What Are the Parks For? Making Policy Explicit in the Park Service's NEPA Decisions

Louis Russell

Follow this and additional works at: http://scholarship.law.berkeley.edu/elq

Recommended Citation
Available at: http://scholarship.law.berkeley.edu/elq/vol41/iss2/14

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38825M

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Ecology Law Quarterly by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcer@law.berkeley.edu.
What Are the Parks For? Making Policy Explicit in the Park Service’s NEPA Decisions

Louis Russell

In WildEarth Guardians v. National Park Service, the plaintiff organization brought a values-based challenge to a National Park Service decision that was both based on a technical determination and within the agency’s discretion. While such challenges must be channeled through the National Environmental Policy Act, the statute is a poor fit in that it cannot be used to force a different discretionary decision. Public participation is especially desirable for broad policy decisions, because public input assures legitimacy, accountability, and transparency in decisions that cannot be made entirely on the basis of expertise. This is especially true of Park Service decisions involving broad discretion—by definition including those made in Records of Decision based on Environmental Impact Statements—because the Park Service places special emphasis on values. One method of enhancing the value of public input for these decisions is for the Park Service to include in its Records of Decision a statement of policy, explaining not only why the decision is within the agency’s discretion, but how it serves both the policies of the National Environmental Policy Act and the agency’s mission as mandated by its Organic Act and Management Policies.

Introduction........................................................................................................522
I. Explanation of Surrounding Law ........................................................................525
   A. Substantive Law: Organic Act and Enabling Act........................................525
   B. Substantive NPS Guidance........................................................................525
   C. Procedural Law: NEPA and the Administrative Procedure Act........526
   D. NPS Procedural Guidance: A Prominent Role for Public Input...529
II. WildEarth Guardians v. National Park Service: Opinion and Context ........................................................531
    A. A Wolf Reintroduction Primer ..............................................................531
    B. Elk in RMNP .....................................................................................533
    C. The RMNP Elk Management Plan .....................................................534
    D. The Tenth Circuit’s Analysis...............................................................537
    E. The Place of WildEarth Guardians in the Story.............................537
INTRODUCTION

“For whom and for what are the parks most important?”1 Over thirty years after Professor Sax posed this question in Mountains Without Handrails, the conversation has evolved, but park managers, users, and advocates are not approaching a collective answer. Since 1963, the National Park Service (NPS or Park Service) has taken the preservation approach of working “toward maintaining, and where necessary re-establishing, indigenous plant and animal life.”2 The contours of this approach are difficult to draw. In NPS’s role as expert, steward, and representative of the public, the agency faces decisions with implications that reach well beyond park borders.3 The preservation and restoration ethic laid out in NPS’s redefining document, the Leopold Report,4 frequently conflicts with human economic interests. Science alone cannot resolve this tension: It cannot decide whether to make preservation and restoration paramount, or to subordinate nature to human needs.5 Nor can it tell us how much restoration is enough.6

An organization that wants to change NPS’s stance on these questions has three options: it can try to influence the agency politically; it can participate in administrative processes; or it can sue. When an organization sues, however, it must contort its argument to fit within the bounds of the National Environmen-
tional Policy Act (NEPA), the federal statute that requires agencies to prepare an Environmental Impact Statement (EIS) for any “major Federal action significantly affecting . . . the environment.” There is simply no other federal statute through which a plaintiff can bring this type of claim with any hope of success. NEPA forces agencies to consider, but not to act on, the environmental consequences of their actions. A plaintiff organization must, in short, convert an argument based on policy or ethics into one based on techno-rational disputes. A NEPA suit is thus an uneasy fit for a plaintiff motivated by values, or a belief that, “[s]omewhere in all our artificial and semi-natural world of factories and automobiles and cow pastures and woodlots, we must have places where the conservation of nature is paramount”—and that those places should include our National Parks.

This is the position of the plaintiff in WildEarth Guardians v. National Park Service. WildEarth Guardians argued that reintroducing gray wolves to Rocky Mountain National Park (RMNP) was a reasonable alternative for dealing with the park’s overpopulated elk, and thus should have been included in the EIS for the park’s Elk Management Plan. "Legally,” WildEarth conceded, “this case is about process.” WildEarth claimed that it only wanted to enforce the procedure that NEPA mandates, even if the decision was ultimately within NPS’s discretion. However, in doing so, the organization hoped to influence NPS’s eventual decision by forcing the agency to consider reintroducing a self-sustaining wolf population to the park, and by opening that alternative up to NEPA’s public input process, thereby increasing public pressure on the agency. In short, WildEarth wanted to bring NPS around to seeing a reintroduced wolf population as an essential part of a park where, in its view, "the conservation of nature is paramount.”

NPS does not disagree that conservation is paramount to parks. Instead,
it based its decision not to consider the “natural wolf alternative” on practicalities, concluding that the alternative was “infeasible” and thus did not need to be included in its alternatives analysis. The NPS Regional Director made this determination on the basis of scientific reports and consultations with experts, who had concluded that the natural wolf alternative would be impracticable. Ultimately, however, “feasibility” is a policy judgment—one that depends on what monetary and political tradeoffs an agency is willing to make to pursue an action.

Contrary to WildEarth’s claim, then, the crux of its suit was not process but policy. WildEarth sought to advance a different answer to Professor Sax’s question: that parks are for nature in as close to its “original” state as possible, even if substantial tradeoffs must be made. This Note examines the disconnect between this type of values-based policy conflict and the NEPA arena in which it plays out, where values take a backseat to science. Because the court quite easily decided for NPS under a “rule of reason,” I conclude that the WildEarth Guardians decision demonstrates the ineffectiveness of the NEPA process for members of the public who wish to influence NPS’s decision making on a broad scale.

Part I explains the substantive and procedural law involved in WildEarth Guardians and the public participation framework for NPS decisions. Part II explains the facts of the case, the court’s analysis, and how the case fits into the tumultuous American saga of wolf reintroduction. In Part III, I argue that WildEarth waged “the right fight on the wrong battleground”: that its suit shows a disconnect between the intent and the content of NEPA suits, which, when used to challenge broad agency decisions as in WildEarth Guardians, inevitably “cloak” a dispute over values in scientific debate. Finally, in Part IV I propose a simple, if optimistic, solution: NPS should issue guidance that requires decision makers to include a “statement of policy” in all RODs—in other words, decisions that are certain to be based on policy. This, I suggest, would enhance NPS’s transparency, accountability, and legitimacy and lead to better

---

19. By “broad,” I mean both philosophically and organizationally—that is, WildEarth wanted to influence NPS’s attitude toward its mission in general, and it also wanted to compel a change in agency action that could only come from a policy decision made at a national level. Reintroducing wolves would have been “above the pay grade” of the superintendent at Rocky Mountain National Park (RMNP). See John Donahue, Wildlife in Parks: Policy, Philosophy and Politics, 14 GEO. WRIGHT F. 47, 54 (1997), available at http://www.georgewright.org/141donahue.pdf (“Only the Directorate can determine when the moment is right for such action.”).
decision making.

I. EXPLANATION OF SURROUNDING LAW

A. Substantive Law: Organic Act and Enabling Act

The background law of *WildEarth Guardians* includes the National Park Service Organic Act and the enabling legislation for Rocky Mountain National Park (RMNP Act). Congress created the National Parks with a dual mandate: 1) “to conserve the scenery and the natural and historic objects and the wild life therein”; and 2) “to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.” Today, the Park Service understands its Organic Act to prioritize conservation over “enjoyment” when the two conflict.

The enabling legislation for RMNP sets it “apart as a public park for the benefit and enjoyment of the people of the United States.” RMNP’s Strategic Plan further explains that the park is “significant” because of the access it provides to a “wild landscape,” its dramatic scenery, its opportunities for tranquility, and its recreational opportunities. RMNP is also part of the UNESCO International Biosphere Reserve, a network of protected areas “devoted to conservation of nature and genetic material and to scientific research.” NPS thus recognizes biodiversity, scientific value, and recreation as fundamental to RMNP.

B. Substantive NPS Guidance

In addition to the Organic and RMNP Acts, NPS guidance mandates that the agency endeavor to preserve the components and processes of the Parks’ ecosystems. To this end, NPS recognizes the necessity of active management and restoration “to maintain the closest possible approximation of the natural condition,” where “biological or physical processes were altered in the past by

---

21. Id. § 1.
22. MANAGEMENT POLICIES, supra note 15, § 1.4.3; ELK MANAGEMENT PLAN, supra note 11, at 30; see also S. Utah Wilderness Alliance v. Nat’l Park Serv., 387 F. Supp. 2d 1178, 1189 (D. Utah 2005) (upholding NPS’s 2001 Management Policies, which introduced this interpretation of the “no-impairment” mandate, under *Chevron v. Natural Resources Defense Council*). For instance, the most recent Yosemite Plan has called for decreased vehicle traffic in the valley and a decreased human footprint on the Merced River. Norimitsu Onishi, *A Plan to Save Yosemite by Curbing Its Visitors*, N.Y. TIMES, July 28, 2013, http://www.nytimes.com/2013/07/29/us/plan-for-yosemite-calls-for-scaling-back-human-activity.html?_r=0. NPS retains “discretion to allow impacts to park resources and values when necessary and appropriate to fulfill the purposes of a park, so long as the impact does not constitute impairment of the affected resources and values.” MANAGEMENT POLICIES, supra note 15, § 1.4.3.
24. ELK MANAGEMENT PLAN, supra note 11, at 33.
25. Id.
26. Id. at 2.
human activities.”27 This management involves using the “best available technology,” which in this context includes restoration of naturally occurring species.28

C. Procedural Law: NEPA and the Administrative Procedure Act

As a federal agency within the Department of the Interior, NPS’s actions are also subject to NEPA. As federal environmental laws go, NEPA is short and concise.29 It has three parts.30 The first declares a national environmental policy whereby the federal government will “use all practicable means and measures . . . to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony.”31 The second part is the Act’s “action-forcing” mechanism, requiring a “detailed statement” on the environmental impacts and feasible alternatives for any “major Federal action[] significantly affecting the quality of the human environment.”32 This “detailed statement,” the EIS, serves the Act’s “action-forcing” purpose in two ways: first, by ensuring that agencies will consider information on significant environmental impacts; and second, by guaranteeing that information will reach the public, who “may also play a role in both the decision making process and the implementation of that decision.”33

As its authors framed it, NEPA “exemplifies the need to view systems through a wider-angle lens that captures the dynamic of ecological principles and promotes sustainability.”34 The statute’s policy statement is immense in scope, attempting to gather all of the interrelated needs of humans and nature in the United States in its ambit.35 Further, nestled between the policy statement and the EIS requirement is section 102(1), “NEPA’s potential substantive mandate.”36 It states firmly, “the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set

---

27. Id.
28. Id. at 31 (internal quotation marks omitted).
32. Id. § 4332(c).
34. Kalen, supra note 30, at 115.
35. In some circumstances, NEPA may also apply to actions by federal agencies with effects outside the United States or its territories. 2 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUB. NAT. RESOURCES L. § 17:7 (2d ed. 2014).
forth in [NEPA].”37

However, within only a few years of its enactment in 1970, NEPA’s procedure swallowed its substance. The Act’s principal architect, Lynton Caldwell, noted in 1973 that “[t]he ultimate effectiveness of the Act is being threatened by underemphasis on its intended ends and overemphasis on one of several means to those ends”—the EIS.38 Subsequently, the Supreme Court effectively stripped NEPA of its substantive mandate, leaving the EIS process as the primary constraint on agencies.39 Thus, NEPA as courts construe it requires only that federal agencies consider the likely environmental impacts of their actions. So long as an agency observes the process of documentation and public notice and comment, NEPA never mandates a course of action.40

Alternatives analysis is “the heart” of the EIS.41 An agency preparing an EIS must “[r]igorously explore and objectively evaluate all reasonable alternatives,” including those “not within the jurisdiction of the lead agency.”42 Courts accord agencies a high degree of deference in determining which alternatives are “reasonable,” as agencies “are not required to analyze infeasible alternatives so long as they articulate the reasons supporting their decisions.”43 The agency then must predict whether each alternative for the proposed project will have a significant impact on the environment.44

In part because of the EIS’s focus on prediction, and in part because of the

---

37. 42 U.S.C. § 4332(1); see Lazarus, supra note 36, at 1514 (quoting 42 U.S.C. § 4332).
40. Moreover, the Council on Environmental Quality regulations likely ensure that NEPA cannot be used to force action, and so “[t]here is nothing to prevent an agency from simply ignoring an emerging problem.” Daniel A. Farber, ADAPTATION PLANNING AND CLIMATE IMPACT ASSESSMENTS: LEARNING FROM NEPA’S FLAWS, 39 ENVTL. L. REP. (ENVT. LAW INST.) 10,605, 10,613 (2009). But see Robert B. Keiter, PRESERVING NATURE IN THE NATIONAL PARKS: LAW, POLICY, AND SCIENCE IN A DYNAMIC ENVIRONMENT, 74 DENV. U. L. REV. 649, 681 (1997) (suggesting that NEPA would apply where NPS fails to act, when inaction would lead to significant impacts). NEPA’s impotence in correcting inaction may also be problematic in addressing deteriorating ecosystems.
42. Id.
43. WildEarth Guardians v. Nat’l Park Serv., 703 F.3d 1178, 1186 (10th Cir. 2013); see League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Serv., 689 F.3d 1060, 1072 (9th Cir. 2012) (“[T]he EIS does not have to consider in detail an alternative that would not provide the research data that the Service seeks to obtain.”); Natural Res. Def. Council, Inc. v. Fed. Aviation Admin., 564 F.3d 549, 557 (2d Cir. 2009) (finding that the Federal Aviation Administration did not need to consider alternatives to runway extension that “were unlikely to secure permit approval” from cooperating state agency); cf. Wilderness Soc’y v. Wisely, 524 F. Supp. 2d 1285, 1311–12 (D. Colo. 2007) (holding that BLM’s note in environmental assessment that alternative was “eliminated [b]ased on guidance received from the BLM Colorado State Office” was an inadequate discussion of the BLM’s reasons).
44. 40 C.F.R. § 1502.14.
actual impossibility of accurate prediction, this process is extremely burdensome for agencies. “The background of ecological complexity” allows those seeking to derail a project plenty of opportunities to challenge the substance of an EIS by finding, among the project’s many possible impacts, alternatives, and mitigation measures, something that the agency has failed to consider. Consequently, the EIS often compels agencies to use the “kitchen sink” approach—addressing every possible challenge, no matter how dubious, to show the agency “considered it”—thus adding cost and delay to the process. The odd result, as Professor Karkkainen notes, is that the EIS “turns out not to be a particularly good device for informing anyone—not key agency decision-makers, and certainly not the public.” The incentives for an agency to overinform in its EIS can thus inhibit both of the EIS’s purposes and discourage meaningful public participation.

Despite the limitations courts place on NEPA’s substantive potential and the EIS’s tendency to overinform, NEPA has had a positive influence on agency behavior. It makes agencies hire personnel who are more sympathetic to the environment, “foster[s] an interdisciplinary approach” to decision making, and also encourages agencies to integrate their decision making across their many plans and actions. Also, through sheer onerousness in the form of cost and delay, the EIS requirement encourages agencies to embed environmental concerns into their decision making. The information gathered for the EIS also changes agency behavior: once the agency has the data, it will likely feel pressure to act on it, both from members of the public and from its own staff—which, because of NEPA’s requirements, is likely more environmentally aware.

---

46. Id. at 346 & n.52. Notably, this was not the Park Service’s approach in crafting its Elk Management Plan EIS.
47. Id. at 346 (noting that “EISs tend to be quite uninformative,” as “more information is not always better”).
49. NEPA’s underpinnings are also problematic, as the EIS rests on two related assumptions that science has since proven false: that the environment is a “static ecological unit,” in equilibrium unless and until it is thrown off by human incursions; and that it is possible for experts to take a “snapshot” of this ecological state, and thereby predict how a human action will impact it. Kalen, supra note 30, at 119–20. One study (albeit from 1986) found that just one-third of EIS predictions were “particularly accurate,” and that most were “either accurate solely by virtue of the vagueness of the forecast or somewhat inaccurate in various complicated ways.” Farber, supra note 40, at 10,610 (citing Paul J. Culhane et al., Forecasts and Environmental Decision Making: The Content and Predictive Accuracy of Environmental Impact Statements 146 (1987)).
51. Ackerman, supra note 50, at 708–09.
52. See Karkkainen, supra note 45, at 349. For example, agencies have increasingly turned to mitigated Findings of No Significant Impact (FONSI) to avoid having to write EISs by modifying the proposed action to reduce environmental effects. Id. at 348. Professor Karkkainen writes that the use of mitigated FONSI is “the best evidence we have that NEPA is actually altering agency decision-making and improving environmental performance.” Id.
Both the Administrative Procedure Act (APA) and NEPA provide for public input in agency decision making. Under the APA, an agency promulgating a rule must publish a notice in the Federal Register, then “give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments.”54 Similarly, NEPA provides a substantial role for the public in providing input during scoping about what issues an EIS should address, and in commenting on draft documents.55 However, while these statutes are explicit about the procedure for involving the public, they provide little guidance on how public input should factor into an agency’s decision, if at all. Although an agency is required to respond to significant public comments in its final rule,56 an action that is not arbitrary or capricious is never prohibited under either statute, no matter how strong the public opinion or reasoned the comments.57

D. NPS Procedural Guidance: A Prominent Role for Public Input

In addition to the statutory provisions in NEPA and the APA, Park Service guidance embraces public input as integral to agency decision making. In its Management Policies, NPS states that it considers civic engagement a “fundamental discipline and practice,” and that the agency’s mission of conservation relies on “continued collaborative relationships between the Service and American society.”58 Moreover, NPS pledges its “commitment to building and sustaining relationships with neighbors and other communities of interest—both near and far.”59 Every level in the NPS guidance system contemplates civic engagement and public participation.60

Director’s Orders are just below the Management Policies in the NPS guidance framework. With respect to the public’s role in NPS decision making,

53. Lazarus, supra note 36, at 1519.
58. MANAGEMENT POLICIES, supra note 15, § 1.7. NPS explains that civic engagement is the general principle of involving the public, while public participation is civic engagement in actual practice. Id. § 2.3.1.5.
59. Id. § 1.7. NPS thus implies a role for both local stakeholders and groups with more symbolic interests at stake.
60. Id. The Management Policies outline the hierarchy of NPS guidance: (1) the Management Policies themselves; (2) director’s orders; (3) handbooks and manuals issued by associate directors. Id. at 4–5. Below these are instructions, guidance, and directives of regional or otherwise-limited application from superintendents. Id. at 5.
two Director’s Orders supplement the Management Policies. Director’s Order No. 75A sets NPS’s goal “to provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping [NPS’s] decisions and policies.”61 The Order acknowledges that public involvement, and the public’s perception of its own involvement, adds legitimacy to agency decisions.62 In addition, the Director’s Order No. 12 Handbook (“the Handbook”) requires NPS managers “to make every reasonable attempt to consider the issues or alternatives raised” and encourages officials “to be ‘diligent’ and creative in [their] efforts to involve the public in [their] NEPA procedures and resource planning.”63

The Handbook is unequivocal about the desirability of public involvement in “even broad policy-level decisions.”64 It notes that public discussion is even more important when an issue is controversial65 and recommends that broad planning documents can be “ideal places to discuss ecosystem sustainability and management, biodiversity, . . . and other larger-scale issues,” so as “to be more in line with the policy set forth in NEPA.”66 The Handbook thus indicates that the agency should seek transparency about how the policies of NEPA inform its broad policy decisions.

While NPS guidance is enthusiastic about public involvement, it is also vague and noncommittal.67 This is understandable given the agency’s need for flexibility in accommodating many policy concerns, its role as expert, and its statutory duties.68 NPS guidance describes the line at which listening to public input must yield to agency discretion: Order No. 75A includes the caveat that the public “cannot ultimately make many of the decisions that are the legal responsibility of the NPS.”69 It notes that NPS “must make sure to define and communicate what decision-making responsibilities are delegated” to it by

62. Id. at pt. VI(a) (“The public will have a greater appreciation of, and support for, [NPS’s] management if they recognize that [NPS] seek[s], and [is] receptive to, their contributions to and involvement in the important decisions that are made.”). The Order also acknowledges the importance of public involvement “where parks and neighboring communities interact or where there are communities of interest that are engaged with parks.” Id.
64. Id. at 84. The Handbook debunks the idea that only the implementation of a plan, and not the plan itself, requires NEPA analysis, acknowledging that alternatives analysis and public input “would be valuable in making even broad policy-level decisions.” Id.
65. See DIRECTOR’S ORDER #75A, supra note 61, at pt. VIII (“Attention will be focused in particular on those activities where it appears that controversy is not being addressed through proper application of this Director’s Order.”).
66. HANDBOOK, supra note 63, at 89.
67. See DIRECTOR’S ORDER #75A, supra note 61. Suggested “public involvement activities” include “informing and educating the public,” “[c]onsulting the public,” “[l]earning from the public,” etc. Id. at pt. V.
69. DIRECTOR’S ORDER #75A, supra note 61, at pt. VI(A)(6).
Wolves have been a topic of spirited public input, to say the least. In creating its Elk Management Plan, NPS limited public participation on wolf reintroduction from the outset, by deciding not to consider reintroduction in its EIS despite substantial input to the contrary. WildEarth Guardians illustrates the complicated interplay of public participation and agency policy decisions, and it suggests that the NEPA process should be made more effective in connecting the two.

II. WILDEARTH GUARDIANS V. NATIONAL PARK SERVICE: OPINION AND CONTEXT

A. A Wolf Reintroduction Primer

The history of wolf reintroduction is symbolically weighted and emotionally fraught, as “myths, mystifications and other narrative constructions inform the legal disputes” over wolves. While wolves have been reintroduced successfully, over vigorous opposition, in Yellowstone National Park and Canada’s Banff National Park, the controversy surrounding the “symbolic predator” goes back centuries. Early Americans’ attitudes toward wolves were inseparable from their feelings toward wilderness. Essayist Barry Lopez wrote that “[t]o celebrate wilderness was to celebrate the wolf; to want an end to wilderness and all it stood for was to want the wolf’s head.”

The federal government has been no exception to this ambivalence toward the wolf. In its early years of managing land, it fell firmly on the side of fear. In 1915, a year after establishing the National Elk Refuge in Wyoming and a year before creating the National Park system, Congress initiated a program of predator extirpation by appropriating money to eradicate wolves. It did so partly “out of a mistaken belief that eradicating [predators] protected game” — a be-

70. Id. Under constitutional nondelegation principles, members of the public (including special interest groups) cannot perform “inherently governmental activities,” like the final decision to approve or deny a permit. Federal Employees and Partnerships, NAT’L PARK SERV., http://www.nps.gov/partnerships/effect_fed_status.htm (last visited Mar. 12, 2014). Similarly, NPS cannot delegate its duties to private interests—like allowing a local council to manage a park unit—without retaining final reviewing authority. Id.

71. See Michael Burger, Environmental Law/Environmental Literature, 40 ECOLOGY L.Q. 1, 22, 31 (2013) (observing that “[i]f the malevolent Mythic Wolf drove people to exterminate the Real Wolf in the Rocky Mountains, the benevolent Mythic Wolf drove the nation’s attempt to recover it”).

72. WildEarth Guardians v. Nat’l Park Serv., 703 F.3d 1178, 1184 (10th Cir. 2013); WildEarth Brief, supra note 9, at 9.

73. BEYOND WOLVES, supra note 8, at 4–5.

74. Id. at 4 (quoting BARRY LOPEZ, OF WOLVES AND MEN 140 (1978)). Which side people fell on depended largely on their background: Irish folktales saw wolves as wise, while German folktales saw them as foolish; hunters respected the wolves’ teamwork and skill, while farmers saw “a sinister threat to their livelihoods and well-being.” Id. at 4–5.

75. Colburn, supra note 8, at 158 n.57. Many hunting advocates focus on conjectural impacts of wolves on game while ignoring their “salutary effect on the health of wild ungulate populations [and] their habitat.” Debra L. Donahue, Trampling the Public Trust, 37 B.C. ENVTL. AFF. L. REV. 257, 275 (2010). While wolves control ungulate populations, they also improve those populations’ health by cull-
belief that continues today.\textsuperscript{76} While no legislation mandated eradication, the practice became the norm because of the “entrenched routines and unbending constituencies” of NPS and the U.S. Forest Service.\textsuperscript{77} The agencies eventually ended the extirpation programs in response to public pressure—“a moment that, in retrospect, represents a pivot in public lands management.”\textsuperscript{78}

That pivot came largely from changing attitudes and beliefs that were no doubt connected with shifting American lifestyles and culture.\textsuperscript{79} For many people, wolf restoration now represents a kind of redemption for past destruction of North American species and habitats.\textsuperscript{80} Public agencies and organizations have successfully advocated for wolf protection and restoration in several parts of the country. Most famously, the Fish and Wildlife Service (FWS) released a group of wolves into Yellowstone and the northern Rockies in 1995 and 1996, amid a series of legal battles.\textsuperscript{81} FWS designated the northern Rockies wolves a “nonessential, experimental population[ ]” under the Endangered Species Act, allowing them to be treated as threatened rather than endangered. This compromise allowed agencies to manage troublemaking wolves more flexibly and assuaged the fears of ranchers and landowners. Wolves reintroduced in both the northern Rockies and the Southwest have faced intense opposition, particularly from farmers and ranchers, including both litigation and illegal killings.\textsuperscript{82}

Given the entrenched positions of those on every side, the conflicts surrounding wolves do not admit to an easy solution. With wolves, as in other areas of public lands management, “[t]he combination of uncertainty and com-

\begin{footnotes}
\item[76] See Appellants Safari Club International and Safari Club International Foundation’s Reply Brief at 11, WildEarth Guardians v. Nat’l Park Serv., 703 F.3d 1178 (10th Cir. 2013) (No. 08-1479), 2009 WL 1388422 [hereinafter Safari Club Brief] (“A wolf population, fertile or infertile, will harm SCI members who hunt and conserve wildlife in the vicinity of the RMNP.”).
\item[77] Colburn, supra note 7, at 161–62.
\item[78] Id. at 163 & n.80 (citing Stanley A. Cain et al., ADVISORY COMMITTEE ON PREDATOR CONTROL, PREDATOR CONTROL—1971, REPORT TO THE COUNCIL ENVIRONMENTAL QUALITY AND THE DEPARTMENT OF THE INTERIOR (1971)).
\item[79] See id.
\item[80] Id., supra note 8, at 5.
\item[81] Id. at 12–15. In addition, the FWS reintroduced the Mexican wolf in eastern Arizona (again as a nonessential, experimental population), owing much to the efforts of nongovernmental organizations. Id. at 9, 14–15. Defenders of Wildlife and other nonprofits have also instituted preliminary studies for wolf recovery in the Northeast. Id. at 11. Finally, citizens in Alaska voted overwhelmingly to end hunting of wolves using aircraft, in direct opposition to their own legislature. Id.
\item[82] Id.
\end{footnotes}
plethora creates an atmosphere conducive to group polarization.” As anyone familiar with American politics knows, public opinion is driven largely by “competing symbolisms.” Perhaps because of their symbolic status, wolves are so wrapped up in larger debates that it is sometimes difficult to remember the animal at the center of them. In discussing wolf policy, a rancher might emphasize “the importance of more local control, custom, culture, private property rights, and the need for ‘sound science’ in wildlife management,” while a state wildlife manager might expound on “budgets, boondoggles, and state wildlife commissions.” An environmentalist might espouse the view of Professor Deborah Stone, that “[w]ilderness without its animals is dead—dead scenery. Animals without wilderness are a closed book.”

Professor Nie suggests that wolves force us to ask probing questions of ourselves, both individually and as a society: How do we value not only wolves, but biodiversity and evolution? How much do we value habitats and wilderness preserved from human incursions? And “[a]re we willing to coexist with a species that cannot be consumed or turned into profit?” What are we willing to sacrifice to do so? Most immediately, who should make these decisions, and how?

Viewed through this lens, WildEarth Guardians’ challenge to NPS’s Elk Management Plan EIS takes on more dimensions than simply a techno-rational dispute.

B. Elk in RMNP

From the 1960s to the 2000s, RMNP’s elk population grew “without constraint” due to several factors. Predators had been exterminated in the first part of the twentieth century. NPS adopted a nonintervention strategy toward the elk population in 1969. Finally, hunting declined in the surrounding area as it became more developed. As a result, the elk population more than tripled between 1969 and 2007, also becoming more sedentary and more concentrated...
than it would be with predators present.90

The booming elk population overgrazes the RMNP’s vegetation, causing direct and indirect damage to the park’s plant and animal life.91 The unnaturally concentrated elk also decrease the abundance, stand size, and complexity of aspen and montane riparian willow habitats.92 Moreover, 10 to 15 percent of the elk population remains in its winter range during summer, instead of migrating to their summer range as they would under natural conditions.93 As a result, the elk severely inhibit the summer growth of plants in those areas.94 Because aspen and willow communities are particularly biodiverse, the result has been a decline in those communities.95 For instance, a less-impacted riparian willow community would support more beavers, which would create higher water levels, which in turn would support the establishment and growth of more willows.96

C. The RMNP Elk Management Plan

In response to this growing problem, in 2002, NPS began the interagency process of creating a new elk management plan and an accompanying EIS.97 NPS identified the return of beavers, wetlands, and willows as “the overall desired future condition for elk and vegetation on the elk range.”98 The agency noted, “[t]he absence of an intact predator base is a key reason the elk population size, density and behavior is considered to be outside the natural range of variation.”99 In keeping with its mandate to restore the RMNP ecosystem to the “closest possible approximation of the natural condition,” NPS included as its objectives to “[r]estore and/or maintain the elk population” and “the natural range of variation in vegetation conditions on the elk range” “to what would be expected under natural conditions to the extent possible.”100

90. 703 F.3d at 1180–81; ELK MANAGEMENT PLAN, supra note 11, at 2.
91. 703 F.3d at 1180–81; ELK MANAGEMENT PLAN, supra note 11, at 2, 7. In addition, denser populations of elk “could potentially increase the risk of spreading chronic wasting disease[,] . . . a transmissible spongiform [sic] encephalopathy that primarily occurs in free ranging deer and elk in northeastern Colorado and southeastern Wyoming.” ELK MANAGEMENT PLAN, supra note 11, at 9.
92. ELK MANAGEMENT PLAN, supra note 11, at 7.
93. Id. at 9.
94. Id.
95. Id. at 2.
96. Id. at 7, 11.
97. The Town of Estes Park and the Estes Valley Recreation and Parks District participated “in all aspects of developing the plan/EIS” as part of the “core planning team.” Id. at 13. The Colorado Division of Wildlife, Grand County, Larimer County, the Town of Grand Lake, the U.S. Bureau of Reclamation, and the U.S. Forest Service were all on “the extended planning team,” “provid[ing] expertise and data on pertinent topics and [] review[ing] appropriate portions of the plan” and EIS. Id. While the Forest Service has authority over wildlife habitat in National Forest land adjacent to RMNP, the Colorado Division of Wildlife (now Colorado Parks and Wildlife) is responsible for managing the wildlife itself. Id.
99. ELK MANAGEMENT PLAN, supra note 11, at 2.
100. Id.
101. Id. at 12.
Among the proposed alternatives for controlling the elk population that emerged from the public comment process was the reintroduction of a self-sustaining, or “natural,” wolf population.\textsuperscript{102} A scientific report concluded that either predator reintroduction or substitute management techniques (like culling) would be the option most “closely aligned to NPS policy and guidelines” for reducing the RMNP elk population.\textsuperscript{103} However, the authors maintained that the ultimate decision would be one of policy, not science, since their model did not consider the “natural”-ness of a pre-settlement ecosystem in the present time or how it would fit with NPS’s policies and the views of the public, “the true owners of RMNP.”\textsuperscript{104} Attempting to influence that policy decision, a WildEarth report pointed to studies that found several reasons for a choice of reintroduction, including “solid public support for wolf reintroduction in Colorado,” wolves’ effectiveness in dispersing elk, and the benefits of wolves to tourism.\textsuperscript{105}

After a meeting of biologists and other experts and a second round of public comments, NPS did not select the natural wolf alternative as one of four alternatives it would analyze in the EIS.\textsuperscript{106} The Regional Director ultimately made this decision.\textsuperscript{107} NPS explained in the draft EIS that the natural wolf alternative was infeasible “due to lack of support from coordinating agencies, concerns by neighboring communities, the high potential for human-wolf conflicts, and the likelihood that management of wolves in the park would be expensive and time-consuming.”\textsuperscript{108} The unwillingness of the Colorado Division

\begin{footnotesize}
\textsuperscript{102} 703 F.3d at 1181–82.

\textsuperscript{103} Francis J. Singer & Linda C. Zeigenfuss, U.S. GEOLOGICAL SURVEY & NATURAL RES.

\textsuperscript{104} Id. at 264.


\textsuperscript{106} 703 F.3d at 1182. These alternatives included: (1) the “no-action alternative”; (2) rapid population reduction by culling; (3) gradual reduction, by culling up to 200 elk annually for twenty years, coupled with fencing and distribution techniques (the preferred alternative); (4) fertility control of females “to the greatest extent possible,” coupled with culling as needed; and (5) culling combined with intensively managed, phased reintroduction of up to fourteen gray wolves (the environmentally preferred alternative). \textit{ELK MANAGEMENT PLAN}, supra note 11, at 48, 63, 68, 72, 79–80 (2007).

\textsuperscript{107} Telephone Interview with Therese Johnson & John Mack, supra note 17; see HANDBOOK, supra note 63, at 67. The decision did not represent the view of every NPS employee, as some supported reintroduction, at least early in the EIS process. Telephone Interview with Therese Johnson & John Mack, supra note 17; Telephone Interview with Michael Harris & Jennifer Barnes, supra note 13.

\textsuperscript{108} 703 F.3d at 1182. NPS guidance instructs agency decision makers that, “[f]or projects or implementation plans, early in the process you can eliminate alternatives that are not feasible because they are unreasonably expensive, are not implementable for technical or logistic reasons, do not meet park mandates, or are not within legal or other mandatory constraints.” HANDBOOK, supra note 63, at 87–88.

It cautions, however, that “[t]his does not mean that alternatives must be cheap or easy,” and that “[a]gencies often mistake this winnowing process as one that allows them to choose only their favorite alternatives for analysis without having first completed NEPA.” Id. at 88. The guidance describes this “winnowing” as “a procedure for eliminating infeasible or duplicative alternatives while still leaving a full spectrum of reasonable choices.” Id.
\end{footnotesize}
of Wildlife (CDOW) to cooperate in managing reintroduced wolves weighed strongly against the natural wolf alternative, as “without CDOW’s cooperation in managing wolves outside RMNP’s boundaries, NPS estimated wolf reintroduction was unlikely to succeed.” After another round of public comments, NPS released its final EIS in December 2007, selecting “gradual reduction,” primarily through managed killing, as the preferred alternative, again excluding the natural wolf alternative from consideration.

NPS explained in its ROD that “implementation [would] be less complex” for the preferred alternative in relation to Alternatives 4 and 5 (culling coupled with fertility control and managed wolves, respectively); that the preferred alternative would “have a greater level of effectiveness with less time and resources dedicated to implementation”; and that Alternative 5, requiring NPS to manage wolves, would “present logistical challenges” and require more park resources than the preferred alternative. NPS also considered the complexity of the bureaucratic process for reintroducing wolves. Finally, NPS explained that the preferred alternative would not “result in impairment of any of the resources and values of” RMNP, nor would it cause any “unacceptable impacts.” Thus, NPS concluded that culling was the best method for accomplishing the goal of the agency’s plan, to manage the elk population and protect vegetation in the park, and that it “acted well within its discretion” in making the policy determination to eliminate the natural wolf alternative.

WildEarth sought judicial review of the EIS, claiming that the exclusion of the natural wolf alternative was arbitrary and capricious under the APA. The district court held for NPS, finding that the agency “articulated a rational connection” between the relevant facts and its conclusion that the natural wolf alternative was infeasible. The Tenth Circuit affirmed the District Court’s finding that NPS did not act arbitrarily and capriciously or abuse its discretion

---

109. 703 F.3d at 1185.
110. Id. at 1182. The final EIS, unlike the draft EIS, allowed volunteers to assist NPS staff in killing elk—the “culling” process, which the EIS distinguished from “hunting,” which is prohibited under the RMNP Act. Id. at 1181–82. Culling involves controlled killing by NPS employees and, under the agency’s final EIS, qualified and trained volunteers. WildEarth’s other claim was that the killing of elk by volunteers constitutes hunting, in violation of the Parks Organic Act and RMNP’s enabling statute. 703 F.3d at 1189.
112. Id. at 6 (noting that as long as wolves are federally protected, NPS would need approval and permits from the FWS to acquire, release, and manage them, and that FWS would require NPS to make a detailed plan, which would then be subject to NEPA and continuing FWS consultation; that NPS would also need permits from states to transport wolves across state lines; and concluding that NPS “will continue to monitor the regional status of wolves and . . . cooperate with other agencies on wolf-related issues”).
113. Id. at 14–16.
114. See 703 F.3d at 1182; NPS Brief, supra note 16, at 28.
115. 703 F.3d at 1182.
116. Id. The court also held that NPS’s distinction between hunting and culling was reasonable, and that NPS’s use of volunteers in culling did not violate the RMNP Act. Id.
in declining to consider the “natural wolf alternative.”

D. The Tenth Circuit’s Analysis

WildEarth argued that NEPA required NPS to consider the natural wolf alternative, because that alternative was “practical” and fit the Elk Management Plan’s purpose and need. In support of its claim, WildEarth presented evidence of biological benefits of wolf reintroduction, information about successful wolf reintroductions in other parks, and evidence relating to the feasibility of wolf reintroduction.

The court found that under “a rule of reason, where the agency explains its decision to take certain proposed options off the table because of a lack of practicality,” the record supported NPS’s decision not to consider the natural wolf alternative. First, the court found that the record reflected that RMNP was badly suited as wolf habitat: it is much smaller than either Yellowstone or Banff National Park, close to a densely populated urban corridor, and filled with steep, high-altitude terrain that is unappealing to wolves. In addition, the court found that NPS was justified in considering CDOW’s lack of cooperation in managing wolves outside RMNP, because this was “a question of feasibility, not jurisdiction.” Finally, the court found that WildEarth failed to support its claim that the meeting of experts and scientists which led to the dropping of the natural wolf alternative was a “shadow process” that improperly excluded the public; rather, the court found that NPS properly relied upon the opinions of its experts—a course the agency is entitled to take as long as those opinions are not arbitrary and capricious.

Accordingly, the court held that, in taking a “hard look” at the data, consulting its experts, and repeatedly explaining its reasons for dropping the natural wolf alternative, NPS had fulfilled NEPA’s requirements. For the time being, gray wolves would not be returned to the southern Rockies.

E. The Place of WildEarth Guardians in the Story

WildEarth Guardians demonstrates the continuing conflict between groups who adopt “competing symbolisms” surrounding the wolf. As noted above, this conflict has played out between wildlife advocates and agrarian, development, and recreational interests since the nineteenth century. Here, NPS considered likely harm to livestock and pets in making its decision to exclude

---

117. Id. at 1187.
118. Id. at 1183.
119. Id. at 1183–84.
120. Id. at 1184.
121. Id.
122. Id. at 1185.
123. Id.
124. Id. at 1182, 1187.
125. See Colburn, supra note 8, at 202.
the natural wolf alternative,\textsuperscript{126} accommodating the concerns of competing land users outside RMNP borders. However, the more important political consideration for NPS was probably hunting groups, which are influential in Colorado.\textsuperscript{127} Just as a concern for hunting stocks contributed to NPS’s eradication program in the early twentieth century, hunting interests played an important role in opposing wolves in RMNP.\textsuperscript{128} Those groups represent an important sector of the state’s economy,\textsuperscript{129} and many of them vehemently oppose wolf reintroduction.\textsuperscript{130} As noted above, CDOW’s unwillingness to cooperate in wolf reintroduction was a key reason for NPS’s decision, and regard for hunting groups’ economic power may have influenced this position.\textsuperscript{131} Moreover, a hunting group, Safari International, intervened on NPS’s side to protect Safari’s members’ ability to take part in the elk culls and because it thought that wolves would threaten the huntable population of elk.\textsuperscript{132} In addition, NPS took the position that properly reintroducing wolves requires a regional approach and that, in seeking to compel NPS to consider reintroduction through the Elk Management Plan, WildEarth attempted to shortcut what should be a long-term, cooperative endeavor.\textsuperscript{133}

In opposition, WildEarth cited the need for “places where the conservation of nature is paramount”—“conservation” here meaning nature in its original state.\textsuperscript{134} Like many environmental groups, one of WildEarth’s guiding principles is the “existence value” of nature, regardless of its value to humans.\textsuperscript{135} In

\begin{itemize}
\item \textsuperscript{126} 703 F.3d at 1184; NPS Brief, supra note 16, at 33.
\item \textsuperscript{128} Telephone Interview with Michael Harris & Jennifer Barnes, supra note 13; Colburn, supra note 8, at 158 n.57.
\item \textsuperscript{129} See PICKTON & SIKOROWSKI, supra note 127, at 1–2. CDOW is probably also concerned with out-of-state hunters’ perceptions of the state’s friendliness to hunting, since out-of-state hunters make of 42 percent of trip expenditures in Colorado. See id.; Telephone Interview with Michael Harris & Jennifer Barnes, supra note 13.
\item \textsuperscript{130} See, e.g., Wolf Overpopulation, BIG GAME FOREVER, http://biggameforever.org/ (last visited Nov. 16, 2013) (“Wolf overpopulation is dramatically damaging and even eliminating entire populations of Moose, Rocky Mountain Elk and other large ungulate populations.”).
\item \textsuperscript{131} Telephone Interview with Michael Harris & Jennifer Barnes, supra note 13.
\item \textsuperscript{132} WildEarth Guardians v. Nat’l Park Serv., 703 F.3d 1178, 1184 (10th Cir. 2013); Safari Club Brief, supra note 76; Telephone Interview with Michael Harris & Jennifer Barnes, supra note 13.
\item \textsuperscript{133} Telephone Interview with Michael Harris & Jennifer Barnes, supra note 13.
\item \textsuperscript{134} WildEarth Brief, supra note 9, at 2 (referring to conserved nature as “a benchmark, a standard, a governing principle” for “naturalness”). WildEarth describes what is more often termed “preservation.” Compare 16 U.S.C. § 1 (2012), with 16 U.S.C. § 1131 (National Parks vs. wilderness areas). Preservation is ordinarily juxtaposed with conservation, which accommodates and balances human resource needs.
\item \textsuperscript{135} See Colburn, supra note 8, at 195–96; Values and Vision, WILDEARTH GUARDIANS, http://www.wildearthguardians.org/site/PageNavigator/about_values_and_vision.html (last visited Oct. 11, 2013). A 2009 WildEarth report quotes Senator Mark Udall: “The call of a wolf . . . can remind us of the West as it once was and as we hope to see it become, a West . . . where the human spirit can be up-
\end{itemize}
contrast, conservation is only part of NPS’s dual mandate, and NPS has broad discretion in choosing how best to serve its conservation mandate. That discretion almost certainly includes a determination that reintroducing wolves requires a regional approach and that, to manage wolves, NPS would have to trade off too many resources that it would rather devote to directly controlling the elk population and restoring vegetation.

Thus, WildEarth and NPS were talking at cross-purposes, the government citing practical difficulties and WildEarth philosophical needs. In the middle was NEPA: an imperfect fit, given the statute’s greater suitability for technical and project-level agency “actions” than values disputes. In addition to being a legal setback for many wolf advocates, WildEarth’s defeat in court is part of a broader legal narrative: the failure of public organizations to influence broad agency decision making through NEPA.

III. THE RIGHT FIGHT ON THE WRONG BATTLEGROUND

The plaintiffs framed the issue in *WildEarth Guardians* as a technical one: their procedural challenge hinged on whether reintroducing wolves to RMNP would be a reasonable method for controlling the elk population and thus protecting and restoring the park’s vegetation. NPS said no, and the court deferred to it as an expert agency. However, WildEarth’s dispute with NPS was not fundamentally technical. Rather, WildEarth wanted NPS to make a different decision based on values and policy. WildEarth wanted NPS to align its answer to the question, “What are parks for?” with WildEarth’s own. Admittedly, NEPA was a poor vehicle for this type of influence—a court victory would only have meant more pages in the EIS—but WildEarth hoped that forcing NPS to analyze the natural wolf alternative would bring the alternative into the pu-

lifted and rejuvenated, and where human development and habitation can coexist with nature in its wild-est forms.” *Edward*, *supra* note 105, at 10.

136. See 16 U.S.C. § 1; Bicycle Trails Council of Marin v. Babbitt, 82 F.3d 1445, 1454 (9th Cir. 1996).

137. See *Record of Decision*, *supra* note 111, at 14.

138. Compare id. at 13–14, and NPS Brief, *supra* note 16, at 34 (“An infeasible alternative is not capable of practical implementation and therefore would be an ineffective means for NPS to deal with the resource management problem at hand.”), *with* WildEarth Brief, *supra* note 9, at 2.


140. See WildEarth Guardians v. Nat’l Park Serv., 703 F.3d 1178, 1184 (10th Cir. 2013).

141. While WildEarth did contend that wolves would do a better job of reducing the elk population than culling would, it did not spend much time on that assertion, simply pointing out that while cullers operate seasonally, wolves work year-round. WildEarth Brief, *supra* note 9, at 28.

lic light and thereby generate political support for it. In short, in its lawsuit against NPS, WildEarth pursued a political goal by using technical claims as a surrogate for ethical and political values.

A. Why This Matters: Science Cannot Make Policy Decisions

Science can only inform our decisions; it cannot make them for us. The problem has been described this way: science will tell us that a sixteen-ounce glass contains eight ounces, but we need values to tell us whether it is half-full or half-empty. The latter question determines the course of action we should take.

Technocrats, including NPS land-managers, are not elected and are not directly representative of the public’s values; nor (I will venture) do they particularly want that role. Therefore, technocrats should have no greater say in determining policy outcomes “like how much risk is tolerable and how much diversity and wilderness we want” than the public. Once those broad determinations are made, however, “science can help guide us there.” Thus, science and other technocratic concerns are and should be a vital part of any decision-making process. But when stakeholders feel compelled to make technical challenges the focus of conflict, the mismatch between their motives and their means obscures the real questions at stake and encourages polarization.

“[S]cience cannot settle questions of meaning,” so it cannot answer the normative question, “Should wolves be in RMNP?”

---

143. Telephone Interview with Michael Harris & Jennifer Barnes, supra note 13. WildEarth is currently taking this strategy to an extreme in joining a group called Kids vs. Global Warming that has brought a suit to have the atmosphere declared a shared resource protected under the public trust. Jessica Coomes, Teens Seeking More Government Action on Climate Appeal Case to D.C. Circuit, 44 Env’t Rep. (BNA) 1978 (July 5, 2013).

144. Nie, supra note 6, at 42–43 (citing R. McGregor Cawley & John Freemuth, Tree Farms, Mother Earth, and Other Dilemmas: The Politics of Ecosystem Management in Greater Yellowstone, 6 SOC’Y & NAT. RESOURCES 41, 48 (1993)).

145. Id.

146. Cf. id. at 19–20 (“[S]cience alone cannot answer all the important questions,” and “[p]retending otherwise jeopardizes the legitimacy of agencies and scientists.”).

147. See Singer, supra note 103, at 264. The scientists themselves put this nicely, in concluding the principal report upon which NPS based its Elk Management Plan. Between active restoration and allowing ecosystem processes to unfold without intervening, they noted that it was not their place to decide: “The model provided insight into how a pre-settlement ecosystem might have looked and functioned, but it did not consider whether or not such an ecosystem is natural in the present time, most appropriate to NPS policies, or desirable to the American people who are the true owners of RMNP.” Id. (emphasis added). In the abstract, of course, leaving the question of how much wilderness is desirable solely up to the public could lead to a tragedy of the commons—each individual taking his or her desired share to the detriment of all. In reality, the public’s ability to decide this question is bounded by the substantive laws protecting the Parks, as well as a healthy political counterbalance.

148. Nie, supra note 139, at 450.

149. See Colburn, supra note 8, at 168 n.101.

150. See Nie, supra note 8, at 19–20 (quoting Professor Deborah Stone).
B. NEPA Litigation: Values Cloaked in Science

Attempting to change an agency’s policy by challenging its technical basis is not an uncommon strategy, as values-based NEPA litigation is often “cloaked” in scientific debate.\textsuperscript{151} Two factors, one judicial and the other systemic, help explain the cloaking of values in NEPA litigation. As I suggest below, it is particularly important for NPS decisions to be explicit about values because NPS—more than other federal agencies—was created, and views itself, as a values-based agency.

The first explanation is that, as discussed above, the Supreme Court has read the substance out of NEPA.\textsuperscript{152} As a result, NEPA’s procedural requirements tend to elide values debates.\textsuperscript{153} This leaves environmental plaintiffs little choice but to bring claims challenging agencies’ technical determinations.\textsuperscript{154} Instead of claims that agency policies are not being “administered in accordance with the policies” of NEPA\textsuperscript{155}—a direct challenge to the agency’s values—plaintiffs bring claims that excluded alternatives are reasonable or that EISs are inadequate. For certain types of suits, this strategy can be tremendously powerful.\textsuperscript{156} For instance, in \textit{Meister v. U.S. Department of Agriculture}, the Sixth Circuit held for a lone plaintiff who brought a NEPA action against the Forest Service for its forest management plan, finding that the agency violated NEPA by failing to consider closing protected areas to hunting and snowmobiling.\textsuperscript{157} However, for a suit that is not truly over a technical dispute—one that is not arguing for a different decision-making process but a different values decision based on that process—this strategy is incongruous with NEPA and likely ineffective.\textsuperscript{158}

The second reason is fundamental to the administrative agency system. The cloaking of values in science occurs because Congress has shifted policymaking onto agencies that, at least in theory, make decisions based on scientific

\textsuperscript{151} See Nie, \textit{supra} note 139, at 432 (“The rational comprehensive foundation of NEPA and resources planning [] tends to camouflage value and interest-based political conflicts as scientific-technical ones.”); see, e.g., Friends of Animals v. Caldwell, 434 F. App’x 72, 79 (3d Cir. 2011) (rejecting a NEPA challenge brought by plaintiffs wanting NPS to consider introducing coyotes to control deer population in a suburban Pennsylvania National Park); The Fund for Animals v. Norton, 294 F. Supp. 2d 92, 92 (D.D.C. 2003), enforcement denied, 390 F.Supp.2d 12 (D.D.C. 2005) (finding that NPS decision to reverse a rule that would have phased out snowmobile use in Yellowstone National Park was arbitrary and capricious and violated NEPA).


\textsuperscript{153} See Purdy, \textit{supra} note 139, at 877 (arguing that NEPA’s current, utilitarian bent was not inevitable).

\textsuperscript{154} See \textit{supra} Part II.

\textsuperscript{155} See 42 U.S.C. §§ 4331(a), 4332(1).

\textsuperscript{156} See William H. Rodgers Jr., \textit{NEPA’s Insatiable Optimism}, [2009] 39 Envtl. L. Rep. News & Analysis (Envtl. L. Inst.) 10,618, 10,620 (observing that NEPA is “a steady danger to justification of science that strays toward the ideological, the political, and the convenient”).

\textsuperscript{157} 623 F.3d 363 (6th Cir. 2010).

\textsuperscript{158} That said, bringing any kind of NEPA suit is an uphill battle in the Tenth Circuit. The author’s research turned up only two decisions for NEPA plaintiffs on the merits in that Court of Appeals between 2006 and 2010, compared with more than forty in the Ninth Circuit Court of Appeals.
Although it is a necessity in today’s system of government, this displacement of policy decisions can injure the fundamental goals of legitimacy, accountability, transparency, and predictability if not handled carefully. The shift may happen simply through inaction, as “[g]ridlock in Congress has pushed environmental policymaking onto less traditional pathways.” Those pathways include rulemaking, appropriations, and lawsuits—in short, “back-door policymaking.” Congress can also delegate policy making explicitly, as it did in giving NPS its dual mandate.

Partly as a result of this shift and “the tough choices [being] dealt with through NEPA and planning procedures,” NEPA “has led to more lawsuits than any other environmental statute.” Because NEPA emphasizes agencies’ and scientists’ predictive capabilities, those lawsuits typically center on “scientific disagreement and uncertainty.” However, the agencies’ decisions “often have little to do with science,” but are instead policy choices based on values and politics, raising concerns about consistency and legitimacy.

The shifting of policy decisions from Congress to agencies means that organizations must challenge those decisions not in the political arena, as they would if Congress were making the decisions, but through the administrative process. Frequently, “instead of explicit debates about different ‘desired future conditions,’ we get planning processes, appeals, and litigation wrought with disagreement about the science underlying those disparate visions.” In practice, then, groups with value differences who lack a substantive statutory hook necessarily take up their disputes in NEPA participation and litigation.

159. See 16 U.S.C. § 1 (2012) (“The Director shall have substantial experience and demonstrated competence in land management and natural or cultural resource conservation.”). Although NPS is a uniquely values-motivated agency, its RODs do not purport to be based on policy except insofar as they avoid impairment. See HANDBOOK, supra note 63, at 78.

160. Id. at 429–30. Legitimacy, because agency officials can elect whether or not to act on the public’s input; accountability, because agency officials are unelected; transparency in the event that the plans do not go through NEPA or APA public comment processes; and predictability in that nontransparent processes inevitably lead to changeable agencies policies.

161. Nie, supra note 139, at 429.

162. Congress continues to influence the planning process outside of conventional politics through the use of rider provisions to House or Senate bills. Id. at 448–49. Professor Nie writes that the abuse of riders is “a threat to the principles of deliberative representative democracy” in that an enterprising politician can subvert decisions that have been made through a long, painstaking, collaborative process. Id.


164. Nie, supra note 139, at 432.

165. Id. at 432–33. This is especially unfortunate because those experts’ predictions are often inaccurate, or go unmonitored, as NEPA does not require continuing monitoring and assessment. Id. at 433.

166. Id.; Keiter, supra note 40, at 659. In Yellowstone, NPS changed its preservationist policies—presumably arrived at scientifically—for nonecological reasons “in the face of often heavy criticism and recurrent political pressure.” Id. For instance, NPS modified its wolf management as a compromise with locals and ranchers, attaching radio collars and otherwise limiting the animals’ movement. Id. at 669.


168. See Colburn, supra note 8, at 194 (“Too many stakeholders have systemic complaints that they can only air in artificially particularized challenges.”). Even if a group could challenge an agency decision on political or ethical grounds, it would have little success: so long as the decision passes the low bar of arbitrary and capricious review, and does not violate the agency’s organic statute (a determi-
C. NPS Is Equipped to Deal with Policy Decisions

The delegation of policy decisions to technocrats should be less problematic for NPS than for other agencies, because NPS’s decisions are uniquely entwined with its values and mission. First, through its guidance, NPS is explicit to its own employees about its values. The Management Policies celebrate the values that make NPS unique and discuss what agency employees should do to put them into practice. The Handbook further acknowledges that NPS’s stewardship of the nation’s most treasured natural resources gives it a special place among federal agencies when it comes to values. The agency notes that its mission sets it apart from other land management agencies, since the Organic Act “requires conservation of park resources” and their enjoyment in such a way as to “leave them unimpaired for the enjoyment of future generations.” In short, NPS views its Organic Act as a values statement. The agency’s mission is thus “not just the technical task of resource ‘management,’” but “an ethic of stewardship that focuses on passing the parks unimpaired to future generations.” NPS personnel, moreover, may be especially equipped to inject this ethical focus into the decisions they make. NPS employees rank “employee skills/mission match” as the agency’s strongest attribute and NPS

---

169. See Donahue, supra note 19, at 52, 54 (noting “the critical role” of the NPS mission; that “the [NPS] mandate is completely different from those of other agencies in relation to wildlife management” in that it requires a holistic approach; and recommending that high-level NPS officials make wildlife management policy decisions “with full knowledge and understanding of the controversy, emotions, and ecological considerations involved”).

170. See MANAGEMENT POLICIES, supra note 15, § 1.4.3 (“The fundamental purpose of the national park system, established by the Organic Act . . . begins with a mandate to conserve park resources and values. This mandate is independent of the separate prohibition on impairment and applies all the time with respect to all park resources and values, even when there is no risk that any park resources or values may be impaired.”).

171. See HANDBOOK, supra note 63, at 85. This stems partly from the parks themselves (and their usefulness to humanity): “Parks are places to stimulate an understanding of history . . . as the sum of the interconnection of all living things and forces that shape the earth. In many ways, the National Park Service is our nation’s Department of Heritage.” DIRECTOR’S ORDER #75A, supra note 61, at pt. II (citing NAT’L PARK SERV. ADVISORY Bd., RETHINKING THE NATIONAL PARKS FOR THE 21ST CENTURY (2001)) (internal ellipses omitted).

172. See HANDBOOK, supra note 63, at 85; 16 U.S.C. § 1 (2012). NPS concludes that because Congress entrusted NPS with such unique resources, NEPA is especially important for the agency, as “decisions affecting these special resources have greater potential for significant impact than if they occurred on federal lands managed by other agencies.” HANDBOOK, supra note 63, at 85.

173. REVISITING LEOPOLD, supra note 1, at 3. This ethical focus necessarily elevates values decisions away from individual park units to higher levels of management. See Donahue, supra note 19, at 54. The decision to reintroduce wolves in Yellowstone in 1995 was ultimately made by the Secretary of the Interior. See Wyoming Farm Bureau Fed’n v. Babbitt, 987 F. Supp. 1349, 1354 (D. Wyo. 1997), rev’d, 199 F.3d 1224 (10th Cir. 2000). That project’s draft EIS was done mainly for public support; it received 160,000 comments. See id. at 1354 n.5.

guidance provides specially for employee involvement in decision making. In addition, high-level NPS personnel, unlike other political appointees, consistently rise up through the agency—in theory, bringing agency values with them.

Nonetheless, the decisions NPS makes in documents like the Elk Management Plan ROD elide the importance of the agency’s mission by focusing entirely on factual bases for its decision. Persuasive as these facts may be, technical determinations cannot tell the entire story behind a broad, Regional Director-level NPS decision.

D. Science as Cloak in WildEarth Guardians

As in other NEPA cases, the factors discussed above in Part III.B compelled the plaintiffs in WildEarth Guardians to compartmentalize their claims into scientific disputes that did not represent the real goals of their litigation. Specifically, WildEarth made a technical argument about the feasibility of the natural wolf alternative, briefing the court on the ecological benefits of wolves and arguing that NPS’s own experts thought the wolf alternative was feasible. This science-based argument cloaked a debate that is really about values and how humans should view ecosystems and wildlife.

The positions taken by the opponents in WildEarth Guardians are familiar from past debates pitting the environment against economic interests. While CDOW and local groups advocated for economic interests, arguing that wolves would spill out of RMNP, attack their livestock and pets, and injure their hunting stock, environmentalists “urge us to see the big picture.” Like the conservationists who wanted to “remind Americans that the Tongass [National Forest] is theirs” in combatting a Forest Plan that would accommodate logging interests, WildEarth posed wolf reintroduction as an issue of national and even global significance. Its argument was patently ethical and political, so to cabin it in terms appropriate for NEPA, WildEarth posited that, “[l]egally, this case is about process.” The process here involved technical considerations, as it usually does under NEPA: were wolves “feasible” for RMNP? Given the

---

175. DIRECTOR’S ORDER #75A, supra note 61, at pt. II.

176. The current NPS Director, Jon Jarvis, was appointed after thirty years of civil service with the agency. Directors of the National Park Service, NAT’L PARK SERV., http://www.cr.nps.gov/history/hisnps/NPSHistory/directors.htm (last visited Mar. 12, 2014).

177. WildEarth Brief, supra note 9, at 13.

178. See Nie, supra note 139, at 390, 409–15 (chronicling the partly symbolic disputes between environmentalists and the timber industry over Tongass National Forest, which produced battles over clear-cutting, habitat destruction, timber harvesting in roadless areas, and alleged subsidies to timber companies); Keiter, supra note 40, at 659, 669 (discussing the clash of politics and ecology in Yellowstone, where NPS modified its wolf management “in the face of often heavy criticism and recurrent political pressure” from locals and ranchers).

179. See Nie, supra note 139, at 443; WildEarth Guardians v. Nat’l Park Serv., 703 F.3d 1178, 1184 (10th Cir. 2013).

180. See Nie, supra note 139, at 443.

181. WildEarth Brief, supra note 9, at 3.
deference that courts give agency decisions on “technical or scientific matters within the agency’s area of expertise,”182 WildEarth carried a heavy burden.

Equally discouraging for WildEarth, even if its NEPA suit had succeeded and the court had forced NPS to consider the natural wolf alternative, the agency’s actions would almost certainly have been the same. As discussed in Part I, NEPA as the courts construe it has no substantive requirements—the most a plaintiff can hope is to force the agency to include more in its EIS.183 Moreover, even without the natural wolf alternative in the mix, NPS declined to select the “environmentally preferred alternative,” which would have involved reintroduction of wolves, albeit a strictly managed population, opting instead for the “less complex” option of culling.184

WildEarth thus has little direct recourse under NEPA to make NPS choose what WildEarth thinks is, ethically, the best choice.185 As noted above, public input is especially desirable for making broad public lands management decisions based on values. Public participation includes a wide array of voices, though—many of which oppose wolf reintroduction. A group that, like WildEarth, seeks to be heard apart from the cacophony has no choice but to turn to a NEPA suit. But NEPA suits are ill suited to symbolic or expressive challenges to pragmatic agency decisions.186 So the question remains: What is NEPA good for? Specifically, how can NPS and its stakeholders use NEPA to make higher-quality and more legitimate decisions? Part IV offers one answer to these questions.

IV. A REQUIRED POLICY STATEMENT FOR THE EIS DECISION

As discussed above, the Park Service makes wildlife management deci-

---

182. 703 F.3d at 1183 (stating that court will defer to agency unless “the agency (1) entirely failed to consider an important aspect of the problem, (2) offered an explanation for its decision that runs counter to the evidence before the agency, or (3) failed to base its decision on consideration of the relevant factors, or (4) made a clear error of judgment” (quoting Forest Guardians v. U.S. Fish & Wildlife Serv., 611 F.3d 692, 710 (10th Cir. 2010))).


184. RECORD OF DECISION, supra note 111, at 13–16 (stating that the Environmentally Preferred Alternative was Alternative 5, which involved a combination of culling and reintroducing up to fourteen managed wolves).

185. In addition, in using its valued-based litigation strategy against a park-level decision, WildEarth attacked the reintroduction issue at the wrong level. As Jedediah Purdy points out, “[a] relatively mechanical, seemingly neutral decision procedure is possible as an administrative technique only because it takes its normative substance from decisions made at other levels.” Purdy, supra note 139, at 883–84 (arguing that environmental law is “blind without values”); see also Nite, supra note 8, at 45–46 (noting that decisions are being commented on at public hearings have already been determined by a mandate from “a more inclusive democratic forum”). Here, decisions about wolf reintroduction—a politically charged issue with broad implications for the purposes of parks—are made not by the RMNP superintendent, but by NPS and Department of Interior officials in Washington.

186. The “sand-in-the-gears” function of NEPA litigation is also ineffective where, as in WildEarth Guardians, plaintiffs seek to compel affirmative actions rather than delay harmful ones. Cf. Karkkainen, supra note 45, at 338.
sions based on values, by necessity and as part of its mission.\footnote{See, e.g., Donahue, supra note 19, at 51 (“NPS will have to determine its wildlife management policies and strategies based strictly upon its own mandates and goals.”).} In contrast, the NEPA process, both in public comment and litigation, facilitates exclusively factual and scientific debate.\footnote{See HANDBOOK, supra note 63, at 66. In running public meetings on a draft EIS, the Handbook instructs that “[a]ttendees should be reminded that the purpose of the session is to collect input on the adequacy of the EIS and not to express preferences for or against the proposal.” Id.} Moreover, because public input only takes place during the “seemingly neutral decision procedure” at the Park planning level, when the relevant decision has already been made (at a higher level), that input is inevitably ineffective.\footnote{See generally HANDBOOK, supra note 63.} By marginalizing public input and “cloaking” the debate in science, this system injures the transparency, accountability, and legitimacy of the agency by implying that its decisions are based purely on its scientific expertise—a position NPS does not claim in the first place.\footnote{See Purdy, supra note 139, at 884.} This pretense leads to cynicism among the public, particularly for organizations that want to influence the agency’s policy but need to come up with a scientific rationale to do so.

My proposal is simple. The Park Service should update its NEPA guidance to impose a new requirement for all NPS RODs: The decision maker must explicitly declare that, while informed by the best available science, the decision it is making is ultimately based on policy. In doing so, the decision maker must articulate (a) why that decision is within the agency’s discretion, and (b) how the decision promotes the policies of the Organic Act, the Park’s enabling act, the Management Policies, and NEPA.\footnote{See generally HANDBOOK, supra note 63.} In short, (a) would require the agency to explain why it can make its decision, while (b) would require it to explain why it did make its decision.

NPS’s EIS and ROD for its Elk Management Plan both demonstrate how these requirements would help clarify its decision making. NPS included a thorough description of applicable law in its Purpose and Need section of the EIS, including the Organic Act, Management Policies, Handbook, RMNP Act, and numerous federal and local planning documents.\footnote{See 16 U.S.C. § 1 (2012) (“[C]onserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”); id. § 191 (“[d]edicate[] and set apart as a public park for the benefit and enjoyment of the people of the United States”); 42 U.S.C. § 4331(a) (“foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans”).} The ROD, however, makes little attempt to relate the policies laid out in these documents to the decision made. It notes that Alternative 3 was selected based on the “overall ability of the alternative to meet park objectives, support the purpose of the park, and minimize adverse effects on the resources of the park while providing for public use and enjoyment”—but then acknowledges that “other action alterna-
tives would also meet these criteria.”193 The ROD then describes “a number of additional factors,” which tipped the balance for Alternative 3: concerns about availability of funding, higher certainty, simplicity, efficiency, and a potentially smaller impact on visitor use and experience.194 Such a balancing exercise necessarily involves discretionary judgments, and presumably NPS could have made an argument for one or more other alternatives. The policy statement I am proposing would in effect connect the dots: why did NPS reach its decision, in light of its mission and values?

This requirement should be imposed for all RODs, which are reviewed, distributed, and approved by the Regional Director.195 Because the decisions made in RODs by definition apply to major actions that are likely to have significant impacts on the environment, these decisions necessarily involve value and policy choices and ethical tradeoffs.196 Because these decisions are all made at the Regional Director level, the policy statement requirement would allow Directors to articulate a consistent and unified stance toward park policy.197 While decisions made for projects requiring only environmental assessments (with FONSIs) also involve policy choices, these decisions are by their nature less discretionary, making the transparency and public participation benefits of the policy statement less vital.198 Finally, while the policy statement would normally discuss NPS’s decision among EIS alternatives, the statement should also address important scoping decisions where those decisions are a continuing source of controversy, as in WildEarth Guardians.

194. Id. at 14.
195. See HANDBOOK, supra note 63, at 67. The current guidance for a ROD recommends that it “give enough information on the alternatives and their impacts, the decision-maker’s rationale in selecting the chosen alternative, and the extent of mitigation and monitoring the public can expect, so that the reader can understand these major issues without referring to the EIS.” Id. at 78. The “decision rationale” calls only for an explanation of how certain criteria—“cost, degree of environmental impact, technical considerations, degree to which objectives were met, logistics”—apply for each alternative and how they were weighted. Id. This determination implicates values and the NPS mission, but there is no requirement to address these explicitly.
196. Currently NPS advises that both EISs and FONSIs “affirmatively state, and contain supporting information in the analysis, that the preferred alternative for selection will not impair park resources or values and, as a result, will not constitute a violation of the NPS Organic Act.” Id. at 77. This requires only that decision makers explain that the choices they have already made do not violate NPS values. My proposal would require decision makers to explain why they made their choices as a matter of values and policy. The California Environmental Quality Act involves a similar requirement, a “Statement of Overriding Considerations,” though only for projects that are predicted to have significant impacts even after mitigation. CAL. PUB. RES. CODE § 21081 (West 2014). Unlike NEPA, CEQA actually prohibits actions with significant impacts. However, “[i]f the specific economic, legal, social, technological, or other benefits . . . of a proposal project outweigh the unavoidable adverse environmental effects” as explained in the Statement of Overriding Considerations, “the adverse environmental effects may be considered ‘acceptable.’” CAL. CODE REGS. tit. 14, § 15093(a) (West 2014).
197. See HANDBOOK, supra note 63, at 67.
198. See id. at 79. NPS prepares a FONSI when the selected alternatives do not have the potential for significant impact. Id. Unlike a ROD, then, the FONSI is not a choice among alternatives—in which values/policy necessarily play a large role—but a factual determination of the alternatives’ likely impacts. See Environmental Assessments and Environmental Impact Statements, EPA, http://www.epa.gov/reg3esd1/nepa/eis.htm (last updated Jan. 28, 2014).
This approach would have three advantages. First, it would increase transparency, accountability, and legitimacy, and thus alleviate the cynicism that has worked its way into the decision-making process.\textsuperscript{199} It would increase transparency by allowing the public to see how the Park Service actually makes decisions. It would increase accountability by arming the public with better information in voting for the President, who nominates NPS Directors, the Senate, which confirms them, and members of Congress, who fund the agency and are uniquely able to amend parks’ enabling legislation and the Organic Act.\textsuperscript{200} These factors would combine to enhance the Park Service’s legitimacy by allowing the public to feel that it has a role in how its parks are managed, and by putting weight behind the agency’s policy of involving the public in “even broad policy-level decisions.”\textsuperscript{201} If the agency is serious about that commitment, then an EIS policy statement would be a straightforward, tangible way to show it.

These effects would also allow for better resource allocation for both NPS and environmental organizations. The policy statement would encourage environmentalists to direct their limited funds toward litigation only when NPS had actually erred procedurally, avoiding such costs when NPS followed the required procedure but permissibly based its decision on a policy choice.\textsuperscript{202} NPS, in turn, would need to spend less to fight such litigation. The policy statement might also obviate some of the need for “kitchen sink”-type overinclusion of scientific information in EISs, saving paper and money and alleviating the paradoxical problem “that EISs tend to be quite uninformative.”\textsuperscript{203}

Finally, the transparency effects of a required policy statement would encourage more, higher quality, and less polarized public participation, and ultimately lead to better outcomes.\textsuperscript{204} A major criticism of the current NEPA pro-

\begin{itemize}
\item \textsuperscript{199} See Nie, supra note 8, at 2–3 (discussing viewpoints of various stakeholders); cf. Steven Davis, Does Public Participation Really Matter in Public Lands Management?: Some Evidence from a National Forest, 25 SOUTHEASTERN POL. REV. 253, 254–55 (1997) (noting that critics of the Forest Service process “argue that participation as it occurs today is essentially an exercise in public relations”).
\item \textsuperscript{200} The Director of NPS is nominated by the President and confirmed by the Senate. About Us, NAT’L PARK SERV., http://www.nps.gov/aboutus/index.htm (last updated Feb. 25, 2014). Congress, of course, controls NPS’s budget and can direct the agency’s spending toward specific activities. See NAT’L PARK SERV., BUDGET JUSTIFICATIONS AND PERFORMANCE INFORMATION: FISCAL YEAR 2014, at Overview-5, available at http://www.nps.gov/aboutus/upload/FY_2014_greenbook.pdf.
\item \textsuperscript{201} See HANDBOOK, supra note 63, at 84; Lorna Jorgensen, The Move Toward Participatory Democracy in Public Land Management under NEPA: Is It Being Thwarted by the ESA?, 20 J. LAND RESOURCES & ENVT'L. L. 311, 333 (2000) (“When people do put their time and energy into the NEPA process and that effort is marginalized or made irrelevant, resentment toward administrative agencies results, and there are demands to take decision-making authority away from those agencies[.] . . . If those that are affected by the decisions have an opportunity to help shape those decisions, the goals of NEPA may actually be realized.”).
\item \textsuperscript{202} Of course, that policy choice would still be subject to judicial review for arbitrariness and capriciousness in upholding the Organic Act and other applicable statutes and regulations. See 5 U.S.C. § 706 (2012).
\item \textsuperscript{203} Karkkainen, supra note 45, at 346 & n.52.
\item \textsuperscript{204} See Colburn, supra note 8, at 168 n.101; cf. Rebecca M. Bratspies, Human Rights and Environmental Regulation, 19 N.Y.U. ENVTL. L.J. 225, 278 (2012). Professor Bratspies recommends “a human rights framing for the [EIS] process,” arguing that such a change could “significantly expand partic-
cess for public participation is that stakeholders come into the process with entrenched value positions, which translate into polarized views about how to prioritize facts. A required policy statement would not mean that parties would instead sit down during the scoping process and comment periods to hash out their values differences. Rather, the benefits of NPS providing stakeholders and the public with an explanation of its policy in EIS decisions would be slow and accretive. NEPA participants would know the burden they face during comment periods; politicians would be able to respond from office and while campaigning; voters would know what they vote for; and most importantly, perhaps, NPS officials themselves would be compelled to “to constantly check their internal cultures, values, and biases against that of the public.”

An obvious criticism of this approach is that it would not change anything in practice: environmental groups (and other challengers of park plans) could and would still challenge the decisions they disagree with on the basis of science, in the context of process. One might even argue that the kind of honesty the policy statement calls for would only spur more litigation. However, this overlooks the positive effects that a culture of transparency would have on stakeholders. In addition to enhancing the quality of public input, turning the “black boxes” of agency decision making into “windows” would likely decrease stakeholders’ adversarialism by allowing the public to “better understand the logic and complexity of agency rulemaking.”

Another potential objection is that a policy statement would be judicially unenforceable and therefore pointless—that in practice it would simply become more boilerplate language in an EIS. However, this could be said of the EIS itself, which, as long as it includes the requisite information, is unenforceable with respect to environmental decision making. The policy statement would have benefits akin to those of the EIS: it would make agencies think about their policy decisions, and it would tell the public how the agency has applied its judgments. Finally, while one might also object that such a requirement sanctions politically motivated decisions by expert agencies, the Supreme Court has affirmed that “it is entirely appropriate” for agencies, as part of a political branch of government, to make policy choices “resolving the competing information in public decision making, as well as transparency and access to information,” and as a result “greatly enhance both the perceived legitimacy of the EIS process and its overall usefulness.”


207. See WildEarth Brief, supra note 9, at 3.

208. See Nie, supra note 206, at 735.

209. See Sierra Club v. Van Antwerp, 526 F.3d 1353, 1361–62 (11th Cir. 2008) (noting that “it would not violate NEPA if the EIS noted that granting the permits would result in the permanent, irreversible destruction of the entire Florida Everglades”).
ests which Congress itself” left unresolved. 210

In sum, as Professor Nie argues, it is “necessary to move away from a predominantly scientific-technical approach to one with politics and policy front and center.” 211 I suggest a required EIS policy statement as one means of making such a shift, and as part of a broader strategy to actively seek public input beyond what is required by NEPA and the APA—not only on a local level, but nationally as well. Bringing broad agency policies into the public light gives the Park Service “an opportunity to clarify its preservation policies, to garner public support for them, and to respond directly to scientific and other criticisms,” while giving the public “an opportunity to inject its values and concerns into the decision process.” 212 Such a strategy is in keeping with the purposes of the Parks (for the enjoyment of “the people of the United States”). While this would not necessarily lead to better outcomes for the environment in every case, it would lead to a more open discussion of what our public lands are for, without the tenuous and costly façade of scientific disputes that are not, at bottom, about science.

CONCLUSION

Public input can come through NEPA and APA processes, but it can also come through politics—and ultimately this may be where WildEarth’s lawsuit reaps some benefit. Polls have shown that a majority of Coloradans, bolstered by booming urban populations, support reintroducing wolves. 213 In bringing attention to the subject, WildEarth Guardians may bring that population’s pressure to bear on the Senators who influence NPS and, perhaps more importantly, the state politicians who influence the Division of Parks and Wildlife (formerly CDOW). 214 My recommendation would not solve the systemic flaws of public lands management, nor would it bridge the symbolic divide that still rends the wolf debate. But by bringing the policy concerns at play in NPS decision making into the public light, it would provide an important link between the NEPA process and its political influence on agency decisions.

211. Nie, supra note 8, at 22. Professor Nie makes this claim in the context of U.S. Forest Service forest plans, but it should apply equally or even more to the type of values-laden choices encountered by NPS.
212. See Keiter, supra note 40, at 681.
213. EDWARD, supra note 105, at i.
214. Telephone Interview with Michael Harris & Jennifer Barnes, supra note 13.
We welcome responses to this Note. If you are interested in submitting a response for our online companion journal, Ecology Law Currents, please contact ecologylawcurrents@boalt.org. Responses to articles may be viewed at our website, http://www.boalt.org/elq.