

A Narrative Understanding of the National Environmental Policy Act

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The National Environmental Policy Act requires federal agencies to engage in a public participation process when making decisions that affect the environment. The technical complexity of the NEPA public participation process blocks the public from participating in an agency's decision-making process, and agencies often struggle to take public comments seriously while creating Environmental Impact Statements. Furthermore, National Environmental Policy Act lawsuits filed against agencies usually revolve around complex technical or scientific issues that are divorced from the concerns and values articulated by stories that the public tells about its relationship to the natural world. The result of this disconnect between public comments and agency considerations means that the Environmental Impact Statement process often addresses public comments grounded in technical arguments while failing to engage comments founded on other values. Looking at WildEarth Guardians v. the Bureau of Land Management and the public comments filed with the Bureau of Land Management related to that case, I argue that a law and literature analysis helps explain why agencies struggle to fully engage the public while implementing the National Environmental Policy Act. A core problem with the law's current public participation process is that it privileges environmental narratives of efficient economic and scientific management over all other environmental narratives. However, many values cannot be expressed through those narratives because not all values are economic or scientific. And those values are best communicated using different environmental narratives. This literary framework reveals some significant challenges that will be difficult to overcome in seeking to improve the National Environmental Policy Act public participation process.

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INTRODUCTION

There has long been debate about the efficacy and purpose of public participation under the National Environmental Policy Act (NEPA).¹ Some scholars argue that the technical complexity of the NEPA process blocks the

1. 42 U.S.C. §§ 4321–4370(h) (2012).

public from participating in an agency's decision-making process, and other scholars note that agencies struggle to respond to public comments or to take public comments under serious consideration while drafting Environmental Assessments or Environmental Impact Statements (EIS). Furthermore, NEPA lawsuits filed against agencies usually revolve around complex technical or scientific issues that are divorced from the concerns and values articulated by stories that the public tells about its relationship to the natural world. The result of this disconnect between public comments and agency considerations means that EISs often address public comments grounded in science or economics but fail to engage comments founded on other values.

This process played out in a recent Tenth Circuit case, *WildEarth Guardians v. the Bureau of Land Management (WildEarth)*.² In this case, the court considered a challenge brought by WildEarth Guardians and the Sierra Club (WildEarth) against the Bureau of Land Management's (BLM) decision to approve four coal leases in Wyoming's Powder River Basin.³ WildEarth argued that BLM violated NEPA when it concluded in its EIS that leasing the mines would have zero impact on national carbon dioxide (CO₂) emissions. The court agreed, holding BLM's decision to be arbitrary and capricious.⁴

The arguments in this litigation did not focus on public values or concerns about aesthetic beauty, humanity's responsibility to future generations, humanity's ethical responsibility to nature, or even the effect of the coal mining operations on the local Wyoming population. Rather, the litigation involved highly complex debates about the economics of coal pricing and its effect on national carbon emissions, the science of how different kinds of coal produce different kinds of carbon emissions, the technical complexity of mining coal in the Powder River Basin versus somewhere else in the world, and the social science behind how energy pricing affects the behavior of people, localities, and states. In short, the litigation, as well as the Final EIS on which that litigation was based, failed to engage public values conveyed by diverse narratives.

In the end, the Final EIS exceeded over 1400 pages and failed to respond meaningfully to many of the stories told by the public to express their environmental values. Instead, the Final EIS primarily responded to comments challenging the science or technical information in the Draft EIS.⁵ Is this highly technical and scientific discussion between agencies and the public the kind of discussion that NEPA intended to create? Or perhaps more importantly, is this the kind of interaction between the public and federal agencies that we want the

2. *WildEarth Guardians v. Bureau of Land Mgmt.*, 870 F.3d 1222 (10th Cir. 2017).

3. *Id.* at 1226.

4. *Id.* at 1240.

5. BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE WRIGHT AREA COAL LEASE APPLICATIONS (2010), APPENDIX I (BLM RESPONSES TO COMMENT LETTERS RECEIVED REGARDING THE WRIGHT AREA DRAFT EIS), <https://eplanning.blm.gov/epl-front-office/projects/nepa/67033/82290/97261/02WrightCoalVo2.pdf>.

NEPA process to create? To try to answer these questions and to better understand the disconnect between public comments and agency decision-makers, legal scholars have looked to the intersection of various fields: law and economics, law and science, and law and social science.⁶ I argue, however, for a different interdisciplinary analysis situated in the intersection between law and literature. By taking a literature and law approach to the NEPA process, we can better understand the disconnect between the narratives conveyed in public comments and the narratives generated by agencies to inform the public.

In this Note, I analyze NEPA's public participation process as serving two narrative functions. First, agencies listen to the narratives of the public to understand the public's environmental values. Second, agencies generate an EIS to narrate the agencies' decision and values to the public. A core problem with the current NEPA public participation process is that it privileges environmental narratives of efficient economic and scientific management. However, some values cannot be expressed in these terms, but rather are best communicated using different environmental narratives. For example, aesthetic values might be better communicated by narratives of romantic epiphany; ethical values might require a person to fashion a georgic narrative; place-based values often require people to repeat folktales or rehearse personal lyrics about home; ecological values often require the use of various narrative structures such as the toxic tale or the environmental apocalyptic. But agencies struggle to hear these narratives because they do not seem objective enough. Therefore, these values, if they are communicated to agencies at all, must be shoe-horned into scientific and economic frames that obscure the public's actual concern. The end result is two-fold. First, the agency generates an EIS that fails to respond to nonscientific and nontechnical public values. Second, debates during the decision-making process and in subsequent litigation utilize a techno-scientific narrative that masks the actual environmental values being litigated. Because public participation is a core goal of NEPA,⁷ this narrative disconnect between the public and agencies prevents the successful implementation of NEPA.

To support this proposition, in Part I, I introduce the narrative types that intersect with environmental values, which are often used to describe humanity's relationship with nature. In Part II, I turn to a closer examination of NEPA's narrative requirements. I first discuss the law governing NEPA public participation and then examine how the current EIS process suffers from a narrative glitch that prevents it from achieving those goals. In Part III, I apply the literature and law framework to *WildEarth Guardians v. BLM* and to the EIS at issue in that case to demonstrate the utility of this framework for

6. See *infra* Part II.B (discussing the different ways that the NEPA public participation process has been analyzed).

7. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); 40 C.F.R. § 1500.2 (b), (d).

understanding flaws in the NEPA process. In Part IV, I conclude by suggesting that agencies should include a values statement in the Draft and Final EISs to better involve the public in the NEPA public participation process.

I. NARRATIVES AND VALUES IN THE LAW

To begin, it is necessary to define some terms used in this Note, as words like story, trope, and narrative can have a variety of meanings.⁸ “Story” refers to an account of an event or sequence of events that develops over time to resolve, or calls into question the possibility of resolving, some trouble or conflict that disturbs the present state of things.⁹ “Trope” refers to a symbolic or metaphorical representation of the world, and often, that representation of nature is common to or stands for a familiar story.¹⁰ “Narrative” here refers to a broader entity than story, but is sometimes used interchangeably with story.¹¹ Narrative “consists of the cumulative effects of . . . separate stories as their aggregate meaning comes to light” and “represents one collective way of knowing things, one communal mechanism for grasping the world.”¹²

In an essay now considered canonical for law and literature scholarship, Robert Cover explains why the study of law and literature should not be ignored:

In this normative world, law and narrative are inseparably related. Every prescription in it demands to be located in discourse — to be supplied with history and destiny, beginning and end, explanation and purpose. And every narrative is insistent in its demand for its prescriptive point, its moral. History and literature cannot escape their location in a normative universe, nor can prescription, even when embodied in a legal text, escape its origin and its end in experience, in the narratives that are the trajectories plotted upon material reality by our imagination.¹³

Cover stakes out two compelling claims about the relationship between law and narrative. First, he asserts that law is narrative in the way it operates on the world as an organizing force for reality. Second, he claims that narrative influences not just what becomes law but also how existing law is shaped. Christine Lorillard states this second point differently by claiming that stories make the law accessible to the public, and that stories make public values known to law-making institutions because stories convert “individual experience into collective coin which can be circulated.”¹⁴ These scholars, and

8. Michael Burger, *Environmental Law/Environmental Literature*, 40 *ECOLOGY L.Q.* 1, 5–6 (2013).

9. *Id.*

10. *Id.* at 6.

11. *Id.*

12. Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 *BUFF. L. REV.* 141, 148 (1997).

13. Robert M. Cover, *Foreword: Nomos and Narrative*, 97 *HARV. L. REV.* 4, 5 (1983).

14. Christine Metteer Lorillard, *Stories that Make the Law Free: Literature as a Bridge Between the Law and the Culture in Which It Must Exist*, 12 *TEX. WESLEYAN L. REV.* 251, 254 (2005) (citing JEROME BRUNER, *MAKING STORIES: LAW, LITERATURE, LIFE* 6 (2002)).

many others, recognize that the law does not emerge out of thin air, but rather is a cultural construct which represents the values of the society in which it exists.

The law and literature movement is typically divided into two categories: law in literature and law as literature. The law in literature category examines representations of the judicial system, lawyers, and justice in works of fiction or poetry.¹⁵ Often, advocates of the law in literature advance the idea that reading and interpreting these fictional texts can be beneficial to law students, lawyers, legal scholars, and judges.¹⁶ For example, they claim that reading these texts might cause someone in the legal system to evaluate his or her ethics or professional responsibilities, thereby rehumanizing the practice of law.¹⁷

Law as literature research can be divided into two distinct categories. The first strives to interpret appellate court opinions using literary criticism and theory.¹⁸ The second seeks to understand the effect that storytelling, narrative, and rhetoric have had on the law and how story continues to shape the law.¹⁹ This Note falls into the law as literature camp and specifically into the second category of that camp. I adopt a literary vocabulary in order to understand the role of storytelling and narrative on environmental law generally, but specifically in the NEPA process.

Two key claims behind this law and narrative approach are that legal claims are always in some sense narrative and that narratives provide a way for people to convey values.²⁰ Seen this way, law becomes literary, “a producer of meanings and an avenue for self-expression,” rather than simply a tool for resolving conflicts between parties.²¹ And legal or regulatory processes such as pleadings, briefs, agency documents, judicial opinions, and public comments become expressive, narrative events.²² Therefore, by better understanding the kinds of narratives that people use to describe humanity’s relationship to the natural world, we can come to a better understanding of the values at issue in any given environmental debate. In environmental law, the stories people tell to

15. See Burger, *supra* note 8, at 12.

16. See, e.g., RICHARD WEISBERG, POETHICS: NARRATIVE STRATEGIES OF LAW AND LITERATURE (1992) (arguing that the practice of the law is literary and encouraging a return to the literary form in various kinds of legal writing); ROBIN WEST, NARRATIVE, AUTHORITY, AND LAW (LAW, MEANING, AND VIOLENCE) 10–11 (1994) (calling for the exploration of literature and narrativity in traditional jurisprudence and in the law itself); RICHARD POSNER, LAW & LITERATURE 305–44 (2nd ed. 1998) (discussing the “edifying school of legal scholarship”); James Boyd White, Book Review, *What Can a Lawyer Learn from Literature?*, 102 HARV. L. REV. 2014, 2023 (1989) (reviewing the first edition of Judge Posner’s *Law & Literature*).

17. See *id.*

18. See Burger, *supra* note 8, at 13.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 13–14.

explain and justify their view of humanity's relationship with nature are critical determinants of the policies government adopts.²³

A. Environmental Narratives of the Law

In contrast to some areas of law, such as criminal law, environmental law seems less susceptible to literary analysis.²⁴ Criminal law leads to cases that read like stories. Environmental cases often read like technical manuals. But the importance of narrative for environmental law is grounded in the reality that narratives, when deployed in the arena of law, do not exist merely to tell a story. Rather, as Robert Cover explains, narratives in law constitute events, intended to persuade various audiences: juries, judges, legislators, and the public.²⁵ In this Note, I attempt to shed light on the ways in which stories and narratives have shaped environmental laws, and why some narratives are less effective drivers of change in the NEPA public participation process.

Environmental law uses many stories and tropes to talk about the natural world, some of which have had great sway over the American environmental imagination. The particular tropes and narratives this Note will focus on are the pastoral, the georgic, the wilderness adventure narrative, place-based stories, the environmental apocalyptic, toxic tales, and Humans-As-Controlling-Engineers narrative.²⁶ Each of these stories offers the opportunity for the storyteller to frame the natural world in a way that conveys the storyteller's environmental values.

1. The Pastoral

The pastoral trope is perhaps the oldest environmental narrative dating back to classical times.²⁷ Pastorals can be used to express a number of political perspectives but usually involve a retreat to the country from the city, or at least establish a contrast between life in the country versus life in the city.²⁸ This narrative idealizes rural life and has been attacked for oversimplifying the complexity of the natural world and ignoring the difficulties that come with a life lived in the country.²⁹ Furthermore, pastoral stories spark reflection on different ways of living by placing the audience in a middle place between the country and the city where they can evaluate the advantages and disadvantages

23. See generally Holly Doremus, *The Rhetoric and Reality of Nature Protection: Toward a New Discourse*, 57 WASH. & LEE L. REV. 11 (2000) (exploring the importance of rhetoric in political battles in environmental policy).

24. *Id.* at 14.

25. See Cover, *supra* note 13, at 4–10.

26. The categories pastoral, wilderness adventure narrative, environmental apocalypse, toxic tales, and Humans-as-Controlling-Engineers are largely pulled from Burger, *supra* note 8, at 15.

27. Burger, *supra* note 8, at 16.

28. See *id.*

29. See *id.*

of each space.³⁰ Because pastorals create this middle position for the audience, “pastoral stories may be inflected with nostalgia (an idealization of some older past), or with prolepsy (a sense of prophesy or utopianism).”³¹

2. *The Georgic*³²

The georgic is a literary form akin to the pastoral, but with a greater focus on the intersection of labor and the natural world. For example, while a traditional pastoral might populate the rural countryside with shepherds lazing in fields with compliant sheep, a traditional georgic would depict farmers working the land. Put simply, the difference between the pastoral and georgic is the absence or presence of labor in the natural world. However, just as the pastoral idealizes its subject, so too does the georgic often romanticize the idea of rural labor. Georgics usually depict a harmonious relationship between humans and the land they work; as a result, even though georgics often involve actors doing hard work in fields or vineyards, that hard work is always rewarded by an abundant harvest. In this sense, georgics are a storytelling form which promotes the idea that the natural world not only can be enhanced by human labor, but that nature is at its best when worked by humans.

3. *Wilderness Adventure Narratives*

In the United States, the idea of wilderness has become a sacred cultural touchstone. Wilderness “expresses core values such as authenticity, freedom, purity, while holding out the possibility of refuge from the modern/post-modern world.”³³ Even though wilderness narratives contain some of the pastoral and georgic’s anthropocentric and humanist values, the wilderness idea is distinct from those tropes because it places special importance on nonhuman nature.³⁴ Some scholars claim that the wilderness narrative requires an element of terror or the sublime,³⁵ but my definition of wilderness extends to any story about a retreat into the wild accompanied by epiphanies about humankind’s relationship to the natural world, to each other, and to the universe at large. For examples of both the former and latter definitions of wilderness stories, we need look no further than Henry David Thoreau. In a book entitled *The Maine*

30. LEO MARX, *THE MACHINE IN THE GARDEN: TECHNOLOGY AND THE PASTORAL IDEAL IN AMERICA* 22 (1964).

31. See Burger, *supra* note 8, at 17 (to reflect these overlapping temporal orientations, the pastoral contains three generic forms: “the elegy, which looks back to a lost history; the idyll, which celebrates an abundant present; and the utopia, which looks forward to an idealized future”).

32. See generally DWIGHT DURLING, *GEORGIC TRADITION IN ENGLISH POETRY* (1935) (exploring the rise and tradition of the Georgic form in English poetry); JOHN CHALKER, *THE ENGLISH GEORGIC* (1969) (providing a detailed study of the growth of the Georgic form in English poetry).

33. See Burger, *supra* note 8, at 17.

34. See *id.*

35. See *id.* at 17–19.

Woods, Thoreau documented his hike to the peak of Mount Ktaadn.³⁶ While atop Mount Ktaadn, Thoreau felt the profound difference between the wild and civilized world, and these experiences produced within Thoreau a sublime experience of terror and an overwhelming sense of immediacy.³⁷ Another work by Thoreau, *Walden*, constitutes a different kind of wilderness narrative.³⁸ In *Walden*, Thoreau builds a small cabin in the woods near a local pond; grows his own food; and reflects on nature, humanity, and morality.³⁹ In short, his quest to stake out a life along Walden Pond leads to a series of encounters with the natural world giving rise to intellectual and emotional epiphanies.⁴⁰

4. Place-Based Tales

Place-based tales are stories about the value of a specific space to an individual person or group of people. These stories are highly subjective because they are only developed by an individual's or group's long-term relationship with a specific place in the natural world. In short, these stories are defined by a feeling of local attachment. For example, bluegrass songs from the mountains of Eastern Kentucky often discuss the psychological and familial harm caused by strip mining when whole communities are forced to leave a hollow or mountain side that they have long called home.⁴¹ This focus on local attachment as a way of conveying environmental values is illustrated by the British poet William Wordsworth. In his poetry, William Wordsworth wrote almost exclusively about his home region—the English Lake District—and through his poetry and essays, the British people learned to value the beauty of that particular place.⁴² The public came to see the beauty and importance of the region's small, white cottages, unassuming manor homes, and largely undisturbed natural spaces through the subjective experiences of a poet who

36. HENRY DAVID THOREAU, *THE MAINE WOODS* 70 (1983).

37. *Id.* at 71.

38. See generally HENRY DAVID THOREAU, *WALDEN, CIVIL DISOBEDIENCE, AND OTHER WRITINGS* (3rd ed. 2008).

39. *Id.*

40. See GREG GARRARD, *ECOCRITICISM: THE NEW CRITICAL IDIOM* 67–68 (2nd ed. 2012). Not long after Thoreau first began to popularize the wilderness narrative in the United States, John Muir launched his literary career which would draw inspiration from Thoreau's work. In *My First Summer in the Sierra* and other writings, John Muir defined for the American public the ecstatic and overwhelming experience of encountering rugged nature. His books combined with his work as a founder of the Sierra Club popularized the idea that wild nature possesses intrinsic value. JOHN MUIR, *THE MOUNTAINS OF CALIFORNIA* (1894); JOHN MUIR, *OUR NATIONAL PARKS* (1901); JOHN MUIR, *MY FIRST SUMMER IN THE SIERRA* (1911); JOHN MUIR *A THOUSAND-MILE WALK TO THE GULF* (1916).

41. See, e.g., STEVE EARLE AND DEL MCCOURY, *The Mountain, on THE MOUNTAIN* (E-Squared 1999); CLINCH MOUNTAIN BOYS, *Rank Stranger, on RALPH STANLEY & THE CLINCH MOUNTAIN BOYS 1971–1973* (Rebel Records LLC 1995); MERLE TRAVIS, *Dark as a Dungeon, on FOLK SONGS OF THE HILLS* (Capitol 1947); THE DILLARDS, *Old Home Place, on BACK PORCH BLUEGRASS* (Rhino/Elektra 1963); LESTER FLATT & EARL SCRUGGS & THE FOGGY MOUNTAIN BOYS, *Blue Ridge Cabin Home, on BLUE RIDGE CABIN HOME* (Columbia 1978).

42. See WILLIAM WORDSWORTH, *WORDSWORTH'S GUIDE TO THE LAKES* 150 (5th ed. 1970).

wanted to share his love of his home with the national public.⁴³ Contemporary American environmental writers such as Wendell Berry have continued in this Wordsworthian tradition. By telling detailed intimate stories about particular places, Berry and other writers of place convey the importance of developing a respect for the place where one lives and of cultivating an awareness of the beauty in one's very own locale.

5. *The Environmental Apocalyptic*

Stories about impending environmental apocalypse have long served as a critical rhetorical tool for environmental advocates⁴⁴ and have become especially relevant as concern about climate change continues to rise.⁴⁵ Derived from Biblical apocalyptic literature, the environmental apocalyptic is “the single most powerful master metaphor that the contemporary environmental imagination has at its disposal.”⁴⁶ This narrative operates on the public in many ways. First, the narrative contains a shock factor that might frighten the audience into action.⁴⁷ Second, the entire goal of the narrative is to change the way people see the relationship between their actions and the impact those actions have on the natural world.⁴⁸ Third, the narrative in some ways is tied to pastoral or georgic logic in that its scare factor comes from its insistence that the natural world we think we know is fragile and about to change; therefore, we need to act to preserve the aspects of it that we can.⁴⁹ Fourth, the apocalyptic narrative, perhaps strangely, attempts to inspire hope through fear by leaving open the possibility that humanity can still act to avoid the worst effects of an environmental apocalypse.⁵⁰ The environmental apocalyptic remains critically important because it links moral action and aesthetics to the regulatory management apparatuses of environmental law, thereby keeping alive the need for urgent action but also the hope that with time, money, and resolve, humanity can change its ways and prevent ecological disaster.⁵¹

43. For general discussions of Wordsworth's place-based poetry, see FIONA STAFFORD, *LOCAL ATTACHMENTS: THE PROVINCE OF POETRY* (2010); JONATHAN BATE, *ROMANTIC ECOLOGY: WORDSWORTH AND THE ENVIRONMENTAL TRADITION* (1991).

44. See Burger, *supra* note 8, at 19.

45. See *id.*

46. LAWRENCE BUELL, *THE ENVIRONMENTAL IMAGINATION: THOREAU, NATURE WRITING, AND THE FORMATION OF AMERICAN CULTURE* 285 (1995).

47. M. Jimmie Killingsworth & Jacqueline S. Palmer, *Millennial Ecology: the Apocalyptic Narrative From Silent Spring to Global Warming*, in *GREEN CULTURE: ENVIRONMENTAL RHETORIC IN CONTEMPORARY AMERICA* 21, 22 (Carl G. Herndl & Stuart C. Brown eds., 1996).

48. *Id.* at 41.

49. See BUELL, *supra* note 46, at 300–01.

50. See *id.*

51. See Burger, *supra* note 8, at 20.

6. Toxic Tales

Perhaps the most famous toxic tale is Rachel Carson's *Silent Spring*.⁵² *Silent Spring* and other toxic tales can be defined as "expressed anxiety arising from the perceived threat of environmental hazard due to chemical modification by human agency."⁵³ Toxic tales have four common characteristics. First, they are stories about a "rude awakening" from the ignorance of simpler times to the complexity that comes with living in modern industrial society.⁵⁴ Second, the world of the stories has no "refuge from toxic penetration."⁵⁵ Third, they depict conflict between weak local communities and vast corporate power.⁵⁶ Fourth, they paint a world of good and evil designed to "instill shock and compassion in uninitiated readers."⁵⁷ The tales often deromanticize the natural world by making readers aware of how humans have tainted it, yet push the reader to expand their understanding of what constitutes nature.⁵⁸ Therefore, in contrast to the pastoral or georgic, toxic tales present humans as a negative influence on nature while also directing the audience to care for what those before them have tainted.⁵⁹

7. Humans-as-Controlling-Engineers Narrative

This narrative emphasizes human control over nature.⁶⁰ Within this narrative, humans have claimed a significant ability to control and regulate their impact on the natural world.⁶¹ Some have argued that this narrative is the result of America's vast technological expansion after World War II, including our ability to place a man on the Moon.⁶² In the words of Robin Kundis Craig commenting on the mindset of Americans after World War II, "Americans could, it seemed, do anything we wanted with respect to harnessing nature's resources—down to and including atoms—and with respect to conquering nature's challenges, like the vacuum, cold, and immense distances of outer space. Humans appeared to be the technological masters of the universe."⁶³ This narrative is favored by administrative agencies and experts because it is a "managerial, science-based story about utilitarian governance that emphasizes the reliability and legitimacy of the modern administrative state and promises a

52. RACHEL CARSON, *SILENT SPRING* (1962).

53. See Burger, *supra* note 8, at 30–31.

54. See *id.* at 37.

55. See *id.* at 38.

56. See *id.* at 40.

57. See *id.* at 43.

58. See *id.* at 21.

59. *Id.*

60. Robin Kundis Craig, *Learning to Live with the Trickster: Narrating Climate Change and the Value of Resilience Thinking*, 33 PACE ENVTL. L. REV. 351, 363 (2016).

61. See *id.*

62. Melinda Harm Benson, *Reconceptualizing Environmental Challenges—Is Resilience the New Narrative?*, 21 J. ENVTL. & SUSTAINABILITY L. 99, 103–04 (2015).

63. See Craig, *supra* note 60, at 363.

reconciliation of other competing stories through public process and expert reason.”⁶⁴

B. Different Values-Based Understandings of Nature Give Rise to Different Statutes

These various narratives have been used throughout history to communicate different environmental values. This Subpart will describe some of the environmental values that have emerged throughout American history. Americans have long disagreed about how to approach the environment.⁶⁵ Rather than being just about economics or science, this disagreement often goes to the level of personal ethics and social identity; in other words, ideas about nature are often linked to ideas about humanity’s role in the world, our relationship to each other, and our responsibility to past and future generations.⁶⁶ However, the current debate in environmental law and policy appears to be a search for comprehensive regulatory schemes capable of resolving our environmental challenges, but this framing of the discussion confines debates about environmental law to elites.⁶⁷ Because those debates are highly complex and presume an ability of humans to control the environment, the debate remains cabined to the elite. As a result, the debate is already predisposed toward a particular environmental narrative—the Humans-as-Controlling-Engineers narrative.

But what the current environmental debate fails to notice is that other values, not just economic and scientific concerns, have been the root of most of our environmental laws. Drawing on Jedediah’s Purdy’s research, this Subpart briefly outlines how Americans have created and acted on four distinct understandings of their place in the natural world: 1) providential republicanism, 2) progressive management, 3) romantic epiphany, and 4) ecological interdependence. Each of the four involves both factual beliefs about how nature works and beliefs about what we should value in nature.⁶⁸ These different understandings of nature utilize different narratives to contribute to major episodes of environmental law making, and each understanding of nature remains alive and well in American discourse.⁶⁹ The problem is that some of these values are excluded from the decision-making process of NEPA because agencies are unable to hear the environmental narratives that best convey them.

64. See Burger, *supra* note 8, at 5.

65. Jedediah Purdy, *American Natures: The Shape of Conflict in Environmental Law*, 36 HARV. ENVTL. L. REV. 169, 172 (2012).

66. *Id.*

67. Holly Doremus, *Constitutive Law and Environmental Policy*, 22 STAN. ENVTL. L.J. 295, 298 (2003).

68. See Purdy, *supra* note 65, at 172.

69. See *id.*

1. *Providential Republicanism*

Providential republicanism is the oldest understanding of the environment in the American environmental imagination, and it utilizes a georgic narrative to frame humankind's place in nature.⁷⁰ In this view, the natural world exists for humans to use; in other words, nature must be productive and only becomes valuable after human labor has transformed it in some way.⁷¹ For example, trees must be cut and made into timber, wild meadows plowed and planted with corn, and fish caught and made into food. Moreover, this understanding of nature emphasizes the importance of small-scale private ownership of land as the best way to manage nature's resources, thereby linking ownership to economic productivity and political liberty.⁷² As Purdy observes, "much of the continent's private property in land was created under the banner of providential republicanism, and its tropes persist in property-rights movements, calls for local land-use sovereignty, and resistance to regulation as a centralizing, tyrannical . . . scheme."⁷³

2. *Progressive Management*

Progressive management arose in the late nineteenth century and often advances the Humans-As-Controlling-Engineer narrative. Its greatest political developers include President Theodore Roosevelt and the conservationist Gifford Pinchot, who were influenced by writers such as George Perkins Marsh.⁷⁴ In this understanding of the environment, nature is meant to serve human needs, but can only do so under expert governance.⁷⁵ Experts govern nature through irrigation networks, game preserves, the U.S. Forest Service, and the U.S. National Park Service. Here, the private landowner is not the ideal user of nature's resources; instead, the "scientifically trained and public-spirited manager" is.⁷⁶ In this view, the government is best situated to promote the interests of all Americans through careful management of vast public lands.⁷⁷ This understanding of the environment led to the creation of much of this nation's public lands laws, including that of national forests, parks, and grasslands.⁷⁸

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. Purdy, *supra* note 65, at 172.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

3. *Romantic Epiphany*

In the romantic epiphany view, certain features of the natural world are considered sacred because of their unique ability to give people spiritual or quasi-spiritual experiences.⁷⁹ Unlike the prior two views of nature, this view prizes wilderness, and for that reason often draws upon wilderness adventure narratives.⁸⁰ John Muir, Henry David Thoreau, and Ralph Waldo Emerson are well-known proponents of this view of nature.⁸¹ Here the ideal actor in the natural world is a person adventuring alone into the dramatic vistas of the wilderness where she can experience the power of the sublime and be overwhelmed by beauty.⁸² These encounters with natural beauty help people shake off the burdens of the civilized world and discover their authentic selves.⁸³ The largest legal legacy of romantic epiphany is the over 100 million acres of statutorily reserved wilderness, as well as environmental advocacy groups such as the Sierra Club, WildEarth Guardians, and the Wilderness Society.⁸⁴

4. *Ecological Interdependence*

Ecological interdependence is the most recent understanding of the natural world to emerge in the American environmental imagination, and this approach to nature often deploys the toxic tale or environmental apocalyptic.⁸⁵ The core idea of this understanding is that humans are a part of the natural world and that the natural world is a complex web of intermingling systems.⁸⁶ Ecological interdependence promotes an aesthetic and ethical attitude in which “human life is intertwined with a vast web of natural phenomena in which some observers discover inspiration, wonder, or humility.”⁸⁷ This view also promotes a focus on future generations with a recognition that human actions today have vast and often unknown consequences on all future life. The regulatory statutes passed in the heyday of ecological interdependence contain the idea of ecology at their core. NEPA, the Clean Air Act,⁸⁸ and the Clean Water Act⁸⁹ are the most prominent statutes arising from this understanding.⁹⁰

79. *Id.*

80. Purdy, *supra* note 65, at 172.

81. *Id.* at 200–01.

82. *Id.* at 172.

83. *Id.*

84. *Id.* at 174.

85. *See id.*

86. *Id.* at 174.

87. *Id.*

88. 42 U.S.C. § 7401 et seq. (2012).

89. 33 U.S.C. § 1251 et seq. (2012).

90. Purdy, *supra* note 65, at 174.

5. *Summary of Understandings of Nature*

These four understandings of the natural world are all active in the American environmental imagination. Even though some understandings of nature developed earlier in American history, those ideas remain central to the way many people value and tell stories about the natural world. While the broad narrative of American environmental law involves all four values-based approaches, in the NEPA context, agencies often fail to hear the values that do not coincide with the ecological interdependence approach upon which NEPA was based. Furthermore, because the acting agency is often animated by a Humans-as-Controlling-Engineers narrative, values that cannot be expressed in those terms are also frequently ignored. Because public participation plays such a substantial role in the NEPA process, looking at the stories people submit as public comments can help us understand the gap between public values and agency decision making.

II. NEPA AND ITS NARRATIVE FUNCTION

A. *NEPA's Narrative Requirements—Creating the EIS*

NEPA's procedural requirements have two narrative functions. First, the acting agency listens to the narratives of the public to understand which environmental values are important, so that the agency can respond to those concerns. Second, after listening to the public, the agency renders its decision in an EIS, which, ideally, should be narrated in such a way as to inform the public of why and how the agency arrived at its decision. Unlike most decision making in the United States, the NEPA process strives to involve the public in executive decision making “by encouraging public involvement and deliberative, participatory democracy.”⁹¹

1. *Overview of Law Governing Public Participation in NEPA Decision Making*

Ever since NEPA was passed in 1969, the law has served as the principal avenue for public participation in environmental decision making by federal agencies.⁹² Because public participation is considered such an important part of the NEPA process, people often forget that the language of NEPA itself does not outline what that public participation ought to look like. The statute only hints at public participation twice in a federal agency's NEPA process. The

91. Nicholas A. Fromherz, *From Consultation to Consent: Community Approval as a Prerequisite to Environmentally Significant Projects*, 116 W. VA. L. REV. 109, 110 (2013); see also 40 C.F.R. § 1500.2(d) (stating “Federal agencies shall to the fullest extent possible . . . encourage and facilitate public involvement in decisions which affect the quality of the human environment.”).

92. Mark C. Travis, *Collaborative Processes under NEPA: Are We There Yet?*, 23 NAT. RESOURCES & ENV'T 36, 36 (2009).

policy declaration in Section 4331(a) urges federal agencies to cooperate with “other concerned public and private organizations” and state and local governments to create programs that limit the effect on the natural environment.⁹³ Furthermore, Section 4332(C)(5) mandates that agencies generate an EIS for the public; however, this section does not mention public participation as part of the EIS process.⁹⁴ NEPA only requires an agency preparing an EIS to consult with other federal agencies relevant to the project being proposed and make available an EIS for federal, state, and local environmental agencies.⁹⁵

Because NEPA contains only public participation aspirations, the details of what is required in NEPA’s public participation process come from regulations promulgated by the Council for Environmental Quality (CEQ), which was created by NEPA to govern NEPA implementation.⁹⁶ According to CEQ, “NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and *public scrutiny* are essential to implementing NEPA.”⁹⁷ In another section concerning public participation, CEQ regulations make clear that agencies must “[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures” and “solicit appropriate information from the public.”⁹⁸ Furthermore, in the policy section of the CEQ regulations, agencies are required, to the fullest extent possible, to “[i]mplement procedures to make the NEPA process more useful to decision makers and the public” and “[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment.”⁹⁹

Even though references to public participation in NEPA are scarce, and references to public participation in CEQ regulations are arguably vague, the Supreme Court has recognized that NEPA’s purposes are best carried out through an exchange of information between agencies and the public.¹⁰⁰ Courts have generally interpreted NEPA to require inclusion of the public in decision-making processes from which they would normally be excluded.¹⁰¹ Moreover,

93. 42 U.S.C. § 4331(a).

94. 42 U.S.C. § 4332(C)(5).

95. See 40 C.F.R. 1503.1. See also Travis, *supra* note 92, at 36 (“make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment”).

96. 42 U.S.C. § 4342 (2012).

97. 40 C.F.R. § 1500.1(b) (emphasis added).

98. 40 C.F.R. § 1506.6.

99. 40 C.F.R. § 1500.2.

100. See Travis, *supra* note 92, at 36.

101. See *id.* (citing *Envntl. Def. Fund v. Tenn. Valley Auth.*, 339 F. Supp. 806, 810 (E.D. Tenn. 1972), *aff’d*, 468 F.2d 1164 (6th Cir. 1972)); *Sierra Club v. Hodel*, 848 F.2d 1068, 1093 (10th Cir. 1988).

courts have long interpreted NEPA to allow agency action only after careful consideration of public concerns and have consistently held that attempts to block specific individuals or groups from NEPA public participation impinge on NEPA's goals.¹⁰² The Supreme Court has stated that one of the main goals of NEPA is to ensure "that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process."¹⁰³

2. *Public Participation in the Generation of an EIS*

The most extensive public participation requirements under NEPA occur when an agency determines that it must generate an EIS. The creation of an EIS triggers every narrative aspect of NEPA, requiring agencies to listen to stories from the public and to create a narrative explaining its decision-making process. When an agency determines that an EIS is necessary, CEQ regulations require the agency to determine "the scope of the issues to be addressed" and to identify "the significant issues related to a proposed action."¹⁰⁴ The agency must "invite the participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons (including those who might not be in accord with the action on environmental grounds)."¹⁰⁵ Furthermore, the regulations require circulation of a Draft EIS for public and government agency comment, and the comments must be as specific as possible.¹⁰⁶ Additionally, the agency must affirmatively solicit "comments from those persons or organizations who may be interested or affected."¹⁰⁷ The agency is not required to address ambiguous or obscure comments, and if a party fails to raise an issue during the public comment period on a Draft EIS, that party may be barred from raising that issue in a subsequent action for judicial review of the agency's final decision.¹⁰⁸

In the Final EIS, the agency must respond to any "responsible opposing view" that was not sufficiently addressed in the Draft EIS.¹⁰⁹ The agency may respond to comments by modifying the alternatives, including the proposed action evaluated in the Draft EIS, developing and evaluating new alternatives, supplementing or modifying the analysis in the Draft EIS, making factual corrections, or explaining why the comments do not warrant a further response.¹¹⁰ Courts have stated that agencies do not need to respond to each

102. See Travis, *supra* note 92, at 36 (citing Wisconsin v. Calloway, 371 F. Supp. 807, 811 (W.D. Wis. 1974)); Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1123 (D.C. Cir. 1971).

103. Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, 462 U.S. 87, 97 (1983).

104. 40 C.F.R. § 1501.7.

105. 40 C.F.R. § 1501.7(a)(1).

106. 40 C.F.R. § 1503.3(a).

107. 40 C.F.R. § 1503.1(a)(4).

108. See Travis, *supra* note 92, at 37; Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 553–54 (1978).

109. 40 C.F.R. § 1502.9(b).

110. 40 C.F.R. § 1503.4(a).

individual comment.¹¹¹ On the other hand, courts have generally held that an agency must address each significant issue raised by the public comments.¹¹²

B. The Current EIS Process Prevents Federal Agencies from Hearing Narratives from the Public and Generating Narratives for the Public.

Even though the EIS process strives to listen to the narratives of the public and generate an informative narrative, the EIS process fails to do both. Because the EIS process takes a long time, costs a lot of money, and focuses on complex scientific and economic information, many members of the public struggle to participate in the process at all, and those who are able to participate usually find themselves stuck debating economic interests or technical scientific data rather than values.¹¹³ In a study conducted by CEQ, citizens reported feeling like “adversaries rather than welcome participants” when bringing comments to agencies in a hearing,¹¹⁴ and saw the hearings as events where citizens and agency representatives “talk[ed] past each other,” doing “very little listening.”¹¹⁵ Furthermore, even though citizen participants seemed to comprehend that the acting agency is not required by NEPA to address every individual comment, citizens still complained about the complete lack of explanation for why certain comments were not addressed by agencies in their Final EISs.¹¹⁶ Citizens also reported feeling “overwhelmed by the resources available to [project] proponents and agencies.”¹¹⁷ As a result of this narrative breakdown between public comments and the questions actually addressed in the Final EIS, many citizens reported feeling that litigation was their only vehicle to achieving meaningful participation in the NEPA process.¹¹⁸ In addition to these barriers to public participation, EISs are frequently prepared to justify decisions that have already been made by the responsible agency.¹¹⁹

111. See *Vermont Yankee*, 435 U.S. at 553–54; *North Carolina v. FAA*, 957 F.2d 1125, 1135 (4th Cir. 1992).

112. *Oregon Nat. Res. Council v. Marsh*, 52 F.3d 1485, 1489–90 (9th Cir. 1995).

113. See Fromherz, *supra* note 91, at 138–40. In one of its own studies of the EIS process, CEQ reached the following discouraging conclusions: “[t]he Study determined that frequently NEPA takes too long and costs too much, agencies make decisions before hearing from the public, documents are too long and technical for many people to use, and training for agency officials, particularly senior leadership, is inadequate. According to many federal agency NEPA liaisons, the EIS process is still frequently viewed as merely a compliance requirement rather than as a tool to effect better decision-making. Because of this, millions of dollars, years of time, and tons of paper have been spent on documents that have little effect on decision-making.” COUNCIL ON ENVIRONMENTAL QUALITY, EXEC. OFFICE OF THE PRESIDENT, *THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS* 7 (1997) [hereinafter CEQ STUDY].

114. CEQ STUDY, *supra* note 113, at 18.

115. *Id.*

116. *Id.*

117. *Id.*

118. See Fromherz, *supra* note 91, at 140.

119. Ray Clark, *The National Environmental Policy Act and the Role of the President's Council on Environmental Quality*, 15 ENVTL. PROF. 4 (1993).

Therefore, the EIS process is frequently entered into by an agency with little intention to take public comments seriously.

Another major impediment to public participation in NEPA decisions is the highly complex nature both of the information provided by the EIS and the debates that occur during the decision-making process.¹²⁰ For example, in a study of how the NEPA public participation process has changed the way the Forest Service makes decisions about managing national forests, Ackerman found that NEPA had “fostered expanded public information and involvement efforts” but “it is not clear that this information is what the public wants or needs to be adequately informed” about Forest Service decision making.¹²¹ The information provided to the public by federal agencies is often incomplete, highly technical, or attempts to serve too many different public groups at one time.¹²² Put another way, the documents produced by the NEPA process are often difficult to read, and the technical nature of those documents requires public participants to hire lawyers or their own experts to translate NEPA documents.¹²³ These experts and lawyers are necessary because they serve the intermediary function of translating public narratives grounded in nonscientific or noneconomic values into narratives that the federal agency is better able to hear, such as the Humans-as-Controlling-Engineers narrative. This means that only members of the public or public groups with substantial resources will be able to understand the EIS and make their concerns heard by the agency.¹²⁴

The public cannot use a mode of storytelling to communicate their values and concerns to the federal agency because the NEPA process is not truly deliberative.¹²⁵ Deliberative decision making requires critical reflection on individual and public values because reflection clarifies those values and helps individuals, agencies, and the public understand why they enter a discussion with the values they have.¹²⁶ When these parties articulate their values-based viewpoints to one another, the communication becomes more meaningful because interested parties are given space to fully engage with another party’s ideas. Ideally, deliberative decision making creates more enduring public values through this inclusive values-based discussion.¹²⁷

In contrast to deliberative decision making, agencies often render decisions through the NEPA process by engaging in either pluralist decision

120. Stephen M. Johnson, *NEPA and SEPA's in the Quest for Environmental Justice*, 30 LOY. L.A. L. REV. 565, 600 (1997).

121. Stark Ackerman, *Observations on the Transformation of the Forest Service: The Effects of the National Environmental Policy Act on U.S. Forest Service Decision Making*, 20 ENVTL. L. 703, 708–09 (1990).

122. *See id.*

123. *See Johnson, supra* note 120, at 600.

124. *See id.*

125. Jonathan Poisner, *A Civic Republican Perspective on the National Environmental Policy Act's Process for Citizen Participation*, 26 ENVTL. L. 53, 86 (1997).

126. *See id.* at 65–66.

127. *Id.*

making or synoptic decision making. Pluralist decision making refers to a mode of debate in which individuals and other private interests bargain with each other in an attempt to maximize their own interests.¹²⁸ In contrast, synoptic decisions making involves the professional exchange of data so that experts can apply preset scientific or economic rules to determine the optimal decision.¹²⁹ The former mode of discussion privileges economics and individual self interest in decision making. The latter privileges scientific data and technical information. Neither form of decision making is conducive to a discussion about values that do not emerge from economic, technical, or scientific categories, such as values grounded in ethics, morals, aesthetics, personal attachment, and ecology. Therefore, the NEPA process becomes a battleground between experts and well-financed interest groups rather than a forum for the public.

To be fair, agencies probably exclude certain public comments from the actual decision-making process because they find comments that operate outside technical or scientific rationales difficult to consider. In his essay about why environmental ethics often gets rejected in favor of economic and scientific analysis through cost-benefit analysis (CBA), Clowney articulates three main reasons that agencies lean on technical analysis. First, unlike a discussion about values, a discussion about economics is more efficient.¹³⁰ As part of this efficiency, agencies only undertake actions where benefits outweigh costs.¹³¹ Second, agencies lean on CBA because it provides the agency and its leaders with “cognitive supports.”¹³² This argument is based on the idea that “ordinary people” have great difficulty understanding the choices in front of them, which prevents them from making well-informed, reasoned decisions.¹³³ CBA short circuits the “mental glitches” of the public and permits an agency to make rational decisions even when the public is not being rational.¹³⁴ Third, Clowney notes that using CBA and techno-rational decision making enables agencies to make decisions free from the lobbying of interest groups.¹³⁵ In this way, quantitative decision making is an antidote to corruption.¹³⁶

However, quantitative decision making is not always appropriate to address the problems of environmental policy, and is particularly problematic in the context of NEPA, which aims to involve the public in the environmental decision making of federal agencies. In the context of general environmental policy, pure techno-rational analysis fails in four fundamental ways. First, such

128. *See id.* at 56–57.

129. *See id.* at 57.

130. Stephen Clowney, *Environmental Ethics and Cost-Benefit Analysis*, 18 *FORDHAM ENVTL. L. REV.* 105, 113 (2006).

131. *Id.*

132. *Id.* at 115.

133. *Id.*

134. *Id.*

135. *Id.* at 118.

136. *Id.*

analysis fails to see that some values and things in life should not and cannot be monetized.¹³⁷ Second, quantitative data is often far less reliable than it appears because it is shaped by special interest groups or does not take all costs and benefits adequately into account.¹³⁸ Third, techno-rational analysis, particularly economic analysis, is more likely to hurt the poor than the rich since the rich can more likely mobilize resources to engage in a technical debate with a federal agency.¹³⁹ Fourth, such analysis fails to adequately consider our responsibility to future generations—a consideration that is especially important for environmental law.¹⁴⁰ Furthermore, particularly in the NEPA process, reducing the scope of discussion to scientific or economic concerns prevents the public from engaging in a deliberative decision-making process which considers and shapes the public's environmental values.¹⁴¹

III. APPLICATION OF NARRATIVE THESIS TO *WILDEARTH GUARDIANS V. BLM*

To begin, this Part will provide a case summary of *WildEarth* and the Wright Area Coal leases at issue. Turning then to an examination of the EIS process itself, a discussion of several comments filed by individual citizens and nonprofit organizations on the Draft EIS will illustrate how different narratives convey different values. A review of BLM's corresponding responses in the Final EIS, however, will show how BLM struggled to meaningfully respond to comments not grounded in Progressive Management values. After examining the EIS process, I will apply my narrative thesis to the actual litigation of the case and argue that the technical narratives litigated obscure the actual values at issue between the parties. To better understand some of the underlying values being litigated, the analysis will look to the briefs filed by the parties, as well as the district court opinion to examine narratives that are in the background of this case.

A. The Case Summary

As touched upon in the introduction of this Note, *WildEarth* involved a challenge brought by environmental groups to BLM's approval of four coal leases in Wyoming's Powder River Basin (PRB). Challenger *WildEarth* argued that BLM violated NEPA when it concluded that issuing the four coal leases would have no effect on national CO₂ emissions.¹⁴² The court agreed with *WildEarth*, holding BLM's analysis was arbitrary and capricious.¹⁴³ The court

137. *Id.* at 119.

138. *Id.* at 120.

139. *Id.* at 121.

140. *Id.* at 122–23.

141. *See Doremus, supra* note 67, at 352.

142. 870 F.3d at 1228.

143. *Id.* at 1240.

ordered BLM to revise its EIS and Records of Decision in accordance with the court's decision but did not vacate the leases.¹⁴⁴

WildEarth based its claim on the NEPA provision addressing what agencies must include in an EIS. NEPA, in relevant part, requires federal agencies to generate EISs that analyze direct effects, reasonably foreseeable indirect effects, and effects that are cumulative over time or aggregated with other forces outside the agency's proposed action.¹⁴⁵ In addition, the agency must not only examine the effects of its proposed action, but also effects of alternative actions, including no action. The alternatives analysis "is the heart of the environmental impact statement."¹⁴⁶ As described by the Tenth Circuit: "Without substantive, comparative environmental impact information regarding other possible courses of action, the ability of an EIS to inform agency deliberation and facilitate public involvement would be greatly degraded."¹⁴⁷

In particular, the controversy in *WildEarth* arose out of a disagreement between WildEarth and BLM about how leasing four coal tracts in the PRB would affect national carbon emissions contributing to climate change.¹⁴⁸ The PRB region is the largest single contributor to United States' domestic coal production, at times accounting for 38.5 percent of the country's total coal production.¹⁴⁹ The four PRB coal tracts at issue would extend the life of two existing surface coal mines, the Black Thunder mine and the North Antelope Rochelle mine, which account for almost 20 percent of the United States' annual domestic coal production.¹⁵⁰ All four coal tracts are near and partially within the Thunder Basin National Grassland, a national forest.¹⁵¹

In deciding whether to lease the four tracts, BLM prepared a Draft EIS for the leases as required by NEPA.¹⁵² In the Draft EIS, BLM compared the environmental impacts of its preferred action—leasing the tracts—to a no action alternative in which none of the coal leases would be issued, as it was required to do under CEQ regulations governing NEPA compliance.¹⁵³ Regarding CO₂ emissions and impacts on climate change, BLM concluded that there would be no appreciable difference between the United States' total CO₂ emissions under the preferred alternative and no action alternative.¹⁵⁴ BLM reasoned that, even if it did not approve the leases, a perfect substitution of coal

144. *Id.*

145. 40 C.F.R. §§ 1508.7, .8.

146. 40 C.F.R. § 1502.14.

147. *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 708 (10th Cir. 2009).

148. *WildEarth Guardians*, 870 F.3d at 1227–28.

149. *Id.* at 1227.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 1227–28.

154. *Id.* at 1228.

at the same price would be sourced, resulting in almost no difference in CO₂ emissions between the preferred and no action alternatives.¹⁵⁵

BLM then received comments on the Draft EIS, including one from WildEarth and the Sierra Club.¹⁵⁶ WildEarth pointed out that BLM's conclusions regarding national CO₂ impacts were "at best a gross oversimplification, and at worst entirely impossible."¹⁵⁷ WildEarth asserted that if the PRB coal tracts were not leased then it would be very difficult for domestic or international coal mines to replace the lost supply of coal at the same price.¹⁵⁸ According to WildEarth, the price of coal would almost certainly increase if the leases were not approved because PRB mined coal is among the cheapest coal in the world.¹⁵⁹ This price increase would, in turn, lead to a reduction in coal-burning in favor of less expensive, less carbon intensive energy sources such as natural gas or renewables.¹⁶⁰ As a result of this shift to natural gas or renewable sources, WildEarth argued that far less CO₂ would be emitted under the no action alternative than under the preferred alternative.¹⁶¹

After receiving these comments, BLM stood by its initial conclusions and published them in its Final EIS.¹⁶² Furthermore, BLM issued a Record of Decision (ROD) for each of the four tracts that included the same conclusions about national CO₂ emissions and climate change impacts.¹⁶³ WildEarth challenged the Final EIS and the four RODs in federal district court in three consolidated cases in 2012.¹⁶⁴ The State of Wyoming intervened, as did a group of mining interests.¹⁶⁵ As part of their challenge, WildEarth objected to BLM's no action alternative analysis, but the district court did not specifically address it. Ultimately, the district court upheld BLM's actions as reasonable, and WildEarth timely appealed on the narrow issue of whether BLM's alternative analysis regarding climate change impacts failed to comply with NEPA.¹⁶⁶

The court then moved to consider the merits of the NEPA challenge. First, the court held that BLM's perfect coal substitution was deeply flawed because it defied basic economics and had no evidentiary basis in the administrative record.¹⁶⁷ The court noted that even though agencies are given a certain level

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* Specifically, one could look to Reply Brief for Petitioners-Appellants at 2, *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222 (10th Cir. 2017) (No. 15-8109), 2016 WL 1695484.

160. *See WildEarth Guardians*, 870 F.3d at 1228.

161. *Id.*

162. *Id.*

163. *Id.* at 1229.

164. *Id.* at 1230.

165. *Id.* at 1230.

166. *See id.* at 1230.

167. *See id.* at 1237–38.

of deference by courts, the data relied on by BLM did not meet minimum NEPA consideration requirements.¹⁶⁸ Under NEPA, the evidence must be sufficient in volume and quality to “sharply define the issues and provide a clear basis for choice among options.”¹⁶⁹ Furthermore, the court determined that because BLM’s perfect-substitution assumption was key to its ultimate decision to open bidding on the leases, the deficiency in the EIS was “more than a mere flyspeck.”¹⁷⁰ In effect, the court held that the deficiency was so great as to “defeat NEPA’s goals of informed decision making and informed public comment.”¹⁷¹ For relief, the court remanded to the district court with instructions to enter an order requiring BLM to revise its EIS and RODs, but did not vacate the resulting leases.¹⁷²

B. *The Wright Area Coal Leases EIS Process*

Pursuant to NEPA, BLM issued a 1112-page Draft EIS for the Wright Area Coal leases on July 8, 2009.¹⁷³ In accordance with CEQ regulations governing NEPA public participation, BLM received written comments and held a public hearing regarding the Draft EIS.¹⁷⁴ The public comments received by BLM varied in sophistication, with some comments involving forty-two pages of analysis on climate change impacts and others only a few sentences asking BLM not to lease the coal tracts.¹⁷⁵ BLM received seventy-two individualized comments and hundreds of additional form letter comments.¹⁷⁶ These comments reveal a public with different environmental values using various narratives to convey the importance of those values to BLM. Analyzing a few of these comments reveals that well-financed organizations know to frame their values within the Humans-as-Controlling-Engineers or environmental apocalyptic narratives so that BLM will hear and respond to their concerns. In contrast, individual members of the public often

168. *See id.* at 1235–36.

169. *Id.* at 1235 (citing *Citizens’ Comm. to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1179 (10th Cir. 2008)).

170. *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 704 (10th Cir. 2009).

171. *See WildEarth Guardians*, 870 F.3d at 1237.

172. *Id.* at 1240.

173. *See* BUREAU OF LAND MGMT., U.S. DEP’T OF THE INTERIOR, *Wright Area Coal Lease Draft Environmental Impact Statement* (2009), available at https://eplanning.blm.gov/epl-front-office/eplanning/docset_view.do?projectId=67033¤tPageId=96927&documentId=82292.

174. *See* BUREAU OF LAND MGMT., U.S. DEP’T OF THE INTERIOR, *WRIGHT AREA COAL LEASE APPLICATIONS DRAFT EIS PUBLIC HEARING* (2009), https://eplanning.blm.gov/epl-front-office/projects/nepa/67033/147473/181248/WYW172388_Transcripts_Coal_Lease-wrightarea.pdf.

175. *See* BUREAU OF LAND MGMT., U.S. DEP’T OF THE INTERIOR, *FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE WRIGHT AREA COAL LEASE APPLICATIONS* (2010), <https://eplanning.blm.gov/epl-front-office/projects/nepa/67033/82290/97261/02WrightCoalVo2.pdf> [hereinafter *WRIGHT FEIS*]. *See* Appendix I of *WRIGHT FEIS* (Defenders of Wildlife’s comment is an example of a lengthy comment and comments from Leslie Glustrom illustrate shorter comments).

176. *See* *WRIGHT FEIS*, *supra* note 175, at Appendix I (Draft EIS Comment Letters, BLM Responses, and Hearing Summary).

frame their values using pastoral, place-based, or wilderness adventure narratives that BLM either struggles to respond to or entirely ignores. While all the narratives described in Part I of this Note were present in the public comments, this Subpart only analyzes four representative comments in detail to demonstrate the utility of a narrative frame for understanding NEPA's public participation process.

One of the first comments recorded in the Final EIS is from the environmental nonprofit Defenders of Wildlife (Defenders), and this comment constitutes one of the longest received by BLM during the EIS process.¹⁷⁷ In its comment, Defenders clearly states that the values it seeks to promote are wilderness values: "Defenders is a committed advocate for the protection of the nation's wildlife refuges, parks, forests, and other public lands."¹⁷⁸ Defenders also argues that BLM's Draft EIS fails to adequately consider two specific impacts: climate change and harm to endangered and threatened species.¹⁷⁹ In making its arguments, Defenders chose not to discuss the ethical or spiritual reasons that members of Defenders value wild animals. Defenders does not tell wilderness adventure stories about encounters with wild animals or pastoral narratives about what the Thunder Basin National Grassland looked like or could look like before or without massive coal mining operations. Nor does Defenders tell a georgic story about how its members want humans to live in responsible relationship to the natural world. Rather, Defenders opts for narratives that do not clearly convey wilderness values because it likely knows that BLM will not respond to pastorals, georgics, or wilderness adventure narratives. Defenders frames its concerns in the Humans-as-Controlling-Engineers narrative, arguing that BLM's actions are irresponsible in light of what we know from science about both the impacts of increased greenhouse gas emissions on global warming and the impact of coal pricing on energy markets.¹⁸⁰ While the Humans-as-Controlling-Engineers narrative allows Defenders to make scientific and technical arguments showing that BLM is not acting as a responsible "engineer" of the resources it governs, that narrative also obscures the aesthetic and ethical values of wild animals motivating Defender's opposition to the leases.

Another environmental nonprofit, the Center for Biological Diversity (CBD), filed a comment on the Draft EIS opposing BLM's decision to grant the Wright Area coal leases. In its comment, the CBD clearly states that its mission is to advance the values of ecological interdependence: "The Center is a non-profit conservation organization dedicated to the protection of native species

177. *Id.* at Appendix I cmt. 2.

178. *Id.* at 1.

179. *Id.* at 2–18.

180. *Id.* at 2–8 ("[t]he proposed action is unprecedented. BLM has never offered to lease such a large amount of coal through a single EIS for at least the last 20 years. What's more BLM is offering to lease such a large amount of coal in a day and age where scientific knowledge of human-caused global warming is more advanced than ever.").

and their habitats through science, policy[,] and environmental law.”¹⁸¹ The CBD opposes the leases because it aims “to reduce greenhouse gas emissions to protect biological diversity, our environment, and public health.”¹⁸² While this aim sounds similar to that articulated by Defenders, the values are slightly different. The CBD strives not just for the protection of wild animals and wild places; rather, its mission is grounded in values of ecological interdependence in that it opposes activities that harm people, animals, and the planet as a whole. The values expressed by the CBD are grounded in a belief that harm to one species necessarily harms all species because of the interconnected nature of our environment. This recognition requires that humans be seen as part of the environment—not as masters over it. Some of the CBD’s values might be better conveyed by other narratives. For example, a pastoral story would emphasize nature’s capacity for balance of its complexity, or toxic-tale would emphasize the deep ecological harm that can come from a single policy decision. Yet, the CBD opted for an environmental apocalyptic narrative to achieve its goals.

The CBD’s comment marshals vast quantities of scientific data to argue that “the proper context for an analysis of the Wright Area Project is the Climate Crisis.”¹⁸³ Then, it uses that data to catalogue all the ways that burning the Wright Area coal will move the planet closer to apocalypse. The CBD argues that burning the Wright Area coal will contribute to “more frequent and intense heat waves,” “increases in smog,” “more frequent and intense flooding and hurricanes,” “more frequent and intense drought and wildfire,” “increased disease transmission,” “increased allergens,” “shrinking ranges,” “altered timing of natural events,” “bigger and more frequent wildfire,” “rising insect epidemics,” “hotter and more acidic oceans with rising sea levels,” “polar ecosystem impacts,” “earlier snow melt and threatened water supplies,” “unstable farming conditions,” and “runaway climate change.”¹⁸⁴ By using this apocalyptic narrative, the CBD likely hoped to capture the full attention of BLM and also the American public. And even though other narratives may have better conveyed CBD’s values, the CBD’s environmental apocalyptic still managed to convey the values of ecological interdependence. However, the effectiveness of this argument likely drew its force from the dozens of scientific studies the CBD cited in its comment.

In contrast to the comments of these environmental organizations, comments filed by individual members of the public did not rely on technical and scientific data. Most cited none at all. Furthermore, many individuals failed to reshape their comments into the Humans-as-Controlling-Engineers or environmental apocalyptic narratives to which agencies are more likely to

181. *Id.* at Appendix I cmt. 3, at 1.

182. *Id.*

183. *Id.* at 2.

184. *Id.* at 11–27.

respond. Many individual comments were only a few sentences long and invoked morality to try and convince BLM to “do the right thing.”¹⁸⁵ To demonstrate how some individual comments differ from the comments of organizations, I will look more closely at two comments, one submitted by Lewis Poole, which invokes a place-based pastoral, and one by Leland Turner, which utilizes a place-based narrative inflected with georgic undertones.

Lewis Poole identifies himself as a “lifelong resident of Wyoming” who is “extremely concerned about the current level of development on public lands.”¹⁸⁶ These introductory remarks are simple, but Mr. Poole accomplishes a great deal in that sentence. His credentials are not from a university, and he does not boast of great scientific knowledge; however, he claims authority as a lifelong Wyomingite—someone who has deep knowledge of his state. He goes on to narrate a mixed story: a place-based pastoral. He writes, “We are losing all that makes Wyoming a unique place to live.”¹⁸⁷ Here, he shows a place-based pride and love of his home, and he goes on, “I have witnessed truly special places sacrificed to short-sighted development.”¹⁸⁸ What kinds of special places? He answers, “The grasslands of Wyoming make up some of the most crucial prairie habitats left in the nation.”¹⁸⁹ And he urges the coal leases be rejected because “this proposal sacrifices far too much” of that pristine grassland habitat.¹⁹⁰ He invokes the classic pastoral trope of the machine in the garden—an imaginative contrast between a pure natural world and a filthy industrial world, and he utilizes the powerful rhetoric of nostalgia imbedded in the pastoral form. This place-based pastoral makes a protest against the coal leases grounded in love for his state and a deep reverence for unspoiled nature.

In another personal comment, Leland Turner tells a place-based tale with georgic undertones to convey what he feels is at stake if the coal mines are leased by BLM. This comment constitutes the most comprehensive place-based narrative of the seventy-two public comments received by BLM for the Wright Area Coal leases. Mr. Turner begins his story by establishing his local attachment to the land:

Our ranch was homesteaded by my family here in 1918. In the 1930’s when the area now known as the Thunder Basin National Grassland was first put together, my family obtained grazing rights in the Thunder Basin . . . for

185. See, e.g., *id.* at Appendix I cmt. 8, at 1 (“[d]ear Ms. Bucklin: We can’t continue to burn coal and keep a healthy planet. If you care about human survival you must put a stop to this. You know that it is dangerous to continue to dig up the coal and put it into the air via burning it for electricity. When all the coal is gone we’ll all be dead or most of the Earth’s species will any way. Do the right thing and stop this. Please. Sincerely, Betty Harris.”).

186. *Id.* at Appendix I cmt. 10, at 1.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

me personally, my first experience with tailing cattle back and forth to the Thunder Basin came in 1941 as a baby in a cradle.”¹⁹¹

Clearly, this is an area for which Mr. Turner has a great deal of love, for this land near the proposed coal leases is the place where he grew up, where he has lived his life, where he has made all his memories.

But this place-based tale is not a pastoral because Mr. Turner does not idealize the natural world; he believes that the land can be worked by humans and still be beautiful and, as such, his narrative is inflected with georgic undertones. This perspective comes from his lifelong work on the land as a rancher. But he also recognizes that the land can be abused by humans as it has been by coal companies in the past. He notes that past coal mines caused him and his family to lose pasture, to lose “spring holes with fish in them,” “a good swimming hole,” and “a large spring that [his] parents and neighbors depended on to get their supply of ice each winter.”¹⁹² The land no longer provides these recreational and personal pleasures because the coal companies do not share his environmental values of stewardship, responsibility, affection, and balance. He writes, “Since the mining started, we do not have a fish on the ranch today, there is no place to swim unless mud wrestling is your thing and we have no place on the ranch where I can take our grandchildren to cut a block of ice to make a freezer full of ice cream.”¹⁹³ His place-based narrative conveys nonquantifiable values that BLM will not be able to hear. Because BLM cannot quantify the loss of a family swimming hole or the experience of using a spring on one’s own ranch to acquire ice to make ice cream, BLM will, and ultimately did, fail to meaningfully engage with his comment in the Final EIS.¹⁹⁴

In response to the comments from environmental organizations, which framed values in narratives which included substantial quantities of scientific and technical analysis, BLM provided extensive feedback and often used those comments to expand portions of the Draft EIS.¹⁹⁵ In contrast, the place-based narratives told by individuals were largely ignored and only given the response “The information provided in your comment letter has been considered in the preparation of the EIS.”¹⁹⁶ One sentence to respond to people who expressed nonquantifiable environmental values through place-based, pastoral, or georgic narratives. Although some individual responses received more than this single sentence, the depth of BLM’s response to all public comments was roughly proportional to the technical specificity and complexity of the comment.¹⁹⁷

191. *Id.* at Appendix I cmt. 18, at 1.

192. *Id.* at 2.

193. *Id.*

194. *See id.* at Appendix I (BLM Responses to Comment Letters Received Regarding the Wright Area Draft EIS).

195. *Id.*

196. *See id.* at 27.

197. *See id.* at 1–47.

What an examination of the public comments process of this EIS demonstrates is that there is a narrative disconnect between the public and the decision-making agency. Certain narratives, such as the Humans-as-Controlling-Engineers and environmental apocalyptic, are privileged over others, such as place-based tales and pastorals. Furthermore, this EIS process shows that a conversation intended to include the public in BLM's decision-making process ended up as a debate between experts from sophisticated environmental organizations and experts at BLM. In short, the public participation of this EIS process became a synoptic debate about scientific data and not a deliberative process about values. Because this is a pattern that has repeated itself in multiple NEPA public participation processes, it is likely that fewer individuals commented on BLM's EIS than otherwise would have if they had faith that the public participation process would spark a meaningful conversation between public values and the goals of the agency. Finally, even though environmental organizations made their scientific concerns known in the EIS process, some clearly felt that BLM failed to adequately address their comments in the Final EIS, which led to litigation. But the litigation did not reflect the actual values at issue in the case; rather, those values were masked in technical/scientific narratives.

C. Narratives Being Litigated versus Values at Issue

What is really being litigated in this case? Did WildEarth file this lawsuit simply because it disagrees with BLM's analysis on the effects of coal pricing on national carbon emissions? Probably not. Rather, the issue of coal pricing's effect on national carbon emissions is a technical basis for litigating environmental values. WildEarth likely actually wants BLM to make a different decision based on values and policy but can only force BLM to reconsider its decision through a technical challenge. Ultimately, a NEPA challenge is not the best way to force a policy change, since victory usually only leads to a revision of the EIS and not a different decision.¹⁹⁸ But a NEPA challenge was the tool WildEarth had at its disposal to try and advance its values-based goals. WildEarth hoped that the court would vacate the coal leases because of the NEPA violations.¹⁹⁹ This result, they argued, would increase the price of coal and help facilitate a national transition toward renewable energy sources.²⁰⁰ In short, WildEarth used technical/scientific arguments grounded in the narrative of Humans-as-Controlling-Engineers to try to advance its nonquantifiable wilderness values.

198. See Louis Russell, *What Are the Parks For? Making Policy Explicit in the Park Service's NEPA Decisions*, 41 *ECOLOGY* L. Q. 521, 539 (2014).

199. See Opening Brief for Petitioners-Appellants at 39, *WildEarth Guardians v. Bureau of Land Mgmt.*, 870 F.3d 1222 (10th Cir. 2017) (No. 15-8109), 2016 WL 389758 at *4.

200. *Id.* at 19–28.

In its briefs, WildEarth used the Humans-as-Controlling-Engineers narrative because it knew this narrative would be better received by the courts than wilderness stories about the importance of wild places for experiences of romantic epiphany.²⁰¹ Courts, like agencies, prefer to think of themselves as objective rational actors, and the Humans-as-Controlling-Engineers narrative enables courts and agencies to see themselves as rational characters in the story of litigation and decision making. WildEarth skillfully advanced this narrative by emphasizing the clear economic flaws in BLM's argument.²⁰² WildEarth did this by reference to the economic studies cited by BLM in its EIS and to economics generally. However, supplementing WildEarth's argument was an undertone of the environmental apocalyptic. In one brief, WildEarth consistently brought up climate change and often provided a frame that would lead the court to believe that leasing the coal would have significant climate impacts.²⁰³ For example, WildEarth claimed that the "BLM misled the public . . . by arbitrarily asserting that the climate effects of authorizing two-billion-ton coal leases are essentially no different from leaving that coal in the ground."²⁰⁴ In this single sentence, WildEarth fuses the Humans-as-Controlling-Engineers narrative to the environmental apocalyptic, thereby adding force to its claim that BLM did not reach a rational decision about the impacts of coal pricing on national carbon emissions. This framing also gave the court the opportunity to see itself both as a rational actor forcing BLM to do its economics homework and as a moral actor demanding that closer attention be paid to climate change in future NEPA analysis.

But other environmental narratives played a role in the litigation of this case. In the district court opinion, the court detailed several individual narratives that helped plaintiffs establish standing.²⁰⁵ The first declaration the court outlines is from Jeremy Nichols.²⁰⁶ His injury is based on his experiences as an outdoors enthusiast who enjoys hiking in the Thunder Basin National Grassland. His declaration pronounces his support of wilderness values and explains how the aesthetics of the grassland will be harmed by the mining operations.²⁰⁷ In addition to this wilderness narrative, the declaration of Percy Angelo puts forward a toxic tale emphasizing the long-distance effects of burning Wyoming coal on his coastal home in Florida.²⁰⁸ The declaration of Edward Mainland presents a place-based tale about how Novato, California, a

201. See Reply Brief for Petitioners-Appellants, *supra* note 159 (throughout the argument, WildEarth relies on scientific and economic evidence to make its argument that BLM as an expert agency should have recognized that its reasoning was flawed and disclosed climate change impacts to the public).

202. See *id.* at 5–10.

203. *Id.* at 19–22.

204. *Id.* at 20.

205. WildEarth Guardians v. U.S. Forest Serv., 120 F. Supp. 3d 1237, 1250–55 (D. Wyo. 2015).

206. *Id.* at 1250.

207. *Id.* at 1251.

208. *Id.* at 1252.

lagoon community on the shores of San Francisco Bay, is being harmed by rising sea levels.²⁰⁹ And the declaration of Dave Clarendon also utilizes a place-based narrative with some georgic values.²¹⁰ He complains about the “shorter growing season and lack of rainfall in the area, and the impact on his ability to grow hay and water his cattle.”²¹¹ All these narratives give voice to nonquantifiable aesthetic and ethical values that BLM does not give great credence to in its EIS.²¹²

D. Why This Matters: Narrative Disconnect Discourages NEPA Public Participation

As the comments on the Wright Area coal leases Draft EIS and the *WildEarth* litigation demonstrate, the NEPA process restricts participation in the decision-making process to those who can compress their values into the few narratives that mask nonquantifiable values in scientific and economic terms. Science and economics can and should inform agency decision making, but technical information alone cannot make policy decisions.²¹³ CEQ regulations require federal agencies to solicit comments from the public to aid the agency in its NEPA decision making.²¹⁴ But the current state of NEPA public participation discourages public comments that tell stories about values an agency is unable to easily quantify or respond to. Agency decision makers, including BLM land-managers, only give full attention to public narratives that are “responsible”; in other words, they are more likely to respond to narratives that articulate verifiable, quantitative complaints.²¹⁵

The result is that members of the public either choose not to participate in the EIS process or are shut out of the process. The only members of the public who are heard are those who possess or have access to expert training and the financial and temporal resources to overcome the narrative and economic hurdles to participation.²¹⁶ The people, with their place-based tales about their ranches, their pastoral visions of what Wyoming has been and could be again, their adventure narratives about spiritual encounters with wild animals in the

209. *Id.* at 1252.

210. *Id.* at 1255.

211. *Id.*

212. Future research could explore why courts seem better positioned than agencies to hear and validate environmental narratives that are not grounded in science and economics. In holding that environmental plaintiffs have standing, courts are often moved by wilderness adventure narratives, pastorals, georgics, and other narratives that articulate aesthetic and spiritual values about the natural world.

213. See MARTIN A. NIE, *BEYOND WOLVES: THE POLITICS OF WOLF RECOVERY AND MANAGEMENT* 42–43 (2003) (citing R. McGregor Cawly & 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)).

214. See 40 C.F.R. §§ 1500.2, 1506.6.

215. See 40 C.F.R. § 1502.9(b).

216. See Fromherz, *supra* note 91, at 142.

grasslands, and georgic stories about responsible relationship to nature, go unheard. And as a result, agencies fail to engage the public in a deliberative process to produce decisions that reflect public values.²¹⁷

CONCLUSION

The narrative gap between federal agencies and the public presents policy makers with a complex problem.²¹⁸ But we can begin to bridge this gap by requiring agencies to include a values-based statement in their Draft and Final EISs that make clear to the public what values and goals are driving the agency's decision-making process. While this values-statement will not entirely resolve NEPA's narrative glitch, I believe it will better enable agencies to hear and respond to various public narratives.

By being transparent with the public about its values, an agency would be able to clarify its policies, garner public support for its plans, and respond directly to scientific and technical criticisms, while also giving the public "an opportunity to inject its values and concerns into the decision process."²¹⁹ While this new requirement would not necessarily lead to better environmental decisions, it would move the NEPA process closer to a deliberative process where environmental values can be heard, debated, and formed. In other words, a values-based discussion would likely enable agencies to engage with place-based, pastoral, or wilderness narratives that are not grounded in scientific terms. This deliberative structure would lead to greater trust between the public and agencies because the discussion about how major federal actions impact the environment would be more transparent. And this discussion would occur "without the tenuous and costly façade of scientific disputes that are not, at bottom, about science."²²⁰ In short, this statement would move the EIS process toward better fulfilling NEPA's public participation goals.

Agencies make decisions based on values—often the values that underlie the authorizing statute for that agency.²²¹ But in its present form, the NEPA process does not facilitate a discussion about values but rather about technical and scientific issues.²²² Therefore, the NEPA process marginalizes public input and cloaks policy or values-based decisions in technical analysis.²²³ To remove this cloak, agencies could include a short and practical statement based on

217. See Poisner, *supra* note 125, at 89.

218. The complexity of this problem will likely require a combination of various strategies, and I leave for another day a more detailed exploration of possible solutions.

219. See Russell, *supra* note 198, at 550 (citing 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)). While Keiter and Russell are both referring specifically to the National Park Service, the idea that making agency policy and values more clear would improve public input applies broadly to all federal agencies.

220. See Russell, *supra* note 198, at 550.

221. See *id.* at 546.

222. See *id.*

223. See *id.*

Wendell Berry's framework for value-based decision making in their EISs. Including a values-based statement in the EIS will increase the transparency, accountability, and legitimacy of the acting agency. Berry suggests five basic questions that need to be answered in values-based decision making:

1. Where are we? (This question applies, with as much particularity as human competence will allow, to all the world's millions of localities. Who are we and what is our goal?);
2. What is our condition? (This question refers to the various parties and values that the agency's decision might affect by its current project proposal. How does the agency see its relationship to all the competing interests?);
3. What are our abilities? (This question refers to the abilities that an agency has been granted by Congress, as well as the technological and public outreach tools at the agency's disposal);
4. What appropriately may we do for present interests? (this question submits to the standard of the health of the place);
5. What should we do for future interests? (this question accepts that the agency has a responsibility to consider the interests of future generations).²²⁴

By answering these questions, an agency would be forced to explain to the public why it can make its decision, why it is making the current decision, and what values are being served by the decision. Requiring an agency to answer these questions would help the public understand the potential values and policy goals of the agency with which they are trying to dialogue.

As a second step, the agency could be required to include a summary values statement in the Final EIS, which explains the values the agency considered. This values statement should discuss why agencies chose a particular EIS alternative and should also address important scoping decisions where those decisions are a continuing source of controversy.²²⁵ And even if pastoral narratives, place-based tales, and wilderness adventures ultimately do not change the agency's decision, the public should be told why other values were privileged over the values conveyed by those stories. This would improve the public participation process by ensuring that the public feels like its stories are being heard.

The initial values statement and final values summary will hopefully improve public participation in the NEPA process, not just by demonstrating that the agency is open to a discussion about values but also by helping the public better understand the actual policies and values at stake for a proposed project. If a values statement had existed in the Wright Area coal leases EISs, then the agency would have been better able to respond to people like Lewis

224. A more detailed description can be found in WENDELL BERRY, *LIFE IS A MIRACLE: AN ESSAY AGAINST MODERN SUPERSTITION* 14 (2000).

225. See Russell, *supra* note 192, at 547–48.

Poole and Leland Turner by recognizing the legitimacy and importance of their concerns and explaining the values that shaped BLM's final decision. This would have granted Poole and Turner the dignity of being heard and would have enhanced agency decision making by making those overseeing the project consider the values underlying BLM's final decision.

There are some limitations to this values-statement approach: the statement would likely be judicially unenforceable, may simply generate more boilerplate language to include in EISs, and would not necessarily alter agency decisions. Some might even argue that the values statement could delegitimize an agency's status as an expert decisionmaker by making its decisions seem more political. But such concerns are all outweighed by the benefit of agencies being clear about the values underlying their decisions.

This values-statement approach would have three basic advantages. First, it would increase transparency, accountability, and legitimacy, and thus begin to alleviate the cynicism of the public who have long felt isolated from the NEPA process.²²⁶ The values statement would increase transparency by allowing the public to see how agencies actually make decisions.²²⁷ Transparency would not only make public input more targeted to the concerns of the agency, but would also alleviate the confusion and mystery surrounding agency decision making. The values statement would increase accountability by providing the public with better information, which could be used to tailor public comments or used to inform public voting for the president who sets agency political policy.²²⁸ These two factors would combine to enhance the legitimacy of agency decision making by ensuring the public feels like it had a say in shaping the decision of the agency through a meaningful participation process.²²⁹

Second, this values statement might also lead to better resource allocation. Because the public and environmental nonprofits would be better informed of how the agency is acting within the scope of its legal authority and why it is making the decision it is, those groups would be incentivized to direct their limited resources to litigating actual procedural violations of NEPA.²³⁰ In other words, the clarity provided by the statement could reduce the amount of litigation involving NEPA decisions. Furthermore, the inclusion of a values statement in an EIS might have the paradoxical effect of decreasing the size of an EIS by reducing the need for the overinclusion of scientific information.²³¹

226. See *id.* at 548 (citing MARTIN A. NIE, *BEYOND WOLVES: THE POLITICS OF WOLF RECOVERY AND MANAGEMENT* 2–3 (2003)).

227. See *id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. See *id.*

This would save paper, money, and alleviate the problem that “EISs tend to be quite uninformative.”²³²

Finally, the transparency effects of the values statement would likely encourage higher quality and less polarized public participation.²³³ NEPA participants would better understand the burdens they face in crafting their comments, politicians would be able to respond from office about the choices being made, and most importantly, agency officials would be compelled to “constantly check their internal cultures, values, and biases against that of the public.”²³⁴ Some might complain that the values statement would delegitimize agency decisions by exposing expert decision making as a largely political process. The Supreme Court, however, has declared that “it is entirely appropriate” for agencies, as part of the executive branch of government, to make policy choices “resolving the competing interests which Congress itself . . . did not resolve.”²³⁵

However Congress or CEQ decides to address the problems plaguing NEPA’s public participation process, it is important to acknowledge that excluding these public narratives from the EIS process is indeed a problem, which is exposed by a law and literature analysis. As it currently functions, NEPA public participation only works for specific narratives that express particular environmental values. Because the law and literature analysis helps identify the severity of NEPA’s public participation problem, a law-and-literature-based solution such as providing a values statement that narrates an agency’s actions may be the first step needed to bridge the narrative gap between agencies and the public. Moreover, climate change adds to the importance of revising the public participation process of NEPA because environmental questions and values will be debated with greater frequency, intensity, and urgency as climate change accelerates. As such, the public participation process of NEPA will be an increasingly important space for people and agency leaders to share ideas and make decisions about our shared environment. These conversations are important, because in the words of Lewis Poole, “this land belongs to us all.”²³⁶

232. See *id.* (citing Bradley C. Karkkainen, *Whither NEPA?*, 12 N.Y.U. ENVTL. L.J. 333, 346 & n.52).

233. See Russell, *supra* note 198, at 548.

234. Martin Nie, *Administrative Rulemaking and Public Lands Conflict: The Forest Service’s Roadless Rule*, 44 NAT. RESOURCES J. 687, 735 (2004).

235. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 865–66 (1984); see also *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., dissenting).

236. WRIGHT FEIS, *supra* note 175, at Appendix I, cmt. 10, at 1.

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