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## OFF-ROADING WITHOUT A MAP: THE SUPREME COURT DRIVES OVER NEPA IN *SOUTHERN UTAH WILDERNESS ALLIANCE*

### INTRODUCTION

At a recent unveiling of a new sports utility vehicle, William Lash, United States Assistant Secretary of Commerce said, “Going off-road is an American tradition . . . there wouldn’t be an America if no one went off-road!”<sup>1</sup> Indeed, there are “more than 200,000 miles of forest roads” and more than 36,000 miles of trails in the national forests currently open to off-road vehicle (ORV) use.<sup>2</sup> An ORV is “any motorized vehicle capable of, or designed for, travel on or immediately over land, water, or other natural terrain.”<sup>3</sup> In 2004, Americans increasingly used their ORVs, with over 11 million operating their ORVs on national land.<sup>4</sup> However, despite the increase in popularity of this American tradition, several organizations have staunchly resisted the use of ORVs on forest lands and grasslands because of the problems with erosion, noise, air, and water pollution resulting from ORV use.<sup>5</sup> These organizations have battled the federal Bureau of Land Management (BLM) and the United States Forest Service (USFS) in federal courts across the country.<sup>6</sup>

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1. Steven Cole Smith, *Coming: Romanian SUV*, ORLANDO SENTINEL, June 9, 2005, at F1.

2. Press Release No. FS-0605, U.S. Dep’t of Agric. Forest Serv., USDA Forest Service Releases Final Rule for Motorized Recreation in National Forests & Grasslands (Nov. 2, 2005), <http://www.fs.fed.us/news/2005/releases/11/travel-management.shtml>.

3. 43 C.F.R. § 8340.0-5(a) (2007).

4. Press Release No. FS-823, U.S. Dep’t of Agric. Forest Serv., On The Right Trail! A Forest Service Program for OHV Access (Summer 2005) (on file with the Georgia State University Law Review) [hereinafter FS-823].

5. See, e.g., Off-Road Vehicles—Conservation Policies—Sierra Club, <http://www.sierraclub.org/policy/conservation/offroad.asp> (last visited Mar. 15, 2008) (discussing policy of conservation of all lands); Southern Utah Wilderness Alliance: ORVs, [http://www.suwa.org/site/PageServer?PageName=work\\_orv](http://www.suwa.org/site/PageServer?PageName=work_orv) (last visited Mar. 15, 2008) (discussing the Alliance’s commitment to “ensure[] that the wild country . . . [is] protected from the ORV use that has grown out of control in recent years.”); Natural Trails and Water Coalition—Stopping Off-Road Vehicle (ORV) Abuse, <http://www.naturaltrails.org/about-us/> (last visited Mar. 15, 2007) (discussing disfavor towards ORVs).

6. See e.g., *S. Utah Wilderness Alliance v. Babbitt*, No. 2:99CV852K, 2000 WL 33914094 (D. Utah Dec. 22, 2000), *rev’d sub nom.* *S. Utah Wilderness Alliance v. Norton*, 301 F.3d 1217 (10th Cir. 2002), *rev’d*, 542 U.S. 55 (2004).

In a recent legal battle, the Southern Utah Wilderness Alliance (Alliance) filed suit against BLM to force it, among other things, to consider whether supplementation of an environmental impact statement (EIS) was necessary when there was evidence of increased ORV use in federally-managed land in Utah.<sup>7</sup> After a series of appeals, Justice Scalia, writing for a unanimous Supreme Court, held that increased ORV use is not sufficient to require an agency to evaluate its EIS, because after an agency issues its land use plan there no longer remains any federal action to be taken.<sup>8</sup> This decision could have a significant impact on the national forests and lands across the country, because it allows federal agencies to ignore increased ORV use in an area where the agency has already issued a land use plan.<sup>9</sup>

Therefore, this Comment will consider whether the Court was correct, in light of the clear language of the National Environmental Policy Act (NEPA),<sup>10</sup> Executive Order 11,644,<sup>11</sup> and Executive Order 11,989,<sup>12</sup> which require federal agencies to produce a supplemental environmental impact statement when there are significant new circumstances or information relevant to the environmental impact of a government action.<sup>13</sup>

Part I of this Comment provides the legal background surrounding this issue.<sup>14</sup> Part I.A explains the purpose and function of NEPA.<sup>15</sup> Part I.B explains the Federal Land and Policy Management Act.<sup>16</sup> Part I.C explores Executive Orders 11,644 and 11,989.<sup>17</sup> Part I.D looks at how the Department of Interior and Department of Agriculture has

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7. *Id.*

8. Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 73 (2004).

9. See discussion *infra* Part III. The purpose of this Comment is *not* to argue that the Court should have ordered BLM to prohibit the ORVs from public land. Rather, this Comment argues that federal agencies ought to comply with the plain language of the pertinent statutes and regulations in carrying out their duties as federal agencies.

10. National Environmental Policy Act, 42 U.S.C. § 4321 (2000).

11. Exec. Order No. 11,644, 37 Fed. Reg. 2877 (Feb. 8, 1972).

12. Exec. Order No. 11,989, 37 Fed. Reg. 26,959 (May 24, 1977).

13. See 42 U.S.C. § 4332; Exec. Order No. 11,644, 37 Fed. Reg. 2877 (Feb. 8, 1972); Exec. Order No. 11,989, 37 Fed. Reg. 26,959 (May 24, 1977); 40 C.F.R. § 1502.9(c)(1)(ii) (2007).

14. See discussion *infra* Part I.

15. See discussion *infra* Part I.A.

16. See discussion *infra* Part I.B.

17. See discussion *infra* Part I.C.

interpreted and promulgated regulations in compliance with NEPA and Executive Orders 11,644 and 11,989.<sup>18</sup> Part II analyzes *Southern Utah Wilderness Alliance*.<sup>19</sup> Part III argues that the Court erred in its application of the clear language of the text of the laws.<sup>20</sup> Part IV examines the effects of the Court's holding and suggest that given evidence of increased ORV use, a temporary injunction would be effective at preventing increased environmental damage until the agency reevaluated its EIS in light of the evidence.<sup>21</sup> Finally, the Comment provides an overview of the issue and concludes by proposing a solution.<sup>22</sup>

## I. LEGAL BACKGROUND

### A. *National Environmental Policy Act*

#### 1. *Overview of NEPA*

By enacting the National Environmental Policy Act (NEPA) of 1969, Congress stated that it would thereafter be the national policy of the United States to “encourage productive and enjoyable harmony between man and his environment.”<sup>23</sup> In furtherance of this policy, NEPA requires that all federal agencies produce an environmental impact statement (EIS) for any proposals for legislation or other major federal actions “significantly affecting the quality of the human environment.”<sup>24</sup> The EIS must include “the environmental impact of the proposed action,”<sup>25</sup> “any adverse environmental effects which cannot be avoided,”<sup>26</sup> “alternatives to the proposed action,”<sup>27</sup> the relationship

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18. See discussion *infra* Part I.C.

19. See discussion *infra* Part II.

20. See discussion *infra* Part III.

21. See discussion *infra* Part IV.

22. See *infra* Conclusion.

23. National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2000).

24. 42 U.S.C. § 4332(C) (2000).

25. 42 U.S.C. § 4332(C)(i) (2000).

26. 42 U.S.C. § 4332(C)(ii) (2000).

27. 42 U.S.C. § 4332(C)(iii) (2000).

between local short-term uses . . . [and] long-term productivity,"<sup>28</sup> and "any irreversible . . . commitments of resources."<sup>29</sup>

Finally, NEPA established the Council on Environmental Quality (CEQ), which is charged with carrying out the purposes and function of NEPA.<sup>30</sup> Among other things, CEQ gathers information regarding the current condition and trends of the environment<sup>31</sup> and reviews and appraises various federal programs in light of NEPA.<sup>32</sup> In order to carry out these functions, the CEQ promulgates rules and regulations for other federal agencies to follow in furtherance of NEPA.<sup>33</sup>

## 2. *The NEPA Process*

As previously stated, the CEQ has promulgated rules that govern how NEPA interacts with federal agencies.<sup>34</sup> The CEQ states the purpose of NEPA is to encourage public officials to understand the environmental consequences of their decisions and to "take actions that protect, restore, and enhance the environment."<sup>35</sup> NEPA does not mandate that a certain result occur; rather, it only requires that the federal agency consider the adverse effects of its actions on the environment.<sup>36</sup>

The first step an agency must take under NEPA is to determine whether an EIS must be prepared.<sup>37</sup> If the proposed action normally requires an EIS, then the agency must prepare one.<sup>38</sup> If the action normally does not require an EIS, then the agency is not required to prepare one.<sup>39</sup> Otherwise, the agency shall prepare an environmental

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28. 42 U.S.C. § 4332(C)(iv) (2000).

29. 42 U.S.C. § 4332(C)(v) (2000).

30. 42 U.S.C. § 4342 (2000).

31. 42 U.S.C. § 4344(2) (2000).

32. 42 U.S.C. § 4334(3) (2000).

33. *See, e.g.*, 40 C.F.R. §§ 1500.1–1507.3 (2007).

34. *Id.*

35. 40 C.F.R. § 1500.1(c) (2007).

36. *See, e.g.*, *Env'tl. Def. Fund, Inc. v. Corps of Eng'rs of U.S. Army*, 492 F.2d 1123, 1131–32 (5th Cir. 1974).

37. *See* CRAIG N. JOHNSTON ET AL., *LEGAL PROTECTION OF THE ENVIRONMENT* 89 (2005).

38. 40 C.F.R. § 1501.4(a)(1) (2007).

39. 40 C.F.R. § 1501.4(a)(2) (2007).

assessment (EA) that will provide the agency with sufficient information to determine whether an EIS is required.<sup>40</sup>

If an EIS is required, then the agency issues a draft environmental impact statement (DEIS) in the Federal Register.<sup>41</sup> After receiving comments on the DEIS, the agency produces and publishes a final environmental impact statement (FEIS).<sup>42</sup> Finally, the CEQ has promulgated a rule stating that agencies shall prepare supplements if “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”<sup>43</sup> Thus, an agency may be required to prepare a supplemental environmental impact statement (SEIS) if evidence relevant to the environmental concerns addressed in the first EIS comes to light.<sup>44</sup>

## *B. National Federal Land and Policy Management Act*

### *1. Overview of the Act*

In addition to the regulation of all federal agency action under NEPA, the Federal Land and Policy Management Act (FLPMA) was adopted by Congress to establish a national policy in regards to public land.<sup>45</sup> Public land is any land owned by the United States and administered by the Secretary of Interior through BLM.<sup>46</sup> Through the Act, Congress clearly promoted multiple and different uses of public land.<sup>47</sup> The statute defines “multiple use” as “the management of the public lands and their various resource values so that they are utilized in the combination that

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40. 40 C.F.R. § 1501.4(b) (2007); *see* 40 C.F.R. § 1508.9 (2007) (for a definition of an environmental assessment).

41. 40 C.F.R. § 1502.9(a) (2007); *see also* JOHNSTON ET AL., *supra* note 37, at 90.

42. 40 C.F.R. § 1502.9(b) (2007); *see also* JOHNSTON ET AL., *supra* note 37, at 90.

43. 40 C.F.R. § 1502.9(c)(1)(ii) (2007). Agencies are also required to prepare a supplemental environmental impact statement if there are significant changes to the proposed action; however, this scenario is outside the scope of this Comment.

44. *Id.*

45. 43 U.S.C. § 1701(a)(8) (2000).

46. 43 U.S.C. § 1702(e) (2000).

47. *See* Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 877 (1990).

will best meet [the needs] of the American people.”<sup>48</sup> However, because these needs frequently clash, it is especially difficult for BLM to create proper land use plans.<sup>49</sup>

## 2. Duties Placed on BLM

Pursuant to the FLPMA, BLM must prepare and maintain “an inventory of all public lands and their resource and other values (including . . . outdoor recreation).”<sup>50</sup> In furtherance of this duty, land use plans must be developed to control the different uses of public land.<sup>51</sup> FLPMA lists specific criteria that BLM must follow in creation of land use plans.<sup>52</sup> Among these criteria, BLM must “use and observe the principles of multiple use” in the establishment of land use plans.<sup>53</sup> Therefore, BLM must consider the recreational value of the land in deciding how the land should be used.<sup>54</sup> Because ORV use is considered recreational activity, BLM must consider the value ORV users place on access to the land.<sup>55</sup> Finally, BLM must provide the public an opportunity to participate through the notice and comment procedure.<sup>56</sup>

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48. 43 U.S.C. § 1702(c) (2000). The “needs” of the American people include the access to land for recreational purposes. 43 U.S.C. § 1701(a)(8) (2000).

49. See *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 59 (2004); see also discussion *infra* Part I.B.2 (discussing land use plans); discussion *infra* Part I.D (discussing BLM in greater detail).

50. 43 U.S.C. § 1711(a) (2000). BLM is an agency within the Department of Interior. 43 U.S.C. § 1702(e) (2000).

51. 43 U.S.C. § 1712(a) (2000).

52. 43 U.S.C. § 1712(c) (2000).

53. 43 U.S.C. § 1712(c)(1) (2000).

54. 43 U.S.C. § 1701(a)(8) (2000).

55. See generally H. KEN CORDELL ET AL., OFF-HIGHWAY VEHICLE RECREATION IN THE UNITED STATES, REGIONS AND STATES: A NATIONAL REPORT FROM THE NATIONAL SURVEY ON RECREATION AND THE ENVIRONMENT (NSRE) 2 (2005), available at [http://www.fs.fed.us/recreation/programs/ohv/OHV\\_final\\_report.pdf](http://www.fs.fed.us/recreation/programs/ohv/OHV_final_report.pdf).

56. 43 U.S.C. § 1712(f) (2000). Federal agencies are required to provide general notice to the public, by publication in the Federal Register, of their intent to make a rule. See 5 U.S.C. § 553(b) (2006). After the notice is published, the public is permitted to submit data, views, and argument supporting or disagreeing with the proposed rule. See 5 U.S.C. § 553(c) (2006).

*C. Executive Orders 11,644 and 11,989*

On February 8, 1972, President Richard Nixon signed Executive Order 11,644 in furtherance of NEPA.<sup>57</sup> The President found that the widespread use of ORVs on public land demonstrated the need for a unified federal approach to ORV management.<sup>58</sup> The order required agency heads to designate specific areas for ORV use on public lands.<sup>59</sup> It further required that the areas shall be located to minimize damage and harassment to the environment and to minimize conflicts between ORV use and other recreational use of the public lands.<sup>60</sup> Finally, the order required that each agency shall monitor ORV use on designated lands and amend or rescind those designations in furtherance of the order and NEPA.<sup>61</sup>

On May 24, 1977, President Jimmy Carter amended Executive Order 11,644 in furtherance of NEPA.<sup>62</sup> President Carter added a new section requiring the immediate closure of areas or trails open to ORVs when an agency determines that ORVs will cause or are causing considerable adverse effects on the environment, including effects on the soil, vegetation, and wildlife.<sup>63</sup> These Executive Orders, taken together with NEPA, evince that the national policy concerning ORV use is one of careful monitoring and restriction.<sup>64</sup>

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57. Exec. Order No. 11,644, 37 Fed. Reg. 2877 (Feb. 8, 1972).

58. *Id.*

59. *Id.* § 3(a).

60. *Id.* §§ 3(a)(1)–(3).

61. *Id.* § 8(a).

62. Exec. Order No. 11,989, 37 Fed. Reg. 26,959 (May 24, 1977).

63. *Id.* § 9(a).

64. See discussion *supra* Part I.A.



## *D. The Bureau of Land Management and the Department of Agriculture*

### *1. Bureau of Land Management*

#### *a. Generally*

Public lands are lands owned by the United States and administered by the Secretary of the Interior.<sup>65</sup> The Bureau of Land Management (BLM) is an agency within the Department of Interior<sup>66</sup> that administers public lands across the United States.<sup>67</sup> As part of its administration, BLM develops and revises resource management plans to maximize resource values for the public in the public lands.<sup>68</sup> BLM is required to produce an environmental impact statement (EIS) to accompany the resource management plan, because resource management plans are recognized as major Federal actions significantly affecting the environment.<sup>69</sup>

#### *b. The Bureau and Off-Road Vehicles*

In furtherance of Executive Orders 11,644 and 11,989, BLM “designate[s] all public lands as either open, limited, or closed to [ORVs].”<sup>70</sup> The designations are based on the protection of the environment, promotion of safety, and the minimization of conflicts between competing uses and ORVs.<sup>71</sup> BLM produces these designations through the resource management planning process and is, therefore, required to prepare an EIS on the effects of the designations.<sup>72</sup>

After BLM has designated public lands for ORV use, it monitors the ORV use to ensure that the objectives of NEPA and the Executive

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65. *Id.* § 1601.0-5(l).

66. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 58 (2004).

67. 43 C.F.R. § 1601-1610 (2007).

68. 43 C.F.R. § 1601.0-2 (2007); *see also* discussion *supra* Part I.B (discussing resource management plans in the context of FLPMA).

69. 43 C.F.R. § 1601.0-6 (2007).

70. 43 C.F.R. § 8342.1 (2007).

71. *Id.*

72. 43 C.F.R. §§ 8342.2(a)-(b) (2007); *see* discussion *supra* Part I.D.2.a.

Orders are being carried out.<sup>73</sup> BLM may amend, revise, or revoke any designations on the basis of information, or whenever necessary, to carry out the objectives of the Executive Orders and NEPA.<sup>74</sup>

In summary, BLM designates public lands for ORV use and monitors the effect of the ORVs on the lands and environment.<sup>75</sup> This action has been found to be a major federal action significantly affecting the environment and therefore requires the preparation or supplementation of an EIS.<sup>76</sup>

## 2. *Department of Agriculture and the United States Forest Service*

### a. *Generally*

Under the National Forest Management Act,<sup>77</sup> “the Secretary of Agriculture shall develop, maintain, and as appropriate, revise land and resource management plans for . . . the National Forest System.”<sup>78</sup> Additionally, the Secretary is required to revise the land use plans when conditions “have significantly changed, but at least every fifteen years.”<sup>79</sup>

### b. *The Forest Service and Off-Road Vehicles*

The United States Forest Service (USFS) has recognized the issue of ORVs and the conflicts that ORV use on federal lands has caused.<sup>80</sup> In recognition of such, USFS has designated ORV use as “one of four key threats facing the nation’s forests and grasslands.”<sup>81</sup> In furtherance of

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73. 43 C.F.R. § 8342.3 (2007).

74. *Id.*

75. See discussion *supra* Part I.D.1.

76. See discussion *supra* Part I.D.1.a.

77. National Forest Management Act, 16 U.S.C. § 1600 (2000).

78. 16 U.S.C. § 1604(a) (2000).

79. 16 U.S.C. § 1604(f)(5) (2000).

80. CORDELL ET AL., *supra* note 55, at \* 3. USFS also recognizes that ORV use is an enjoyable sport for many Americans and does not want to eliminate it completely. *Id.*

81. USDA Forest Service, Travel Management & Off-Highway Vehicle (OHV) Program, <http://www.fs.fed.us/recreation/programs/ohv/index.shtml> (last visited Oct. 1, 2007).

Executive Order 11,644 and 11,989, USFS promulgated a final rule in 2005 regarding ORV use in national forests.<sup>82</sup>

The final rule requires each national forest or ranger district to specifically designate trails and areas open to ORVs.<sup>83</sup> Additionally, in furtherance of the Executive Orders, each administrative unit shall monitor the effects of ORVs on the designated trails and ensure that it is consistent with the overall scheme of environmental protection.<sup>84</sup> Finally, the designations “may be revised as needed to meet changing conditions” surrounding the ORV use.<sup>85</sup>

### *E. Summary*

Taken as a whole, there are three major principles surrounding NEPA, EIS requirements and ORV use: 1) NEPA’s purpose is broad and requires an EIS when there is a major federal action affecting the environment;<sup>86</sup> 2) creation and revision of land use plans is major federal action requiring an EIS;<sup>87</sup> and 3) the agencies are required to monitor and revise land use plans in order to protect the environment from ORV use.<sup>88</sup>

## II. THE COURT TAKES THE WHEEL IN *SOUTHERN UTAH WILDERNESS ALLIANCE*

### *A. Background of Southern Utah Wilderness Alliance*

Almost 23 million acres of Utah “is federal land administered by the Bureau of Land Management (BLM).”<sup>89</sup> In 1991, BLM studied 3.3 million acres in Utah and determined that 2 million acres were suitable for wilderness designation.<sup>90</sup> Afterwards, BLM produced an

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82. 36 C.F.R. §§ 212.51–.57 (2007).

83. 36 C.F.R. § 212.51 (2007).

84. 36 C.F.R. § 212.57 (2007).

85. 36 C.F.R. § 212.54 (2007).

86. 2 U.S.C. § 4332 (2000).

87. 43 C.F.R. § 1601.0-6 (2007).

88. Exec. Order No. 11,644, 37 Fed. Reg. 2877 (Feb. 8, 1972).

89. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 58 (2004).

90. *Id.* at 59.

environmental impact statement (EIS) that did not consider ORV use and issued a resource management plan for the area permitting ORV use.<sup>91</sup>

The Southern Utah Wilderness Alliance (Alliance) is an environmental organization that resists the rapid growth of ORV and seeks to encourage BLM to minimize conflicts between ORVs and other users.<sup>92</sup> Alliance and eight other environmental groups teamed together and sued BLM, its Director and the Secretary of the Interior in the United States District Court for Utah.<sup>93</sup> In its complaint, Alliance alleged that ORV use in the Utah areas designated by the resource management plan had significantly increased and was negatively affecting the environment.<sup>94</sup> Alliance argued that BLM had failed to take a “hard look” at whether, pursuant to NEPA, it was required to supplement the environmental impact statement of the area where there was increased ORV use.<sup>95</sup>

The District Court of Utah dismissed Alliance’s claim, writing that it could not compel BLM to issue a supplemental environmental impact statement (SEIS).<sup>96</sup> Alliance appealed to the Tenth Circuit, which reversed the district court’s decision.<sup>97</sup> The Tenth Circuit held that the question is not whether BLM can be compelled to produce a SEIS, which it generally cannot,<sup>98</sup> but whether subsequent information of the ORV use raises sufficient concerns that makes it necessary for BLM to take a “hard look” at the environmental consequences.<sup>99</sup>

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91. *Id.* at 61; see also discussion *supra* Part I.C (explaining the process BLM follows in producing a resource management plan).

92. Southern Utah Wilderness Alliance: ORVs, [http://www.suwa.org/site/PageServer?pagenam=work\\_orv](http://www.suwa.org/site/PageServer?pagenam=work_orv) (last visited Apr. 14, 2008).

93. *S. Utah Wilderness Alliance*, 542 U.S. at 60.

94. *Id.* at 60–61.

95. *Id.* at 61. Alliance also alleged that BLM violated its obligation under the Federal Land Management Policy Act and failed to implement provisions of its land use plan. *Id.* However, these claims are outside the scope of this Comment.

96. *S. Utah Wilderness Alliance v. Norton*, 301 F.3d 1217, 1237 (10th Cir. 2002), *rev’d*, *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004).

97. *S. Utah Wilderness Alliance*, 301 F.3d at 1222.

98. *Id.* at 1238. The judicial branch generally defers to agency decisions absent a finding that the agency was arbitrary or capricious in its decision making process. See 5 U.S.C. § 706(2)(A) (2006); see also *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

99. *S. Utah Wilderness Alliance*, 301 F.3d at 1238.

## B. *The Supreme Court's Holding*

After the Tenth Circuit's holding, the Secretary of Agriculture appealed to the United States Supreme Court. In writing for a unanimous Court, Justice Scalia held that evidence of increased ORV use is not sufficient to require an agency to take a "hard look" at whether to publish a SEIS.<sup>100</sup> Despite mandatory revision of land use plans and monitoring of ORV use, the Court held there was no major federal action remaining that "could require supplementation."<sup>101</sup> Therefore, NEPA was not triggered and BLM was not required to consider whether it should supplement its EIS on the land use plan.<sup>102</sup> The next two sections will determine what a "hard look" is<sup>103</sup> and when the Court considers there to be major federal action.<sup>104</sup>

### 1. *A "Hard Look" Under NEPA*

Although citation and references to the "hard look" doctrine are frequent, the "hard look" doctrine as applied to NEPA is not easily defined.<sup>105</sup> Generally, agencies are required, at a minimum, to consider and respond to legitimate concerns regarding the creation of an environmental impact statement (EIS).<sup>106</sup> Additionally, pursuant to 40 C.F.R. § 1502.9(c)(1)(ii),<sup>107</sup> agencies are required to take a "hard look" at new evidence when it goes to the environmental impact of its actions.<sup>108</sup>

Essentially, the courts require agencies to consider available evidence and make reasonable decisions based on that evidence.<sup>109</sup> Because courts grant agency determinations much deference and generally only

100. *S. Utah Wilderness Alliance*, 542 U.S. at 73; see discussion *infra* Part II.2.B.1.

101. *S. Utah Wilderness Alliance*, 542 U.S. at 73.

102. *Id.*

103. See discussion *infra* Part II.2.B.1.

104. See discussion *infra* Part II.2.B.2.

105. DANIEL R. MANDELKER, *NEPA LAW AND LITIGATION* § 3:7 (2d ed. 2006).

106. See *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976); *Nat'l Audubon Soc'y v. Dept. of the Navy*, 422 F.3d 174, 185 (4th Cir. 2005); *Highway J Citizens Group v. Mineta*, 349 F.3d 938, 955 (7th Cir. 2003).

107. 40 C.F.R. § 1502.9(c)(1)(ii) (2007); see also discussion *supra* Part I.A.2.

108. See *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 385 (1989).

109. See MANDELKER, *supra* note 105, § 3:7.

overturn them when the determinations are arbitrary and capricious,<sup>110</sup> many courts have equated the “hard look” doctrine with the arbitrary and capricious standard.<sup>111</sup> Thus, when an agency fails to take a “hard look” at evidence, it has acted arbitrarily and capriciously and not in compliance with NEPA.<sup>112</sup> On the other hand, if an agency does take a “hard look” at evidence, its decision to produce, or not produce, an EIS will not be found to be arbitrary and capricious.<sup>113</sup>

While noting that BLM ordinarily would have been required to take a “hard look” at the evidence of increased ORV usage, the Court sidestepped the issue by holding that there was not any remaining federal action and, therefore, NEPA was not triggered.<sup>114</sup>

## 2. Major Federal Action Under NEPA

Relying on *Marsh v. Oregon National Resources Council*,<sup>115</sup> the Court in *Southern Utah Wilderness Alliance* held supplementation of an EIS is only necessary when there remains federal action to occur.<sup>116</sup>

### a. *Marsh's Rule*

In *Marsh*, nonprofit environmental organizations (hereinafter Oregon Natural Resources Council) sued to enjoin the Army Corps of Engineers from constructing a dam.<sup>117</sup> Among other claims, the Oregon Natural Resources Council alleged that the Corps violated NEPA by failing to prepare a supplemental environmental impact statement (SEIS) to

110. See 5 U.S.C. § 706(2)(A) (2006); see also *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

111. See, e.g., *Wilderness Watch v. Mainella*, 375 F.3d 1085, 1095 (11th Cir. 2004); *Highway J Citizens Group v. Mineta*, 349 F.3d 938, 953 (7th Cir. 2003); *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001).

112. See *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

113. *Id.*

114. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 73 (2004); cf. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 385 (1989) (finding that the Army Corps of Engineers was required to take a “hard look” at the new information because the action in question was not yet complete); see also discussion *infra* Part II.B.2.

115. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360 (1989). The unanimous decision in *Marsh* was delivered by Justice Stevens.

116. *S. Utah Wilderness Alliance*, 542 U.S. at 73.

117. *Marsh*, 490 U.S. at 368.

review new information that developed after the Corps published its first EIS.<sup>118</sup>

In *Marsh*, unlike *Southern Utah Wilderness Alliance*, the Court found that the Corps was required to take a “hard look” at the information.<sup>119</sup> Indeed, the Court wrote, “[i]t would be incongruous with [NEPA’s] approach to environmental protection . . . for the blinders to adverse environmental effects . . . to be restored prior to the completion of agency action.”<sup>120</sup> Thus, if there remains action to be taken by the agency, the agency must not turn a blind eye to adverse environmental effects.<sup>121</sup>

Based on this, the Corps, unlike BLM in *Southern Utah Wilderness Alliance*, did consider the new evidence and concluded that it was not required to supplement its EIS.<sup>122</sup> The Court found that the Corps’s decision was reasonable based on its consideration of the evidence, and that therefore the Corps was not acting arbitrarily and capriciously and was in compliance with NEPA.<sup>123</sup>

#### *b. Marsh Applied to Southern Utah Wilderness Alliance*

As applied to the facts in *Southern Utah Wilderness Alliance*, the Court held that the BLM’s actions were complete after the land use plan was approved.<sup>124</sup> The Court held that *approval* of the land use plan was the federal action that triggered NEPA.<sup>125</sup> Because BLM had already approved the land use plan and issued an EIS when the Alliance provided the new information, it was not required to even consider the new information.<sup>126</sup> Therefore, BLM did not act arbitrarily and capriciously because it did not have to act at all.<sup>127</sup>

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118. *Id.*

119. *Compare Marsh*, 490 U.S. at 371, with *S. Utah Wilderness Alliance*, 542 U.S. at 73.

120. *Id.*

121. *See id.*

122. *Id.* at 385.

123. *Marsh*, 490 U.S. at 385.

124. *S. Utah Wilderness Alliance*, 542 U.S. at 73.

125. *Id.*

126. *Id.*

127. *Id.*

### III. THE COURT'S IMPROPERLY NARROW REASONING

This part of the Comment will apply the law discussed in Part I to the facts of *Southern Utah Wilderness Alliance* to argue that the Court was too narrow in its reading of the law. The application of the law will not show that the Bureau of Land Management (BLM) *should* have supplemented its environmental impact statement (EIS) in regards to its land use plans when faced with increased ORV use.<sup>128</sup> Rather, the application will show that, at a minimum, BLM should have taken a “hard look” at the evidence and then determined whether to supplement its EIS.<sup>129</sup>

#### A. NEPA's Broad Goals and Requirement of an Environmental Impact Statement

As discussed previously,<sup>130</sup> NEPA provides the broad policy that drives all federal government action when the environment is involved.<sup>131</sup> NEPA dictates that the federal government should use “all practicable means”<sup>132</sup> to “fulfill the responsibilities of each generation as trustee of the environment”<sup>133</sup> and “attain the widest range of beneficial uses of the environment without degradation . . . or other undesirable and unintended consequences.”<sup>134</sup> The courts should thus consider this broad language and purpose when evaluating whether or not an EIS is required under NEPA.<sup>135</sup>

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128. See discussion *infra* Part III.D.

129. *Id.*

130. See discussion *supra* Part I.A.

131. See generally National Environmental Policy Act, 42 U.S.C. § 4331 (2000).

132. 42 U.S.C. § 4331(b) (2000).

133. 42 U.S.C. § 4331(b)(1) (2000).

134. 42 U.S.C. § 4331(b)(3) (2000).

135. See generally *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 375 (1989).



*B. Agencies are Required to Revise Environmental Impact Statements When New Information is Available*

In recognition of the broad principles and purposes of NEPA, the Council of Environmental Quality (CEQ) promulgated regulations requiring agencies to prepare a supplement to a published EIS when there is new information relevant to environmental concerns of a “proposed action or its impacts.”<sup>136</sup> When read in the context of NEPA, if agencies could ignore new information after they began acting, then the CEQ regulation would have no force.<sup>137</sup>

*C. The Bureau of Land Management is Required to Monitor Off-Road Vehicle Use*

In addition to NEPA’s requirement to create an EIS when proposing a land use plan and the requirement to supplement that plan when new information is available, BLM has promulgated rules mandating that it monitor ORV use and supplement its land use plans as necessary to regulate ORV use.<sup>138</sup> Therefore, there are two distinct federal actions that implicate NEPA: first, the proposal of land use plans,<sup>139</sup> and second, the subsequent revision of land use plans arising out of information obtained from the mandatory monitoring of ORV use.<sup>140</sup> The Court in *Southern Utah Wilderness Alliance* improperly focused on only the first action and ignored the law as applied to the second.<sup>141</sup>

*D. The Court’s Improperly Narrow Application of the Law*

*1. Approval of a Land Use Plan*

In *Southern Utah Wilderness Alliance*, the Court improperly focused only on the proposal of the land use plan and not on the future required

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136. 40 C.F.R. § 1502.9(c)(1)(ii) (2007); see also discussion *supra* Part I.A.2.

137. See *Marsh*, 490 U.S. at 371.

138. 43 C.F.R. § 8342.3 (2007); see also discussion *supra* Part I.C.1.

139. 43 C.F.R. § 1601.0-6 (2007); see also discussion *supra* Part I.C.

140. 43 C.F.R. § 1610.5-6 (2007); see also discussion *supra* Part I.C.

141. See discussion *infra* Part III.D.

revision.<sup>142</sup> As Justice Scalia wrote, “the [a]pproval of a [land use plan]” is the “proposed action” that 40 C.F.R. § 1502.9(c)(1)(ii) contemplates.<sup>143</sup> He further wrote, “[the federal action] is completed when the plan is approved.”<sup>144</sup> Thus, the Court held BLM’s actions were complete and, therefore, it was no longer obligated to follow NEPA.<sup>145</sup>

## 2. *Monitoring and Revision of Land Use Plans*

In addition to proposing land use plans, BLM must monitor ORV use and revise its land use plans.<sup>146</sup> Although the *monitoring* of ORV use is not necessarily major federal action that triggers NEPA, the *revision and supplementation* of land use plans that follow the monitoring are major federal actions that trigger NEPA.<sup>147</sup> The rule further provides, “on the basis of information so obtained” it may revise its land use plans in furtherance of the law.<sup>148</sup> In this case, BLM has two distinct obligations: NEPA and Executive Orders 11,644 and 11,989.<sup>149</sup>

Under NEPA, BLM has the obligation to consider the environmental impacts and prepare an EIS.<sup>150</sup> Under the Executive Orders, BLM must maintain its lands so as to minimize the damaging impact of ORVs on the environment and to minimize the conflict between ORV use and other uses of the environment.<sup>151</sup> Thus, there are two questions that must be answered to determine whether BLM followed the law and whether the Court ruled properly. First, did BLM receive information regarding the effects of ORV use? Second, if it did receive such information, did BLM take a “hard look” at whether to supplement or revise its land use plans in furtherance of Executive Orders 11,644 and 11,989? The Court improperly narrowed its analysis on the approval of the initial land use

142. See generally *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 73 (2004).

143. *S. Utah Wilderness Alliance*, 542 U.S. at 73 (quoting 43 C.F.R. § 1601.0-6 (2003)).

144. *Id.*

145. *Id.*

146. 43 C.F.R. § 8342.3 (2007).

147. 43 C.F.R. § 1610.5-5 (2007).

148. 43 C.F.R. § 8342.3 (2007).

149. See discussion *supra* Part I.C.

150. See discussion *supra* Part I.A.

151. See discussion *supra* Part I.C.

plan, because BLM refused to take a “hard look” at data it received from the Alliance regarding the adverse effects of ORV use.<sup>152</sup>

*a. The Bureau of Land Management Received Significant Information Regarding ORV Use*

The first question is whether BLM received information that would trigger 43 C.F.R. § 8342.3? In this case, BLM had significant information regarding the damage ORVs are causing to its lands.<sup>153</sup> In fact, BLM had knowledge of the ORV use even before the Alliance filed suit for an injunction and provided its own evidence.<sup>154</sup> As the trial court found, “BLM points out that it [was] well aware that ORV-caused damage is resulting from . . . travel in these [areas].”<sup>155</sup> Thus, there is no question that BLM had information about damage caused by ORV use in the area.<sup>156</sup>

*b. The Bureau of Land Management Failed to Take a Hard Look at the Information*

After the initial creation of a land use plan, BLM must monitor ORV use and ensure that ORVs are not negatively impacting the environment.<sup>157</sup> In this case, ORVs were found to be causing damage to the environment.<sup>158</sup> Thus, BLM was required under its own rule to consider whether to revise its land use plans to minimize the effect of ORV use.<sup>159</sup> However, BLM decided to ignore the information in an attempt to bypass NEPA until a more favorable time.<sup>160</sup> BLM

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152. See 43 C.F.R. § 1610.5-5 (2007).

153. See *S. Utah Wilderness Alliance v. Babbitt*, No. 2:99CV852K, 2000 WL 33914094, at \*5 (D. Utah Dec. 22, 2000), *rev'd sub nom.* *S. Utah Wilderness Alliance v. Norton*, 301 F.3d 1217 (10th Cir. 2002), *rev'd*, 542 U.S. 55 (2004).

154. *Id.*

155. *Id.*

156. See *id.*

157. See 43 C.F.R. § 8342.3 (2007); see also Exec. Order No. 11,644, 37 Fed. Reg. 2877 (Feb. 8, 1972); Exec. Order No. 11,989, 37 Fed. Reg. 26,959 (May 24, 1977).

158. *S. Utah Wilderness Alliance v. Babbitt*, 2000 WL 33914094, at \* 5.

159. See 43 C.F.R. § 8342.3 (2007).

160. See *S. Utah Wilderness Alliance v. Norton*, 301 F.3d 1217, 1236–37 (10th Cir. 2002), *rev'd*, 542 U.S. 55 (2004).

recognized the need to perform supplemental analysis of its land use plans, but decided the information came at an inopportune time.<sup>161</sup> This, in effect, saved BLM the costs and time associated with preparing the required supplemental EIS.<sup>162</sup> Therefore, BLM, with Court approval, ignored the mandate of NEPA and Executive Orders 11,644 and 11,989,<sup>163</sup>

Finally, the language of 40 C.F.R. § 1502.9(c)(1)(ii) is clear.<sup>164</sup> It directs agencies to consider supplementation when new information is relevant to the “impacts” of its action.<sup>165</sup> If the only impacts an agency must consider when new evidence becomes available are the impacts that already occurred, then the language would be superfluous because it was already required to consider those impacts in the initial EIS.<sup>166</sup> Because the courts should not interpret language to be superfluous,<sup>167</sup> BLM specifically ignored its duty to reconsider the evidence of ORV use.<sup>168</sup>

### c. *The NEPA Implications*

Had BLM taken a “hard look” at the available information, it would have been required to produce the supplemental EIS.<sup>169</sup> However, BLM decided to ignore the information in an attempt to bypass NEPA.<sup>170</sup>

161. See *S. Utah Wilderness Alliance*, 301 F.3d at 1237.

162. See generally *id.* BLM would not have been required to find and then revise its land use plans. Rather, it would have only been required to produce an EA or EIS. See discussion *supra* Part I.A.

163. See discussion *supra* Part III.D.

164. 40 C.F.R. § 1502.9(c)(1)(ii) (2007).

165. *Id.*

166. See 42 U.S.C. § 4332(C)(ii) (2007); see also discussion *supra* Part I.A.

167. Cf. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (“We have stated time and again that courts must presume that . . . a statute [says] what it means and means . . . what it says.”).

168. Cf. *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1023–24 (9th Cir. 1980) (stating that agencies have a “continuing duty to gather and evaluate new information relevant to the environmental impact of its actions.”); *Soc’y for Animal Rights, Inc. v. Schlesinger*, 512 F.2d 915, 917–18 (D.C. Cir. 1975) (stating that an agency has a continuing responsibility to gather information and “incorporate new findings of significance into its analysis, perhaps by way of amending the existing EIS.”).

169. Cf. *Soc’y for Animal Rights, Inc.*, 512 F.2d at 917–18 (holding that the Defense Department “has a continuing responsibility to gather information . . . [to] incorporate new findings of significance into its analysis . . . [and to] reassess its determination to go forward in light of any changes in environmental impact analysis occasioned by its discoveries.”).

170. See *S. Utah Wilderness Alliance v. Norton*, 301 F.3d 1217, 1236–37 (10th Cir. 2002).

When the Alliance attempted to force BLM to reconsider, the Supreme Court affirmed this clear NEPA-dodging act.<sup>171</sup> Because NEPA emphasizes reasonable decision making by requiring the production of an EIS when there is federal action that affects the environment,<sup>172</sup> this holding directly contradicts the purpose and policy behind NEPA.<sup>173</sup>

Thus, contrary to the Court's holding, there is ongoing major federal action that could require supplementation.<sup>174</sup> The Court improperly reasoned that because BLM was not acting *at the time* it therefore had no further action to take in the future.<sup>175</sup> However, the reason BLM was not acting at the time was because it ignored the information in an attempt to subvert the requirements of the law.<sup>176</sup> As the Supreme Court found in *Marsh*, a case on which Justice Scalia relied in his decision, it would be inconsistent with the purpose of NEPA, in protecting the environment and assuring reasoned decision making, to allow agencies to ignore the adverse environmental effects of its actions after it had initially approved an action.<sup>177</sup>

Therefore, there was impending major federal action requiring BLM to comply with NEPA, because BLM was required to take a "hard look" at the data of ORV use in order to determine whether to supplement the previously produced EIS.<sup>178</sup> Thus, the Court improperly ruled that BLM was not required to take a "hard look" at the evidence of increased ORV use to determine whether to supplement its previously issued EIS.<sup>179</sup>

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171. See *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 73 (2004).

172. See *S. Utah Wilderness Alliance*, 301 F.3d at 1238.

173. See discussion *supra* Part I.A.

174. Cf. *S. Utah Wilderness Alliance*, 542 U.S. at 73 (finding that in *Marsh* the dam was not yet completed and, therefore, the Corps was required to consider new information).

175. *Id.*

176. See generally *S. Utah Wilderness Alliance*, 301 F.3d at 1238; see also discussion *supra* Part III.D.2.

177. See *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 371 (1989).

178. See 43 C.F.R. § 1610.5-5 (2007); see also discussion *supra* Part III.D.

179. See *Sierra Club v. Bosworth*, 465 F. Supp. 2d 931, 936 (N.D. Cal. 2006) ("An agency cannot rest on the conclusions made by an EIS or EA but instead maintains a continuing obligation to take a hard look at the environmental effects of its [decisions].") (internal quotations omitted).

## IV. AFTER THE COURT'S HOLDING

*A. Court Allows Agencies to Defer Looking at Increased Evidence of Off-Road Vehicle Use*

The real danger after *Southern Utah Wilderness Alliance* stems from significantly increased ORV use across the nation.<sup>180</sup> There will necessarily be less ORV use and damage to an area before BLM or USFS designates an area as ORV friendly.<sup>181</sup> The problem is if an agency can ignore evidence of increased ORV use,<sup>182</sup> then the environmental effects of the use will necessarily compound over time.<sup>183</sup> Therefore, the Court takes a dangerous step by allowing the BLM to ignore information that it ordinarily would have been required to take a "hard look" at.<sup>184</sup>

Moreover, the decision extends beyond just BLM and its regulations.<sup>185</sup> If BLM, which has promulgated strict regulations regarding ORVs and its land use plans can dodge NEPA, then other agencies such as the United States Forest Service (USFS) will be able to do the same in designating ORV trails in the national forests.<sup>186</sup> Moreover, if environmental groups cannot produce evidence of significant ORV use before the final approval of a land use plan, then it will be powerless to force the agency to consider the ORV use after the approval.<sup>187</sup>

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180. See FS-823, *supra* note 4.

181. See generally CORDELL ET AL., *supra* note 55, at 2 (discussing the rapid growth of ORV use in America).

182. See discussion *supra* Part III.

183. See generally Off-Road Vehicles—Conservation Policies—Sierra Club, <http://www.sierraclub.org/policy/conservation/offroad.asp> (last visited Sept. 13, 2006) (stating that ORVs contribute to erosion of the ground, noise, water, and air pollution, and other environmental dangers).

184. Cf. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987) (finding environmental injury is frequently irreparable).

185. See e.g., *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 385 (1989) (applying NEPA to Army Corps of Engineers); *Mountaineers v. U.S. Forest Serv.*, 445 F. Supp. 2d 1235 (W.D. Wash. 2006) (applying NEPA to the United States Forest Service).

186. See e.g., *Mountaineers*, 445 F. Supp. 2d at 1251.

187. See *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 73 (2004) (holding that approval of the land use plan is the federal action).

Thus, ORV use in an environmentally sensitive area is allowed to fester and grow for a significant period before the Court would find that the agency is required to take a “hard look” at it.<sup>188</sup> This sort of delay “is especially dangerous in the environmental area, where the temptations to delay compliance are already substantial.”<sup>189</sup> Moreover, this directly subverts the language of NEPA, which states, “it is the continuing responsibility of the Federal Government to use all practicable means . . . [to] attain the widest range of beneficial uses of the *environment without degradation*.”<sup>190</sup>

Finally, due to the rising use of ORVs in the United States of America<sup>191</sup> and the particular attention that ORVs have been given,<sup>192</sup> fostering ORV use would subvert the language and purpose of the law.<sup>193</sup> President Nixon ordered that “[agencies] *shall* monitor the effects of the use of off-road vehicles on lands under their jurisdictions.”<sup>194</sup> President Carter further ordered that “[the agency] *shall*, whenever he determines that the use of off-road vehicles will cause or is causing considerable adverse affects [on the environment] . . . *immediately close such areas*.”<sup>195</sup> If the decision of *Southern Utah Wilderness Alliance* continues to be good law, then BLM and USFS will essentially bypass the mandate of those orders.<sup>196</sup>

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188. See generally *S. Utah Wilderness Alliance*, 542 U.S. 55. That is, the agency would not need to take a “hard look” at how the ORVs are affecting the area until it issued a subsequent land use plan. See also CORDELL, ET AL., *supra* note 55.

189. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 326 (1982) (Stevens, J., dissenting). In *Weinberger*, the district court allowed the Navy to continue discharging into navigable waters, in violation of the Clean Water Act, 33 U.S.C. § 1251 et seq., while waiting for approval of a permit.

190. 42 U.S.C. § 4331(b)(3) (2000) (emphasis added).

191. See CORDELL, ET AL., *supra* note 55, at 2.

192. See generally *id.* at 1.

193. See generally Exec. Order No. 11,644, 37 Fed. Reg. 2877 (Feb. 8, 1972).

194. *Id.* (emphasis added). Ordinarily “the word ‘shall’ is . . . ‘the language of command.’” *Alabama v. Bozeman*, 533 U.S. 146, 153 (2001).

195. Exec. Order No. 11,989, 37 Fed. Reg. 26,959 (May 24, 1977) (emphasis added).

196. See *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004) (holding BLM is not required to take a “hard look” at new evidence of ORVs).

## *B. A Practical Solution to the Environmental Problem of Off-Road Vehicles*

There is an internal inconsistency with how the law stands now. On one hand, the law states that ORVs cause damage and their use must be monitored;<sup>197</sup> on the other hand, the law allows agencies charged with monitoring the damage to ignore the information and defer action until a more feasible time arrives.<sup>198</sup> Because NEPA does not provide a substantive duty on agencies to make particular decisions,<sup>199</sup> NEPA cannot always be used to deny ORVs access to lands.<sup>200</sup> Moreover, a policy of blindly denying ORVs access to all lands would run contrary to federal law and should be resisted.<sup>201</sup> Therefore, the solution must require agencies to make reasoned decisions and consider evidence of ORV-related damage, but at the same time provide ORV users the opportunity to use public land.<sup>202</sup> Thus, by using a scheme of temporary closures of ORV trails predicated on taking a “hard look” at relevant information,<sup>203</sup> the damages of ORV use in environmentally sensitive areas can be reduced, while at the same time affording agencies the discretion on when to begin the costly procedure of preparing an EIS.<sup>204</sup>

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197. *Id.* at 58.

198. *See S. Utah Wilderness Alliance*, 542 U.S. at 73; *see also* *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 877 (1990) (holding that in passing the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701–1725, Congress created a policy in favor of retaining public lands for multiple uses). *See generally* *Federal Land and Policy Management Act*, 43 U.S.C. §§ 1701–1725 (2000). *See also* discussion *supra* Part I.B (discussing FLPMA).

199. *See* discussion *supra* Part I.A.

200. *See* discussion *supra* Part I.B (discussing policy of promoting multiple uses, including recreational use of public lands).

201. *See generally* 43 U.S.C. § 1701 (2000). *See also* discussion *supra* Part I.B (discussing FLPMA).

202. *See generally* 43 U.S.C. § 1701 (2000). *See also* discussion *supra* Part I.B. (discussing FLPMA).

203. If after taking a hard look at the information, the agency determines that a supplemental environmental impact statement is necessary, then the closure should continue until the SEIS is produced. *See generally* 43 C.F.R. § 8341.2 (2007) (providing power to close ORV trails); discussion *supra* Part I.C.

204. *See* *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1250 (9th Cir. 1984) (holding that only in rare circumstances may a court refuse to issue an injunction for NEPA violations); *Habitat Educ. Ctr., Inc. v. Bosworth*, 381 F. Supp. 2d 842, 862 (E.D. Wis. 2005) (holding that a court may enjoin further action on a federal project until NEPA is fully complied with); 43 C.F.R. § 8341.2 (2007) (authorizing BLM to immediately close trails to ORV use when it is determined that ORVs are or will cause significant adverse environmental effects); 72 Fed. Reg. 57,067 (Oct. 5, 2007) (BLM giving notice of closure of lands to ORV use); *cf.* *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985) (granting injunctive relief under the Endangered Species Act for procedural violations).



### 1. *Temporary Closure and Agency Discretion*

The unique nature of environmental damage is that it is frequently irreparable.<sup>205</sup> Therefore, the practical remedy is usually not money damages, but rather an injunction to prevent the harm from continuing.<sup>206</sup> As Justice White wrote in *Amoco Production Co. v. Village of Gambell, AK*, “[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent . . . [i]f such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.”<sup>207</sup> The federal circuits have frequently found that “[i]rreparable damage is presumed to flow” from environmental injury.<sup>208</sup> Thus, an effective solution to ORV use that is harming the environment is closing ORV access to the environmentally sensitive area.<sup>209</sup>

As discussed earlier, because the Court held that the land use plan was the federal action that triggered NEPA, BLM is not in violation of NEPA if it chooses to ignore information after the final approval of a land use plan.<sup>210</sup> BLM is therefore not required to prepare an EIS.<sup>211</sup> However, BLM must still comply with other regulations and Executive Orders.<sup>212</sup> In this case, Executive Order 11,989 is directly on point. Under the order, “the respective agency head *shall*, whenever he determines that the use of off-road vehicles will cause or is causing considerable adverse effects [on the environment] . . . immediately close such areas” to the type of ORVs causing the damage.<sup>213</sup>

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205. See *Amoco Prod. Co. v. Village of Gambell, AK*, 480 U.S. 531, 545 (1987).

206. *Id.*

207. *Id.* at 545.

208. See *Thomas*, 753 F.2d at 764 (“Irreparable damage is presumed to flow from a failure properly to evaluate the environmental impact of a major federal action.”).

209. *Cf. id.*

210. See discussion *supra* Part II.B.2.

211. *Id.*

212. See, e.g., Exec. Order No. 11,989, 37 Fed. Reg. 26,959 (May 24, 1977).

213. *Id.*; see also 43 C.F.R. § 8341.2 (2007) (granting authority to close ORV trails until the adverse effects of the use are eliminated and measures are implemented to prevent recurrence); see, e.g., 72 Fed. Reg. 57,067 (Oct. 5, 2007) (BLM closing 1871 acres of public lands to ORV use).

On the other hand, if the agency refuses to voluntarily close the area, an efficient and reasonable means to accomplish this closure is through the use of an injunction.<sup>214</sup> The injunction can be fashioned to protect the environment from further harm caused by the ORV use and also allow the agency to defer issuing formal findings in pursuant to NEPA until it is more economically feasible.<sup>215</sup> Because ORVs will not be harming the environment during the period from the injunction and agency action, the problems that arose from *Southern Utah Wilderness Alliance* will be partially eliminated.<sup>216</sup>

## 2. Permitting Less-Harmful ORV Use

Not only will temporary closure of ORV trails prevent increased environmental harm and give agencies discretion on when to embark on preparing an EIS, temporary relief can be shaped to allow less-harmful ORV use to continue.<sup>217</sup> As the United States Forest Service has found, ORV use and sales have skyrocketed in recent years with more and more people using their vehicles on federal land.<sup>218</sup> While unregulated use of ORVs on federal land would violate current law,<sup>219</sup> almost paradoxically, it is the national policy to promote multiple, often conflicting, uses on public land.<sup>220</sup> Thus, a complete prohibition of ORVs on public land would be inappropriate and would likely be met with staunch resistance by ORV-friendly organizations.<sup>221</sup>

214. *Cf. Amoco Prod. Co. v. Village of Gambell, AK*, 480 U.S. 531, 545 (1987).

215. *Cf. Utah Shared Access Alliance v. Carpenter*, 463 F.3d 1125, 1135 (10th Cir. 2006) (finding temporary closure of ORV trails is not major federal action triggering NEPA); *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 641 (9th Cir. 2004) (noting that district courts have broad discretion in fashioning injunctive relief).

216. See discussion *supra* Part IV.A.

217. See *Tread Lightly!*, <http://www.treadlightly.org/page.php/aboutus/About-Us.html> (last visited Mar. 24, 2008) (encouraging respect and protection of the environment when using ORVs).

218. See CORDELL, ET. AL., *supra* note 55, at 2.

219. See discussion *supra* Part I.

220. See *e.g.*, 43 U.S.C. § 1701 (2000); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 877 (1990) (holding that in passing the Federal Land Policy and Management Act (FLPMA) Congress created a policy in favor of retaining public lands for multiple uses); see also discussion *supra* Part I.B (discussing the FLPMA).

221. See *e.g.*, *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004). In *Southern Utah Wilderness Alliance*, several ORV-friendly organizations intervened in the action in support of BLM.

Moreover, as the concern for the environment grows and increasingly strict rules are promulgated, ORV groups are beginning to advocate careful and less-harmful procedures while driving off-road.<sup>222</sup> This promotion of environmental concern follows Executive Orders 11,644 and 11,989 by encouraging careful and safe ORV use on federal lands.<sup>223</sup> Because the use of temporary closure and injunction can be fashioned to prohibit ORV use that damages the environment, but still permit less-harmful ORV use in an area, the agency will have more information available to make a reasoned decision to allow or prohibit ORV use in a particular area in the future.<sup>224</sup> Thus, this solution protects the environment pursuant to NEPA<sup>225</sup> and encourages multiple uses pursuant to the Federal Land Management and Policy Act.<sup>226</sup>

### CONCLUSION

While the use of ORVs on federal land is rapidly increasing, federal agencies are finding it difficult to deal with the effects of the ORVs in compliance with NEPA and other rules promoting protection of the environment.<sup>227</sup> In *Southern Utah Wilderness Alliance*, the Supreme Court authorized the Bureau of Land Management (BLM) to ignore increased evidence of ORV use in an area it had designated for ORV travel, contrary to direct language of Executive Orders 11,644 and 11,989 and rules promulgated by BLM itself.<sup>228</sup>

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222. See e.g., Tread Lightly!, *supra* note 217. As Tread Lightly! instructs, “[t]ravel only in areas open to four-wheel drive vehicles” and “protect the soundscape by preventing unnecessary noise.” Tread Lightly! Responsible Four Wheeling, <http://www.treadlightly.org/page.php/responsible-four/Recreation-Tips.html> (last visited Mar. 24, 2008).

223. See generally Exec. Order No. 11,644, 37 Fed. Reg. 2877 (Feb. 8, 1972); Exec. Order No. 11,989, 37 Fed. Reg. 26,959 (May 24, 1977).

224. Cf. *Thomas v. Peterson*, 753 F.2d 754, 765 (9th Cir. 1985) (granting injunctive relief, but giving U.S. Forest Service an opportunity to revise its biological assessment and come into compliance with the Endangered Species Act).

225. See generally 42 U.S.C. § 4332 (2000).

226. See generally 43 U.S.C. § 1701 (2000); see also discussion *supra* Part I.B (discussing the FLPMA).

227. See generally CORDELL, ET. AL., *supra* note 55, at 1.

228. See discussion *supra* Part III.

Because the law clearly provides that ORV use shall be monitored and land use plans shall be revised when new information becomes available,<sup>229</sup> this authorization allows agencies to subvert the requirements of the law and opens the door for potentially devastating environmental effects across the nation.<sup>230</sup> It would be inconsistent with the national policy promoting protection of the environment to allow an agency in charge of that protection to unilaterally ignore the process.<sup>231</sup> Hence, the Court's decision was improper.<sup>232</sup>

In order to further the policy and purposes of the environmental laws, agencies should temporarily close ORV trails, and if they refuse courts should issue carefully fashioned injunctions when they find the environment significantly affected by ORV use.<sup>233</sup> This would prevent increased, often permanent, harm in the area until the agency has the opportunity to take a hard look at the information and if necessary prepare an EIS.<sup>234</sup> Moreover, it would promote the policy of multiple uses of public lands by allowing less-harmful ORVs to use the land.<sup>235</sup> While we do not want to destroy an American tradition,<sup>236</sup> we should also be very mindful not to disrupt the national policy of protecting the environment and require agencies to follow the law.<sup>237</sup>

*Aaron M. Kappler*

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229. See 43 C.F.R. § 8342.3 (2007); Exec. Order No. 11,644, 37 Fed. Reg. 2877 (Feb. 8, 1972); Exec. Order No. 11,989, 37 Fed. Reg. 26,959 (May 24, 1977); see also discussion *supra* Part I.C (discussing Executive Orders 11,644 and 11,989).

230. See discussion *supra* Part III.

231. *Id.*

232. *Id.*

233. See generally *Habitat Educ. Ctr., Inc. v. Bosworth*, 381 F. Supp. 2d 842, 862 (E.D. Wis. 2005). See also discussion *supra* Part IV (proposing temporary injunctive relief as balancing BLM's discretion and concern for the environment).

234. See discussion *supra* Part IV.

235. See generally 43 U.S.C. § 1702(c) (2000). See also discussion *supra* Part I.B; discussion *supra* Part IV.

236. Smith, *supra* note 1.

237. See 42 U.S.C. § 4331 (2000); see also discussion *supra* Part I.A (discussing NEPA).

