DISMISSAL OF THE CERTIORARI PETITION IN PACIFIC RIVERS COUNCIL: A BULLET DODGED IN THE SUPREME COURT’S WAR AGAINST PUBLIC CHALLENGES TO FLAWED FEDERAL LAND USE PLANNING

Hope M. Babcock *

I. INTRODUCTION ................................................................. 226
II. FEDERAL LAND MANAGEMENT PLANNING .......................... 230
III. U.S. FOREST SERVICE v. PACIFIC RIVERS COUNCIL .......... 233
   A. Standing ................................................................. 237
   B. Ripeness ............................................................... 245
IV. DEFERENCE TO THE USFS’S INTERPRETATION OF CEQ’S REGULATIONS ON THE SCOPE AND TIMING OF ITS NEPA REVIEW ................................................................. 250
V. CONCLUSION ................................................................. 256

I. INTRODUCTION

This article looks at how recent U.S. Supreme Court decisions insulating agency decision making from legal challenges and expanding the deference given to agency interpretations of their statutory and regulatory authority have made it harder for the public to dispute, let alone overturn, agency planning decisions like those made in U.S. Forest Service land and resource management plans. The recent grant of certiorari in U.S. Forest Service v. Pacific Rivers Council,1 although subsequently dismissed by the Court,2 suggests that the Court would

* Hope Babcock is a law professor at Georgetown University Law Center where she teaches natural resources and environmental law and co-directs an environmental clinic. Professor Babcock thanks Georgetown for its continued generous support of her research. She is also indebted to her former graduate teaching fellow Margot Pollans for her helpful comments on earlier drafts of the article, and to her tireless research assistant Erica Pincus for her careful research and helpful edits. A paper based on this article was presented at the 2014 J.B. and Maurice C. Shapiro Environmental Symposium on the Role of Planning in Federal Land Management.

1 689 F.3d 1012 (9th Cir. 2012).
2 On June 17, 2013, the Court vacated the judgment below and remanded the case to the Ninth Circuit with directions that it instruct the U.S. District Court for the Eastern District of California to dismiss the case as moot in its entirety. See Pac. Rivers Council v. U.S. Forest Serv., 724 F.3d 1146 (9th Cir. 2013) (discussing the Supreme Court order and remanding to the Eastern District of California).
like to go further in protecting the federal land management planning process from judicial review. This article uses the original grant in *Pacific Rivers Council* as a springboard to examine the Court’s view of the federal resource planning process and citizen involvement in it.

*Pacific Rivers Council* involved a successful challenge to a U.S. Forest Service (“USFS”) framework plan governing management of eleven national forests in the Sierra Nevada region of California. The basis for the environmentalist challenge was that the plan violated the National Environmental Policy Act (“NEPA”) and Administrative Procedure Act (“APA”). The Ninth Circuit found that plaintiffs, Pacific Rivers Council (“PRC”), had standing, that their lawsuit was ripe and that the scope of the agency’s programmatic environmental impact statement was too narrow. Since there was neither a conflict among the circuits nor a strong signal to the Court from the Solicitor General regarding the case’s importance, it is likely that the Court took *Pacific Rivers Council* because it saw the opportunity to make new law by reversing the lower court on one or more of its holdings. As former

---

3 These are two oft-mentioned grounds for the Court accepting certiorari petitions. See Sup. Ct. R. 10(a), (c); see also A. Raymond Randolph, *Certiorari Petitions in the Supreme Court*, 4 Litig. 21, 23–24 (Winter 1978) (discussing the reasons the Supreme Court grants cases certiorari). Factors that bear on the importance of the issue presented include the number of persons affected, the amount of money involved, and the number of other cases that will be influenced. None of these factors were present in *Pacific Rivers Council*. As for the case’s “broad importance,” all that the government could muster in support was that two land planning agencies, the Bureau of Land Management and the Forest Service, would be “substantially hampered in their ability to implement regulations and management plans because they would be open to immediate challenge.” Petition for Writ of Certiorari at 19, U.S. Forest Serv. v. Pac. Rivers Council, 133 S. Ct. 1582 (2013) (No. 12-623). In addition, as PRC argued, since the dispute about its standing revolved around the interpretation of its principal declarant, resolution of the dispute could not be considered an issue of either “general or continuing importance.” Brief in Opposition at 16, U.S. Forest Serv. v. Pac. Rivers Council, 133 S. Ct. 1582 (2013) (No. 12-623).

4 Judge Randolph notes that a cert-worthy conflict must mean that the opinions of the lower court are irreconcilable, are not so open-ended that they “can be reasonably construed to resolve the apparent inconsistency . . . [and] must arise out of the lower courts’ holdings.” Randolph, supra note 3, at 23.

5 Most cases in which the Court has granted a certiorari petition are reversed. Randolph, supra note 3, at 21. Another possible reason that the Court took the case was the filing of amicus briefs in support of petitioner by the American Forest Resource Council, and the Public Lands Council and National Cattlemen’s Beef Association. See Adam D. Chandler, *The Early Brief Gets the Worm*, Slate (Dec. 5, 2008), http://www.slate.com/articles/news_and_politics/jurisprudence/2008/12/the_early_brief_gets_the_worm.html (commenting on the importance of amicus briefs in forming the Court’s docket and noting that the chief deputy clerk of the Court has said that amicus briefs are one of four explicit factors the Court weighs in deciding whether to grant a certiorari petition); see also Adam Liptak, *Friend of the Corporation*, N.Y. Times, May 5, 2013, at Sunday Business 5 (noting that Chandler’s study showed that pro-business and anti-regulatory groups made up more than “three quarters of the top . . . filers,” resulting in the Court hearing
Chief Justice Rehnquist said, “[t]he most common reason members of our Court vote to grant *certiorari* is that they doubt the correctness of the decision of the lower court.”

Teed up for the Court in the *certiorari* petition was the government’s argument that courts should apply a heightened pleading standard for standing in cases such as this; specifically, that plaintiffs must show that the threatened injury was “certainly impending,” as opposed to “reasonably likely to occur.” Also presented to the Court for resolution was the government’s argument that the finding in *Ohio Forestry Ass’n v. Sierra Club* that NEPA challenges are ripe when the injury first occurs is only *dicta* and should have no application to agency programmatic decisions with no “real-world effect,” and that ripeness was a jurisdictional defense rather than a prudential one. *Pacific Rivers Council* additionally raised the question of how much deference a court should give the USFS’s constricted interpretation of the Council on Environmental Quality’s (“CEQ”) regulation directing agencies to “apply NEPA early in the process” when they determine the timing and scope of their environmental analyses of tiered management decisions. This latter issue provided an opportunity for the Court to expand on its holding in *City of Arlington v. Federal Communications Commission* that courts must apply *Chevron* to an agency’s interpretation of any statutory ambiguity concerning the agency’s regulatory jurisdiction.

The issues discussed in this article are not of trivial import to the federal land planning process, a process that natural resources law professor George Coggins said in a 1990 article “threatens to become the most critical stage in the overall process of allocating public natural resources.” If consideration of *Pacific Rivers Council* had continued to

---


8 As respondents noted in their brief in opposition to the certiorari petition, no lower court ruled on the ripeness of its claims, nor did the government make a ripeness defense in the lower court. Brief in Opposition at 17–19, U.S. Forest Serv. v. Pac. Rivers Council, 133 S. Ct. 1582 (2013) (No. 12-623).

9 40 C.F.R. § 1501.2 (2013); see also 40 C.F.R. § 1501.7 (2013) (requiring an early process for determining the scope of issues to be addressed in an Environmental Impact Statement (“EIS”)).

10 133 S. Ct. 1863 (2013).

the merits, the Court likely would have agreed with the government that a heightened pleading standard should be applied to challenges to federal programmatic planning documents. The door would have been opened to ripeness challenges to NEPA claims against programmatic documents, forestalling judicial review of agency planning decisions until a point in the process where they may be moot and thus impossible to raise. And future courts would be encouraged to give deference to constrained, self-serving agency interpretations of their NEPA responsibilities. Even though the petition was ultimately dismissed by the Court on grounds unrelated to its merits, it is likely that the government will pursue these lines of arguments at the next opportunity and that the Court will remain interested in them.

The article begins by briefly describing the federal land management planning process, emphasizing, in particular, the importance of tiered decision-making and the importance of the second stage—area-wide planning. Then it focuses on the Ninth Circuit’s decision in Pacific Rivers Council and the questions certified to the Court, focusing particularly on the standing and ripeness issues raised in the government’s petition. This discussion describes the Court’s increasing hostility toward citizen lawsuits challenging agency planning initiatives and offers the grant in Pacific Rivers Council as just the most recent instance of this hostility. The third part of the article examines recent Court decisions expanding judicial deference to agency interpretations of the scope of their regulatory authority and how the Court might have applied those decisions in Pacific Rivers Council to the USFS’s interpretation of CEQ regulations defining its duties under NEPA. While deference may be a good thing when a litigant agrees with the agency’s action, it may work against her when she does not. Here the USFS’s crabbed interpretation of CEQ’s regulations severely narrowed

---

12 See, e.g., Summers v. Earth Island Inst., 555 U.S. 488 (2009) (holding that plaintiffs lacked standing to facially challenge a USFS regulation that allowed the agency to ignore certain procedural requirements for actions categorically excluded under NEPA); Norton v. S. Utah Wilderness Alliance (SUWA), 542 U.S. 55 (2004) (holding among other things that plans are not judicially enforceable); Ohio Forestry Ass’n v. Sierra Club, 523 U.S. 726 (1998) (holding that land use plans are not ripe for judicial review); Lujan v. Nat’l Wildlife Fed’n, 497 U.S. 871 (1990) (holding that environmental plaintiffs lacked standing to challenge BLM’s land withdrawals in a single programmatic lawsuit). For a scathing critique of the Court’s ruling in SUWA its devastating effect on federal land use planning, see generally Michael C. Blumm & Sherry L. Bosse, Norton v. SUWA and the Unraveling of Federal Land Use Planning, 18 DUKE ENVT’L. L. & POL’Y F. 105 (2007). Blumm and Bosse blame Ohio Forestry and SUWA for placing “significant roadblocks in the path of challenges to planning decisions, virtually eliminating the public’s ability to challenge agency land management decisions on a programmatic level.” Id. at 111.
public participation opportunities in the NEPA process and increased the possibility that important environmental effects of the USFS’s proposed action would go unevaluated. The article concludes that while supporters of meaningful federal planning dodged a bullet when the Court dismissed the petition in Pacific Rivers Council, given the Court’s perverse interest in them, these issues will arise again and may not be so easily avoided.

II. FEDERAL LAND MANAGEMENT PLANNING

The two principal federal land management statutes are the National Forest Management Act (“NFMA”) and the Federal Land Policy and Management Act (“FLPMA”). Planning plays a central role in each. NFMA requires the Secretary of Agriculture to “develop, maintain, and, as appropriate, revise land and resource management plans” (“LRMPs”) for all the national forests, while FLPMA directs the Secretary of Interior to engage in land-use planning for the nation’s public lands (“Resource Management Plans” or “RMPs”). Federal planning statutes like NEPA “institutionalize" a degree of administrative foresight," their purpose is to make agencies “pause and take a hard look at the environmental implications of their actions.” Because most federal

13 There are many other laws that impose a planning duty on the Interior Department, such as the 1997 National Wildlife Refuge System Improvement Act (which requires the Secretary of Interior to prepare comprehensive plans to help maintain the biological integrity, diversity, and environmental health of the National Refuge System), 16 U.S.C. § 668dd (2012), the National Park Service Organic Act, 16 U.S.C. § 1a-7 (2012) and various onshore and offshore mineral leasing programs including the Federal Land Policy and Management Act, 43 U.S.C. § 1701(a) (2012) and the Mineral Leasing Act, 30 U.S.C. § 184 (2012) to name just a few. Even the Endangered Species Act contains a planning component, which requires the preparation of recovery plans for listed endangered species, 16 U.S.C. § 1533(f)(1) (2012), and habitat conservation plans by individuals who want to take a listed species pursuant to an incidental take permit, 16 U.S.C. § 1539 (2012). See generally Coggins, supra note 11 (describing the principal federal land planning statutes).


15 43 U.S.C. § 1712 (2012). § 1712(c)(2) directs the Secretary to “use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences,” while § 1712(a) and § 1712(f) emphasize the need for public involvement in the planning process. BLM has planning jurisdiction over 250 million acres, which include 160 million acres of rangeland. JAMES RASBAND, JAMES SALZMAN & MARK SQUILLACE, NATURAL RESOURCES LAW & POLICY 215–16 (2009).

16 Coggins, supra note 11, at 351.

17 RASBAND ET AL., supra note 15, at 294; see also Coggins, supra note 11, at 308 (“The National Environmental Policy Act of 1969 (NEPA), especially in its programmatic Environmental Impact Statement requirements, directly foreshadows formal land planning mechanisms.”); id. at 351 (“The federal land use planning statutes imitate NEPA to a considerable extent.”).
plans are major federal actions requiring the preparation of an environmental impact statement (“EIS”), the EIS process generally accompanies the development of such plans, as in the case of the framework plans for the Sierra Nevada National Forest.\textsuperscript{18}

For both the U.S. Forest Service ("USFS"), which administers NFMA, and the Bureau of Land Management ("BLM"), which implements the planning provisions of FLPMA, planning is a multi-tiered process.\textsuperscript{19} The first stage involves gathering data to inventory both commodity and non-commodity resources.\textsuperscript{20} The second stage is the development of a broad plan, which assesses inventoried resources, reconciles competing demands for allocation of those resources, and proposes broad-based management initiatives.\textsuperscript{21} The third stage implements the plan on a site-specific basis.\textsuperscript{22} A critical aspect of the second stage is land classification, which allows or prohibits specific uses in various parts of the planning area.\textsuperscript{23} Although the planning processes under NFMA and FLPMA are similar, the USFS’s LRMPs are more specific than BLM’s RMPs, allowing the USFS significantly less discretion as it moves through the next stages of the planning process than what is accorded to BLM under FLPMA.\textsuperscript{24} Planning is expensive, which may explain the efforts by various administrations to curtail its use.\textsuperscript{25} Professor Blumm calculated in 2007 that the USFS and BLM had spent more than $1 billion since the mid-1970s in developing their land management plans, and spend, on average, more than $100 million annually to revise them.\textsuperscript{26}

Although neither LRMPs nor RMPs authorize site-specific projects or activities like road building or timber harvesting, by dividing the

\textsuperscript{18} See infra p. 234 (referencing 2001 EIS and 2004 SEIS).

\textsuperscript{19} Coggins describes the BLM planning process as “middle tier,” by which he means that there is “national policy above it” and individual, lower-level plans below and subservient to it in the sense they must be consistent with the middle-tier plan. Coggins, supra note 11, at 319. See also id. at 337 (describing the forest planning process as a three-stage process and “‘an uneasy compromise between the top down and bottom up theories’ of planning”).


\textsuperscript{21} Id.

\textsuperscript{22} Id.

\textsuperscript{23} Id. Coggins emphasizes the zoning nature of planning. Coggins, supra note 11, at 352.

\textsuperscript{24} RASBAND ET AL., supra note 15, at 298; see also Coggins, supra note 11, at 308 (“The Forest Service must comply with relatively specific procedural and substantive provisions in its planning, but Congress neglected to spell out anything except vague generalities to guide the BLM.”).

\textsuperscript{25} See Blumm & Bosse, supra note 12, at 109 n.15 (discussing reductions in the planning budgets for both USFS and BLM during the Bush Administration).

\textsuperscript{26} Blumm & Bosse, supra note 12, at 122.
Planning area into discrete management areas, the agencies are effectively determining what future uses will be allowed in each area. Actual projects in a planning area cannot occur until the relevant resource management agency has conducted site-specific analyses to ensure compliance with NEPA and other applicable laws like the Endangered Species Act (“ESA”). If done correctly, agencies can cross-reference their site-specific analyses at stage three to whatever substantive and environmental analyses were made at the stage two plan level. This process avoids readdressing environmental issues discussed earlier in the planning process when specific projects or activities are being considered by the agency.

Specific projects and activities approved at the last stage must be consistent with the broader LRMP or RMP. If they are not, they can be disapproved. If a nonconforming project is deemed desirable, the agency must amend the plan to incorporate it, a process that can significantly delay the project’s approval. Subsequent project specific reviews can require the agency to adopt additional mitigation or restrictions beyond what are prescribed in the LRMPs or RMPs. While LRMPs and RMPs establish only the minimum requirements and the agency can impose more stringent conditions, there is nothing in either statute requiring them to do so, or even to consider it.

Thus, the second stage in the agency planning process is critical because it determines what activities may occur in the planning area and under what circumstances those activities can take place. These broad plans are essential, as they restrict subsequent management decisions by legally binding their agencies and limiting “the range of future options that federal land managers would otherwise have authority to implement.” Further, as a practical matter, since the plan-writer is also

28 Id. at 4-10.
29 Id.
30 Id.
31 Id. at 4-11 to 4-12.
32 Coggins, supra note 11, at 309 (discussing the consistency requirement and saying “because of this effect of planning, the planning stage of the management process in many instances should govern subsequent questions of particular entitlement”).
33 Id. at 309. Coggins predicts that the legally binding nature of plans will make the degree of specificity required in them a “key factor in future disputes,” noting that agencies may “prefer to write motherhood generalities rather than blueprints for future resource allocation and protection,” while natural resource litigants will be concerned that agencies “will promulgate plans so general as to be meaningless as limitations on or guidelines for subsequent management decisions.”
34 Hardt, supra note 27, at 4-9.
the land use manager tasked with approving specific projects, there is a reasonable presumption that future activities will be consistent with the plan.35

In theory, without the pressure of having to decide on a specific project at the planning stage, federal managers “are in a posture of unbiased managers rather than project proponents.”36 Thus, land use plans “can encourage rational decision-making in advance of specific land use decisions” and insulate the land manager from the pressure that those decisions bring to bear on them.37 But agencies generally dislike planning. It is resource intensive, time-consuming, and, when bounded by congressional standards, capable of restricting much-valued agency flexibility.38

III. U.S. FOREST SERVICE V. PACIFIC RIVERS COUNCIL

The facts of the case are straightforward and typical with respect to the planning process used by the USFS, and the typical opposition in environmental circles due to perceived shortcuts taken during the planning process. From a planning perspective, things were only atypical in respect to the length of time it took to complete the plan and the extent of political involvement in the process.39 There was also nothing atypical about the lawsuit challenging the plan, nor its ultimate fate in the Ninth Circuit.

35 Coggins wryly notes that since the plan writer is often the plan implementer given the decentralized nature of planning, “[i]t is unlikely that he or she will not be influenced by his or her own handiwork—the purpose of which, of course, is to give direction and guidance to managers.” Coggins, supra note 11, at 310.
36 Blumm & Bosse, supra note 12, at 159; see also id. (“at the planning stage, with an areawide concentration and a focus on land resources, the cumulative effects of various potential resource developments can be evaluated without pressure from project sponsors”).
37 Id. at 159; see also id. (commenting that the planning process can “produce predictability” if the plans are specific enough with respect to resource allocation).
38 Coggins, supra note 11, at 308–09 (“Agencies jealously guard their flexibility, which means, in essence, that they seek to retain the discretion to decide as they wish on any resource allocation question.”).
39 The saga of the management framework plan for the Sierra Nevada National Forests is an example of what Professor Flatt calls “political administrative tinkering,” and while not adversely affecting public health as what happened in the ozone national ambient air quality standard described by Professor Flatt in his article, nonetheless had an adverse impact on the professionalism of the agency, created significant uncertainty in the field and within the affected interest groups, and undermined what otherwise might have been a rational decision based on sound science. See Victor B. Flatt, Frozen in Time: The Ossification of Environmental Statutory Change and the Theatre of the (Administrative) Absurd, 24 FORDHAM ENVTL. L. REV. 125, 141 (2013).
The facts of the case are essentially these. After studying eleven of California’s Sierra Nevada forests for almost a decade, in January 2001, the USFS issued a final environmental impact statement (“2001 FEIS”) covering the planning area. The 2001 FEIS recommended numerous amendments to individual forest plans in the region “to ensure the ecological sustainability of the entire Sierra Nevada ecosystem and the communities that depend on them.” Later that year, the USFS adopted a modified version of the preferred alternative from the 2001 FEIS, known as the 2001 Framework, which governed the management of these forests. The planning area covered by the 2001 Framework was approximately 11.5 million acres—more than 5% of the total forest land managed by the Service. The forests at issue consisted of multiple complex ecosystems and supported substantial economic activity like grazing, logging, and recreation.

Almost immediately after the 2001 election, a new Chief of the Forest Service under recently elected President Bush initiated a review of the 2001 Framework. Although numerous administrative appeals had been filed under the 2001 Framework, rather than choosing to act on them, the new Chief ordered the Regional Forester to reevaluate the 2001 Framework to address three fire-related issues. The Regional Forester in December 2001 added to the fire-related issues additional issues regarding the 2001 Framework’s impact on grazing, recreation, and local communities. This review culminated in the 2003 publication of a supplemental EIS (“SEIS”), which recommended significant changes in the 2001 Framework, specifically the reduction of restrictions on grazing and logging. These changes were subsequently adopted by the Bush USFS (“2004 Framework”). The 2004 Framework allowed substantially more logging, construction of new logging roads, and grazing than the 2001 Framework; the 2004 Framework also authorized the opening of sensitive ecosystems to these activities.

PRC sued the USFS in 2005, alleging that the 2004 Framework violated NEPA and the APA by failing to adequately examine in the SEIS the effects of the 2004 Framework on fish and amphibian species. The District Court granted summary judgment to the USFS, finding the

---

40 The facts set out in this section are drawn from the panel decision in Pac. Rivers Council v. U.S. Forest Serv., 689 F.3d 1012, 1015–20 (9th Cir. 2012).
41 Pac. Rivers Council, 689 F.3d at 1016.
42 The Regional Forester was to address the possibilities of more flexibility in aggressive fuels treatment, possible new information associated with the National Fire Plan, and the limitations placed by the 2001 Framework on the Herger-Feinstein Quincy Library Group Forest pilot project dealing with fire prevention. Id. at 1016.
2004 SEIS adequate. In February of 2012, the Ninth Circuit reversed in part and affirmed in part, finding that the USFS failed to take a hard look at the impact of the 2004 Framework on fish, but did take the requisite hard look at its impact on amphibians. The panel remanded the case to the district court and, subsequently, denied the government’s petitions for rehearing and rehearing en banc. The government filed its petition for certiorari in November 2012, which was granted by the Court in March 2013.

Subsequent to the Court accepting the petition, on remand, the district court denied respondent’s request to vacate the 2004 Framework management plan, but directed the USFS to prepare a new SEIS to address deficiencies in the document PRC had identified and prevailed on in the Court of Appeals. A little over a month after the district court’s action, after eight years of challenging the USFS’s planning process for this National Forest system, PRC filed a motion in the Supreme Court to vacate the Ninth Circuit’s judgment and dismiss the

---

44 Pac. Rivers Council, 689 F.3d at 1014. Judge N.R. Smith dissented over the majority’s misapplication of the standard of review in a NEPA case, contending that it created a less deferential standard of review, which amounted to an “inappropriate and substantial shift” in the court’s NEPA jurisprudence. Id. at 1034–38 (Smith, J., dissenting).
45 The court withdrew its February 3, 2012 opinion, replacing it with the June 20, 2012 opinion, in which it made minor changes to its original opinion. The June 20th opinion was the subject of the government’s November 16, 2012 certiorari petition. See Pac. Rivers Council, 689 F.3d at 1014.
46 The petition presented the following questions: (1) whether respondent Pacific Rivers Council (“PRC”) has Article III standing to challenge the Forest Service’s 2004 programmatic amendments to the forest plans governing management of eleven Sierra Nevada Forests when PRC failed to establish that any of its members were imminently threatened with cognizable harm because he or she would come into contact with any parcel of forest affected by the amendments; (2) whether PRC’s challenge to the Forest Service’s programmatic amendments is ripe when PRC failed to identify any site-specific project authorized under the amended plan provisions to which PRC objects to; and (3) whether the National Environmental Policy Act required the Forest Service, when adopting the programmatic amendments, to analyze every type of environmental effect that any project ultimately authorized under the amendments throughout the eleven affected forests might have, if it was reasonably possible to do so when the programmatic amendments were adopted, even though any future site-specific project would require its own appropriate environmental analysis before going forward. Petition for Writ of Certiorari at 1, U.S. Forest Serv. v. Pac. Rivers Council, 133 S. Ct. 1582 (2013) (No. 12-623).
47 U.S. Forest Serv. v. Pac. Rivers Council, 133 S. Ct. 1582 (2013). At the request of the government, briefing on the merits was extended for the government until June 12, 2013, and for respondent (PRC) until August 23, 2013.
petition as moot. This motion was rather unusual as PRC had not filed the petition and sought to have the Supreme Court vacate a judgment it had won below. The government supported PRC’s motion to dismiss, if the Court vacated the Court of Appeals’ decision and remanded the case with instructions to the district court to dismiss the entire case with prejudice. The government also suggested in a footnote that the Court could dispose of the case on standing, rather than dismissing it as moot, indicating the government’s unsurprisingly strong interest in having the Court impose a heightened standard of injury. The Court did not take up the government’s invitation to keep the standing question alive and granted the motion, vacating the decision below.

In its certiorari briefs, the government asked the Court to expand the protection agencies receive from suits challenging their compliance with laws. First, the government asked the Court to adopt a heightened standard of injury by requiring that any injury a party complains about “must be ‘certainly impending’” before jurisdiction will attach. Second, the government asked the Court to treat ripeness challenges under NEPA as jurisdictional rather than prudential. An approach that ignores decades of adherence to a principle that allows parties to challenge agency compliance with NEPA when the injury complained about first arises. The government also asked the Court to expand the deference given to an agency’s interpretation of CEQ’s regulations

---


51 Id. The heightened injury standard was actually raised for the first time in the government’s reply to PRC’s opposition to the petition. See infra pp. 16–17 (discussing the insertion of Clapper into the government’s standing discussion at the reply stage).


54 Id. at 26–27.

55 See, e.g., Sierra Club v. Marita, 46 F.3d 606, 613–14 (7th Cir. 1995) (holding the forest plan ripe for review); Res. Ltd., Inc. v. Robertson, 35 F.3d 1300, 1303–04 (9th Cir. 1994) (finding the challenge to Flathead National Forest Plan ripe even though it was not brought in context of site-specific action); Seattle Audubon Soc’y v. Espy, 998 F.2d 699, 703 (9th Cir. 1993) (holding that plaintiffs can challenge a forest plan when their grievance is with the overall plan); Portland Audubon Soc’y v. Babbitt, 998 F.2d 705, 708 (9th Cir. 1993) (holding ripe plaintiffs’ challenge to the agency’s decision not to supplement the EIS because the forest plans “predetermine the future,” making the injury concrete); Idaho Conservation League v. Mumma, 956 F.2d 1508, 1518–20 (9th Cir. 1992) (holding the forest plan subject to judicial review).
governing the scope and timing of its NEPA analysis when faced with a tiered resource management program.56 If the government had prevailed on any one, let alone all of these points, it would have become almost impossible for environmental plaintiffs to challenge programmatic planning initiatives and would have given agency personnel a free ride from public oversight of their area-wide planning process.57

Once the Court had granted the government’s petition, the potential for the Court to create a very bad precedent became apparent.58 This possibility, in all likelihood, is what motivated PRC to take the unusual step of asking the Court to dismiss the petition and vacate the judgment below. Although the Court did accept the government’s invitation to address at least the standing arguments even if it found the case to be moot, the heightened injury and ripeness standards and expanded agency deference are still appealing arguments to the government. It is more than likely that the government will pursue these arguments in future cases involving tiered decision-making and that the Court will be receptive to them.

The article now turns to those arguments, beginning with standing.

A. Standing

The majority on the Ninth Circuit panel presented a thorough analysis of PRC’s standing, in which it applied its own and the Court’s precedent. Far from being a rogue court, as the government inferred in its reply brief,59 the Ninth Circuit took pains to fit its decision within extant Court standing precedent, including applying *Summers v. Earth Island Institute*60 and other cases that had come before it61 to the facts in *Pacific Rivers Council*.

---

58 The likelihood of this happening increased given the Court’s recent penchant to reverse the Ninth Circuit’s environmental decisions. See Babcock, The Strange Pas de Deux Between the U.S. Supreme Court and the Ninth Circuit (forthcoming) (discussing this record).
59 See Reply Brief of the Petitioner at 7, U.S. Forest Serv. v. Pac. Rivers Council, 133 S. Ct. 1582 (2013) (No. 12-623) (describing the Ninth Circuit’s substantial departure from controlling Article III standing principles); see also id. (“The Ninth Circuit has flouted the direction this Court provided only four years ago in *Summers* based on a materially indistinguishable declaration and set of arguments.”).
61 See, e.g., Wilderness Soc’y, Inc. v. Rey, 622 F.3d 1251 (9th Cir. 2010) (finding general averments insufficient to establish standing). In fact, respondents, in an attempt to persuade the Court not to take the case, argue that *Pacific Rivers Council* is a poor vehicle to address standing issues because the challenged SEIS had been held inadequate on other grounds in two other cases.
Specifically, the lower court took pains to distinguish PRC from the plaintiffs in *Summers*,\(^{62}\) who could show no “realistic likelihood” they would intersect the land affected by the regulation because of the regulation’s breadth and because the land at issue was in “small and widely scattered parcels of land throughout the entire United States.”\(^{63}\) In contrast, the panel concluded that the broad range of the 2004 Framework’s impacts created “a likelihood” that the PRC declarant would encounter an affected area.\(^{64}\) Second, the Ninth Circuit distinguished the plaintiff in *Wilderness Society, Inc. v. Rey*,\(^{65}\) where it had previously found allegations based on a member’s general intention to return to a specific Sierra Nevada forest insufficient for standing purposes in a challenge to the same nationwide USFS regulations at based on different standing allegations. See *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1169 (9th Cir. 2011) (deciding both cases). As the case is on remand to the District Court and will likely result in the Forest Service having to prepare a new EIS regardless of what happens in *Pacific Rivers Council*, further review of the instant case would have no practical significance. See Brief in Opposition at 16, *U.S. Forest Serv. v. Pac. Rivers Council*, 133 S. Ct. 1582 (2013) (No. 12-623).

\(^{62}\) Plaintiffs in *Summers* alleged that the USFS had failed to provide notice, an opportunity to comment, and a right of appeal to a particular salvage timber sale. While the case was pending the parties settled, but the plaintiffs went ahead with a facial challenge to USFS’s regulations, which allowed the agency to ignore these procedural requirements when the proposed action was categorically excluded under NEPA. Justice Scalia writing for the Court held that the challenge could not go forward because the plaintiffs were unable to show any concrete injury from the application of the regulations to them. Their procedural claim failed as well because they had also not shown a concrete interest that might be affected by the denial of the procedural right to notice and comment. *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009).

\(^{63}\) *Pac. Rivers Council v. U.S. Forest Serv.*, 689 F.3d 1012, 1023 (9th Cir. 2012) (discussing *Summers*). The plaintiffs in *Summers* were challenging national regulations that exempted sales of salvage timber of 250 acre or less from the requirement to prepare an EIS under NEPA. *Summers*, 555 U.S. at 490–91. Plaintiffs could only make a general statement that they intended to visit national forests in the future and might thus come into contact with one of these small parcels of land on which a salvage timber sale had been conducted. *Id.* at 496–97.

\(^{64}\) The majority noted that PRC’s declarant established that he lived near and frequently hiked and climbed in the area covered by the 2004 Framework Plan, that he planned to continue these activities so long as implementation of the Framework Plan did not prevent him from doing so, and that he “garnered great personal solace in the knowledge that Sierra Nevada native species and the watersheds that support them persist.” *Pac. Rivers Council*, 689 F.3d at 1022. The government argued in its certiorari reply brief that the panel improperly hypothesized aesthetic injuries that were not alleged in the declaration and thus ran afoul of the *Summers* court’s “admonition that a ‘statistical probability’ or supposedly ‘realistic threat’ that a plaintiff’s members would be harmed in the ‘reasonably near future’ cannot establish standing.” Reply Brief of the Petitioner at 15–16, *U.S. Forest Serv. v. Pac. Rivers Council*, 133 S. Ct. 1582 (2013) (No. 12-623). But, the fact that the government raised its standing challenge in *Pacific Rivers* for the first time on appeal gave the government a “tactical advantage,” which justified the majority drawing inferences in PRC’s favor, such as inferring the existence of an aesthetic injury. This fact also distinguishes *Summers*, which arose from the district court’s final judgment on the merits, not on a belated summary judgment motion in the court of appeals.\(^{65}\)
issue in *Summers*. Third, the appellate court applied the “more likely” than not prescription from *Ohio Forestry Ass’n v. Sierra Club*; where the Court found the Sierra Club’s challenge to a land resource management plan under NFMA unripe as a prudential matter, but found that the Club still had standing despite the “considerable legal distance between the adoption of the Plan and the moment when a tree is cut.”

Finally, the panel contended that PRC clearly met the standards set out in *Lujan v. Defenders of Wildlife*, as the declarant averred to substantially more than “some day intentions to return to the areas in question.” The court also opined that PRC’s principal declarant identified specific areas in much smaller tracts of land than were at issue in *Lujan v. National Wildlife Federation (NWF)*, and thus met the demanding standards of that case. Even a cursory review of the Ninth Circuit’s opinion shows that it obeyed the high Court’s standing jurisprudence.

In its *certiorari* petition, the government relied principally on *Summers*, arguing that PRC’s failure to challenge any site-specific decision by the USFS under the 2004 Framework Plan, let alone to identify any specific location in the planning area that has been or will be affected by the 2004 planning document, deprived it of the requisite threatened imminent harm. In its reply brief, however, the government for the first time asserted a heightened pleading standard; namely, that plaintiffs must show that the threatened injury was “certainly impending.” According to the government, the failure to do so put respondent PRC at odds with the Court’s holding in *Clapper v. Amnesty International USA*, which the Court issued after it granted the petition in *Pacific Rivers Council*. Despite the fact that *Clapper* can be easily distinguished from the facts in *Pacific Rivers Council*, the case is potentially very troublesome for environmental litigants, and it is no surprise that the government raised it in their reply.

---

67 *Pac. Rivers Council*, 689 F.3d 1012, 1024 (9th Cir. 2012).
73 *Clapper* involved a facial challenge to a statute’s constitutionality and involved foreign affairs/national security, which collectively raised the standing burden on the plaintiffs in that case. *Clapper*, 133 S. Ct. at 1147. Neither of these factors was present in *Pacific Rivers Council*. 

In *Clapper*, the Court held that Amnesty International lacked Article III standing to challenge the constitutionality of a provision in the 1978 Foreign Intelligence Surveillance Act74 (“FISA”) because it was unable to show that any injury its members might suffer was “certainly impending.”75 Plaintiffs in *Clapper* had based their standing allegations on the “objectively reasonable likelihood” that their communications with their foreign contacts will be intercepted at some point in the future.76 They had also alleged that the risk of surveillance under §1881a was sufficiently great to force them to take “costly and burdensome measures to protect the confidentiality of their international communications,” constituting injury that was fairly traceable to §1881a.77 Justice Alito, writing for the majority, rejected these arguments in their totality, noting that their standing theory rested on a “speculative chain of possibilities” that fails to establish that their potential injury is *certainly impending* or is fairly traceable to the disputed section of FISA; instead, it required a court to engage in “guesswork” as to how independent decision-makers will exercise their judgment.78

The controversial part of Justice Alito’s opinion was his rejection of the Second Circuit’s “reasonable likelihood” standard for showing injury because it was inconsistent with the requirement that a “threatened injury must be certainly impending to constitute injury in fact.”79 Although Justice Alito cites an array of opinions in which the Court supposedly announced the need to show that a threatened injury is certainly impending, none of them actually employed this standard.80

---

75 *Clapper*, 133 S. Ct. at 1143.
76 Id. at 1147.
77 Id. at 1150–51.
78 Id. at 1150.
79 Id. at 1147–48. The Second Circuit had employed the reasonable likelihood standard. Amnesty Int’l USA v. Clapper, 638 F.3d 118, 134 (2d Cir. 2011). In addition, as Justice Breyer points out in his dissent, § 1881a(g) eliminated the requirement that the government describe to the Foreign Intelligence Surveillance Court each specific target and facility at which surveillance would take place, transforming an individualized surveillance into one that was programmatic. *Clapper*, 133 S. Ct. at 1156. (Breyer, J., dissenting).
80 DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 345 (2006) (“the [plaintiff] must be able to show . . . that he has sustained . . . some direct injury . . . and not merely that he suffers in some indefinite way in common with people generally”); Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 190 (2000) (“It is the plaintiff’s burden to establish standing by demonstrating that . . . the defendant’s allegedly wrongful behavior will likely occur or continue”); Whitmore v. Arkansas, 495 U.S. 149, 158 (1990) (“A threatened injury must be ‘certainly impending’ to constitute injury in fact”); Lujan v. Defenders of Wildlife, 504 U.S. 555, 566 (1990) (“Standing . . . requires . . . a factual showing of perceptible harm”); Babbitt v. Farm Workers, 442 U.S. 289, 298 (1979) (“If the injury is certainly impending, that is enough”). See
fact, in a footnote, Justice Alito admits that the Court has “not uniformly” required that plaintiffs demonstrate that it “is literally certain that the harms they identify will come about,” and that standing can indeed be based on a “substantial risk,” prompting plaintiffs to incur costs to avoid that harm. Confusing matters further, Justice Alito distinguished *Friends of the Earth v. Laidlaw Environmental Services* and *Monsanto Co. v. Geertson Seed Farms*, saying that in each case there was an appreciable risk of harm distinguishable from the circumstances in *Clapper*.

Justice Breyer issued a blistering dissent in which he attacked the Court’s reliance on the failure of plaintiffs to show that the harm to them was *certainly impending*, noting that “certainty is not, and never has been, the touchstone of standing, as the majority conceded in footnote 5.” According to Justice Breyer, federal courts frequently find plaintiffs meet the injury prong of Article III standing when they seek an injunction or declaratory relief to block future action that is “reasonably likely or highly likely, but not absolutely certain, to take place.” As Justice Breyer points out, when the word “certainly”

---

81 *Clapper*, 133 S. Ct. at 1150 n.5. For contrary cases see *Monsanto*, 130 S. Ct. at 2755 (where the Court found injury “sufficiently concrete to satisfy the injury-in-fact prong of constitutional standing analysis” based on measures plaintiffs would have to undertake to protect their crops from cross-contamination, even if their crops were “not actually infected” by genetically modified genes) and *Laidlaw*, 528 U.S. at 183–84 (finding standing where plaintiffs limited their recreational uses of a nearby river based on their “reasonable concerns” about impact of pollutants that had been discharged for many years by a chemical plant). Indeed, as Justice Breyer points out in his dissent in that same Court precedent, the meaning of the word “certainly” in the phrase “certainly impending” is “more akin to ‘reasonable probability’ or ‘high probability,’” than absolute certainty. *Clapper*, 133 S. Ct. at 1165 (Breyer, J., dissenting).

82 *Laidlaw*, 528 U.S. 167; *Monsanto*, 130 S. Ct. 2743.

83 In *Laidlaw* the question was whether the members of Friends of the Earth who lived near the polluted river acted “reasonably in refraining from using the polluted area,” *Clapper*, 133 S. Ct. at 1153, and in *Monsanto*, whether respondents presented sufficient evidence of a “significant risk of gene flow to non-genetically engineered varieties of alfalfa” to grant them standing, *Clapper*, 133 S. Ct. at 1153.

84 *Clapper*, 133 S. Ct. at 1160–61 (J. Breyer, dissenting); see *supra* note 81 and accompanying text (discussing footnote 5 of the majority opinion). Justice Breyer also argued that the government had failed to allege any special circumstances that would defeat a strong natural inference that interception of communications would occur. Indeed, according to Breyer, one need only “assume” that the government was doing its job, to conclude “the high probability” that some of plaintiffs’ electronic communications will be intercepted, making the harm anything but “speculative.” *Clapper*, 133 S. Ct. at 1160 (J. Breyer, dissenting).

85 *Clapper*, 133 S. Ct. at 1160 (Breyer, J., dissenting).
appears in reference to the injury prong of Article III standing case law, it is to emphasize, not “literally define[ ], the immediately following term ‘impending.’" Nonetheless, Clapper’s certainly impending threshold for establishing the injury prong of Article III standing has become a centerpiece of court analysis.\(^8\)

The application of Clapper to the federal land management planning process is quite dire for environmental challengers. Specifically, Clapper will insulate area-wide plans from judicial review, even though decisions made in them—like site selection, choice of extraction methods, assessment of area-wide impacts, and broad-based mitigation measures—are determinative of actions at the later project approval stage. These early decisions, which shape the agency’s later actions, will likely not be challenged at the point of site development by agency personnel who have become project proponents and defenders of their initial planning decisions.\(^8\) This puts the burden on courts to correct planning errors, but Clapper makes it unlikely that they will get that chance.

After Clapper, judicial review of agency plans will become more difficult as it will be unlikely that environmental litigants can show the planning errors they are concerned about will cause injuries that will actually occur, especially as those injuries require independent action by future decision makers. Clapper will require them to wait until the last stage in a chain of events to be assured of standing. This may enable the underlying deficiencies in the programmatic authorization for a site-specific activity to escape review forever\(^9\) because tiering under NFMA

\(^8\) Id. at 1161 (Breyer, J., dissenting).
\(^9\) That Clapper is becoming the new “normal” for courts is apparent from a recent decision by the U.S. Court of Appeals for the Federal Circuit. The court applied Clapper to organic farmers and supporting organizations in a suit seeking declaratory judgment against Monsanto concerned about crop contamination. Organic Seed Growers & Trade Ass’n v. Monsanto Co., 718 F.3d 1350, 1358 (Fed. Cir. 2013). The court reasoned that Monsanto’s disclaimer posted on its website blog, stating that it would not sue an “inadvertent infringer,” while not exactly a covenant not to sue had a “similar effect” and deprived plaintiffs of being able to shod “a substantial risk that harm will occur, which may prompt [them] to reasonably incur costs to mitigate harm.” Id. at 1355 (quoting Clapper v. Amnesty Int’l USA, 133 S. Ct. 1138 (2013)). See also Williams v. Governor of Pa., No. 13-1896, 2014 U.S. App. LEXIS 249, at *6–7 (3d Cir. Jan. 7, 2014); Liberty Univ. v. Lew, 733 F.3d 72, 89 n.5 (4th Cir. 2013); Sullo & Bobbit PLLC v. Abbott, 536 Fed. App’x. 473, 476–77 (5th Cir. 2013).
\(^8\) See Blumm & Bosse, supra note 12, at 113 (“Once an agency has chosen a specific course of action, it becomes a project proponent, and the public’s influence diminishes.”); see also Brief in Opposition at 22, U.S. Forest Serv. v. Pac. Rivers Council, 133 S. Ct. 1582 (2013) (No. 12-623) (“The 2004 Framework will shape the agency’s actions and decisionmaking processes between the promulgation of the forest plan and any later site-specific applications”).
\(^9\) See Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1351 (9th Cir. 1994) (quoted in Pac. Rivers Council v. U.S. Forest Serv., 689 F.3d 1012, 1023 (9th Cir. 2012)).
and FLPMA makes it almost impossible for a court to reach planning infirmities in later, more narrowly focused, documents. Indeed, tiered analysis means that any facts developed at the site-specific stage have little relevance to the broader area-wide plan, and the analysis at that later point would be on the much narrower environmental impacts of a site-specific project, like the construction of a road or timber sale. Indeed, tiered analysis means that any facts developed at the site-specific stage have little relevance to the broader area-wide plan, and the analysis at that later point would be on the much narrower environmental impacts of a site-specific project, like the construction of a road or timber sale. A further danger is that an authorized subsequent site-specific action, if based on what turns out to have been an unlawful land use plan, might preclude subsequent challenges to similar activities based on the same flawed plan. Clapper will also increase the expense and time commitment of bringing procedural and substantive challenges to agency land use management decisions as opponents will now have to challenge each individual action taken under a plan for failings in the overall plan as opposed to challenging the plan itself—assuming individual challenges are possible. Additionally, insulating the planning stage in a multi-stage process, as application of Clapper might do, also directly undermines CEQ’s tiering regulations, which envision critical decisions that impact the environment being made at each step. Finally, to the extent that the plan creates expectations about how a planning area will be used, Salmon River involved a NEPA challenge to a forest plan that applied to the use of herbicides in millions of acres of Sierra Nevada forest. Id. at 1348–49. The appellate court found the challenge sufficient for standing purposes because there was a risk that the environmental consequences of the spraying might be overlooked in reviews under applicable substantive statutes. Id. at 1355. In fact, allowing legal challenges to planning documents like the 2004 Framework Plan might actually help planning agencies like the U.S. Forest Service avoid infirmities in subsequent initiatives when premised on a flawed first step and would benefit a reviewing court because later challenges will, in all likelihood, focus on the impacts of site-specific actions and not on facts developed to support the 2004 Framework.

90 Brief in Opposition at 23, U.S. Forest Serv. v. Pac. Rivers Council, 133 S. Ct. 1582 (2013) (No. 12-623) (“a challenge at the site-specific level may not provide a sufficient opportunity to challenge the original framework, because agencies are encouraged to ‘tier’ their analyses at subsequent stages of development by merely summarizing and ‘incorporating by reference’ the general discussions from previous statements and focusing ‘solely on the issues specific to the statement subsequently prepared’”) (citing 40 C.F.R. § 1508.28 (2013)).


92 Claim preclusion, or res judicata, bars the re-litigation of a claim already subject to a final judgment on the merits. 18-131 Moore’s Federal Practice § 131.01 (2008). Issue preclusion, or collateral estoppel, bars the re-litigation of an issue that was litigated and necessarily decided in a prior action. 18-132 Moore’s Federal Practice § 132.01 (2008).

93 Blumm & Bosse, supra note 12, at 125 (discussing SUWA and saying “by rejecting environmentalists’ programmatic challenge,” the Court left the “environmentalists with the burden of challenging each individual revocation of land withdrawal”).

94 40 C.F.R. § 1502.20 (2013) (noting that environmental assessments of subsequent actions need only “incorporate discussions from the broader statement by reference”).
expectations form and investments are made in line with those expectations. Not addressing these expectations at the planning stage ignores that equities that vest in the early stages of a multi-tiered process are difficult to counter at the later stages, tilting the entire process in favor of the proposed development.95

To this author’s knowledge, until the government raised Clapper in its reply brief, the case had not been applied in an environmental context, let alone to a case involving a tiered decision-making process by a government agency. In fact, the Court had previously held many times that standing based on facts far less certain than those in Pacific Rivers Council were sufficient.96 Indeed, there has been a string of cases involving environmental injuries where courts, including the Supreme Court, have found the mere probability that an injury might occur sufficient to demonstrate standing.97 Nonetheless, had the Court gone

95 These are also reasons why at least arguably respondent’s claim is ripe under the standards set out in Abbott Labs. v. Gardner, 387 U.S. 136 (1967). These reasons also illustrate why any ripeness determination like the one invited here is fact intensive and must be heard by a lower court. See Brief in Opposition at 18–19, U.S. Forest Serv. v. Pac. Rivers Council, 133 S. Ct. 1582 (2013) (No. 12-623).

96 See, e.g., Davis v. Fed. Election Comm’n, 554 U.S. 724, 734–35 (2008) (finding the threat faced by a candidate for Congress “realistic and impending,” albeit not a certainty, even though his opponent had declared his intention not to take advantage of the relaxation of limits on his self-financing of his campaign); Pennell v. San Jose, 485 U.S. 1, 8 (1988) (finding that a landlord had demonstrated a “realistic danger of sustaining a direct injury” from the operation of a law preventing him from raising his rents more than eight percent, by showing a mere “likelihood of enforcement” and a “probability” that landlords would charge lower rents, even though he failed to show a chain of events that would end up actually harming him) (emphasis added); Blum v. Yaretsky, 457 U.S. 991, 1000–01 (1982) (finding the “threat of transfers” to a less desirable residence made to nursing home patients, although transfers were not made, was “not imaginary or speculative” harm, but “quite realistic,” and therefore, “sufficiently substantial” to grant the residents standing).

97 Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 74 (1978) (finding standing to challenge the constitutionality of the Price-Anderson Act based on harm that plaintiffs would incur from the building of a nuclear power plant facilitated by the Act because of the Court’s “generalized concern about exposure to radiation and the apprehension flowing from the uncertainty about health and genetic consequences of even small emissions”) (emphasis in original); Monsanto Co. v. Geertson Seed Farm, 130 S. Ct. 2743, 2754–55 (2010) (discussing “a substantial risk of gene flow” injuries to respondents) (emphasis in original). See also Mountain States Legal Found. v. Glickman, 92 F.3d 1228, 1234–35 (D.C. Cir. 1996) (finding plaintiffs had standing to attack government decision limiting timber harvesting based on increased “risk” of wildfires) (emphasis in original); Natural Res. Def. Council v. Envtl. Prot. Agency, 464 F.3d 1, 7 (D.C. Cir. 2006) (plaintiff’s standing established on increased “lifetime risk” of developing skin cancer); Cent. Delta Water Agency v. United States, 306 F.3d 938, 947–50 (9th Cir. 2002) (finding standing when method of dam operation was highly likely to substantially impede plaintiff from growing crops); Consol. Cos., Inc. v. Union Pac. R.R. Co., 499 F.3d 382, 386 (5th Cir. 2007) (granting plaintiff standing to compel cleanup of adjacent land because of threat that contamination might migrate to his land); Wis. Power & Light Co. v. Century Indem. Co., 130
ahead with the case, there is every reason to expect that it would have applied *Clapper* as a natural extension of its standing jurisprudence. Doing this would have left PRC and subsequent plaintiffs of its ilk without standing. The Court would have considered the threatened substantive and procedural injuries raised by PRC to be as remote and indirect as those in *Clapper* because they required further actions by agency personnel to make them come about.

**B. Ripeness**

In *Abbott Laboratories v. Gardner*, the Court established a two-part test for determining when a claim is ripe for judicial review, *i.e.* whether the matter had progressed to a point of finality that a court need not worry that it would return for subsequent review. The first test asked a court to determine if the issues raised by the parties are fit for judicial review, while the second asks whether withholding review would harm the plaintiff. In *Ohio Forestry*, the Court expanded slightly on the two-prong test by directing courts also to determine whether judicial intervention would inappropriately interfere with further administrative action and whether courts would benefit from further factual development. The Court found that a challenge by the Sierra Club to the USFS’s LRMP for the Wayne National Forest in Ohio, which allowed clear-cutting in violation of NFMA, was not ripe since the plan did not approve any particular timber sale, and logging could not occur until the agency prepared a new analysis and made a separate decision on each logging tract in the planning area. Focusing on the second prong from *Abbott Laboratories*, the Court found that delay would not harm the plaintiffs as they could challenge any particular timber sale they wished to stop at some point in the future. At that point, the record would also be more fully developed for the Court, satisfying the first prong.

In *Pacific Rivers Council*, the government challenged the ripeness of PRC’s NEPA claims for the first time in its *certiorari* petition.

---

F.3d 787, 792–93 (7th Cir. 1997) (finding standing for plaintiff to sue insurance company that disclaimed liability for all future costs if environmental agencies required cleanup).


99 Id. at 149.


101 Id. at 732.

102 See *Ohio Forestry*, 523 U.S. at 736; *Abbott Labs.*, 387 U.S. at 148.

arguing that PRC’s failure to identify any site-specific project authorized under the 2004 Framework Plan was fatal to its claims. Despite the clear need to allow record development by a lower court of a “fact-bound” ripeness claim, the Court agreed to hear Petitioners’ ripeness challenge. For many of the same reasons that it raised in opposition to Plaintiff’s standing, the government argued that postponement of PRC’s challenge to the LRMP would cause it no hardship: namely that the Framework does not “regulate the primary conduct of respondent or its members”;\(^{104}\) nor does it “command anyone to do anything or to refrain from doing anything”;\(^{105}\) “grant, withhold, or modify any formal legal license, power or authority”; ‘subject anyone to any civil or criminal liability”; ‘create [any] legal rights or obligations’;\(^{106}\) or by itself “authorize any action to be taken within the Sierra National Forests or ‘abolish anyone’s legal authority to object to any such action in the future.’”\(^{107}\)

All of this would be pretty standard to any defense of an agency’s land planning initiative, and one would not have expected the arguments to draw the Court’s attention. However, one aspect of the government’s attack on the ripeness of PRC’s claims might have been of interest to the Court. Namely, the government’s argument that the Court’s statement in \(\text{Ohio Forestry}\)—that NEPA claims are ripe when they arise because they can never get riper—is “properly limited to NEPA analysis of agency action that directly approves activity with immediate on-the-ground consequences, not programmatic decisions that have no real-world effect.”\(^{108}\) In making this argument, the government tied the

---


\(^{105}\) Id. (quoting \(\text{Ohio Forestry}\), 523 U.S. at 733).

\(^{106}\) Id. at 21–22 (quoting \(\text{Ohio Forestry}\), 523 U.S. at 733).

\(^{107}\) Id. at 22 (quoting \(\text{Ohio Forestry}\), 523 U.S. at 733).


\(^{109}\) Reply Brief of the Petitioner at 22–27, U.S. Forest Serv. v. Pac. Rivers Council, 133 S. Ct. 1582 (2013) (No. 12-623) (emphasis in the original); see also id. at 24 (discussing the reasons why limiting \(\text{Ohio Forestry}\) to NEPA analyses that authorize “particular actions with real-world consequences” or “real world effect on the environment” makes sense). Respondent points out that the government’s position here has no basis in law and that the cases the government cites in support of its position that there is a “blanket rule that programmatic NEPA challenges are generally unripe” are inapposite. Brief in Opposition at 24–25, U.S. Forest Serv. v. Pac. Rivers Council, 133 S. Ct. 1582 (2013) (No. 12-623). Both cases the government cites, \(\text{Wyoming Outdoor Council v. U.S. Forest Service}, 165 F.3d 43 (D.C. Cir. 1999), and \(\text{Center for Biological Diversity v. U.S. Department of the Interior}, 563 F.3d 466 (D.C. Cir. 2009), rely on specific features of the federal mineral leasing program, which make the requirement of an EIS at the preliminary stage inapplicable. Plaintiffs in both cases challenged actions taken at the first stage of a multi-stage leasing process, which involved only identification and mapping of areas. \(\text{Wyom. Outdoor Council}, 165 F.3d at 45–47, 49; \text{Ctr. for Biological Diversity}, 563 F.3d at 480. In
USFS’s 2004 Framework to its NEPA analysis, enabling it to conclude that, since an attack on the plan would be premature because it does not commit the agency to use any resources with “on-the-ground effect,” the same would be true of the SEIS standing alone, making it “abstract and premature.”

Labeling the Court’s statement in Ohio Forestry about the ripeness of NEPA claims a “stray statement” of limited applicability and no more than dictum provided the Court with an opportunity to overturn fifteen years of lower court reliance on that proposition.

However, it makes perfect sense that a procedural challenge under NEPA would not be time dependent because once the procedural error happens, there is no way to take it back or pretend it did not happen. Once the error has occurred, NEPA is triggered regardless of any future decision under a related substantive law. Ohio Forestry recognized that assessing a plan’s environmental impacts only at a later stage in a multi-tiered activity is no substitute for reviewing the plan now because the purpose of an EIS, according to CEQ’s regulations, is to encourage the agency to “plan actions and make decisions” with respect to its most recent proposed action. Since further record development is unnecessary to establish procedural error under NEPA—indeed in Pacific Rivers Council the SEIS record below was closed—a NEPA challenge is readily distinguishable from a substantive challenge to a forest plan’s compliance with NFMA, which arguably might benefit from focusing on a later specific logging proposal.

Additionally, the scope of the relief that someone in this circumstance can receive is limited by the scope of the underlying action. This means that adversely affected individuals (and reviewing courts) must unnecessarily expend resources in repetitive challenges to contrast, not even the government suggested that an EIS was not required for the 2004 Framework. Brief in Opposition at 25, U.S. Forest Serv. v. Pac. Rivers Council, 133 S. Ct. 1582 (2013) (No. 12-623).

110 Petition for Certiorari at 23, U.S. Forest Serv. v. Pac. Rivers Council, 133 S. Ct. 1582 (2013) (No. 12-623). In making its argument, the government found additional support in the APA, which requires that plaintiffs must direct their challenges to “some particular ‘agency action’ that causes harm when ‘“the scope of the controversy has been reduced to manageable proportions, and its factual components fleshed out, by some concrete action applying the [measure] to the claimant’s situation in a fashion that harms or threatens to harm him.”’ Id. at 24 (quoting Lujan v. Nat’l Wildlife Fed’n, 497 U.S. 871, 891 (1990)).

111 Id. at 24 (“Limiting the dictum in Ohio Forestry to NEPA analysis of agency action that authorizes particular actions with real-world consequences . . . .”); see also id. (“Thus, this Court’s stray statement that a NEPA claim is ripe for judicial review as soon as it occurs should not be taken as applicable to every type of agency action”).


similar actions that could have been made once at the area-wide planning stage. The courts of appeals are in general agreement that plaintiffs need not wait to challenge a specific project when their grievance is with the overall plan,\textsuperscript{114} refuting the government’s attempt to create a conflict in the circuits over this approach.\textsuperscript{115} The Court’s acceptance of the petition despite the government’s transparent effort to manufacture a conflict in the circuits over whether ripeness is a valid defense to an otherwise valid EIS is another indication of where the Court wanted to go with the Ninth Circuit’s holdings.\textsuperscript{116}

Making it harder for litigants to bring NEPA challenges to agency programmatic initiatives threatens to weaken NEPA further as an effective tool requiring agencies to stop and think before they proceed with initiatives that then set in motion an inevitable chain of events, whether the event is the approval of a specific project or the start of a process that will result in several projects being undertaken. The government’s attempt to equate NEPA with other laws like NFMA shows a misunderstanding of the difference between NEPA and laws like NFMA. That the Court once understood this difference is apparent from \textit{Ohio Forestry} when it said that NEPA “simply guarantees a particular procedure, not a particular result;”\textsuperscript{117} while substantive laws like NFMA guarantee a particular result.

\textsuperscript{114} Heartwood, Inc. v. U.S. Forest Serv., 230 F.3d 947, 952–53 (7th Cir. 2000). \textit{See also} Nulankeyutmonen NKihtaqmikon v. Impson, 503 F.3d 18, 32–33 (1st Cir. 2007); Ouachita Watch League v. Jacobs, 463 F.3d 1163, 1173–75 (11th Cir. 2006); Sierra Club v. U.S. Army Corps of Eng’rs, 446 F.3d 808, 816 (8th Cir. 2006); Sierra Club v. Dep’t of Energy, 287 F.3d 1256, 1262–64 (10th Cir. 2002).

\textsuperscript{115} \textit{See} Petition for Certiorari at 16–19, U.S. Forest Serv. v. Pac. Rivers Council, 133 S. Ct. 1582 (2013) (No. 12-623). Petitioners manufactured a conflict in the circuits by claiming that the Ninth Circuit’s opinion in \textit{Pacific Rivers Council}, by refusing to follow \textit{Summers}, conflicted with Heartwood, Inc. v. Agpaoa, 628 F.3d 261 (6th Cir. 2010) (finding an organization’s affidavits inadequate because they failed to show the requisite harm), Pollack v. U.S. Dep’t of Justice, 577 F.3d 736 (7th Cir. 2009) (applying \textit{Summers} to allegations of injury from the military discharge of bullets into an area of Lake Michigan from drinking water in another area of the lake was insufficient to establish standing), and Nat’l Ass’n of Home Builders v. Envtl. Prot. Agency, 667 F.3d 6 (D.C. Cir. 2011) (finding plaintiffs lacked standing to assert injury for the potential designation of two reaches of a river as traditional navigable waterways because they were presented with the “possibility” of regulation, which though a slightly increased risk of harm was not enough to create standing because the organization had not asserted any of its members planned to discharge contaminants into the river). \textit{See} Petition for Certiorari at 16–19, U.S. Forest Serv. v. Pac. Rivers Council, 133 S. Ct. 1582 (2013) (No. 12-623). However, the facts in each of those cases are distinguishable from those in \textit{Pacific Rivers Council}. \textit{See Brief in Opposition at 13–15, U.S. Forest Serv. v. Pac. Rivers Council, 133 S. Ct. 1582 (2013) (No. 12-623).}

\textsuperscript{116} \textit{See} Randolph, supra note 3, at 24 (warning against counsel straining to create a nonexistent conflict, as the Court will not be fooled and such action may “doom” the petition).

\textsuperscript{117} \textit{Ohio Forestry Ass’n v. Sierra Club}, 523 U.S. 726, 737 (1998).
An additional attractant to the Court might have been the government’s argument that ripeness is a jurisdictional issue that can be raised at any time even when no other party has raised it and even in cases raising only prudential concerns.\textsuperscript{118} The Court might have wanted to correct any misunderstanding raised by respondent PRC over whether a court \textit{must} consider “prudential ripeness” in circumstances such as these.\textsuperscript{119} The Court has been divided over whether ripeness is a jurisdictional defense that can be raised at any time,\textsuperscript{120} or a prudential defense that can, but need not be raised at any time and, therefore, can be forfeited if not brought to the court’s attention in a timely manner.\textsuperscript{121} But when a defense can be raised at any point during litigation, including at the last stage, this creates a disincentive for litigants in a tiered process, as money and time will have been wasted litigating the case to that point.

Thus, the Court’s interest in \textit{Pacific Rivers Council} was fraught with peril for environmental litigants who want to challenge the early stages of the federal resource planning process, especially the critical second stage. The petition invited the Court to apply a heightened test to PRC’s standing allegations, which might well have been impossible for it to meet in a challenge to an area-wide plan. It also asked the Court to ignore over a decade of lower court decisions finding NEPA challenges to programmatic decisions ripe, thus potentially shielding those actions from judicial review until much later in the process when the planning errors may no longer be timely.\textsuperscript{122} The article now turns to the last problematic aspect of the petition, which might have led the Court to grant \textit{Chevron} deference to the USFS’s cramped interpretation of CEQ’s regulations defining the scope and timing of its NEPA responsibilities when faced with a tiered planning process.

\begin{itemize}
\item \textsuperscript{120} Nat’l Park Hospitality Ass’n v. Dep’t of the Interior, 538 U.S. 803, 808 (2003).
\item \textsuperscript{121} Stolt-Nielson S.A. v. AnimalFeeds Int’l Corp., 559 U.S. 662, 670 n.2 (2010) (declining to hear a late-filed ripeness claim).
\item \textsuperscript{122} Limitations on public lawsuits like those imposed by \textit{SUWA, NWF, Ohio Forestry}, and most recently \textit{Clapper} are the best way to insulate agencies from “‘broad programmatic attack[s].’” Blumm & Bosse, supra note 12, at 131–32 (quoting \textit{SUWA}, 542 U.S. 55, 64 (2004)).
\end{itemize}
IV. DEFERENCE TO THE USFS’S INTERPRETATION OF CEQ’S REGULATIONS ON THE SCOPE AND TIMING OF ITS NEPA REVIEW

The government also challenged the Ninth Circuit’s standard for reviewing the contents of a programmatic EIS, arguing that requiring agencies to analyze the environmental impacts of its proposed action “as soon as it is reasonably possible” was unworkable in a case of tiered decision-making. The government argued that this determination was within the agency’s discretion, and that the court should have given deference to the agency’s decision to defer some of its NEPA analysis until it considered a specific project. Lurking beneath this dispute was the question of how much deference a court should give the USFS’s interpretation of its regulatory duties under NEPA, and by inference any agency’s self-serving interpretation of its NEPA responsibilities.

Most of the panel’s opinion and all of the dissent in Pacific Rivers Council focused on the adequacy of the 2004 SEIS. The parties’ dispute focused on whether the 2004 SEIS was inadequate because it contained no discussion of effects on certain fish species and at what point in a multi-tiered decision-making process that particular effect should be examined. PRC contended, and the Ninth Circuit agreed, that the effect on fish should have been examined in the SEIS accompanying the 2004 Framework plan. The government’s position was that those effects should wait until some specific application of the plan was proposed, like the construction of a logging road or timber sale. In support of its position, the appellate court applied an as soon as it is “reasonably possible” standard for evaluating the required scope of a programmatic EIS, concluding that there was sufficient information to evaluate the effect on fish at the Framework plan stage. Each side in the debate rested on an interpretation of CEQ’s regulations. PRC argued in its Opposition Brief that the Ninth Circuit’s EIS timing/scope standard is consistent with the CEQ’s regulations requiring agencies to integrate the NEPA process as early as possible into the planning process. The

124 Pac. Rivers Council v. U.S. Forest Serv., 689 F.3d 1012 (9th Cir. 2012).
125 Id. at 1020 (quoting Kern v. Bureau of Land Mgmt., 284 F.3d 1062, 1072 (9th Cir. 2002)) (stating that as soon as it is “reasonably possible to analyze the environmental consequences in an EIS . . . the agency is required to perform that analysis”). The parties also argued over whether the Ninth Circuit actually said that federal agencies must analyze every environmental consequence of their future actions “as soon as it’s reasonable possible to do so.” Petition for Certiorari at 12, U.S. Forest Serv. v. Pac. Rivers Council, 133 S. Ct. 1582 (2013) (No. 12-623).
126 40 C.F.R. § 1501.2 (2012) (requiring agencies “to integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental
government argued that PRC’s interpretation was at odds with other CEQ regulations that favor tiering.\footnote{40 C.F.R. § 1502.20 (2013); see Petition for Certiorari at 28–29, U.S. Forest Serv. v. Pac. Rivers Council, 133 S. Ct. 1582 (2013) (No. 12-623); see also Pac. Rivers Council v. U.S. Forest Serv., 689 F.3d 1012, 1039 (9th Cir. 2012) (Smith, J., dissenting) (citing 40 C.F.R. § 1502.20 (2011)) (admonishing agencies preparing programmatic Environmental Impact Statements “to focus on the actual issues ripe for decision at each level of environmental review”); id. at 1041 (saying § 1502.20 “balance[s] the public’s need to receive analysis quickly with the public’s competing need to receive analysis regarding ‘actual issues ripe for decision’”). The government also argued that the “reasonably possible” standard conflicts with the Court’s admonition in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978), that courts not engraft their procedures onto those deemed proper by agencies implementing substantive requirements. See Petition for Certiorari at 28, U.S. Forest Serv. v. Pac. Rivers Council, 133 S. Ct. 1582 (2013) (No. 12-623). But see Vermont Yankee, 435 U.S. at 558 (noting that courts should review an agency’s purported NEPA compliance “to insure a fully informed and well-considered decision”).}

Had this argument over the scope and timing of the USFS’s NEPA duties proceeded, the Court might have seized the opportunity to apply its recent decision in City of Arlington encouraging courts to give agency interpretations of their regulations defining their regulatory responsibilities Chevron deference.\footnote{See Chevron, U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (establishing a two-step process for judicial review of an agency’s interpretation of a statute that Congress has charged it with administering: determining “whether Congress has directly spoken to the precise question at issue,” if not, for example if the statutory language is ambiguous or has left a gap, then determining “whether the agency’s answer is based on a permissible construction of the statute”); see also Robin Kundis Craig, Agencies Interpreting Courts Interpreting Statutes: The Deference Compendium of a Divided Supreme Court, 61 EMORY L.J. 1, 6, 12 (2011) (describing the Chevron framework and saying “it is worth remembering that that framework is most essentially a tool for assessing what is permissible under federal law”).} City of Arlington v. Federal Communication Commission\footnote{133 S. Ct. 1863, 1866 (2013).} involved the Federal Communication Commission’s (“FCC”) interpretative authority under the 1996 values, to avoid delays in the process, and to head off potential conflicts”); see Brief in Opposition at 26, U.S. Forest Serv. v. Pac. Rivers Council, 133 S. Ct. 1582 (2013) (No. 12-623). Respondent also argued that the “as soon as reasonably possible” standard is consistent with the Court’s “hard look” standard requiring agencies to reasonably identify the consequences of their action. Id. at 33 (citing Kleppe v. Sierra Club, 427 U.S. 390, 410 n.20 (1976)). The Respondent further notes that the most the government could muster in support of its position was that the standard is “in tension” with San Juan Citizens Alliance v. Stile, 654 F.3d 1038 (10th Cir. 2011) and with the Center for Biological Diversity v. U.S. Department of the Interior, 563 F.3d 466 (D.C. Cir. 2009). Brief in Opposition at 30–31, U.S. Forest Serv. v. Pac. Rivers Council, 133 S. Ct. 1582 (2013) (No. 12-623) (citing Petition for Certiorari at 31 n.10, U.S. Forest Serv. v. Pac. Rivers Council, 133 S. Ct. 1582 (2013) (No. 12-623)). In fact, Respondent notes that the Tenth Circuit applied the same “reasonably possible” standard used by the Ninth Circuit in holding that the Bureau of Land Management’s failure to analyze certain environmental impacts in a programmatic EIS was arbitrary and capricious. See New Mexico v. Bureau of Land Mgm’t, 565 F.3d 683, 708 (10th Cir. 2009); see also Brief in Opposition at 30, U.S. Forest Serv. v. Pac. Rivers Council, 133 S. Ct. 1582 (2013) (No. 12-623). But see Vermont Yankee, 435 U.S. at 558 (noting that courts should review an agency’s purported NEPA compliance “to insure a fully informed and well-considered decision”).
Telecommunication Act to determine what a “reasonable period of time” was for a local government to act on an application to locate, construct, or modify cell towers. The case is only the most recent in a series of decisions by the Court\textsuperscript{130} that have granted agencies the authority to determine the scope of their own jurisdiction where the law is unclear. In determining whether the agency’s interpretation is permissible, courts are directed to apply the analytical framework from \textit{Chevron}.\textsuperscript{131} Called \textit{Auer} deference, after the case in which the concept was first applied,\textsuperscript{132} its application by a court basically means that “[t]he agency’s interpretation will be accepted if, though not the fairest reading of the regulation, it is a plausible reading—within the scope of the ambiguity that the regulation contains.”\textsuperscript{133} In \textit{National Cable \\& Telecommunications Ass’n v. Brand X Internet Services}, the Court went so far as to allow an agency’s interpretation of a statute “to supersede a prior and contradictory interpretation by a federal court.”\textsuperscript{134}

\textit{Chevron} sent courts on a path of subordinating their own “interpretative authority to that of administrative agencies” out of respect for Congress, which delegates to agencies the responsibility for administering its laws.\textsuperscript{135} But deference to an agency’s interpretation of

\begin{footnotesize}
\begin{enumerate}
\item 467 U.S. 837; \textit{see} Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326 (2013) (Scalia, J., concurring in part and dissenting in part) (“\textit{Auer} deference is \textit{Chevron} deference applied to regulations rather than statutes”).
\item Auer, 519 U.S. 452 (1997).
\item \textit{Decker}, 133 S. Ct. at 1339 (Scalia, J., concurring in part and dissenting in part) (“The canonical formulation of \textit{Auer} deference is that we will enforce an agency’s interpretation of its own rules unless that interpretation is ‘plainly erroneous or inconsistent with the regulation.’”).
\item Craig, supra note 128, at 3; \textit{see also} Chase Bank USA, N.A. v. McCoy, 131 S. Ct. 871 (2011) (applying \textit{Auer} deference to an agency’s interpretation of its own ambiguous regulation when that interpretation is first advanced in a legal brief). The Court does recognize situations in which \textit{Auer} deference does not apply, for example when an agency’s interpretation conflicts with a prior interpretation, when it appears that the interpretation “is nothing more than a ‘convenient litigating position,’” or a “‘post hoc rationalization’ advanced by an agency seeking to defend past action against attack.” Christopher v. Smithkline Beecham Corp, 132 S. Ct. 2156 (2012) (listing these and other reasons when \textit{Auer} deference might not apply).
\item Craig, supra note 128, at 3. Professor Flatt bemoans that “the failure of our political system to address new environmental problems and issues generally through statutory change has resulted in a system that is absurdly complex to understand and practice . . . [and] may have contributed to demeaning judicial review . . . .” Flatt, supra note 39, at 127. He also complains that the current system of “making major policy decisions in the administrative realm” has
\end{enumerate}
\end{footnotesize}
its regulatory duties under a statute is quite a different thing because it short-circuits many important functions served by judicial review of agency action, such as preventing agencies from expanding their statutory authority or acting ultra vires; helping to satisfy the “basic rationality” of agency interpretations; and contributing to the uniform application of federal law throughout the country by requiring uniform and legitimate implementation by agencies of congressional mandates.\footnote{Craig, supra note 128, at 4–6.} In his dissent in \textit{Decker v. Northwest Environmental Defense Center}, in which the Court applied \textit{Auer} deference to EPA regulations on stormwater runoff,\footnote{See \textit{Decker v. Nw. Envtl. Def. Ctr.}, 133 S. Ct. 1326, 1337–38 (“When an agency interprets its own regulation, the Court, as a general rule, defers to it ‘unless that interpretation is ‘plainly erroneous or inconsistent with the regulation.’”) (quoting \textit{Auer v. Robbins}, 519 U.S. 452, 461 (1997)).} Justice Scalia argued that the Court has not yet “put forward a persuasive justification” for \textit{Auer} deference.\footnote{Decker, 133 S. Ct. at 1340 (Scalia, J., concurring in part and dissenting in part); see also \textit{City of Arlington v. Fed. Commc’n Comm’n}, 133 S. Ct. 1863, 1877–78 (2013) (Roberts, C.J., dissenting) (worrying about the aggregation of power by agencies and their independence from the President).} He found non-persuasive the argument that agency expertise is a reason to defer to an agency’s interpretation of its regulations because expertise is relevant only with respect to who should make regulations, not who should interpret them.\footnote{Decker, 133 S. Ct. at 1340 (Scalia, J., concurring in part and dissenting in part); see Craig, supra note 128, at 13 (discussing the \textit{Chevron} court’s recognition that deference to federal agencies is “particularly warranted when the agency’s interpretation involves legislative like policy choices in a highly complex and technical area of law,” areas in which courts have “no particular expertise or legitimacy.”). But see Flatt, supra note 39, at 147–48 (discussing the Court’s “increasing worries about the politicization of administrative expertise”) (quoting Jody Freeman & Adrian Vermeule, Massachusetts v. EPA: From Politics to Expertise, 2007 SUP. CT. REV. 51, 52 (2007)).} He found nothing “odd” about giving agencies less control over the meaning of their own regulations than they have over the meaning of a statute because there is no implication from Congress’s giving an agency power to administer a law, including the power to issue interpretative regulations, that an agency can resolve ambiguities in those regulations.\footnote{Decker, 133 S. Ct. at 1341 (Scalia, J., concurring in part and dissenting in part).} Doing this, according to Justice Scalia, is to “violate a fundamental principle of separation of powers—that the power to write a law and the power to interpret it cannot rest in the same hands.”\footnote{Id. (Scalia, J., concurring in part and dissenting in part). See also id. (“Auer deference encourages agencies to be ‘vague in framing regulations, with the plan of issuing interpretations to create the intended new law without observance of notice and comment procedures.’”); City of
Auer deference “is not a logical corollary to Chevron but a dangerous permission slip for the arrogation of power.”

Accepting for a moment the government’s agency expertise rationale for giving the USFS deference to self-define the scope of its regulatory duties, it would have been a gross expansion of an already problematic standard of review had the Court applied Auer deference to the regulations at issue in Pacific Rivers Council. In contradistinction to the regulations in Auer, Brand X, and City of Arlington, there is nothing complex, highly technical, or remotely novel about the CEQ’s regulations at issue in the case. Absent a need for agency expertise in interpreting CEQ’s regulations, there would have been absolutely no reason for the Court to have allowed the USFS to play the expertise trump card entitling its interpretation of its statutory duties under NEPA to deference other than it would have lessened the burden on the reviewing court to determine independently what that duty was. Indeed, §1501.2 has been the subject of frequent judicial scrutiny, and no court, to this author’s knowledge, has deferred to an agency’s interpretation of the phrase “at the earliest possible time.”

An additional reason that the Court should not have been tempted to give the USFS’s interpretation of § 1501.2 Auer deference is that its

---

Arlington v. Fed. Commc’n Comm’n, 133 S. Ct. 1863, 1876 (2013) (Breyer, J., concurring) (“The question whether Congress has delegated to an agency the authority to provide an interpretation that carries the force of law is for the judge to answer independently,” using traditional tools of statutory interpretation).

142 Decker, 133 S. Ct. at 1341 (Scalia, J., concurring in part and dissenting in part).

143 See Petition for Certiorari at 31, U.S. Forest Serv. v. Pac. Rivers Council, 133 S. Ct. 1582 (2013) (No. 12-623) (“Judicial review of agency action under the APA is deferential, particularly when (as here) an agency’s scientific expertise is implicated.”); see also Reply Brief of the Petitioner at 2, U.S. Forest Serv. v. Pac. Rivers Council, 133 S. Ct. 1582 (2013) (No. 12-623) (arguing that the circuit court should have deferred to “the expert agency decision . . . to complete various aspects of the required analysis”).

144 Auer, 519 U.S. 452 (1997), involved the interpretation of Department of Labor standards interpreting an exemption for certain types of employees from the requirement for overtime pay. Brand X, 545 U.S. 967 (2005), involved the interpretation of the 1934 Federal Communications Act, as amended by the 1996 Telecommunications Act, to exempt broadband cable modem services and, therefore, not subject them to common carrier regulation by the FCC. Finally, City of Arlington, 133 S. Ct. 1863 (2013), involved the FCC’s interpretative authority under the 1996 Telecommunication Act to determine that “reasonable period of time” meant a set period of time for local government authorities to act on an application to locate, construct, or modify cell towers.

145 40 C.F.R. § 1502.20 (2013). Even accepting the government’s reliance on § 1502.20, which encourages agencies to tier EISs, at most it put a gloss on § 1502.1, which directs agencies to integrate the NEPA process as early as possible into the agency planning process and in no way countermands, let alone conflicts with that mandate.
interpretation is within CEQ’s jurisdiction, not the USFS’s. 146 Congress had not delegated to the USFS the authority to interpret CEQ’s regulations. Only courts get to determine whether the agency in question has that authority, 147 and not just the broad authority to administer the act in question, but “whether Congress had ‘delegat[ed] authority to the agency to elucidate a specific provision of the statute by regulation.’” 148 Here Congress clearly gave primary authority to CEQ to interpret NEPA, not the USFS. No authority was given to the USFS by Congress to “definitively interpret an ambiguity [in §1501.2] in a particular manner.” 149

Auer deference has been applied in only one environmental case, Decker, and while its use might have produced a positive outcome from an environmental litigant’s point of view, its application can also be problematic. As the Ninth Circuit pointed out in Pacific Rivers Council, giving agencies the interpretive authority to determine the scope of their NEPA duties, here the required content of an EIS, might enable them to engage in a “shell game” with respect to “when and where deferred issues will be addressed.” 150 Indeed, the USFS may have engaged in just such a shell game in the 2004 Framework plan where it promised to perform specific analyses of various fish species in the programmatic 2004 SEIS, but failed to do so. 151 Even more troubling, giving the USFS

---

146 City of Arlington v. Fed. Commc’n Comm’n, 133 S. Ct. 1863, 1875 (Breyer, J., concurring) (attributing importance to whether the subject matter of the relevant provision falls “within the scope of another agency’s authority”); see also Gonzales v. Oregon, 546 U.S. 243, 258 (2006) (“Chevron deference . . . is not accorded merely because the statute is ambiguous and an administrative official is involved.”). Also relevant, according to Justice Breyer, is the need to fill a legislative gap, the agency’s “related expertise,” the complexity of the provision’s administration, “and the careful consideration the Agency has given the question over a long period of time.” City of Arlington, 133 S. Ct. at 1875 (quoting Barnhart v. Walton, 535 U.S. 212, 222 (2002)).

147 City of Arlington, 133 S. Ct. at 1877 (Roberts, C.J., dissenting); see also id. at 1879–80 (“The argument is instead that a court should not defer to an agency on whether Congress has granted the agency interpretive authority over the statutory ambiguity at issue.”).

148 Id. at 1882 (Roberts, C.J. dissenting) (emphasis added); see also id. at 1880 (stating that “[w]hether Congress has conferred such power is the ‘relevant question of law’ that must be answered before affording Chevron deference.”).

149 Id. at 1883 (Roberts, C.J., dissenting); see also id. at 1884 (“[T]he question is whether authority over the particular ambiguity at issue has been delegated to the particular agency”).

150 Pac. Rivers Council v. U.S. Forest Serv., 689 F.3d 1012, 1029–30 (9th Cir. 2012) (quoting NEPA TASK FORCE, MODERNIZING NEPA IMPLEMENTATION 39 (2003), available at http://ceq.hss.doe.gov/ntf/report/finalreport.pdf ); see also Save Our Ecosystems v. Clark, 747 F.2d 1240, 1246 n.9 (9th Cir. 1984) (“Reasonable forecasting and speculation is . . . implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as ‘crystal ball inquiry.’”).

151 Pac. Rivers Council, 689 F.3d at 1028 (suggesting that USFS engaged in just such a shell game by providing a “puzzling,” but unfulfilled promise to perform specific analyses of
the unreviewable authority to determine the scope of its NEPA duties in the case of a tiered programmatic agency initiative, by allowing it unchecked authority to interpret applicable CEQ regulations, could lead to the complete elimination of the requirement that it prepare an EIS because if the scope of the later action is defined narrowly enough all that might be required is an environmental assessment. Given the significant changes made in the 2004 Framework plan, allowing the USFS to define the scope and timing of its NEPA duties narrowly at the planning stage would have enabled the agency to avoid any analysis of the impact of the revised plan on fish species, creating the same analytical infirmities discussed in the standing section of this article. Therefore, the deference a court gives to an agency’s interpretation of its regulatory obligations can have high stakes to the extent it frees an agency to shirk its NEPA responsibilities. The only saving grace is the dislike of several of the Justices, largely the Court’s conservative wing, of Auer deference because it so clearly transfers a judicial function to the Executive Branch.

V. CONCLUSION

The Court, improvidently it turns out, accepted certiorari in Pacific Rivers Council ostensibly to reverse the Ninth Circuit decision and make it harder for environmental plaintiffs to challenge agency natural resource planning decisions. Had the case not disappeared out from under them, the Justices would likely have used it as a way to heighten the standing and ripeness barriers for individuals desirous of improving individual fish species, and noting that the 2001 EIS contained an extensive analysis of the 2001 Framework’s impact on individual fish species).

152 Professor J.B. Ruhl suggests that in an era of adaptive management, the law, as administered by agencies and interpreted by courts, must be flexible and adaptable. J.B. Ruhl, Panarchy and the Law, ECOLOGY & SCIENCE 17(3) 31, 3–4 (2012), available at http://www.ecologyandsociety.org/vol17/iss3/art31/. He finds constraining administrative rules that require agencies “to engage in a tremendous amount of foreplay before promulgating a rule or adjudicating a decision.” Id. at 3. Although courts may be deferring to agencies, they “nonetheless demand thorough explanations of the rationales for agencies decisions, take a hard look at how the agencies connect the dots, and show little tolerance for any procedural slips.” Id. at 3. However, in his argument that legal systems seeking to manage adaptive natural systems must themselves be “adaptively managed,” Ruhl appears to be arguing for greater court deference to agency adaptive management decisions. See id. at 3–4.

153 For a detailed discussion of these changes, see Pacific Rivers Council, 689 F.3d at 1017–18.

154 See supra pp. 239–243 (Clapper discussion).

the environmental sensitivity and sensibility of agency planning. In doing that, the Court would have been extending the path set down in *Lujan*, *Ohio Forestry*, and *SUWA* of insulating agency planning from public attack—cases that Professor Blumm says “established a trilogy of constraints on the public ability to challenge federal agency land use decisions”\(^\text{156}\)—and more recently in *Summers*, finding environmental plaintiffs could not facially challenge USFS planning regulations. Collectively, these opinions have made it much more difficult for environmental plaintiffs to conform agency planning to legal expectations because they must now wait until individual actions are taken under those plans, which may not raise legal infirmities in the plans themselves.\(^\text{157}\) Increasing judicial deference to agency interpretations of their regulatory duties under NEPA, no matter how misguided those interpretations, is an emergent, contestable path for the Court, but potentially dangerous for those interested in meaningful agency land use planning.

Although the act of planning is discretionary, as Justice Scalia repeatedly pointed out in *SUWA*,\(^\text{158}\) it is not without guiding statutory and administrative principles imposed by Congress. The Court’s shielding of agencies from application of those principles, either by closing courts to citizen lawsuits or by applying overly generous principles of judicial deference, is as much an affront to Congress as if the Court had refused to defer to a clear statement of congressional intent. Thanks to the current Court’s hostility towards environmental groups who value planning’s potential contribution to rational resource management on the nation’s public lands, meaningful planning is in

\(^{156}\) Blumm & Bosse, *supra* note 12, at 134 (“After *Lujan*, citizens lacked standing to bring programmatic challenges against agency land management policies . . . [I]n *Ohio Forestry*, citizens lost the ability to challenge the terms of land use plans outside the context of a site-specific action . . . [and] the *SUWA* decision deprived citizens of the ability to compel an agency to fulfill most of its commitments in a federal land plan”). For example, since BLM’s land use plans are merely “tools by which ‘present and future [uses are] projected’ and are only ‘preliminary step[s] in the overall process of managing public lands,’” according to the Court, commitments contained in them, like requiring monitoring, are non-enforceable. *SUWA*, 542 U.S. 55, 69 (2004) (holding Henry Mountain plan’s statement that “BLM will conduct ‘Use Supervision and Monitoring’ in designated areas—like other ‘will do’ projections of agency action set forth in land use plans—are not a legally binding commitment enforceable under § 706(1).”).

\(^{157}\) See, e.g., Blumm & Bosse, *supra* note 12, at 135 (noting that while *SUWA* “did not entirely preclude judicial review of land plans, it has severely constricted the public’s ability to challenge agency action on a land plan level. Litigants must now instead challenge individual actions taken under land use plans, even if it is the terms of the plans themselves that are objectionable.”).

danger of disappearing. The environmental plaintiff in *Pacific Rivers Council* fell on its sword to avoid the likely outcomes had the Court decided the case. However, one cannot expect that circumstances will fortuitously align themselves again to allow future environmental plaintiffs to escape the many hazards presented by this petition should they be re-presented. Although the bullet was dodged in *Pacific Rivers Council*, given the vigor with which the government pursued its arguments in a case that had little reason to be in the Court and the Court’s receptivity to them, one can confidentially assume that they will be re-presented to the Court at the next opportune moment.