service's power and discretion. 195 An inability to challenge the Forest Plans would divest the NFMA of any meaning 196 and relegate forest planning to an ad hoc, site-specific

187. 956 F.2d. 1515, 1519 (9th Cir. 1992).
188. Id. at 1516 n.17 (quoting West Moyie ROD at 33).
189. See id. (citing Horizon Forest Resource Area ROD at 9).
190. Indeed, the Forest Service has even refused administrative challenges to site-specific actions on the basis that the decisions had already been made by the Forest Plan, stating that "the administrative procedures for evaluating possible wilderness recommendations are separate from the procedures employed to consider specific land management activities." Id. (quoting West Moyie final EIS at 2-39).
191. See Murphy, supra note 62, at 253. In the context of another environmental statute, one federal court pointed out that "Congress made clear that citizen groups are not to be treated as nuisances . . . but rather as welcomed participants in the vindication of environmental interests." Weinberg, supra note 1, at 26 (quoting Friends of the Earth v. Carey, 535 F.2d 165, 172 (2nd Cir. 1976)).
193. For a discussion of the history behind the passage of the NFMA, see generally Tuholske & Brennan, supra note 64; Charles Wilkinson, The National Forest Management Act: The Twenty Years Behind, the Twenty Years Ahead, 68 U. COLO. L. REV. 659, 675 (1997).
194. See Hogan, supra note 192, at 894.
196. See Tuholske & Brennan, supra note 64, at 117.
The APA, moreover, was designed to grant wide powers to the courts to review agency action. This liberal interpretation of judicial review under the APA was in accordance with general congressional intent. In fact, a prior Supreme Court broadened the scope of review under the APA when it held that the exception to review, those agency actions and decisions committed to agency discretion by law, was a very narrow one. The strong presumption that existed in favor of judicial review of agency actions was meant to protect against excess and abuse of power by agencies. The Abbott Labs Court observed that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." Insulating a Forest Plan from review would create a final agency action that could not be challenged, a result that is contrary to both the NFMA's and APA's presumption of review.

C. The Decision Will Cause Inefficiency

Rather than furthering the pragmatic policies behind ripeness, this decision could instead promote extreme inefficiency, a result the doctrine was designed to prevent. If a Forest Plan challenge is unripe for its lack of proposed site-specific actions, even a specific project may not make a challenge to the overall Forest Plan any more ripe. The Supreme Court stated in Lujan v. NWF that "flaws in the entire 'program'... cannot be laid before the courts for wholesale correction under the APA simply because one of them that is ripe for

197. See Hogan, supra note 192, at 868. Such a decision "ignores the intent of Congress and assumes Congress meant to create an exercise in futility by establishing the huge, time-consuming and expensive forest planning process." Murphy, supra note 62, at 251.
198. See Hust, supra note 19, at 527.
199. See O'Donnell, supra note 51, at 228.
201. See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); see also O'Donnell, supra note 51, at 228 n.5.
202. See Garrity-Rokous, supra note 17, at 643; see also Caldwell, supra note 8, at 351 n.14.
203. Abbott Lab., 387 U.S. at 141 (quoting Rusk v. Cort, 369 U.S. 367, 379-80 (1962)). Interestingly, one commentator stated that the Court has in fact "forg[ed] the hitherto-neutral Article III 'case or controversy' requirement into a weapon to thwart Congressional intent." Weinberg, supra note 1, at 11.
204. See Garrahan, supra note 90, at 180.
205. See supra note 10.
206. See Garrahan, supra note 90, at 190.
review adversely affects” a potential plaintiff. Moreover, even if one lawsuit for a specific proposal at the site-specific level prevails, it will not make a second site-specific action any more imminent. Plaintiffs would, therefore, be forced to file a lawsuit and revisit the same justiciability issues for every on-the-ground proposal in order to accomplish what a single Forest Plan challenge could achieve.

Such piecemeal litigation would result in a variety of negative consequences that would impact the agency, plaintiffs, and courts. For example, the amount of litigation directed at the Forest Service could increase. The numerous individual suits that plaintiffs would have to bring if a Forest Plan challenge is not allowed would burden court dockets, strain agency resources, and prove very expensive for the government, environmental organizations, and taxpayers alike. Moreover, inconsistent legal results are a very real potential repercussion. The identical issue would be argued repetitively in different courts and jurisdictions, and inconsistent rulings on the same issue in various courts would create uncertainty for plaintiffs and defendants alike. The ripeness doctrine was designed to protect against such inefficiency. In fact, the Court in Abbott Labs advocated pre-enforcement challenges as a means of advancing agency implementation of a regulatory initiative. Such a challenge would promote efficiency and speed enforcement by precluding future challenges with one decree that either curtailed the plaintiffs or forced the agency to revise its regulations.

D. Aftereffects of the Decision

Despite the unencouraging holding, Justice Breyer did manage “to sneak in” two items of dicta that may prove beneficial to environmental interests in the future. First, the Court noted that the injury alleged here was a substantive one: too much logging would occur under the Forest Plan. This was distinguishable from a

208. *See* *Murphy*, *supra* note 62, at 254.
209. *See* *Sears*, *supra* note 58, at 358.
210. *See id.* at 358 n.386.
211. *See id.*
215. *See id.*
procedural injury, such as a challenge under the NEPA for the failure to prepare an adequate EIS. Second, the Court stated that, had the original complaint alleged that certain harms would occur immediately, such as the closing or opening of roads, the challenge would have been ripe. It was a point that even the government conceded. This seems to imply that Forest Plans may be attacked in a roundabout way. Rather than alleging that the Forest Plan permits too much logging, the plaintiff can assert that recreational areas will be closed in the areas where logging may occur in order to have a ripe controversy.

Whether either of these approaches to litigating Forest Plans would be successful remains to be seen. While a NEPA challenge may get a plaintiff over the ripeness hurdle, he or she must still establish standing and, under the Eighth Circuit analysis, an injury caused by a Forest Plan may not be imminent enough to satisfy the injury-in-fact requirement. Additionally, under the Court’s highly restrictive standards for environmental challenges, the plaintiff would be hard-pressed to state an injury that was particularized enough to warrant review and broad enough that it was redressible only through a revision of the overall LRMP.

CONCLUSION

Ohio Forestry Ass’n v. Sierra Club resolved the split in the circuits in favor of the Forest Service by holding that Forest Plans are not ripe for review. Adopting reasoning closely akin to those circuits that denied review to Forest Plans, the Court decided that the Wayne National Forest LRMP was not ripe for review absent site-specific proposals for on-the-ground activities. In so doing, the Court chose to ignore the nature of the Forest Plans and the harm that they can cause.

Congress intended that LRMPs would have exactly the same effect as site-specific, land-use planning; they were meant to be binding on future agency actions and enforceable in court. It is an intent that is evident in the statutory requirements of the NFMA.

216. See Ohio Forestry Ass’n v. Sierra Club, 523 U.S. 726, 737 (1998). A claim alleging such a failure to comply with the NEPA may be brought immediately because “the claim can never get ripper.” Id.
217. See id. at 738.
218. Id. at 738-39.
219. See Wilkinson, supra note 193, at 675.
While the Court's interpretation of what constitutes final agency action at times seems to vary with the interests being protected, Forest Plans are final agency actions that cause concrete and identifiable injury because of the binding effect they have on the later actions of the Forest Service in regards to that particular forest. These issues are sufficiently developed to warrant judicial review. If access to the courts is restricted, then these Forest Plans may forever escape review, resulting in litigation for each site-specific project, a result that thwarts the goals of both the APA and the doctrine of ripeness itself.

220. See, e.g., Bennett v. Spear, 520 U.S. 154 (1997) (using an environmental statute to vindicate an economic interest by finding that a biological opinion was final agency action); see also supra note 164. One commentator noted that "the history of these [environmental] cases is reminiscent of the long and notorious use of the Commerce Clause and Substantive Due Process by an earlier Supreme Court to strike down laws aimed at curbing untrammeled corporate power." Weinberg, supra note 1, at 11. See, e.g., Hammer v. Dagenhart, 247 U.S. 251 (1918) (holding that Congress could not regulate the shipment of goods made by child laborers); Lochner v. New York, 198 U.S. 45 (1905) (holding that states may not regulate labor hours).