

A Glimpse Into the Realpolitik of Federal Land Planning, in Comparative Context With the Mysterious NLUPA and the CZMA

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I. Introduction

There is an old adage that “those who fail to plan, plan to fail.” Planning is a fundamentally rational, basal process shared at some level and to some degree by all, establishing and implementing frameworks to guide our human actions toward the accomplishment of various desired and defined objectives.¹ Thoughtfully designed and implemented planning is no less rational and essential for governmental entities than it is for corporations and individuals.

This essay surveys an interesting comparison between two quite different federal approaches to directive land and resource management planning. On one hand, the analysis reviews the federal mandate for layered, cooperative, intra-governmental land planning incorporated within the National Land Use Planning Act (“NLUPA”)—a statute repeatedly proposed in the 1970s but which never became law²—and within the Coastal Zone Management Act (“CZMA”), its sibling statute, that did.³ On the other hand,

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1. See JANET SHAPIRO, CIVICUS, TOOLKIT ON OVERVIEW OF PLANNING 1–5 (2011), <http://www.civicus.org/new/media/Overview%20of%20Planning.pdf>.
2. See LYNTON KEITH CALDWELL & KRISTIN SCHRADER-FRECHETTE, POLICY FOR LAND: LAW & ETHICS 265 n.15 (1993), for a brief discussion of the origins of NLUPA.
3. See Coastal Zone Management Act § 302, 16 U.S.C. § 1451 (2012).

this essay observes the circumstances and effectiveness of federal statutory directives to federal management agencies to create and implement mandatory operative plans as a basis for resource regulatory actions on federal lands generally. Both of these models address the need to guide market forces to maximize particular defined societal objectives and to avoid specific public disbenefits.

Shortcomings are frequently encountered, however, in the implementation of many federal resource plans, visible in a variety of disappointing occurrences including oil spill contingency responses in Alaska and the Gulf of Mexico, forestry management, mining, rangeland grazing, and a variety of other federal planning settings. Deficiencies in federal land and resource planning are pondered in this analysis as they are embodied in *Norton v. Southern Utah Wilderness Alliance* (“SUWA”).⁴ Underlying the dysfunctions discernible in many federal resource management plans is a fundamental systemic tension lying within the structure of modern governance. The analysis here finishes with a proposal for understanding how government currently malfunctions in the resource management planning setting and how that can be rectified.

II. Federal and Nonfederal Land Use Planning: NLUPA and CZMA

A. The Elements of Planning

There is, of course, tremendous variety in the way plans are used throughout our society, from personal daily agendas and New Year’s resolutions to statutorily required governmental directives for plans authorized and required to guide legislative policy mandates and outcomes. Plans can fall anywhere on a broad spectrum between formality and informality, between instrumentally dictating actual practices and mere Potemkin Village diversionary artifice.

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4. *Norton v. S. Utah Wilderness Alliance (SUWA)*, 542 U.S. 55 (2004).

Governmental agency planning, reduced to its bare bones, ideally duplicates the elements incorporated within private planning, with the difference that it is externally as well as internally enforced. A number of essential elements can be discerned in sequence or in blended form in virtually all such settings where official plans are formally required:

- definition of the area that is to be covered and the goals that are to be addressed—typically the initial stage, the role of the legislative body;
- agency action surveying and collecting data, maps, charts, relevant expert research, historical data, solicitation and collection of relevant input from private and public sources, and so on;
- formulation of potential alternative approaches that could be chosen, in both structure and procedure, to achieve the goals that have been identified;
- evaluating and weighing the various options;
- selecting the preferred management path, and the principles, enforceable standards, and procedures to be applied;
- putting it all together into a coherent functional plan framework with a structured mechanism to apply the elements to guide agency actions; and
- implementing that plan with its collection of structure, standards, and procedures, including monitoring ongoing actions and circumstances, responsive enforcement, and “adaptive management” where problems arising or new information require ongoing amendment and reorganization of the plan.⁵

A plan, of course, is only as good as the data, standards, procedures, and good faith embodied in the creation and implementation of the plan, and each of the sequential stages noted can trigger a welter of controversial questions and debates.

B. NLUPA: A Novel and Layered Planning Structure

I. History

NLUPA, submitted three times in successive Congresses in the early 1970s, is now a little-remembered attempt to add an effective land planning statute to the parade of environmental protection statutes promulgated during the reign of President Richard Nixon.⁶ It is an orphan child of that decade because it never became law. In 1970, Senator Henry “Scoop” Jackson of Washington State first introduced NLUPA, in the 91st Congress.⁷ He had just previously carried the National Envi-

ronmental Policy Act of 1969 (“NEPA”)⁸ successfully into law and was interested in running for the presidency of the United States.⁹ Relishing the success of NEPA, his first-born, Jackson figured that the wave of environmentalism born of Rachel Carson and nurtured by Earth Day might continue to build into an unstoppable political tsunami that would carry him into the White House.¹⁰

Jackson decided in 1970 that his next progeny would be twins, two new statutes to bring rationality to the chaos of American land use management, federal and nonfederal. One of Jackson’s twin bills was focused upon federal lands—the Federal Land Policy and Management Act (“FLPMA”)¹¹—which he steered through several Congresses finally to achieve passage in 1976.

The second of Jackson’s conceived bills, NLUPA, focused upon nonfederal lands. President Nixon featured the bill in his State of the Union address of 1971, and it passed in the Senate 64–21 in 1973.¹² It did not get past the House of Representatives, however, and later that year Nixon abruptly backed off.¹³ He apparently decided that the environmental protection statutes he had signed were antagonizing the interests of his political base. As reported by Professor Flippen,¹⁴ Nixon told his Cabinet members at a meeting that year that it was time to “[g]et off the environment kick.”¹⁵ NLUPA, and the memory of NLUPA, slipped into obscurity. As we will see, however, the design of both NLUPA and CZMA embody a significant federal land planning model. Though they primarily address nonfederal lands, when viewed in the context of their structure and history, NLUPA and CZMA provide some relevant perspectives on federal land and resource management planning generally. NLUPA was innovative and quite promising in its design and structure, addressing an array of substantial problems arising in national patterns of land use development in the United States.¹⁶

Unlike virtually all other developed countries, U.S. national land management patterns have been almost totally dominated by local governmental units. State planning statutes and state planning offices are typically notable for their absence or lack of meaningful resources and authority to

THE 87TH, 88TH, 89TH, 90TH, AND 91ST CONGRESSES 9–10 (Comm. Print 1971).

8. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2012).

9. See *Biography*, HENRY M. JACKSON FOUND., <http://www.hmjakson.org/biography> (last visited Feb. 4, 2015).

10. See *id.*

11. 43 U.S.C. § 1701 (2012).

12. 119 CONG. REC. S20631 (1973). NLUPA passed the Senate on June 21, 1973. S. 268, 93d Cong. (1st Sess. 1973). It had been featured in President Nixon’s “Special Message to the Congress Outlining the 1972 Environmental Program” of February 8, 1972, where he emphasized the importance of state planning by saying that any state that had not established an acceptable land use program by 1975 would be subject to annual 7% reductions from three specified federal funding programs. See Letter from President Richard Nixon to Congress (Feb. 8, 1972), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=3731>.

13. See J. BROOKS FLIPPEN, NIXON AND THE ENVIRONMENT 191 (2000).

14. See generally *id.*

15. *Id.* at 189–219.

16. Nolon, *supra* note 6, at 519–23.

5. See BUREAU OF LAND MGMT., U.S. DEP’T OF THE INTERIOR, LAND USE PLANNING HANDBOOK 2 (2005).

6. See John R. Nolon, *The National Land Use Policy Act*, 13 PACE ENVTL. L. REV. 519, 520–21 (1996).

7. See S. COMM. ON INTERIOR & INSULAR AFFAIRS, 92D CONG., COMMITTEE’S HISTORY, JURISDICTION, AND A SUMMARY OF ITS ACCOMPLISHMENTS DURING

regulate actions in the real estate marketplace.¹⁷ There is very little federal government planning for nonfederal lands.¹⁸ There were and are, however, more than 80,000 different local government units throughout the United States,¹⁹ virtually all of them exercising control of land uses and land development, and virtually none coordinating with any of the others.

In this country, the standard pattern for land management is that each of the 80,000-plus units of local government, large or small, is insulated from its surrounding municipalities.²⁰ Each tends to operate as a hermetically isolated kingdom, holding on to its resources and making management plans within the four corners of its own territory, typically without regard for coordinated relationship to its surrounding communities. The result of local dominance of land use patterns has become an array of problems given the nation's increasing population, complexity, the intracommunity in social and economic life, and the end of the frontier.

The problems of locally dominated land management lie not only in the irrationality of insulated, fractionalized planning, but also in the fact that, due to development interests' ability to focus expertise and economic and political pressure upon local governments, marketplace political forces typically are able to dominate a major proportion of local decisionmaking.²¹ The most prevalent land use management mechanism in the nation is zoning, sometimes coupled with other land use mechanisms like subdivision regulation, all wielded at a localized level and often outgunned by the real estate forces that impose their preferences and resist public planning constraints.²²

The result of local—usually weak—domination of land use patterns has been sprawl: the isolation of central cities from their surrounding suburban enclaves, strip cities along highways, and irrational distributions of utilities and services.²³ Much or most of the nation's current land development patterning has been implicitly designed on the assumption that most Americans always will want or be able to drive their cars to work, to obtain services, to go shopping, to enjoy recreation, and to access other necessi-

ties of life.²⁴ As the world gets more complex and problematic, however, and the prices of gasoline and automobiles rise,²⁵ the land use premises upon which the settlement patterns of the United States have long been shaped become increasingly irrational.

What planning design did NLUPA propose in order to address the increasing dysfunction of American land use patterns, contradictions, duplications, waste of resources, and serious land use conflicts? Its proposal was a major translocation in the established *subsidiarity* context of land management decisions for nonfederal lands in the United States, shifting the fulcrum of land management away from the local level of over 80,000 municipalities to a more coherent state level of 50 units.²⁶

2. “Subsidiarity” and “Consistency” in NLUPA

“Subsidiarity” is a principle derived from both canon and international law²⁷ reflected in the essential design of NLUPA. It is a concept for determining the appropriate level at which any decision is optimally to be made, and it incorporates a premise that *decisions should be made at the lowest level at which they can rationally be made.*²⁸ For many decisions, the optimal level for decisionmaking is local—like relative locations of residential areas, shopping, and industry; segregation of conflicting uses; or internal traffic and utility patterns—where local participants best know a locality and its needs.²⁹

The subsidiarity calculus embodied in NLUPA reflected the recognition that, in the United States of the 1970s, the local level was no longer a satisfactory locus for coordinating and handling the multiple interconnected requirements and challenges generated by complex modern society. By lifting the level of coordination up from the local to the state level, NLUPA attempted to make what subsidiarity theory would identify as a fundamentally necessary and rational upward reallocation of the nation's land management decisionmaking.³⁰

17. See, e.g., Zachary Jellson, *The Community Planning Act: Market Over Planning*, 23 U. FLA. J.L. & PUB. POL'Y 193, 195, 206 (2012) (critiquing Florida's statewide land planning statute for implicitly favoring the market over regulation).

18. One notable exception is when courts have repeatedly upheld federal regulation of activities on nonfederal lands which impact, or potentially impact, federal lands. See, e.g., *Camfield v. United States*, 167 U.S. 518, 523 (1897) (holding that Congress could prohibit the construction of fences on nonfederal land which prevented all access to adjacent federal lands); *Minnesota v. Block*, 660 F.2d 1240, 1249–51 (8th Cir. 1981) (concluding that Congress “may regulate conduct off federal land that interferes with the designated purpose of that land”).

19. The number of local governments in the United States has for decades been estimated at approximately 80,000; for 2012 the count was estimated at more than 89,000. Press Release, U.S. Census Bureau, *Census Bureau Reports There Are 89,004 Local Governments in the United States* (Aug. 30, 2012), available at <http://www.census.gov/newsroom/releases/archives/governments/cb12-161.html>.

20. See CALDWELL & SHRADER-FRECHETTE, *supra* note 2, at 156.

21. See SIDNEY PLOTKIN, *KEEP OUT: THE STRUGGLE FOR LAND USE CONTROL* 35–36 (1987).

22. See *id.* at 36.

23. See Phillip Weinberg, *Control of Suburban Sprawl Required Regional Coordination Not Provided by Local Zoning Laws*, 72 N.Y. ST. B.A. J. 44, 44–45 (2000).

24. See ROBERT G. HEALY, *APPROPRIATE LEVELS OF GOVERNMENT FOR SUSTAINABLE LAND USE: CONTAINING URBAN SPRAWL 1* (2000).

25. See *Cost of Owning and Operating Vehicle in U.S. Increases Nearly Two Percent According to AAA's 2013 'Your Driving Costs' Study*, AAA NEWSROOM (Apr. 16, 2013), <http://newsroom.aaa.com/2013/04/cost-of-owning-and-operating-vehicle-in-u-s-increases-nearly-two-percent-according-to-aaas-2013-your-driving-costs-study>.

26. The NLUPA bill, unlike CZMA, appears not to have extended its largesse and authorization to U.S. territories.

27. See, e.g., ST. POPE JOHN PAUL II, *CENTESIMUS ANNUS* 40 (May 1, 1991) (“It is the task of the State to provide for the defense and preservation of common goods such as the natural and human environments, which cannot be safeguarded simply by market forces. Just as in the time of primitive capitalism the State had the duty of defending the basic rights of workers, so now, with the new capitalism, the State and all of society have the duty of *defending those collective goods* which, among others, constitute the essential framework for the legitimate pursuit of personal goals on the part of each individual.”); see also *Summaries of EU Legislation: The Principle of Subsidiarity*, EUROPA, http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0017_en.htm (last updated Apr. 3, 2010) [hereinafter *Summaries of EU Legislation*].

28. See *Summaries of EU Legislation*, *supra* note 27.

29. See *id.*

30. See *id.*

Though NLUPA was a completely voluntary federal planning mandate that state governments were free to adopt or decline, it was vested with a powerful double incentive. First, under the authority of the Secretary of the Interior, NLUPA offered states, that wished to apply, very substantial amounts of money to fund an initial planning process to create state-level land use plans; if a state produced a state land use plan approved by the Secretary under standards required by NLUPA, moreover, the federal grants would continue to be paid each year to support the planning-implementation program.³¹

Second, and even more powerfully, once a state land use plan was approved by the Secretary, the state would hold a virtual veto power over any federal agency programs and projects proposed for the state that did not comport with its land use plan. Consider the practical and political impact of NLUPA's kicker as it appeared in the 1970 version of NLUPA:

§307(a). Coordination of Federal Programs. All Federal agencies conducting or supporting activities involving land use in an area subject to an approved statewide land use plan shall operate in accordance with the plan

(b) State and local governments submitting applications for Federal assistance for activities having significant land use implications in an area subject to an approved statewide land use plan shall indicate the views of the State land use planning agency as to the consistency of such activities with the plan. *Federal agencies shall not approve proposed projects that are inconsistent with the [state] plan.*

(c) All Federal agencies responsible for administering grant, loan, or guarantee programs for activities that have a tendency to influence patterns of land use and development, including but not limited to home mortgage and interest subsidy programs and water and sewer facility construction programs, shall take cognizance of approved statewide land use plans³²

NLUPA's grant of state-plan consistency overrides was not absolute, but approval of federal initiatives inconsistent with state plans would require a finding, backstopped by a presidential procedure, that the project was nationally essential and that overriding considerations of national policy required such approval.³³

NLUPA's monetary incentive was clearly a potent catalyst for state enrollment in the NLUPA planning system, but the second incentive, the requirement that federal agency projects and programs be "consistent" with approved state plans,

had even greater potential political attraction.³⁴ Federalism tensions have long existed within the United States, and NLUPA offered attractions for both the left and right of the political spectrum. Progressives tend to be communitarian, desiring that rational coordination be applied to the marketplace under thoughtful and objectively reasoned government guidance.³⁵ NLUPA encouraged the creation of that kind of interconnected, rational, and coordinated overview.³⁶ Political factions on the right tend to favor state jurisdiction rather than federal, so the provision of money to strengthen states' relative strength would be welcome.³⁷

Moreover, the power that NLUPA offered states to override federal agencies' projects and programs posed an extraordinary incentive for states to enter into the NLUPA process. The first step for a state under NLUPA would be to complete a comprehensive inventory of its own resources with the assistance of the Federal Land Planning Information and Data Center, if necessary.³⁸ That inventory then would be used to create an ordered set of themes by which the state would attempt to guide development in coming years with chosen statewide themes and paths.³⁹ The state would also be required to implement state statutes and regulations to encourage land use planning at municipal levels that were consistent with the state-coordinated needs and themes identified as necessities at the state level, with state agencies and enforceable regulatory structures to bring the plan into effect.⁴⁰

Regional arrangements could be included within the state-level planning process. A proposed state plan would be reviewed for consistency with NLUPA's generic requirements for comprehensive inventory, rational analysis, enforceable standards and procedures, consistency between local municipal plans, and overall planning enforceability.⁴¹ Once the plan was approved, additional annual grants would be issued by the Secretary, subject to continuing periodic review by federal agency staff to assure effective implementation.⁴²

31. S. 268, 93d Cong. §§ 201(a), 202(a) (1973).

32. S. REP. NO. 91-1435, at 13 (1970) (emphases added).

33. *Id.* ("The [federal Land and Water Resources] Council may approve a federally conducted or supported project[,] a portion or portions of which may be inconsistent with the plan[,] if it finds that (1) the project is essential to the national interest and (2) there is no reasonable and prudent alternative which would not be inconsistent with an approved statewide land use plan. In the event that the Council fails to approve the project, the project may be undertaken only upon the express approval of the President. The President may approve projects inconsistent with a statewide land use plan only when overriding considerations of National policy require such approval.")

34. See MORRIS K. UDALL, *Land Use: Why We Need Federal Legislation*, 1975 BYU L. REV. 1, at 6-7 (1975) (noting the value of requiring federal consistency with state plans as proposed in NLUPA).

35. See KENNETH M. DOLBEARE & LINDA J. MEDCALF, *AMERICAN IDEOLOGIES TODAY: FROM NEOPOLITICS TO NEW IDEAS* 122-23 (1st ed. 1988) (describing the modern American Left's approach to managing the marketplace through government regulation).

36. See Udall, *supra* note 34, at 2 (noting the need for coordinated approach to land use planning that NLUPA attempted to address).

37. See JACK M. BALKIN, *Federalism and the Conservative Ideology*, 19 URB. LAW. 459, 491 (1987) (describing conservative ideology's preference for states' rights over federal control).

38. See S. REP. NO. 91-1435, at 3, 13-14 (1970). For example, considerations for the inventory included the following questions: Where were the geographical features of importance—mountains, fertile soils, water resources, and areas served by excellent transportation for optimum urban development? Where and how substantial were the state's various natural resources, educated workforces, or other resources necessary to sustain an economy? Where were people currently living and where were employment locations presently and for the foreseeable future? Where were medical facilities, transportation corridors, education facilities, etc.?

39. *Id.* at 9-10.

40. *Id.* at 11.

41. *Id.* at 10. NLUPA's specific planning requirements were set out in the bill's section 305(a). *Id.* The submission and review process were set out in section 306. *Id.* at 12-13.

42. *Id.* at 12-13.

The NLUPA planning program would foreseeably have changed the structure of land use management in the United States in quite revolutionary terms. State planning offices, if they existed, would have become the moderators and coordinators of land use planning throughout the state. By elevating land management to the state level, the over 80,000 separate and disconnected land use systems would be rationalized into fifty far more coherent coordinated state-level initiatives.

What would America look like today if NLUPA had been made law and implemented? NLUPA would potentially have had a significant role in modernizing land management planning for two-thirds of the United States' land base (federal land management agencies, on the other hand, are responsible for managing approximately 28% of land in the United States).⁴³ Had NLUPA passed, images of the United States viewed from space at night might look quite different from the sprawls and strip cities that currently lace the nighttime image of our nation. A practical political consequence of the new role of state plans, moreover, would likely have served to counterbalance the power of real estate market forces that currently dominate the local level. State-level review would probably have brought far more transparency (given state-level media access and freedom of information and sunshine acts) and far more community-based counterbalancing against the focused force of developers bent on projects that potentially disserve the public interest.

3. CZMA: Consistency Planning in Modern Practice

Although the federal land planning system represented within NLUPA never became law, it represented a substantive and procedural model of sophistication and practicality in designing and enforcing meaningful resource management. That model is reflected on a much smaller scale in the structure of today's CZMA planning and implementation, in which the NLUPA theory of layered planning coordination is applied in practice to lands and resources within the "coastal zone," demonstrating a planning approach that compares favorably with other federal land and resource management programs.⁴⁴

When CZMA was enacted in 1972, Congress recognized that states were not effective at controlling development of their coastal zones, to the detriment of natural coastal resources. Congress announced that effective coastal zone management would require, in addition to ample federal support, that states take an active interest in their own coastlines. The announced national policy of CZMA is to preserve, protect, develop, and, where possible, to restore or enhance natural coastal zone resources for future generations.⁴⁵ The

goal of the Act was to encourage state responsibility through the development of area-specific management plans.⁴⁶

Thirty-five states and territories contain coastal lands and thus are eligible to enroll in CZMA, and thirty-four currently are so enrolled.⁴⁷ CZMA's planning and regulatory structure covers each state's "coastal zone," defined as coastal waters, including the lands therein and thereunder, adjacent shorelands, and inland to the extent necessary to control direct and significant impacts on the coastal waters.⁴⁸ Because specific delineation is ultimately subject to each state's further definition, the inland coverage of each state's coastal zone can be extensive or limited. For instance, while Delaware and Hawaii have designated their entire state as a coastal zone, some states designate only counties affected by tides, while Louisiana has designated less than the full reach of tidal waters.⁴⁹

Because CZMA is a high-functioning land planning system under a federal mandate, it not only provides an illuminating guide to how NLUPA might have worked, but also holds lessons for federal agency resource management plans in general. The CZMA process, as it exists today, is articulated and serious in its land use planning strictures. Under CZMA, the required elements of a plan are set out similarly to the NLUPA criteria.⁵⁰ When a state chooses to participate, its coastal management program ("CMP") and plan must meet certain federal requirements, with approval by the

46. Coastal Zone Management Act § 302(i), 16 U.S.C. § 1451(i) (2012).

47. See *Coastal Zone Management Programs*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., <http://coast.noaa.gov/czm/mystate/?redirect=301ocm> (last visited Mar. 21, 2015). Participating states and U.S. territories listed on the National Oceanic and Atmospheric Administration website include Alabama, American Samoa, California, Connecticut, Delaware, Florida, Georgia, Guam, Hawaii, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Northern Mariana Islands, Ohio, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Texas, Virgin Islands, Virginia, Washington and Wisconsin. *Id.* Alaska withdrew from the National Coastal Zone Management Program on July 1, 2011. *Id.* Illinois joined the national coastal management program on March 9, 2012. *Id.*

48. Coastal Zone Management Act § 304, 16 U.S.C. § 1453(1) (2012) ("The term 'coastal zone' means the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states, and includes islands, transitional and intertidal areas, salt marshes, wetlands, and beaches The zone extends inland from the shorelines only to the extent necessary to control shorelands the uses of which have a direct and significant impact on the coastal waters, and to control those geographical areas which are likely to be affected by or vulnerable to sea level rise.").

49. See generally *Coastal Zone Management Programs*, *supra* note 47; see also LA. DEP'T OF NATURAL RES., OFFICE OF COASTAL MGMT., & LA. COASTAL PROT. & RESTORATION AUTH., *DEFINING LOUISIANA'S COASTAL ZONE: A SCIENCE-BASED EVALUATION OF THE LOUISIANA COASTAL ZONE INLAND BOUNDARY* (2010), available at http://dnr.louisiana.gov/assets/OCM/CoastalZoneBoundary/CZB_Study_Report_October_2010_Final.pdf (demonstrating that the Louisiana state definition of the coastal zone takes into account tidal surge areas, height above sea level, and a variety of water-impacting parameters; it has been adjusted several times and has included roughly 5.3 million acres).

50. See Coastal Zone Management Act § 306(d)(2)(A)-(H), 16 U.S.C. § 1455(d)(2)(A)-(H) (2012) (stating that the Secretary shall find the management program identifies boundaries, defines permissible land uses and water uses, designates areas of particular concern, identifies the means of control, establishes guidelines on priorities of uses, describes organizational structure and responsibilities of local, area-wide, State, regional, and interstate agencies, contains a planning process for the protection of areas with environmental, recreational, and cultural value, and also contains a planning process for management of the impacts from energy facilities).

43. ROSS W. GORTE ET AL., CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 3 (2012).

44. See Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, sec. 6202, § 302, 104 Stat. 1388-299, 1388-299-1388-300 (codified as amended at 16 U.S.C. § 1451).

45. Coastal Zone Management Act § 303(1), 16 U.S.C. § 1452(1) (2012).

Secretary of Commerce through the National Oceanic and Atmospheric Administration's Office of Ocean and Coastal Resource Management ("OCRM"). The state plan must be approved if it meets the requirements listed in section 306(d) of CZMA.⁵¹ Once a state's proposed CMP plan is approved by the Secretary, the state is vested with the power of consistency veto over federal agency projects and programs,⁵² and in return, it must submit to the continuing oversight of OCRM, which holds jurisdiction over the program.

OCRM apparently takes its supervisory power seriously. Each state must submit a five-year review process in order to maintain continued federal grants to support the coastal zone program, and numerous informal reviews take place during the interim between the five-year formal reviews.⁵³ OCRM apprises itself of substantial changes that occur either in the state's statutes or regulations, or in the conditions under which the plan operates.⁵⁴ Although there is no citizen suit provision in CZMA, citizen complaints to OCRM reportedly engender agency review of state compliance and, in some cases, citizens have been able to enforce CZMA plan requirements under state or federal administrative procedures acts.⁵⁵

Recently, OCRM commissioned an External Evaluation of State Coastal Zone Management & National Estuarine Research Reserve System Programs.⁵⁶ The study highlights the relevancy, effectiveness, and impact of the State Coastal Zone Management Program ("SCZMP") based on interviews from fifty-seven observers, including SCZMP managers and external parties (e.g., national experts, state partners, affiliates, and stakeholders). The evaluation study also concluded that SCZMPs should expand the number of participants defined as coastal managers and increase involvement in public dialogues related to significant direct and indirect impacts upon the coastal zone, including public infrastructure developments.⁵⁷

51. 16 U.S.C. § 1455(d)(1).

52. Coastal Zone Management Act § 307(c)(1)–(2), 16 U.S.C. § 1456(c)(1)–(2) (2012) (“(1) Each Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs (2) Any Federal agency which shall undertake any development project in the coastal zone of a state shall insure that the project is, to the maximum extent practicable, consistent with the enforceable policies of approved state management programs.”).

53. NAT'L OCEANIC & ATMOSPHERIC ADMIN., FINAL COASTAL ZONE MANAGEMENT ACT SECTION 309 PROGRAM GUIDANCE 4, 8 (2009).

54. See Coastal Zone Management Act §§ 312(a), 316(a), 16 U.S.C. §§ 1458(a), 1462(a) (2012) (discussing Secretary's role in reviewing the performance of coastal management states, coordinating with Congress, and reporting to the President); see also 15 C.F.R. §§ 923.131–923.133 (2014) (discussing procedures for continuing review of state CZMA programs); NAT'L OCEANIC & ATMOSPHERIC ADMIN., *supra* note 53 (discussing OCRM's review process for state coastal management plans submitted as part of grant process).

55. See, e.g., S.C. Coastal Conservation League v. Wise, 2003-CP-15-1137, at 1, 2, 32–34 (S.C. Ct. Com. Pl. Colleton Cnty. Feb. 20, 2007) (holding, in citizen nongovernmental organization lawsuit, that state agency failure to enforce coastal zone requirements limiting wetland fill bulkheading constitutes a violation requiring permanent injunction).

56. SRA INT'L, INC. & THE COUNCIL OAK, EXTERNAL EVALUATION OF STATE COASTAL ZONE MANAGEMENT & NATIONAL ESTUARINE RESEARCH RESERVE SYSTEM PROGRAMS 1 (2010), available at <http://coast.noaa.gov/czm/media/evaluationczmners.pdf>.

57. *Id.*

Interestingly, neither NLUPA nor CZMA included an explicit citizen enforcement process, but, at least in the CZMA example, it appears that citizens' input has been incorporated administratively in a way that reinforces the regulatory system. For example, during federal consistency reviews, the Massachusetts Office of Coastal Zone Management enters into a twenty-one-day public comment period in which the public is invited to weigh in on the agency decision process.⁵⁸ Where licenses and land use permits are concerned, the agency conducts a similar review under the Massachusetts Environmental Policy Act.⁵⁹ While public comment on land use decisions is nothing new, the agency in practice has responded seriously to public inputs and complaints.⁶⁰ In practice, CZMA has indeed helped control what otherwise would have been uncoordinated development in the coastal zone area, particularly with regard to energy facilities.

CZMA has reportedly led to several major consistency blocks by states and their state-approved plans against major and potentially disruptive energy facilities that otherwise would have been developed without sensitivity to state-level concerns.⁶¹ As with NLUPA, under CZMA, a federal agency can appeal to the Secretary for exceptions to the state-plan consistency requirement, where it can allege that the federal agency program or project presents a “paramount interest of the United States.”⁶² This override, however, is only rarely utilized, and, even in the case of emergency situations, the federal agency activity must be as consistent as possible with the state management plan.⁶³ Once the emergency has passed, the activity must come into compliance with the CMP.⁶⁴ In sum, the current practice of CZMA tends to indicate that the layered planning process established under federal mandate by NLUPA would have been workable, although at a national scale more political complexities clearly would have been brought to bear. The fundamental partnership between state and federal in this model appears to provide more checks and balances internally, as well as permitting public input at the front end and subsequent implementation.

III. Federal Resource Management Planning

A. SUWA's Agency Deficiencies

One fundamental impression from observation of today's federal CZMA planning mandate in practice is the seriousness of the effort put into the official CZMA planning

58. See MASS. OFFICE OF COASTAL ZONE MGMT., POLICY GUIDE 7 (2011).

59. *Id.* at 14.

60. Interview with Project Review Coordinator, Mass. Office of Coastal Zone Mgmt. (May 17, 2014).

61. See SRA INT'L, INC. & THE COUNCIL OAK, *supra* note 56, at 12.

62. Coastal Zone Management Act § 307(c)(1)(B), 16 U.S.C. § 1456(c)(1)(B) (2012) (“[T]he President may, upon written request from the Secretary, exempt from compliance those elements of the Federal agency activity that are found by the Federal court to be inconsistent with an approved State program, if the President determines that the activity is in the paramount interest of the United States.”).

63. See 15 C.F.R. § 930.32(b) (2014).

64. *See id.*

process and the seriousness of enforcement of plan requirements once CZMA plans have been federally approved. The contrast between the federally mandated planning process within the more familiar federal resource management statutes on one hand, and the NLUPA and the CZMA layered planning process on the other, is significant.

Environmental management planning by government agencies, especially when it deals with resources entirely owned by the public, should be a straightforward and effective means to achieve rational environmental protection and sustainable development. However, it is not. Observers have long noted that it is not exceptional for federal resource management agencies to suffer serious deficits in their preparation and implementation of congressionally mandated, official plans for sustainable management and protection of resources entrusted to their jurisdiction.⁶⁵ Intensive criticism has been recurrent in the management of mining, timber, ranching and grazing, water conservation on the federal lands, and more.⁶⁶

The *SUWA* case, in its various contexts—factual, political, and judicial—unpleasantly reflects many of the major shortcomings that can occur in a federal agency's implementation of its statutory mandate and of the congressionally required plans designed to guide the agency's actions in fulfilling its statutory duties.⁶⁷ The federal resource management agency involved in the *SUWA* case was the Bureau of Land Management ("BLM") in the Department of the Interior.⁶⁸ BLM manages a number of areas that have been designated as "wilderness study areas" ("WSA") under the terms of the Wilderness Act of 1964 as supplemented by FLPMA.⁶⁹ The Wilderness Act provides a process by which Congress can vote to set aside areas of "untrammelled" federal lands, free of disruptive human activities and the mark of human exploitation as vestigial, undeveloped enclaves of the natural legacy the nation received at its inception.⁷⁰ Of the nearly 650 million acres of federal land, approximately fifty million in the contiguous United States have been designated officially as wilderness by Congress.⁷¹

As one concern addressed in FLPMA, Congress recognized that the process of wilderness designation was taking protracted spans of time, not to mention substantial political energy, and that, in the meantime, many areas eligible for wilderness were being forever lost to potential congressional wilderness designation. Ongoing development and user activities were destroying the wild lands' wilderness character before they could be fully presented for congressional review.⁷²

Accordingly, FLPMA legislated a strict requirement for federal resource management agencies. Pursuant to FLPMA, the Secretary of the Interior identified WSAs, roadless lands of 5000 acres or more possessing "wilderness characteristics" as determined in the Secretary's land inventory,⁷³ to be held in protective custody pending comprehensive studies of their suitability for congressional designation as wilderness. For example, Utah contains roughly 50 million acres, and in 1991, "out of 3.3 million acres in Utah identified for wilderness study, two million were recommended as suitable for designation."⁷⁴ "This recommendation was forwarded to Congress, which [had] not yet acted upon it."⁷⁵

Until Congress acts one way or the other, FLPMA's specific wilderness provisions require that "the Secretary shall continue to manage such lands . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness."⁷⁶ This wilderness "non-impairment" mandate significantly differentiates FLPMA land policy in general (to which FLPMA assigns a "multiple use-sustained yield" directive)⁷⁷ from those areas possessing wilderness study qualities. In recognition of the Wilderness Act mandate, the Department of the Interior issued a special Interim Management Policy for Lands under Wilderness Review ("IMP").⁷⁸ The IMP requires the agency

to ensure that each WSA satisfies [the definition of wilderness] at the time Congress makes a decision on the area The Department therefore has a responsibility to ensure that the existing wilderness values of all WSAs . . . are not degraded so far . . . as to significantly constrain the Congress' prerogative to . . . designate a WSA as a wilderness⁷⁹

65. See, e.g., George Cameron Coggins et al., *The Law of Public Rangeland Management I: The Extent and Distribution of Federal Power*, 12 ENVTL. L. 535, 539, 563 (1982) (pointing to political and financial conditions that impede effective land management).

66. See, e.g., *id.* at 539, 560–63, 579–80; see also *The Electronic Drummer*, THOREAU INST., <http://www.ti.org> (last updated Dec. 31, 2006) (promoting "the repeal of federal and state planning laws and the closure of state and local planning departments").

67. See *SUWA*, 542 U.S. 55, 58–59, 66–67 (2004).

68. *Id.* at 57–58.

69. Wilderness Act of 1964, 16 U.S.C. § 1131 (2012) (containing no relevant planning requirement); Federal Land Policy and Management Act of 1976; 43 U.S.C. § 1701(a) (2012) (containing no relevant planning requirement).

70. 16 U.S.C. § 1133(c) (2012) (providing that designated wilderness areas, subject to certain exceptions, "shall [have] no commercial enterprise and no permanent road . . . no use of motor vehicles . . . and no [manmade] structure[s]"); see also JOSEPH L. SAX, MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS 91–101 (1980) (providing a history of the Wilderness Act).

71. *Federal Lands and Indian Reservations*, U.S. GEOLOGICAL SURVEY, <http://nationalatlas.gov/printable/fedlands.html> (last visited June 10, 2014) (providing the total federally-owned acreage); *The Beginnings of the National Wilderness Preservation System*, WILDERNESS.NET, <http://www.wilderness.net/nwps/fast-facts> (last visited Mar. 20, 2015) ("[T]he NWPS . . . now includes 762 areas (108,916,658 acres) in 44 states and Puerto Rico. In 1980, the passage of the

Alaska National Interest Lands Conservation Act (ANILCA) added over 56 million acres of wilderness to the system Alaska contains just over half of America's wilderness, only about 2.7% of the contiguous United States—an area about the size of Minnesota—is protected as wilderness."). The designation of a wilderness area can be made only by Act of Congress. 43 U.S.C. § 1782(b) (2012).

72. See Interim Management Policy and Guidelines for Land under Wilderness Review, 44 Fed. Reg. 72,014, 72,014 (Dec. 12, 1979) (explaining that the Interim Management Policy applies prior to Congress' review and designation).

73. *SUWA*, 542 U.S. at 59.

74. *Id.* (citing BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, UTAH STATEWIDE WILDERNESS STUDY REPORT 3 (Oct. 1991)).

75. *Id.*

76. 43 U.S.C. § 1782(c) (emphasis added).

77. 43 U.S.C. § 1732(a) (2012) ("The Secretary shall manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans . . . when they are available . . .").

78. BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, H-8550-1 Rel. 8-67, INTERIM MANAGEMENT POLICY FOR LANDS UNDER WILDERNESS REVIEW (1995).

79. *Id.* at 4.

The U.S. Court of Appeals for the Tenth Circuit has stated the following with regard to FLPMA's wilderness "non-impairment" mandate authority:

As part of the non-impairment mandate, the IMP mandates that the BLM may only authorize "non-impairing" activity in the WSAs. Under the IMP, use of WSA land will be considered "non-impairing" if two criteria are met. First, the use must be temporary in nature, meaning that it does not "create surface disturbance or involve permanent placement of structures" (emphasis added). The IMP defines "surface disturbance" as "any new disruption of the soil or vegetation which would necessitate reclamation." Second, after the activity terminates, "the wilderness values must not have been degraded so far as to constrain significantly the Congress's prerogative regarding the area's suitability for preservation as wilderness."⁸⁰

Aside from identification of WSAs and the nonimpairment requirement, the main tool that the Department of the Interior establishes to protect wilderness-eligible areas is the land use plan ("LUP").⁸¹ FLPMA contains an explicit requirement that subject agencies develop, maintain, and, when appropriate, revise LUPs for the territories they administer,⁸² and requires the agencies to "manage the public lands . . . in accordance with the land use plans."⁸³ BLM's implementing regulations sometimes call these plans "resource management plans."⁸⁴ FLPMA plans, adopted after notice and comment, are "designed to guide and control future management actions."⁸⁵

Generally, a LUP for a particular area describes allowable uses, goals for future condition of the land, and specific next steps.⁸⁶ BLM's LUPs are clearly established as mandatory; BLM regulations state that the agency "will adhere to the terms, conditions, and decisions of officially approved and adopted resource related plans."⁸⁷ The Department of the Interior's WSA LUPs are dominated by the wilderness mandate; they are clearly "dominant use" plans, not "multiple use" plans.⁸⁸ As the IMP provides, nonimpairment of wilderness quality is the instrumental standard.⁸⁹ In contrast, the majority of "multiple uses" as defined and exercised in non-WSA areas could cause substantial and long lasting distur-

bance and alteration of the character of the land and ecology of WSAs.⁹⁰

Off-road vehicles ("ORV") are a primary threat to the wild character of public lands, particularly in the West. In stretches of desert such as the Factory Butte WSA contested in *SUWA*, ORV tracks can, in one afternoon, carve up the fragile desert floor leaving long-lasting rutted tracks.⁹¹ Roads developed within WSAs not only create permanent features detracting from wilderness designation, but also open these areas to a wide variety of other disruptive activities that degrade the wilderness quality of the area.⁹²

In *SUWA*, pressures of ORV recreationists to drive their vehicles throughout WSAs in Southern Utah, and BLM's insistent reluctance to restrict such wilderness-destroying activities, reflect a complexity of social, economic, and political forces. These areas are not only extremely attractive to motorized outdoor recreation users, where powering a macho internal combustion machine through virgin territory is apparently of particular attraction. The wilderness-cancelling effect of ORVs and beaten trails is also extremely attractive to market forces eager to open up these untapped "empty" public lands to resource exploitation—timber, mining, ranching, and intensive recreation like ski resorts.⁹³ Strong political pressures support the ORV activity as one foot in the door to future development, specifically for the purpose of blocking potential congressional designation of an area as wilderness.⁹⁴ Profit-driven corporate initiatives and state governmental interests in maximizing extractive industries produce major resistance against designation of wilderness and major incentives to promote uses of the study areas that will prevent them from being "locked up" in the future. As a politically reactive entity, BLM understandably responds to the pressures that impact it most consistently and powerfully—not the often diffuse and plaintive desires of low-intensity hikers, birders, and fisherman, nor the long-ago congressional majority that passed the handful of sentences in the Wilderness Act, but rather the much larger numbers of local communities, state legislators, and corporate lobbyists, who all see WSAs as commodities ripe for near-term exploitation to serve subsistence needs or profit maximization.⁹⁵

At issue in the *SUWA* case were the LUPs for the Factory Butte and San Rafael WSAs areas, which are both fragile and

80. *S. Utah Wilderness Alliance v. Norton*, 301 F.3d 1217, 1225 n.4 (10th Cir. 2002).

81. See 43 U.S.C. § 1712(a) (2012) ("The Secretary shall, with public involvement and consistent with the terms and conditions of this Act, develop, maintain, and, when appropriate, revise land use plans.").

82. *Id.*
83. 43 U.S.C. § 1732(a) (2012).

84. 43 C.F.R. § 1601.0-5(n) (2014) ("Resource management plan means a land use plan . . .").

85. 43 C.F.R. § 1601.0-2 (2014); see also 43 C.F.R. § 1610.2 (2014) (defining role of public participation in resource management); see generally 43 U.S.C. § 1712 (describing FLPMA's land use plans).

86. 43 C.F.R. § 1601.0-5(n).

87. 43 C.F.R. § 1601.0-5(c) (emphasis added).

88. See, e.g., PLATER ET AL., ENVIRONMENTAL LAW & POLICY: NATURE, LAW & SOCIETY 386–92 (4th ed. 2009) (describing the difference between "multiple use" and "dominant use").

89. Interim Management Policy and Guidelines for Land Under Wilderness Review, 44 Fed. Reg. 72,014, 72,015 (Dec. 12, 1979).

90. See PLATER ET AL., *supra* note 88, at 389.

91. See *infra* Fig. 1 (showing ORV tracks that may last for fifty years or more); see also *Off-Road Vehicles*, CENTER FOR BIOLOGICAL DIVERSITY, http://www.biologicaldiversity.com/programs/public_lands/off-road_vehicles/ (last visited June 10, 2014).

92. See generally S. UTAH WILDERNESS ALLIANCE, PETITION TO SECRETARY OF THE INTERIOR: REQUEST FOR IMMEDIATE CONSIDERATION AND ACTION ON THE FACTORY BUTTE AREA EMERGENCY PROTECTION ORDER (Apr. 1, 2005).

93. Editorial, *No Management Plan: BLM Makes Gift of Land to Off-Roaders, Drillers, SALT LAKE TRIB.* (Aug. 11, 2008, 9:42 PM), <http://archive.slttrib.com/printfriendly.php?id=10171145&ctype=ngpsid>; see also Michael C. Blumm & Sherry L. Bosse, *Norton v. SUWA and the Unraveling of Federal Public Land Planning*, 18 DUKE ENVTL. L. & POL'Y F. 105, 148 (2007).

94. Blumm & Bosse, *supra* note 93.

95. See, e.g., C.F. Runge, *Book Review*, 22 NATURAL RESOURCES J. 262, 262–64 (1982) (reviewing PAUL J. CULHANE, PUBLIC LAND POLITICS: INTEREST GROUP INFLUENCE ON THE FOREST SERVICE AND THE BUREAU OF LAND MANAGEMENT (1st ed. 1981)).

arid territories, previously roadless, and perhaps beckoning mineral exploration as well as ORV adventure.⁹⁶ BLM had acknowledged that road building and the terrain-destroying effects of ORVs could eliminate the potential wilderness-eligible character of these areas; in 1990, a LUP identified Factory Butte as a region requiring special monitoring for ORV use, stating that “[t]he area will be monitored and closed if warranted,” and indicating that “[r]esource damage will be documented and recommendations made for corrective action,” and that an ORV implementation plan for San Rafael “will be developed.”⁹⁷ BLM, however, took only trivial steps to restrict ORV entry into the wild areas⁹⁸—vivid ORV tracks laced the desert floor around the butte—and had not done what the LUPs had seemed to promise. The Agency acknowledged that, for the prior ten years, it had not complied with the Factory Butte monitoring pledge, in particular failing to maintain monitoring supervision files specified in the LUP, and had not developed an adequate implementation plan for San Rafael.⁹⁹ BLM clearly recognized that extensive wilderness-negating ORV use was taking place in the WSAs, and just as clearly, the Agency was turning a blind eye to their degradation.

Figure 1: ORV; Factory Butte WSA



To the left, a quad-track ORV. To the right, a Factory Butte Wilderness Study Area photograph showing the extensive ORV tracks that are likely to prevent the WSA's designation as wilderness under the Wilderness Act of 1964. Ray Bloxham, *Impacts of Off-Road Vehicles: Factory Butte*, S. UTAH WILDERNESS ALLIANCE, <http://action.suwa.org/site/PhotoAlbumUser?view=UserPhotoDetail&PhotoID=14677&position=4&AlbumID=5821> (last visited May 6, 2015).

B. SUWA's Citizen Enforcement Effort

As so often in the history of U.S. environmental law, it was not the agencies (or Congress, or the President) that pushed the enforcement of the environmental protection laws that applied; citizen litigation remains the main workhorse.¹⁰⁰

Southern Utah Wilderness Association made three separate claims in a citizen suit: (1) BLM violated the “non-impairment” mandate, by allowing ORVs to roam unconstrained in the WSAs;¹⁰¹ (2) BLM failed to follow the LUPs requiring that it monitor ongoing ORV use to determine whether the degree to which the land was being eroded, in order to support responsive regulation;¹⁰² and (3) the agency failed to take a “hard look” at whether it should issue a supplemental Environmental Impact Statement (“EIS”), a NEPA claim resulting from mushrooming ORV use and BLM's departure from plan obligations.¹⁰³

Instead of reconsidering and reforming its patterns of nonfeasance, BLM bitterly resisted the citizen challenges. As to the nonimpairment violation, BLM argued that, as long as an agency is taking some action toward fulfilling its legal obligations, courts may not compel compliance with statutory commands.¹⁰⁴ The Tenth Circuit disagreed: “Our inquiry under [5 U.S.C.] § 706(1) is . . . whether the agency has unlawfully withheld or unreasonably delayed a legally required, nondiscretionary duty . . . [T]he non-impairment mandate obligation of the BLM is a discrete obligation having independent significance.”¹⁰⁵

As to the official FLPMA plans, BLM argued that LUPs do not create binding, mandatory, non-discretionary duties because LUPs “are not Congressional mandates, and they are subject to contingencies, such as availability of funds, personnel and the presence of competing priorities,”¹⁰⁶ an argument the circuit court dismissed, noting in part the Code of Federal Regulations provision that BLM “will adhere to the terms, conditions, and decisions of officially approved and adopted resource related plans.”¹⁰⁷ “Straightforward reading of the relevant LUPs, as well as applicable statutes and regulations, suggests that the BLM must carry out specific activities promised in LUPs.”¹⁰⁸ The Tenth Circuit also rejected BLM's argument that its ability to amend LUPs frees the agency from adhering to existing plans.¹⁰⁹ “Just as the BLM can be

held accountable for failing to act with regard to its non-impairment duty, it also can be held accountable for failing

most intricate question of how air pollution offset credits can be brokered in interstate transfers, in a vast swath of law-building since 1970. One cannot understand the legal development of major command and control regulatory systems like the Clean Air Act without knowing the role played by citizen NGOs and their attorneys. The one possible exception to the primacy of citizen litigation is probably the field of toxics regulation, in which agency initiative has built most of the doctrine, not so much in response to citizen litigation as to the deep popular revulsion against toxic contamination.

96. See *S. Utah Wilderness Alliance v. Norton*, 301 F.3d 1217, 1233 (10th Cir. 2002).

97. *Id.* at 1233–34.

98. At Factory Butte, BLM merely posted some signs and closed certain roads. See *id.* at 1230.

99. BLM admitted that it prepared an ORV implementation plan for the San Rafael WSA on October 6, 1997, but that it had been only partially implemented. *Id.* at 1234.

100. Citizen litigation has shaped most of the modern administrative structure of environmental law, from NEPA as a tangible procedural requirement to the

101. See *S. Utah Wilderness Alliance v. Norton*, 301 F.3d at 1223.

102. See *id.* at 1233.

103. See *id.* at 1236–37.

104. *Id.* at 1231.

105. *Id.* at 1231–32.

106. *Id.* at 1233.

107. *Id.* at 1234 (quoting 43 C.F.R. § 1601.0-5(c) (2014)).

108. *Id.*

109. *Id.* at 1235.

to act as required by the mandatory duties outlined in an LUP.”¹¹⁰ BLM finally argued that plans only guided future and affirmative actions, not failures to act in accordance with an existing plan.¹¹¹ The Tenth Circuit was unconvinced and reversed the district court on that point as well.¹¹²

C. SUWA in Justice Scalia’s Court

When the case reached the U.S. Supreme Court, however, Justice Scalia fashioned the opinion of the Court—mystifyingly unanimous¹¹³—that not only took no notice of the Agency’s dereliction of its duty to protect the wilderness study areas and attempted to weaken the statutory commands,¹¹⁴ but, more to the point, seriously eroded the concept of federal resource management planning. As to the statute’s nonimpairment command, in his *SUWA* decision, Justice Scalia declared:

[I]t leaves BLM a great deal of discretion in deciding how to achieve it *SUWA* argues that [under FLPMA’s] categorical imperative, namely the command to comply with the non-impairment mandate . . . a federal court could simply enter a general order compelling compliance with that mandate, [but the] principal purpose of the APA limitations . . . is to protect agencies from undue judicial interference with

their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve.¹¹⁵

As to the enforceability of plans, Justice Scalia made a perplexing distinction:

The statutory directive that BLM manage “in accordance with” land use plans and the regulatory requirement that authorizations and actions “conform to” those plans, prevent BLM from taking actions inconsistent with the provisions of a land use plan. Unless and until the plan is amended, such actions can be set aside as contrary to law The claim presently under discussion, however, would have us go further and conclude that a statement in a plan that BLM “will” take this, that, or the other action, is a binding commitment [enforceable by citizens in court]¹¹⁶

Up to this point, the Justice’s position on enforceability of plans is not clear. What is the difference between what he acknowledges as enforceable consistency “conforming to” and “in accordance with” a plan, and, apparently, unenforceable plan provisions that declare an agency “will take” a particular action? The latter, which he deems unenforceable, actually seems more declarative than the former; his argument may also turn on an unspoken assumption that acts of omission are not “actions.” But Justice Scalia’s subsequent words clarified his vision of planning:

Quite unlike a specific statutory command . . . a land use plan is generally a statement of priorities; it guides and constrains actions, but does not (at least in the usual case) prescribe them [A]llowing general enforcement of plan terms would lead to pervasive interference with BLM’s own ordering of priorities Its predictable consequence would be much vaguer plans from BLM in the future—making coordination with other agencies more difficult, and depriving the public of important information concerning the agency’s long-range intentions. We therefore hold that the [plan’s] statements to the effect that BLM will conduct “[u]se [s]upervision and [m]onitoring” 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 [APA] §706.¹¹⁷

What is the result of the *SUWA* decision? On its face, the decision removes effective citizen enforceability of plans being violated by federal agencies by deferring to agency discretion on how statutory mandates should be implemented. Everyone in the *SUWA* litigation recognized that without active citizen enforcement, expanding ORV uses of the WSAs would continue unabated, destroying the WSA’s wilderness character.¹¹⁸ The laws would not be enforced by the official government entities; only citizens, bringing an enforcement action in court, would enforce the statutory and regulatory provisions regarding nonimpairment and planning.

110. *Id.*

111. *Id.*

112. *Id.* at 1235–36. As to the NEPA claim, BLM argued that it was in the process of amending its LUP within three years to take account of admittedly increased ORV use; the Tenth Circuit concluded that possible future procedures did not exempt the agency from the “hard look” doctrine. *Id.* at 1240.

113. See *SUWA*, 542 U.S. 55, 56 (2004). The unanimity of the *SUWA* decision is hard to explain, but may be laid at the door of Justice Scalia’s ability to manipulate administrative law holdings. The author’s first experience of these abilities was in *New York v. Thomas*, 802 F.2d 1443 (D.C. Cir. 1986), in which then-Judge Scalia persuaded his circuit court colleagues to overturn a district court ruling. *New York v. Thomas*, 613 F. Supp. 1472 (D.D.C. 1985), that had held that the terms of Clean Air Act section 115 required regulation of cross-border pollution once an EPA Administrator had made a statutorily-required “finding” (that pollution from the U.S. crossed to Canada, and that Canada granted reciprocal standing to U.S. plaintiffs). See Bennett A. Caplan, *The Applicability of Clean Air Act Section 115 to Canada’s Transboundary Acid Precipitation Problem*, 11 B.C. ENVTL. AFF. L. REV. 539 (1984); Adam Willis, Thomas v. New York: *Sisiphean Tragedy on the Environmental Stage*, 10 LOY. L.A. INT’L & COMP. L. REV. 469 (1988). By arguing that the EPA finding (clearly adjudicatory, not rulemaking) was “rulemaking,” Judge Scalia thereby convinced his two brethren that it was void for lack of the notice-and-comment rulemaking procedure required under 5 U.S.C. § 553(c) (2012). Thus, the statutory environmental protection—which had been the product of a careful compromise in Congress—was nullified. Then-Judge Scalia, it should be noted, for a number of years had been teaching administrative law at the University of Chicago and, presumably, clearly knew the difference between agencies’ adjudicatory and rulemaking actions.

114. *SUWA*, 542 U.S. at 66. In introducing FLPMA’s provisions in *SUWA*, Justice Scalia at the start emphasized “multiple use” as the Act’s central theme: FLPMA “established a policy in favor of retaining public lands for multiple use management . . . including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and [uses serving] natural scenic, scientific and historical values.” *Id.* at 58 (internal citations omitted). He then did acknowledge the Wilderness Act mandate, but presented BLM’s task as “balanc[ing] wilderness protection against other uses.” *Id.* at 59. But of course there is not supposed to be any such balance of “other uses” that undercut wilderness protection, against wilderness protection. Justice Scalia had attempted some of the same legerdemain in arguing that the Endangered Species Act’s (“ESA”) inclusion of an extinction-balancing exemption to be applied in highly extraordinary circumstances implied a general principle of cost-benefit analysis within the ESA. Bennett v. Spear, 520 U.S. 154, 172 (1997).

115. *SUWA*, 542 U.S. at 66.

116. *Id.* at 69.

117. *Id.* at 71–72.

118. *Id.* at 60–61.

The limitation of citizen enforcement, the essential element in the nation's history of environmental protection law, in *SUWA* and a line of other standing cases¹¹⁹ is a consequence discernibly traceable to Justice Scalia's long-running antipathy to such citizen actions. In a famous quote from an address and article he prepared for the *Suffolk Law Review*, in response to Judge Skelly Wright's stentorian *Calvert Cliffs* NEPA decision (which declared that the goal of citizen suits was to assure that important congressional intentions to reduce pollution not be "lost or misdirected in the vast hallways of the federal bureaucracy"),¹²⁰ Justice Scalia asked:

Does what I have said [cutting back citizen standing] mean that . . . "important legislative purposes, heralded in the halls of Congress, [can be] lost or misdirected in the vast hallways of the federal bureaucracy?" Of course it does—and a good thing, too . . . [L]ots of once-heralded programs ought to get lost or misdirected, in vast hallways or elsewhere . . .¹²¹

But *SUWA* not only removes the potential for effective citizen enforcement of the statutes through the leverage of required plan provisions, it also undercuts the concept of planning as an instrumental tool for federal agencies' implementation of their congressionally required duties. If an agency knows that a reviewing court will not hold it to the terms of an official plan which it has produced according to statutory mandate, its planning becomes casual, informal, or mere cosmetology. According to informed observers within the federal land bureaucracy, the effect of the *SUWA* decision has been to make agency FLPMA planning little more than window-dressing on the pragmatic policies and practices that otherwise dictate the daily operation of a federal agency like BLM. In sum, the public participation required in the planning process can be regarded as merely an opportunity to enlist stakeholder support, not a process of hammering out serious provisions to address and enforce congressional mandates.¹²²

IV. Possible Political Explanations

What explains the tendency of federal agencies to underperform the duties required of them by resource management statutes and to erode the provisions of the plans that they themselves have made and formally adopted to achieve those purposes? And what explains the judicial tendency to acquiesce in that agency tendency? It comes as no surprise that there would be extraordinary political pressures brought to bear on federal agencies managing huge blocks of federal lands and resources, particularly in the western United States, where more than half the terrain is owned by the citizens of the United States rather than in private

or state holdings.¹²³ The resources within that land base are understandably the subject, at many levels, of eager initiatives for exploitative development.

Given the pressures of the complex political contexts in which agencies operate, mandatory federal plans—especially those where public participation is curtailed or nonexistent—can fall prey to the same kind of entropic tendencies as EISs; if not downright mistaken in execution (e.g., planning to protect walruses in the Caribbean), they can often be vague, evasive, truncated, and false.¹²⁴

Agencies exist within a political context where congressionally promulgated resource protection statutes, formed in a focused moment of public attention and resolve, declare public policies and occasionally impose stringent legal mandates. Regulatory statutes typically come into being at a moment of public recognition of "market failure," i.e., the private marketplace is in some particular respect failing to serve the public interest. Once a statute is passed, however, the public's attention tends to drift to other areas of concern, and congressional resolve along with it. But the economic and political forces whose actions may have triggered the passage of the regulatory statutes do not drift away; they maintain their daily attention, concern, and resistance to the public values being thrust upon them. Agencies are handed the ambitious mandates of statutes and ordered to bring them into reality through rulemaking, adjudicative enforcement, and programmatic planning and implementation. The insider pressures, now focused upon the agencies left holding the statutory bag, are intensive, extensive, insistent, and powerful.

A. Agency Capture and "Iron Triangles" Blunt the "Dipolar" Paradigm of Social Governance

Professor Lon Fuller of Harvard University once described the standard model of 20th-century regulatory government as, fundamentally, a dynamic two-sided balance.¹²⁵ In his

119. See PLATER ET AL., *supra* note 88, at 241–53 (providing a chronological history of standing cases).

120. *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

121. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 *SUFFOLK U. L. REV.* 881, 897 (1983) (dismissing Judge Skelly Wright's influential clarion call decision in *Calvert Cliffs*).

122. Interviews with Informants at the 2014 Public Interest Envtl. Law Conference in Eugene, Or. (Feb. 27–Mar. 2, 2014).

123. ROSS W. GORTE ET AL., CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 18 (2012).

124. See Andrew Clark, *BP Contingency Plan for Dealing With Oil Spill Was Riddled With Errors*, *THE GUARDIAN* (June 9, 2010), <http://www.theguardian.com/environment/2010/jun/09/bp-oil-spill-contingency-plan> (noting the plan's inclusion of walruses, sea otters, and sea lions as potential victims of an oil spill, although none of these are found in the Gulf region). EISs often mirror such deficiencies. See MATTHEW J. LINDSTROM & ZACHARY A. SMITH, *THE NATIONAL ENVIRONMENTAL POLICY ACT: JUDICIAL MISCONSTRUCTION, LEGISLATIVE INDIFFERENCE, AND EXECUTIVE NEGLIGENCE* 90, 134 (2008). Based on lessons learned from the British Petroleum Deepwater Horizon disaster, the U.S. Environmental Protection Agency ("EPA") is currently preparing to revise the National Contingency Plan for hydrocarbon spills, which theoretically is supposed to cover pipeline breaks as well. The last time EPA updated the National Contingency Plan was 1994, based on lessons learned from the Exxon Valdez spill. In 1994, EPA created an Incident Command System that essentially put the spiller in charge. The entire plan is outdated. It was designed for conventional crude oil spills at sea, not tar sands oil that sinks or extremely volatile (frack) oil that explodes when spilled. This means that oil shippers are transporting oil without viable c-plans illegally. Further, it states a priority to protect public health during spill response but is silent on how to do this, despite ample scientific evidence showing that crude oil is hazardous to humans and extreme oils are ultra-hazardous. Personal Communication from Dr. Riki Ott, Marine Biologist and Envtl. Activist (May 20, 2014).

125. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 *HARV. L. REV.* 353, 383 (1978). I apply the rubric "dipolar" to describe the standard model of

“dipolar” explanation of the standard 20th-century governance model, one pole is the economic marketplace—the largest, most powerful, societal engine, driving our economy to generate innovation, wealth, jobs, culture, and an extraordinary quality of life, as well as negative externalities like pollution. On the other pole, government regulations and regulatory agencies hold the primary responsibility of counterbalancing the excesses of the marketplace economy. The marketplace is the largest most powerful determinant of societal behavior day by day, week by week, and year by year, and official government entities, not citizens themselves, are charged with the role of protecting the public against the excesses and externalities of the market system. In practice, however, as the resource management history of the nation reflects, the dipolar system, dominated by the politics of market forces, often fails to provide sufficient protection for declared public values and the public interest.

Political scientists have long evoked the image of “iron triangles” to describe what actually happens in the dipolar framework of societal governance, which often does not resemble the process described in civics textbooks, and helps understand cases like *SUWA*.¹²⁶ “Iron triangles” are formed by the trilateral relationship between a powerful *industry bloc*, the *governmental agency (or agencies) monitoring that sector of the marketplace*, and the *blocs of legislators* who support that industry sector, typically coddled and served by a specialized cadre of lobbyists.¹²⁷ “Each point of the triangle looks out for and serves the other two points in political and economic terms.”¹²⁸ The narrowed, focused, interlocked interests of the three corners of each triangle create a powerful political status quo within that sector of governance, each point of the triangle motivated by its own intricate system of rewards.¹²⁹ The triangle linkages often reflect the “capture” phenomenon—both agency capture and legislator capture—and the “revolving door” syndrome.¹³⁰ In each case, the iron triangle

dominates the creation and implementation of regulatory constraints upon the market bloc that provides the lobbying, funding, and political and media support for its welfare and continued activity.¹³¹ At the core of the nation’s political establishment, iron triangles tend to work together in resisting the interposition of public interest regulations and interventions by citizen and non-governmental organizational “outsiders.” The concept of insider iron triangles, therefore, undercuts the description, effectiveness, and rationale of dipolar governance; the putatively dipolar system too often becomes centripetal and unipolar.¹³²

B. Dipolarity Meets Pluralistic Multicentrism and Fights Back

Prior to the early 1960s, the dipolar model was arguably an accurate description of how virtually all modern governments worked. The public was, conceptually, a stolid passive multitude. Citizens’ standing to enter actively into the processes of governance was severely limited legally, primarily relegated to the constricted confines of tort law, and, beyond the law, to petitions and other feckless forms of protest interjections into the official corridors of government.

The 1960s brought a series of significant societal changes in broad active citizen movements for civil rights, consumer protection, good music, opposition to imperial wars, and environmental protection.¹³³ The environmental movement perhaps most notably captured the breadth of the shift away from the old stagnant dipolar system. Starting with the *Scenic Hudson Preservation Conference v. Federal Power Commission* case,¹³⁴ citizens were given legal standing without the require-

In political science, “agency capture” is a well-known tendency of industry-agency convergence, and is part of the iron triangle phenomenon. A regulatory agency created in the fervor of a popular movement to regulate some designated problem may begin its life energetically pursuing the overall public interest, but over time its initiative gradually may be eroded into narrower views, intimately linked with the industry and problems it was intended to solve. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1684–87 (1975). Justice William O. Douglas said that “as I told my old friend, . . . Franklin Delano Roosevelt, . . . he should make every regulatory agency terminate after ten years. That’s all the time they’ll have to be effective before they are tamed.” The author recalls Justice Douglas saying this to a class of his at the University of Tennessee (spring semester 1974); according to the author’s recollection, on other occasions Douglas reportedly stated the optimal agency lifetime as five years, not ten.

Id. at 394 n.9.

131. See ZYGMUNT J.B. PLATER, *THE SNAIL DARTER AND THE DAM: HOW PORK-BARREL POLITICS ENDANGERED A LITTLE FISH AND KILLED A RIVER* 78 (2013).
132. See Plater, *supra* note 126, at 393–94; see also OXFORD AMERICAN DICTIONARY AND THESAURUS 225 (2003) (defining centripetal as “moving or tending to move toward a center”).
133. Within the period of two years in the early ‘60s, for instance, three books were written that changed the way society viewed itself. What were they? *The Feminine Mystique* by Betty Friedan, *The Death and Life of Great American Cities* by Jane Jacobs, and, of course, *Silent Spring* by Rachel Carson. Each fundamentally changed the way that generation and subsequent generations thought about the world we live in. The extraordinary civil rights revolution—epitomized by Martin Luther King, Jr., the consumer resurgence—represented by Ralph Nader’s initial assault on unsafe automobile design, and a host of other consumer concerns that followed this period should be added to these three seminal books.
134. *Scenic Hudson Pres. Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965).

societal governance, amending the term that Professor Fuller in a slightly different context actually used (“bipolar”), which to the contemporary ear evokes a very different concept; see also Zygmunt J. B. Plater, *Dealing With Dumb and Dumber: The Continuing Mission of Citizen Environmentalism*, 20 J. ENVTL. L. & LITIG. 9, 25–26 (2005).

126. See Zygmunt J.B. Plater, *The Exxon Valdez Resurfaces in the Gulf of Mexico . . . and the Hazards of “Megasytem Centripetal Di-Polarity,”* 38 B.C. ENVTL. AFF. L. REV. 391, 393–94 n.8 (2011). Current political science semantic convention appears to favor the term “interest networks” instead of “iron triangles,” but “interest network” implicitly misses the power realities of the “iron triangle”—the actual workings of political power are obscured by the “network” rubric because it implies a broad array of different interests without regard to their relative size or influence. See ELIZABETH H. DEBRAY, *POLITICS, IDEOLOGY & EDUCATION* xiii (2006).

127. Plater, *supra* note 126, at 394 n.8.

128. *Id.*

129. See *id.*

In government as well as geometry, triangles are the strongest of all geometric shapes. The “iron triangle” term has useful descriptive application in a wide variety of special interest settings, some more benign than others. There are iron triangles for mining, timber, chemicals, ranching and rangelands, highway construction, public works pork barrels, [oil and gas, big pharma, banking,] the defense procurement industry, as well as for education, medicine and hospitals, sewage treatment, NASA, and more.

Id. (internal citations omitted).

130. See *id.* at 400 (describing the “revolving door” between industry and regulators as producing what political science describes as agency capture).

ment of direct economic or constitutional property rights to be vindicated. The revolution in standing was reinforced by an array of citizen suit provisions in the parade of Nixon-era environmental statutes.¹³⁵ The result has been that America began to shift away from a dipolar to a “multicentric” model. No longer were the official agencies and Washington insiders the insulated determinants of how environmental laws would be interpreted and implemented. As noted, every single environmental protection statutory system in the United States has been fundamentally shaped by citizen involvement in litigation or legislative actions.

The *SUWA* case, in its embattled context, not to mention the current history of American governance, however, demonstrates that “iron triangles” have not lost their power. BLM’s insistent foot-dragging in the course of its lax protection of the wilderness character of the subject WSAs reflects pressures coming from a powerful combination of local communities, state and federal legislators, heavily funded commercial recreation industries, and extractive industries’ political opposition to wilderness “lock-ups,” plus the agency’s own ambivalence toward conservation-minded citizen activists.¹³⁶ This is not to say that BLM and other resource management agencies are monolithically biased against wilderness preservation and nonextractive uses. Within the agencies, many estimable employees would prefer to enforce the resource management laws straightforwardly. The existence of groups like Forest Service Employees for Environmental Ethics and Public Employees for Environmental Responsibility illustrate that fact, but also the fact of powerful “iron triangle” pressures, since both those groups spend a major part of their agendas defending public employees who get in trouble within the agencies for pressing for environmental protection compliance.¹³⁷

The political market pressures upon resource management agencies are so great that some observers have asserted that the agencies will *never* be capable of managing public lands and resources as public interest legislation requires. Professor Jim Huffman has argued that the job of managing public resources is so heavily politicized, with such powerful economic forces dominating agency operations, that the better solution for management of those public resources is to turn them over to private corporate interests;¹³⁸ the argument for

privatization, in one form or another, is based on the premise that conscientious agency implementation of statutes and official plans—whether enforceable by agencies or citizens—is not possible within the political context in which we currently live.

Over the years, since the Goldwater debacle of the 1960s, a conservative resurgence has inexorably mounted, guided by the Powell Memorandum and richly funded by an array of right-wing foundations, many from the fossil-fuel sector.¹³⁹ This insider initiative from the beginning targeted environmental protection law and the U.S. Environmental Protection Agency, and has continually fought to oppose active citizen participation in the enforcement of federal law generally.¹⁴⁰ In effect, the current political scene reflects a continuing battle between the multicentric pluralist tendencies inherited from the 1960s and strong establishment pressures to return to the dipolar structure of governance, inviting what Acemoglu and Robinson describe as the stagnation and entropy consequence of having “extractive élites” as dominant societal play-

management failures gives us reason to explore . . . private ownership.”). For its part, the libertarian Thoreau Institute states,

In the past thirty years, the Thoreau Institute has critiqued well over one hundred forest plans, park plans, transportation plans, and urban plans. We have consistently found that the plans are flawed, and when implemented they produce disastrous results. The problem is with the idea of planning itself. Our new web log, *The Antiplanner*, promotes the repeal of federal and state planning laws and the closure of state and local planning departments.

The Electronic Drummer, THOREAU INST., <http://www.ti.org> (last updated Dec. 31, 2006).

139. See Plater, *supra* note 125, at 38. In 1971, shortly before he was appointed to the Supreme Court, Judge Lewis Powell of the U.S. Court of Appeals for the Fourth Circuit was asked by his neighbor, a high-ranking executive in the U.S. Chamber of Commerce, to write a memorandum for the Chamber on how America’s industrial establishment could beat back the progressive policies that had taken over the nation. See PLATER ET AL., *supra* note 88, at 406. Powell produced a punchy diagnosis and prescription: “Business and the free enterprise system are in deep trouble, and the hour is late.” *The Powell Memo*, RECLAIM DEMOCRACY, http://reclaimdemocracy.org/powell_memo_lewis/ (last visited Feb. 4, 2015). The marketplace was facing, Judge Powell said, a “socialistic” popular clamor for civil rights, environmental regulation, labor rights, consumer protection, and attempts to roll back the military-industrial complex:

The time has come - indeed, it is long overdue - for the wisdom, ingenuity and resources of American business to be marshaled against those who would destroy it . . . Strength lies in organization, in careful long-range planning and implementation, in consistency of action over an indefinite period of years, in the scale of financing available only through joint effort, and in the political power available only through united action and national organizations.

Id. Heeding Lewis Powell’s call, industry started aggregating financial resources and, led by the National Association of Manufacturers and the U.S. Chamber of Commerce, launched a complex and coordinated long term counterattack. They created a sophisticated network of Washington political strategists, media specialists, and lobbyists selectively distributing bundles of campaign contributions to legislators. They set up the Heritage Foundation, a probusiness institute dedicated to producing academically credentialed studies and reports that supported antiregulatory policy arguments, and re-energized the American Enterprise Institute. With grants and other emoluments they cultivated a cadre of law school and other acquiescent academics that could be counted on to bring the promarketplace message to the universities. They founded and lavishly funded “conservative” clubs on many campuses, and Federalist Society chapters at virtually all the nation’s law schools. They set up the Pacific Legal Foundation (“PLF”) and a dozen similar clones of PLF as self-described “public interest law firms” committed to representing a wide variety of industry positions against public interest laws and initiatives. Guided by the Powell Memorandum, this industry-neon politico-cultural effort launched in 1971 has changed the face of American politics.

140. Plater, *supra* note 125, at 50–51, 57–58.

135. By my count, there were thirty-four important environmental statutes passed in the Nixon Administration in the three years after NEPA, which became law on Jan. 2, 1970, and at least twenty of these had citizen suit and fee-shifting provisions. Only Jimmy Carter’s years come close, with twenty in an equivalent span, many of which were perfecting amendments.

136. For years, environmental activists have joked that BLM stands for the “Bureau of Livestock and Mining.”

137. Telephone Interview with Pub. Emps. for Envtl. Responsibility’s Senior Counsel (June 12, 2014).

138. See Huffman, *The Inevitability of Private Rights in Public Lands*, 65 U. COLO. L. REV. 241, 273, 276–77 (1994) (“[P]ublic lands management is fundamentally about politics The lords of the public lands are, and always have been, private interests So long as half of the American West is owned by the United States Government, the pursuit of public land wealth by private interests will be a dominant factor in national politics”); see also Huffman, *Public Lands: The Case for Privatization*, NRLI NEWS, Winter 1995, at 10–11 (“[G]overnment planners are unable to regulate an economy consisting of millions of individual actors and billions of individual decisions. The empirical evidence of government failure is legion The history of public lands

ers.¹⁴¹ Justice Scalia's opinion in *SUWA* illustrates how the same political constraints that press heavily upon the internal operations of resource management agencies can be echoed in judicial agendas pushing for a return to the old dipolar stasis, deferring to agency accommodations with market forces and restricting the abilities of citizens to enforce laws.

What explains the difference in seriousness of planning and its implementation between the NULPA and CZMA layered planning model and the more familiar federal agency resource management model? There appears to be a sharp contrast. In part, of course, the stringent planning compliance of CZMA reflects the fact that it is driven by substantial financial grants keyed to objective implementation of the planning process.¹⁴² In part, it also adds much to the attractive political partnership between federal and state authorities that lies at its core; unlike federal resource agencies, the CZMA program is politically buffered from development pressures by state political buy-in to its regulatory mission. Much of the overall distinction, however, can probably be attributed to the specificity that is statutorily required of plans, the statutory insistence that they be adhered to, and the checks and balances built into the state-federal interaction and OCRM's openness to citizen enforcement suggestions, maintaining a sense of administrative vigilance and a presumption of plan compliance. Those qualities are too often undercut in the political context of the federal resource management agencies.

V. Conclusion

The history of resource management planning and implementation in the United States continues to be a revealing exemplar of the evolving structure of the nation's governance structure. The layered model of federally mandated planning in NLUPA and CZMA offers an innovative framework for comprehensive rationalization of land use management decisions—a framework resisted by the market forces that prefer 80,000 fractionalized, uncoordinated local land programs, so that ultimately NLUPA was blocked from becoming law. CZMA, in practice, however, has been a successful exemplar of the layered model, though at a much decreased scale

from that of NLUPA. CZMA planning programs facilitate a balance between natural resource protection and human economic uses, as relevant today as it was at the inception of CZMA. Just as a contemporary NLUPA might well offer a substantial improvement upon today's still-uncoordinated, local-based land use patterns, federal resource agency management could learn much from the specificity and enforceability of the federally chartered CZMA program.

A plan is only as good as the data, standards, procedures, and good faith incorporated in its creation and implementation. Each element in turn can spawn multiple controversial questions and debates, which may ultimately lead to “once-heralded programs [getting] lost or misdirected in vast hallways or elsewhere.”¹⁴³ Federal agencies exist within a political context where congressionally promulgated resource protection statutes, formed in a focused moment of public attention and resolve, declare public policies and occasionally impose stringent legal mandates in public recognition of “market failure”—that the private marketplace is in some particular respect failing to serve the public interest. There has been, however, a widespread failure of the traditional “dipolar” model of societal governance, which illustrates a pressing current need for transparency and for the defense and evolution of the “multicentric” post-1960s pluralistic model of societal governance, with effective citizen participation and enforcement in the process of federal land management planning.

One of the further lessons of this overview, therefore, is the importance of integrating citizen participation into resource agency operations, counteracting the tendency to return to the old dipolar, iron triangle-burdened governance model. If citizen involvement in federal resource agency management is incapacitated due to agency obstruction and lack of judicial support, then the interests that will generally be reflected within agency processes will be those of the focused economic players invested in exploiting public resources for short-term gain, without regard for the long-term interests of the public and the conservation mandates of the law. As we often tell our students: scratch away at the surface of almost any environmental controversy, and pretty soon you'll find yourself looking at deep questions of democratic governance.

141. See generally D. ACEMOGLU & J. ROBINSON, *WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY* (2012).

142. Perhaps the most successful federal planning program is the Clean Water Act (“CWA”) Water Quality Management Planning program, 33 U.S.C. § 1251 (2012), focused on wastewater. Federal funding encourages states to plan with regional and local units to build and maintain sewerage facilities and monitor impacted waters; the program has had a tangible effect on development patterns. The planning required by the CWA is large-scale and relatively open-ended in the management mandates it dictates.

143. Scalia, *supra* note 121, at 897.