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Be Specific: The Proper Way to Challenge Actions of the United States Forest Service. *Sierra Club v. Peterson*

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CASENOTE

**BE SPECIFIC: THE PROPER WAY TO CHALLENGE ACTIONS OF
THE UNITED STATES FOREST SERVICE**

*Sierra Club v. Peterson*¹

I. INTRODUCTION

In 1976, Congress enacted the National Forest Management Act ("NFMA") for the purpose of protecting the national forests of the United States. The United States Forest Service ("Forest Service") is responsible for managing the national forests under the NFMA. The Forest Service prepares land and resource management plans ("LRMPs") to guide land use and management in each forest, including timber harvesting and sales. There are opponents to many of the practices and techniques that the Forest Service allows for timber harvesting. Currently, there is a great deal of controversy surrounding a particular method of timber harvesting referred to as "even-aged timber management." Even-aged timber management involves cutting all or almost all of the trees in the same stand at the same time. Many environmental groups oppose this technique because of problems with soil erosion, sediment deposits in waterways, and diminishing plant, animal and trees species. However, because the NFMA does not provide for judicial review of Forest Service decisions, challenges to these actions are governed under the Administrative Procedure Act ("APA"). The APA limits review of agency actions to a "final agency action."

The Fifth Circuit's decision in *Sierra Club v. Peterson* clarifies what constitutes a "final agency action" within the context of the Forest Service's administration of the NFMA. The case defines what a plaintiff must allege in order to obtain judicial review within the Fifth Circuit district courts.

II. FACTS AND HOLDING

The National Forest Management Act of 1976 ("NFMA") governs the National Forest System of the United States.² Regulation under the NFMA is the responsibility of the Forest Service.³ In *Peterson*, the court addressed a specific responsibility of the Forest Service involving timber harvesting within the National Forest System. In order for the Forest Service to authorize timber harvesting, they must follow a two-step process.⁴ First, they must prepare a land and resource management plan ("LRMP").⁵ Second, they must select a timber sale area, prepare an environmental assessment, allow public comment, and award a timber harvesting contract to the highest bidder.⁶ Before deciding on a particular timber harvesting technique, the Forest Service must analyze the environmental consequences of each alternative.⁷ The controversy in *Peterson* involves the use of "even-aged timber management" as a technique for timber harvesting.⁸ Even-aged timber management is the process of cutting all or almost all of the trees in the same stand at the same time.⁹ The purpose of this technique is the creation of stands where trees of essentially the same age grow together.¹⁰ The NFMA allows even-aged management if the Forest Service determines that these techniques are appropriate for complying with the non-commercial goals of the LRMP.¹¹ The NFMA also requires that the technique

¹ 228 F.3d 559 (5th Cir. 2000).

² *Id.* at 561.

³ *Id.*

⁴ *Id.* at 562.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* The Department of Agriculture is statutorily charged with administration of the NFMA. See 16 U.S.C. § 1604 (a). The Department of Agriculture in turn delegated this responsibility to the Forest Service. See 36 C.F.R. § 200.3 (b)(2).

only be used where such cuts are carried out in a manner consistent with the protection of soil, watershed, fish, wildlife, recreation, esthetic resources, and the regeneration of timber resources.¹²

Environmental groups oppose even-aged timber management for several reasons. They argue that the technique causes substantial and permanent damage to the soil in the National Forests and causes substantial sediment deposit in streams and waterways.¹³ Environmental groups also assert that even-aged timber management diminishes some inner forest species and reduces the diversity of plant and animal communities and tree species.¹⁴

The dispute in *Peterson* involves a 1987 LRMP developed by the Forest Service that used even-aged timber management as the primary means of timber harvesting.¹⁵ Three environmental groups, the Sierra Club, the Wilderness Society and the Texas Committee on Natural Resources (collectively, the "environmental groups"), filed suit seeking to enjoin the Forest Service from allowing even-aged timber management in the Texas forests.¹⁶

The dispute began in 1987 when the environmental groups administratively challenged the LRMP.¹⁷ Their challenge compelled the Chief of the Forest Service to remand the LRMP for revision in 1989.¹⁸ In the interim, the Chief adopted a temporary scheme allowing the Forest Service to make decisions regarding the choice of harvesting techniques at the site-specific level.¹⁹ The temporary scheme allowed even-aged timber management at specific sites if such management generally complied with the 1987 LRMP.²⁰

In 1992, the environmental groups filed their Fourth Amended Complaint citing twelve allegedly ripe and allegedly improper timber sales in support of their claim.²¹ However, the complaint "made clear that these sales were examples of the larger even-aged management techniques they were challenging rather than the extent of their challenge."²² Thus, the complaint primarily challenged the broad programmatic decisions of the Forest Service and supported its challenge by identifying twelve specific timber sales. Accordingly, the complaint requested broad injunctive relief blocking further timber sales or even-aged management in the national forests of Texas.²³

In 1993, the district court granted a preliminary injunction against "further even-aged logging."²⁴ The Fifth Circuit Court of Appeals reversed the district court.²⁵ The Fifth Circuit began by limiting their review to the "nine pending timber sales" that the court properly had before it.²⁶ The Fifth Circuit then vacated and remanded, holding that the injunction was based on the district court's mistaken view that, under the NFMA, even-aged management techniques "could only be used in exceptional circumstances."²⁷ The Fifth Circuit concluded that the NFMA does not require that even-aged timber management be undertaken only in exceptional circumstances, but that it meet certain substantive restrictions before it selects the technique.²⁸ These substantive restrictions include a requirement that even-aged timber management be the optimum method to accomplish the goals of the LRMP and a warning to the Forest Service to proceed cautiously when implementing the technique.²⁹

The environmental groups next filed a supplemental complaint alleging that the Forest Service's use of the "on-the-ground" even-aged timber management techniques violated the NFMA.³⁰ They generally challenged the Forest Service's allowance of even-aged timber management, but supported their allegations by identifying eighteen specific even-age cutting decisions.³¹ The supplemental complaint requested a broad injunction against even-aged timber management practices.³²

¹² 16 U.S.C. § 1604(g)(3)(F)(v) (1994).

¹³ *Sierra Club v. Espy*, 38 F.3d 792, 800 (5th Cir. 1994).

¹⁴ *Id.*

¹⁵ *Peterson*, 228 F.3d at 562.

¹⁶ *Id.* at 561.

¹⁷ *Id.* at 562.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 563.

²² *Id.*

²³ *Id.*

²⁴ *Sierra Club v. Espy*, 822 F.Supp. 356, 370 (E.D. Tex. 1993).

²⁵ *Sierra Club v. Espy*, 38 F.3d 792, 803 (5th Cir. 1994).

²⁶ *Id.* at 798.

²⁷ *Id.* at 798-803.

²⁸ *Espy*, 38 F.3d at 800.

²⁹ *Id.*

³⁰ *Peterson*, 228 F.3d at 564.

³¹ *Id.*

³² *Id.*

The district court granted the environmental groups' request and held a seven-day bench trial.³³ The court recognized that a "final agency action" is a prerequisite to suit under the Administrative Procedure Act ("APA") and concluded that the environmental groups had met this prerequisite.³⁴ The court determined that the Forest Service's general allowance of even-aged management in the Texas forests constituted a final agency action.³⁵ The Forest Service appealed several aspects of the court's decision, most significantly, the determination that the environmental groups had challenged a final agency action.³⁶ A panel of the Fifth Circuit Court of Appeals affirmed the trial court,³⁷ holding that the environmental groups had challenged two distinct final agency actions: "the decision to engage in timber sales resulting from even-aged management and the failure to inventory and to monitor [certain species]."³⁸

The Fifth Circuit Court of Appeals then vacated the panel opinion and directed the parties to address the issue of whether the environmental groups had actually challenged a specific final agency action.³⁹ The Court vacated and remanded the district court's determination, holding that the environmental groups were impermissibly attempting to demand judicial review of the general programmatic decisions of the Forest Service and therefore had not challenged a final agency action.

III. LEGAL BACKGROUND

In 1976, Congress passed the National Forest Management Act ("NFMA") to govern National Forests within the United States. The NFMA statutorily charged the Department of Agriculture with administration of the National Forest System.⁴⁰ The Department delegated this responsibility to the Forest Service.⁴¹ The NFMA requires that the Forest Service prepare a land and resource management plan ("LRMP") for each unit of the National Forest System.⁴² The LRMPs govern use of the individual forests and creating these plans is the first step in timber harvesting.⁴³ After developing an LRMP, the Forest Service must (1) propose a specific area for timber harvesting to take place and the methods to be used; (2) ensure that the project is consistent with the LRMP;⁴⁴ (3) provide those affected by proposed logging notice and an opportunity to be heard;⁴⁵ (4) conduct an environmental analysis pursuant to the National Environmental Policy Act (NEPA)⁴⁶ to evaluate the effects of the specific project and contemplate alternatives; and (5) subsequently make a final decision to permit timber harvesting. Affected persons are then allowed to challenge the final decision in an administrative appeal process or a court. However, because the NFMA does not provide for judicial review of Forest Service decisions, the general provisions of the Administrative Procedure Act ("APA") apply by default.⁴⁷ These provisions limit a court's review to a "final agency action."⁴⁸

To determine the types of actions that constitute a final agency action, the majority in *Peterson* relied heavily on *Lujan v. National Wildlife Federation*.⁴⁹ In *Lujan*, the United States Supreme Court established the necessary requirements for a petitioner to challenge an agency's action. The dispute in *Lujan* arose over the Bureau of Land Management's ("BLM") activities surrounding compliance with the Federal Land Policy and Management Act of 1976 ("FLPMA").⁵⁰ The National Wildlife Federation challenged the "continuing (and thus constantly changing) operations of the BLM in...developing land use plans as required by the FLPMA."⁵¹ The Supreme Court rejected this challenge.⁵² It

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* On the merits, the court concluded that the Forest Service had violated its duties under the NFMA to protect resources and to monitor and inventory. Accordingly it entered a permanent injunction barring the Forest Service from allowing almost any timber harvesting. *Sierra Club v. Glickman*, 974 F.Supp. 905, 945 (E.D. Tex. 1997).

³⁶ *Peterson*, 228 F.3d at 565.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ 16 U.S.C. § 1604(a) (2000).

⁴¹ 36 C.F.R. § 200.3(b)(2)(i) (2001).

⁴² 16 U.S.C. § 1604(a) (2000).

⁴³ *Peterson*, 228 F.3d at 562.

⁴⁴ 16 U.S.C. § 1604(i).

⁴⁵ 36 C.F.R. § 217.1(b) (2001).

⁴⁶ 42 U.S.C. § 4332 *et seq.*

⁴⁷ *Peterson*, 228 F.3d at 565.

⁴⁸ *Id.*

⁴⁹ 497 U.S. 871 (1990).

⁵⁰ *Id.* at 875.

⁵¹ *Id.* at 890.

began by stating that when review is sought under the general review provisions of the APA, the agency action in question must be a "final agency action."⁵³ The Supreme Court held that a party must direct its attack against some particular agency action that causes it harm.⁵⁴ In *Lujan*, the National Wildlife Federation directed its challenge at the day-to-day operations of the BLM, not a particular action. The Supreme Court stated:

[I]t is at least entirely certain that the flaws in the entire 'program' – consisting principally of the many individual actions referenced in the complaint, and presumably actions yet to be taken – cannot be laid before the courts for wholesale correction under the APA, simply because one of them that is ripe for review adversely affects one of [the challenger's] members.⁵⁵

Thus, *Lujan* announced a prohibition on programmatic challenges stating that "[parties] cannot seek wholesale improvement of [a] program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made."⁵⁶

There are two conditions that must be satisfied for an agency action to be "final." First, the action must mark the consummation of the agency's decision-making process and cannot be of a merely tentative or interlocutory nature.⁵⁷ Second, the action must be one by which rights or obligations have been determined or from which legal consequences will flow.⁵⁸

In *Peterson*, the Fifth Circuit cited a 1999 decision by the Eleventh Circuit as an example of the proper way to challenge an agency action under the NFMA.⁵⁹ In *Sierra Club v. Martin*,⁶⁰ the Sierra Club challenged seven specific timber sales in Georgia's Chattahoochee National Forest.⁶¹ They limited their challenge to these sales, sought relief only as to these sales, and did not attempt to challenge the Forest Service's general administration of national forests.⁶² The Sierra Club argued that the Forest Service's decision to permit the sales was arbitrary and capricious and thus violated the NFMA.⁶³ The Eleventh Circuit considered the merits of the dispute because it presented a concrete justiciable controversy.⁶⁴ Implicit within their consideration of the merits was their determination that the seven timber cutting projects being challenged were final agency actions.

IV. INSTANT DECISION

In the instant case, the court began by noting that the general review provisions of the Administrative Procedure Act (APA) apply by default because the NFMA does not provide for judicial review of Forest Service decisions.⁶⁵ The provisions of the APA limit the court's review to a "final agency action."⁶⁶ The Court stated that a final agency action is an action that (1) "mark[s] the consummation of the agency's decision-making process," and (2) "by which rights or obligations have been determined, or from which legal consequences will flow."⁶⁷ The court relied on *Lujan v. National Wildlife Federation*⁶⁸ for prohibiting a challenge on programmatic agency actions.⁶⁹ In *Lujan*, the Supreme Court stated that the Department of Agriculture or the halls of Congress are the proper forums for improving agency programs.⁷⁰

The Fifth Circuit stated that the environmental group's challenges in *Peterson* are precisely the type of programmatic challenges that the Supreme Court struck down in *Lujan*.⁷¹ It noted that the environmental groups are

⁵² *Id.* at 899.

⁵³ *Id.* at 882.

⁵⁴ *Id.* at 891.

⁵⁵ *Id.* at 892-93.

⁵⁶ *Id.* at 891.

⁵⁷ *Bennett v. Spear*, 520 U.S. 154, 178-79 (1997).

⁵⁸ *Id.* at 179, quoting *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970).

⁵⁹ *Peterson*, 228 F.3d at 569.

⁶⁰ 168 F.3d 1 (11th Cir. 1999).

⁶¹ *Id.* at 2.

⁶² *Peterson*, 228 F.3d at 569, n. 13.

⁶³ *Martin*, 168 F.3d at 2.

⁶⁴ *Peterson*, 228 F.3d at 569.

⁶⁵ *Id.* at 565.

⁶⁶ 5 U.S.C. § 704 (1994).

⁶⁷ *Citing Bennett v. Spear*, 520 U.S. 154, 178 (1997).

⁶⁸ 497 U.S. 871 (1990).

⁶⁹ *Peterson*, 228 F.3d at 567.

⁷⁰ *Lujan*, 497 U.S. at 891.

⁷¹ *Peterson*, 228 F.3d at 566.

seeking “wholesale improvement” of the Forest Service’s program of timber management in the Texas forests.⁷² The objections were overly broad in location and time period, encompassing practices throughout four of Texas’ National Forests and ranging from timber management in the 1970s to sales that have not yet occurred.⁷³ The Fifth Circuit rejected the environmental groups’ specific citations of sales in the pleadings, stating that environmental groups are not allowed to “challenge an entire program by simply identifying specific allegedly improper final agency actions within that program.”⁷⁴

The Fifth Circuit concluded that the district court erred by not limiting its review to specific sales and by reviewing NFMA compliance generally throughout Texas forests.⁷⁵ According to the Fifth Circuit, the district court improperly reviewed the Forest Service’s day-to-day operations.⁷⁶ Therefore, the Fifth Circuit concluded that if a party challenges general forestry practices, the district court lacks the jurisdiction to consider the challenge.⁷⁷ It held that under the APA, programmatic challenges are not final agency decisions and not subject to judicial review.

Five of the circuit judges dissented from the majority opinion because they disagreed with the majority’s broad interpretation of the holding in *Lujan* and its application to the facts in the instant case.⁷⁸ The dissent distinguished *Lujan* from the instant case by the types of challenges brought forth by the plaintiffs.⁷⁹ It stated that the *Lujan* plaintiffs failed to identify any single Bureau of Land Management order, regulation or coherent set of policies that they felt had been violated.⁸⁰ In contrast, the plaintiffs in the instant case challenged more developed and specific agency actions.⁸¹ The dissent found it particularly important that the plaintiffs in the instant case challenged eighteen “scheduled even-age cutting decisions.”⁸² It was not convinced by the majority’s suggestion that the use of general allegations negates the existence of the plaintiffs’ specific allegations challenging specific timber sales.⁸³ The dissent concluded that *Lujan* does not prohibit plaintiffs from combining both general and specific allegations in their complaint.⁸⁴ Rather, *Lujan* merely requires that a plaintiff direct its attack against “some particular agency action that causes it harm.”⁸⁵

V. COMMENT

In *Peterson*, the Fifth Circuit provides further clarification on the proper procedures for challenging an agency action. It is a well-settled principle of law that a party may only challenge a final agency action.⁸⁶ As a practical matter, this makes perfect sense. The ripeness requirement is designed “to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.”⁸⁷

The difficult issue addressed in *Peterson* arose because the parties identified eighteen particular agency actions, but cited these individual actions as examples of the general forestry practices that they were challenging. The court did not address whether the eighteen particular agency actions were “final agency actions” that could be challenged in court. However, they did cite *Martin* as an example of the correct method for challenging the Forest Service’s actions under the NFMA.⁸⁸ The *Martin* plaintiffs limited their challenge to seven timber sales in a Georgia national forest and sought relief only as to these sales.⁸⁹ They did not attempt to challenge the Forest Service’s general administration of national forests.⁹⁰

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 567.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 569.

⁷⁸ *Id.* at 572.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 573.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Lujan*, 497 U.S. at 882.

⁸⁷ *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967).

⁸⁸ *Peterson*, 228 F.3d at 570.

⁸⁹ *Id.* at 569.

⁹⁰ *Id.* at n. 13.

In contrast to *Martin*, the *Peterson* plaintiffs have impermissibly challenged the Forest Service's day-to-day operations, *in addition* to individual actions. There is a subtle distinction here. It is permissible to challenge the Forest Service's individual timber sales as "final agency actions." However, it is not permissible to cite individual timber sales as examples in a broad challenge to the Forest Service's overall program. The Fifth Circuit's reasoning here is extremely technical, especially in light of the purpose for the "final agency action" requirement. The purpose of requiring a final agency action is to give the court definite facts to use in deciding a dispute. It avoids broad and overreaching decisions that might have unforeseen consequences and limits the decision to a particular fact dispute. However, the plaintiffs in *Peterson* gave the court this opportunity by including challenges to eighteen particular Forest Service timber sales.⁹¹ The Fifth Circuit decided that by including a general challenge to the Forest Service's day-to-day operations, the plaintiffs negated their specific challenges. The lesson learned from *Peterson* is that careful drafting of challenges to Forest Service decisions is essential. Plaintiffs must be aware that their legitimate specific challenges may not be heard simply because they included a general challenge to the day-to-day operations of the Forest Service.

It is true that this type of case-by-case approach is more difficult for environmental groups, who have "as their objective[s] across-the-board protection of our Nation's wildlife and the streams and forests that support it."⁹² However, this does not allow the court to disregard the jurisdictional requirement of a "final agency action."⁹³ Furthermore, it is possible that a successful challenge to a "final agency action" will ultimately have the effect of forcing the agency to revise its entire program to avoid the unlawful result that the court discerns in the individual challenge. This may not accomplish the goals of environmental groups to the extent they would desire, but as the Supreme Court points out in *Lujan*, these "more sweeping actions are for the other branches" of government.⁹⁴

VI. CONCLUSION

In *Peterson*, the Fifth Circuit adopted a highly technical and strict interpretation of what a plaintiff challenging a Forest Service decision must allege in order to obtain judicial review under the APA. A plaintiff must be careful to challenge only specific decisions, leaving out any general challenges to Forest Service practices. A plaintiff who makes the mistake of including a general challenge is likely to have his specific challenges negated and dismissed.

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⁹¹ *Id.* at 564.

⁹² *Lujan*, 497 U.S. at 894.

⁹³ *Id.*

⁹⁴ *Id.*