

Regulations in Name Only: How the Bush Administration's National Forest Planning Rule Frees the Forest Service from Mandatory Standards and Public Accountability

by Alyson Flournoy, Robert L. Glicksman and Margaret Clune

A Center for Progressive Reform White Paper

June 2005

Introduction

In May 1976, the Senate published its report on the bill that would evolve into the National Forest Management Act (NFMA). In describing the background and need for the legislation, the Senate noted that the conservation of natural resources was not a central issue of concern when the United States was founded, but that after a century of rapid expansion, industrial growth and wasteful use, the concepts of conservation began to take form and meaning, and were ably articulated by President Theodore Roosevelt:

The reward of foresight for this Nation is great and easily foretold. But there must be a look ahead, there must be a realization of the fact that to waste, to destroy, our natural resources, to skin and exhaust land instead of using it so as to increase its usefulness, will result in undermining in the days of our children the very prosperity which we ought by right to hand down to them amplified and developed.¹

The Senate Report explained that the bill was directed toward improving the management of “one of the Nation’s most precious possessions,” its National Forest System lands.² Noting that the bill was grounded on President Roosevelt’s conservation concepts, the Report declared that “[t]he protection and enhancement of the land is basic to our national survival. It is upon the quality of our stewardship of the land that our society will ultimately be judged.”³

The chief reform that Congress included in the NFMA to achieve the farsighted protection, enhancement and stewardship of the National Forest System espoused in President Roosevelt’s conservation ethic was a comprehensive framework for forest-by-forest planning. First, regulations developed with the help of scientists and based upon guidelines set out in the statute itself would establish the required process and basic substance for

national forest plans. Then, in accordance with those regulations, the Forest Service would analyze the conditions in each national forest, and, with the help of the public, develop a long-range plan to govern its management. Finally, after adoption of the NFMA plan, all site-specific actions in each national forest would be required to conform to its land management plan. Each successive step builds upon the former: the determination of whether a particular proposal for timber harvest advances or detracts from the long-range health of the forest is based upon whether it conforms to the forest plan, which, in turn, was developed in accordance with regulations that were designed with the help of scientific experts and include the standards set forth in the NFMA itself.

Twenty-eight years later, the United States Forest Service, the agency responsible for implementing the NFMA, unveiled a self-proclaimed “paradigm shift” in land management planning for the national forests that ignores both the letter and spirit of the NFMA and takes a lengthy stride backward toward the very mindset that President Roosevelt and Congress warned against. Under the theory that plans in and of themselves have no consequences, the Bush Administration has diluted the NFMA planning

Alyson Flournoy is a Professor and Director of the Environmental and Land Use Law Program at the University of Florida Levin College of Law. Professor Flournoy is also a Board Member of the Center for Progressive Reform (CPR). Robert L. Glicksman holds the Robert W. Wagstaff Chair at the University of Kansas School of Law. Both have researched and published widely in the fields of environmental, administrative and public natural resource law. Margaret Clune is a Policy Analyst with CPR. Additional information about the authors appears on page 15 of this white paper.

regulations to the point that they are essentially meaningless, thus ensuring that plans will indeed become inconsequential exercises.

This paper will examine the events that led to the passage of the NFMA, the statute itself, and the rules the Forest Service promulgated before the Bush Administration took office in 2001 to implement the commands issued by Congress in the NFMA. Next, the paper will examine the developments leading to the Bush Administration's proposal of new forest planning regulations, and provide a brief overview of other major administration initiatives affecting the National Forest System. This background will illuminate the paper's discussion of the specific provisions of the Bush Administration's final forest planning regulations, which: 1.) shift the focus of planning for the national forests from ecological to economic sustainability; 2.) vitiate safeguards to prevent excessive timber harvests; 3.) weaken the role of science in planning; 4.) constrain opportunities for public participation in plan development; and 5.) diminish the accountability of the Forest Service. Ultimately, the Bush Administration's forest planning rule effectively ignores the instructions Congress laid out in the NFMA, returns forest planning to the sole province of the Forest Service, and greatly increases the risk that the Forest Service will take actions that result in the waste or destruction of natural resources that constitute an important part of our national heritage.

Background

Evolution of Statutory Direction for National Forest Planning

The National Forest System encompasses 192 million acres of land, an area equivalent to the size of Texas⁴ that comprises 8 percent of the country.⁵ Congress established the Forest Service, an agency of the Department of Agriculture (USDA), in 1905 and charged it with managing the National Forest System.⁶ Basic authority for management of the national forests stems from the Act of June 4, 1897 (the "1897 Organic Act"), which states that the purposes of national forest lands are to improve and protect designated forests, or to secure "favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States."⁷

Before 1960, Forest Service planning for national forest lands focused on timber harvests and grazing.⁸ Post-World War II increases in timber production and recreational use changed the forest planning landscape, and in 1960 Congress directed the Forest Service to manage the resources of the national forests for "multiple-use and

sustained-yield."⁹ "Multiple use" means management to ensure that forest resources

are utilized in the combination that will best meet the needs of the American people . . . with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.¹⁰

The Multiple-Use, Sustained-Yield Act (MUSYA) confirmed the importance of non-monetary values in forest management by stating that establishing and maintaining wilderness areas would be consistent with the statute.¹¹ In 1974, in an attempt to ensure better funding to achieve "long- and short-term goals for national forest use,"¹² Congress passed the Forest and Rangeland Renewable Resources Planning Act (RPA), which directed the Forest Service to promulgate long-range, systemwide plans.¹³

Meanwhile, the growth in timber sales authorized by the Forest Service¹⁴ and expansion of the use of clearcutting¹⁵ in West Virginia, Montana, and elsewhere began to generate increasingly severe and broad-based criticism of the agency's stewardship of national forest resources.¹⁶ Another important development was the 1975 opinion by the Court of Appeals for the Fourth Circuit in *Izaak Walton League of America v. Butz*¹⁷ (the "Monongahela" case). The Fourth Circuit affirmed a lower court decision that had enjoined the use of clearcutting as a timber harvesting technique in the Monongahela National Forest, basing that decision on a strict interpretation of the 1897 Organic Act, which allowed the sale of only "dead, physiologically mature, or large" trees.¹⁸

NFMA

Concerned with the restrictions on clearcutting imposed by the *Monongahela* court, the Forest Service and timber interests sought congressional relief to correct the offending language in the 1897 Organic Act.¹⁹ These concerns were reflected in the Senate's observance that the drastic reductions in timber harvests required to comply with the *Monongahela* ruling would result in a variety of detrimental effects, including reduced timber supplies, higher prices, and harm to local economies in the form of sawmill shutdowns and unemployment.²⁰ However, the legislation that resulted—the NFMA—was far from a simple congressional response to ensure that the Forest Service had the flexibility to harvest timber as it wished. Rather, the NFMA "amounted to a bitterly-contested referendum on Forest Service timber harvesting practices."²¹ Responding to public concern over the fate of non-timber forest resources, the Senate explained that an

“integral part of the planning process” should be consideration of other forest values, including “wildlife and fish habitats, water, air, esthetics [and] wilderness.”²²

Accordingly, the NFMA directs the Secretary of Agriculture to “develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System” using a “systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences.”²³ To be sure that non-timber forest values would receive appropriate consideration in land management plans, Congress stipulated that the Forest Service promulgate regulations “that set out the process for the development and revision of the land management plans, and the guidelines and standards” prescribed by the statute.²⁴

Congress laid out seventeen detailed prescriptions for the guidelines that must be included in the planning regulations.²⁵ Among other things, the regulations must require plans to: 1.) provide for diversity of plant and animal communities within each national forest;²⁶ 2.) ensure research, continuous monitoring and evaluation of the effects of the management system chosen for the plan area;²⁷ 3.) ensure that timber will be harvested from National Forest System lands only when distinct environmental conditions specified in the Act are met;²⁸ and 4.) ensure that clearcutting will be used only within the constraints set forth in the statute.²⁹ Congress also stipulated that the planning regulations specify procedures to ensure that land management plans are prepared in accordance with the National Environmental Policy Act of 1969 (NEPA).³⁰

The NFMA contained an additional check to ensure both that the Forest Service carry out congressional instructions to include the NFMA guidelines in its planning regulations, and that “an effective interdisciplinary approach is proposed and adopted.” Congress mandated that a committee of scientists (COS) be convened to provide “scientific and technical advice and counsel” on the proposed guidelines and procedures.³¹ Moreover, Congress explicitly instructed that the members of the COS be from outside the Forest Service,³² that is, *not* officers or employees of the Forest Service.³³

The 1897 Organic Act, the MUSYA and the NFMA each emphasized management to ensure continued health and productivity of the national forest lands, with increasing sensitivity to and emphasis on non-use and other hard-to-monetize forest values. The 1897 Organic Act’s emphasis on timber supply, watershed protection and forest preservation was enhanced by the MUSYA’s recognition of wilderness as being compatible with multiple-use management.³⁴ The NFMA’s specific mandates gave more structure to the MUSYA standards and emphasized an

interdisciplinary approach that would consider physical, biological, economic, and other sciences.³⁵ Taken together, these statutes embody goals that are consistent with the more recently embraced concept of sustainability, which involves management “to meet the social, economic, ecological, cultural and spiritual needs of present and future generations.”³⁶

The National Forest Management Act ‘amounted to a bitterly-contested referendum on Forest Service timber harvesting practices.’ Responding to public concern over the fate of non-timber forest resources, the Senate explained that an ‘integral part of the planning process’ should be consideration of other forest values, including ‘wildlife and fish habitats, water, air, esthetics [and] wilderness.’

Regulatory History

The 1982 Forest Planning Rule

The Secretary of Agriculture selected the first COS with the assistance of the National Academy of Sciences.³⁷ The Committee was comprised of experts from outside the Forest Service and first met in 1977.³⁸ Following eighteen meetings of the COS, USDA adopted final NFMA planning regulations in September 1979.³⁹ In February 1982, USDA proposed several changes in the regulations “to streamline the land management planning process.”⁴⁰ After reconvening the COS to obtain its advice on the proposed revisions, the Department promulgated the revised regulations in September 1982 (the “1982 rule”).⁴¹

The 1982 rule covered five major areas. It: 1.) described the content and role of “regional guides;”⁴² 2.) established a ten-step process to develop local plans;⁴³ 3.) set guidelines for determining where and how much timber harvesting is appropriate;⁴⁴ 4.) established planning requirements for a variety of resources, including wilderness, fish and wildlife, grazing, recreation, minerals, water and soil;⁴⁵ and 5.) set “minimum specific management requirements” for timber harvesting and other activities.⁴⁶

The initial NFMA planning regulations were replete with specific environmental safeguards. Specifically relating to timber harvests, the 1982 rule mandated a 100-foot buffer

area around all streams, lakes and other bodies of water,⁴⁷ set a maximum size limitation on clearcuts,⁴⁸ contained comprehensive standards for identifying lands not suited for timber production,⁴⁹ and set forth equally comprehensive standards for identifying the appropriate management intensity for lands suitable for timber production.⁵⁰

Chief among the standards set by the 1982 rule to protect non-timber forest resources was a provision designed to implement the NFMA's diversity requirement; it required that the Forest Service monitor management indicator species.⁵¹ The Forest Service has traditionally used management indicator species as a bellwether for other species that have the same special habitat needs or population characteristics. The species to be chosen as management indicator species were those whose "population changes are believed to indicate the effects of management activities."⁵² As one court indicated, "[t]he use of management indicator species is intended to allow the Service to thoroughly evaluate the effects of the alternatives on fish and wildlife populations by using a 'class representative,' without having to evaluate each species individually."⁵³

To further implement the diversity requirement, the 1982 regulations required that the Forest Service manage habitat "to maintain viable populations of existing native and desired non-native vertebrate species in the planning area."⁵⁴ The term "viable populations" was defined to mean "one which has the estimated numbers and distribution of reproductive individuals to insure its continued existence is well distributed."⁵⁵ To ensure maintenance of viable populations, the regulations mandated that habitat "be well distributed so that those individuals can interact with others in the planning area."⁵⁶ The 1982 rule's species viability requirements and its "canary in the coal mine" approach, put in place during the Reagan Administration, have been identified by environmental groups including Defenders of Wildlife, the Sierra Club, and the Wilderness Society as:

second only to the Endangered Species Act (ESA) . . . in their importance as a federal protection for species conservation and are an important complement to the ESA in that they help identify and correct species declines before the emergency measures of the ESA are needed.⁵⁷

The 1982 rule responded to Congress's charge that plans be prepared in accordance with NEPA by requiring environmental impact statements (EIS) to be prepared for each forest plan.⁵⁸ Accordingly, public participation opportunities included not only those set forth in

provisions of the 1982 rule,⁵⁹ but also public involvement pursuant to NEPA in the preparation of the EIS for each forest plan.⁶⁰ Specifically, NEPA regulations require the preparation of a draft and final EIS, each of which must be supplemented if the Forest Service makes substantial changes to the forest plan.⁶¹ Additionally, to comply with NEPA regulations, the Forest Service must: 1.) make the draft EIS available to the public and invite public comment on it;⁶² 2.) provide public notice of NEPA-related hearings and public meetings; 3.) provide a formal response to public comments in the final EIS; and 3.) make the final EIS and supporting documentation available to the public under the Freedom of Information Act.⁶³

The 2000 Forest Planning Rule

The Forest Service has attempted to revise the NFMA planning regulations several times. In 1989, with the assistance of the Conservation Foundation, it initiated a review of the 1982 rule which resulted in a critique that concluded that the agency spent too much time on excessively costly planning, and that therefore the Forest Service needed a more efficient planning process.⁶⁴ The agency tried to revise the planning rule in 1991⁶⁵ and published a proposed rule in 1995,⁶⁶ but due in part to the large number of comments received on the proposed rule, "generally expressing dissatisfaction with proposed changes," the proposal was abandoned.⁶⁷

However, in response to comments submitted on the 1995 proposed rule,⁶⁸ then USDA Secretary Dan Glickman convened a new COS pursuant to the NFMA to "review and evaluate the Forest Service's planning process for land and resource management and to identify changes that might be needed to the planning regulations."⁶⁹ In keeping with the NFMA's instruction that the COS "provide scientific and technical advice and counsel on proposed guidelines to assure that an effective interdisciplinary approach is proposed and adopted,"⁷⁰ the thirteen-member COS included not only experts in the sciences relevant to forest management but also economists, policy, and legal experts.⁷¹

During 1998, the COS (like its predecessor) held public discussions in all regions of the country with a variety of stakeholders to obtain their views on how best to improve the forest planning process.⁷² In March 1999, the COS presented its findings and recommendations to the Forest Service in a 193-page report.⁷³ Based collectively on the 1990 critique of land and resource management planning, the Forest Service's years of "experience in developing and implementing land and resource management plans," and the COS's findings and recommended regulatory text, the

Forest Service proposed new NFMA regulations in October 1999.⁷⁴ Following public notice and comment, the Forest Service issued the final rule in November 2000 (the “2000 rule”), stating that the new regulations would help it “improve forest planning and on-the-ground management and enable the agency to improve the long-term health of the national forests and grasslands, while better meeting the needs of the American people.”⁷⁵

The 2000 rule affirmed ecological, social, and economic sustainability as the overall goal for managing the National Forest System lands, but firmly established ecological sustainability as the first priority for national forest land and resource management.⁷⁶ The Forest Service defined ecological sustainability to mean “[t]he maintenance or restoration of the composition, structure, and processes of ecosystems including the diversity of plant and animal communities and the productive capacity of ecological systems.”⁷⁷ An extensive section set forth requirements for ensuring that “plans provide for maintenance or restoration of ecosystems at appropriate spatial and temporal scales,”⁷⁸ including requirements that species diversity be evaluated based on: 1.) the viability of species listed under the ESA as threatened, endangered, candidate, or proposed;⁷⁹ and 2.) for all other species, a range of approaches including assessments of “focal species.”⁸⁰ Status of focal species was also to be considered in assessing and monitoring ecosystem diversity.⁸¹ The key characteristic of a “focal species” is “that its status and trend provide insights into the integrity of the larger ecological system to which it belongs.”⁸² Although the Forest Service revised the specific means of fulfilling the NFMA’s diversity mandate in the 2000 rule, it retained the basic species viability, “canary in the coal mine” approach reflected in the 1982 planning rule. Additionally, true to the principle that sustainability is composed of “interdependent ecological, social and economic elements,”⁸³ the 2000 rule required that the Forest Service perform analyses of social and economic factors and incorporate them in plan decisions, in a manner consistent with ecological sustainability.⁸⁴

The 2000 planning rule refined the limitations on timber harvests contained in the 1982 regulations, including the requirement that plans identify lands where timber may not be harvested.⁸⁵ The 2000 rule also added a stipulation that on other lands, harvests could occur only if the costs of timber production were justified by the “ecological, social, or economic benefits”⁸⁶ In addition, the 2000 rule required that the responsible official estimate the amount of timber that could be sold annually, in perpetuity, from those lands eligible for harvest consistent with the area’s plan objectives, and then limit the sale of timber to a quantity equal to or less than that estimate.⁸⁷

The 2000 rule required that the Forest Service use the “best available science” in planning, and that it include scientists in broad-scale assessments, the design and evaluation of monitoring strategies, and, when appropriate, the review of monitoring data.⁸⁸ To ensure effective adaptive management,⁸⁹ the regulations required plans to include monitoring strategies to evaluate ecological, social, and economic sustainability.⁹⁰ The rule required the Forest Service on an annual basis to monitor and evaluate results for each plan area.⁹¹

The 2000 rule also enhanced the public participation provisions of the 1982 rule. The Forest Service took the position that “[p]lanning meaningfully engages the American people in the stewardship of their national forests,”⁹² and that “[p]lanning restores and maintains the trust of the American people in the management of the national forests.”⁹³ Consistent with those principles, the 2000 rule required, among other things: 1.) collaboration during the planning process with various interested entities;⁹⁴ 2.) public availability of planning information to the extent allowed by law;⁹⁵ 3.) early and frequent opportunities for public participation in the identification of issues;⁹⁶ and 4.) consultation with individuals and organizations who can provide information about current and historic public uses of the plan area, and the location of unique and sensitive resources and values and cultural practices related to issues in the plan area.⁹⁷ Additionally, the 2000 rule provided that *anyone* could object to a plan revision or amendment, provided they filed an objection within 30 days from the date that EPA published the notice of availability of the revision’s final EIS.⁹⁸

The Bush Administration’s Rollback of the 2000 Forest Planning Rule

On February 8, 2001, less than three weeks after President George W. Bush took office, the Society of American Foresters (SAF), “the national scientific and educational organization representing the forestry profession in the United States,”⁹⁹ wrote to then Secretary of Agriculture Ann Veneman regarding the 2000 forest planning regulations.¹⁰⁰ The letter stated that the SAF believed it was necessary for USDA to review the 2000 regulations, and asserted that they were “inconsistent with current law, particularly the statutory direction Congress provided for National Forest System lands in the Multiple-Use Sustained-Yield Act of 1960.”¹⁰¹ The SAF objected to the regulations’ elevation of ecological sustainability over social and economic sustainability, expressed concern that implementation of the species diversity requirements would make protection of plant, animal, and fish species the “dominant, if not the exclusive” purpose for national forest

lands, and asserted that the rule would “likely curtail forest mangers’ [*sic*] ability to actively manage forest resources.”¹⁰² As stated in the letter, the SAF had expressed its concerns through comments on the draft 2000 regulations, but “the Forest Service chose to include the diversity requirements in spite of these protests.”¹⁰³ Apparently under the impression that the new administration would respond differently to its concerns, the SAF concluded its letter by predicting that the 2000 planning regulations, “in combination with the roadless rule¹⁰⁴ and other transportation policies, will create a situation sure to invite limitless numbers of lawsuits and continued gridlock,” and recommended that USDA “examine the current statutory framework under which the Forest Service operates.”¹⁰⁵

That same month, allegedly prompted not only by letters such as that from the SAF, but also by a lawsuit filed by “12 environmental groups from seven states” challenging promulgation of the rule, Forest Service Regional Planning Directors agreed that although the “intent of the new Rule [was] good,” their “ability to implement [the] regulations in the short term raised many concerns.”¹⁰⁶ David Tenny, then Acting Deputy Under Secretary for USDA’s Natural Resources & Environment section, decided to initiate a review of the regulations, “with focus on improving process, decision-making and legal defensibility.”¹⁰⁷ The Forest Service attributed this decision to the concerns raised by the SAF, the environmental groups’ lawsuit challenging the 2000 planning rule, and an alleged “review by other experienced professional managers, scientists, and lawyers” that “identified potential problems in decision-making and legal defensibility of decisions” if the 2000 regulations were implemented. USDA outlined a three-phased work plan for the review, the first phase of which would consist of “Forest Service people having significant experience in forest planning, and other aspects of Forest Service natural resource management and research” reviewing and synthesizing information to identify major concerns and then developing options to address those concerns.¹⁰⁸ The review, conducted over a period of three weeks, resulted in a report entitled *NFMA Planning Rule Review: A Report Requested by USDA*, submitted to Deputy Under Secretary Tenny on April 10, 2001.¹⁰⁹

The report stated that the review team had synthesized “about 4000 pages of source material relevant to the problems with implementation of the new [2000] planning rule.”¹¹⁰ That “source material,” however, was heavily tilted in favor of resource extraction – primarily timber harvesting – rather than preservation. Examples of documents reviewed by the team that typify its one-sided approach include: 1.) the February 2001 letter from the SAF

to Secretary Veneman;¹¹¹ 2.) a letter from the National Association of Forest Service Retirees;¹¹² 3.) a memorandum by one of the report’s peer reviewers;¹¹³ and 4.) testimony before the Senate by a representative of the American Forest & Paper Association, and by a former USDA employee.¹¹⁴ The closest entity to an environmental organization represented in the authors of the documents surveyed by the review team was the Ruffed Grouse Society, a hunting organization that advocates forest management to obtain “thick, young forests,”¹¹⁵ a management technique sufficiently favorable to timber interests that the Boise Cascade paper company serves as one of the group’s corporate sponsors.¹¹⁶

The internal *NFMA Planning Rule Review* concluded that the problems with the 2000 regulations “are so serious that it appears impossible for the Forest Service to successfully implement the final Rule,”¹¹⁷ and recommended that USDA allow the 2000 regulations to stand, but: 1.) immediately post notice in the Federal Register to establish an interim rule that would extend indefinitely the schedule for transition from the 1982 regulations to the 2000 regulations; and 2.) post a notice of new rulemaking.¹¹⁸

On April 20, 2001, a coalition of industry groups filed suit against USDA, challenging promulgation of the 2000 regulations.¹¹⁹ The lead attorney representing the industry groups was Steven P. Quarles, upon whose Senate testimony the authors of the *NFMA Planning Rule Review* relied to illustrate problems with the 2000 regulations.¹²⁰ Days later, on April 25, 2001, Deputy Under Secretary Tenny wrote to Forest Service Chief Dale Bosworth and directed him to develop a plan to modify parts of the planning rules to resolve the major concerns identified in the *NFMA Planning Rule Review* report.¹²¹

On May 17, USDA published an interim final rule to extend by one year the date on which the 2000 regulations would take effect because “the Forest Service is not sufficiently prepared to fully implement the rule agencywide.”¹²² The interim rule was effective immediately, as USDA “determined that delaying an extension of the compliance date . . . in order to obtain public comment is impracticable, unnecessary, and contrary to the public interest” and therefore that it need not comply with the Administrative Procedure Act’s notice and comment rulemaking requirements.¹²³ A year later, USDA published another interim final rule “to delay mandatory compliance with the 2000 rule until a new final planning rule is adopted.”¹²⁴ Like the one-year extension a year earlier, USDA’s indefinite exemption was not promulgated in accordance with notice and comment requirements.¹²⁵

The Bush Administration's Proposed Forest Planning Rule

On December 6, 2002, the Bush Administration's USDA proposed a rule to replace the 2000 rule.¹²⁶ The proposed regulations were not the result of recommendations by a new COS, but rather of the Forest Service's decision to respond to the criticisms leveled at the 2000 planning rule by the *NFMA Planning Rule Review*. That *Review*, "conducted by Forest Service personnel at the direction of the Office of the Secretary," "concluded that the 2000 rule is neither straightforward nor easy to implement . . . [and] did not clarify the programmatic nature of land and resource management planning."¹²⁷

The Forest Service asserted that the proposed regulations retained "many of the basic concepts in the 2000 rule, namely sustainability, public involvement and collaboration, use of science, and monitoring and evaluation."¹²⁸ However, significant differences between the two sets of rules were apparent. Most notably, the Forest Service took the position in the proposed regulations that because plans "allow, but do not mandate,

certain activities to take place in the plan area," plans themselves "generally are not actions that significantly affect the quality of the human environment."¹²⁹ A Forest Service official has translated that view into the colloquial, musing that "a forest plan only has an environmental effect if it is knocked off the table and lands on the ground."¹³⁰ Accordingly, under the Bush Administration's proposed planning regulations, most detailed environmental analysis would no longer be conducted at two stages — concurrently with the adoption of plans and when the Forest Service makes site-specific implementation decisions — but exclusively at the site-specific project level.¹³¹ Additionally, the proposed regulations linked "sustainability" more closely to the MUSYA than did the 2000 regulations, "in that economic and social components are treated as interdependent with ecological aspects of sustainability, rather than as secondary considerations."¹³²

The Forest Service has repeatedly denied that political officials of the Bush Administration influenced its decision to scrap the 2000 regulations. For example, Deann Zwright, formerly Regional Planning Director for the Forest

Service's Rocky Mountain Region and later Assistant Director for Planning in the Forest Service's Ecosystem Management Coordination Staff, wrote in an article published in summer 2004:

For those of you who want to know how an administration influences policy, you won't find the answer here. All I know is how this administration has influenced this policy. The planning rule development has been a bottom-up rather than a top-down exercise, created by agency planning and resource practitioners, based on decades of experience with NFMA.¹³³

On December 22, 2004, the Forest Service released its final forest planning regulations. By this time, the Forest Service had abandoned its previous efforts to portray the new regulations as a slightly altered and improved version of the 2000 regulations, whose goals and approaches were consistent with one another. The Forest Service now admitted that the 2004 planning rule represented 'a paradigm shift in land management planning.'

The timing of events suggests otherwise, starting with the repetition by the SAF less than three weeks after the new administration took office of comments made to, and rejected by, the previous administration's Forest Service.

On December 22, 2004, the Forest Service released its final forest planning regulations (the 2004 rule).¹³⁴ By this time, the Forest Service had abandoned its previous efforts to portray

the new regulations as a slightly altered and improved version of the 2000 regulations, whose goals and approaches were consistent with one another. The Forest Service now admitted that the 2004 planning rule represented "a paradigm shift in land management planning."¹³⁵ Representative Tom Udall (D-NM), a member of the House Resources Committee who had tried in vain to block the regulations, described the new rule as a "radical overhaul of forest policy."¹³⁶ Noting the timing of the Forest Service's announcement, Udall observed, "[w]ith Bush's anti-environmental forest policy, you can't blame him for trying to hide behind other news, but not even Scrooge would unveil these regulations"¹³⁷ three days before the Christmas holiday, as the Administration did.

Overview of Other Bush Administration Initiatives Affecting the National Forests

Before exploring the specific provisions of the final Bush Administration forest planning rule, a brief overview of the components of what Representative Udall called "Bush's anti-environmental forest policy" is warranted. This review will allow the 2004 rule to be understood in the broader

context of the Bush Administration's forest management policies. Stated succinctly, the Bush Administration's policy with regard to national forests "emphasizes the protection of private property rights and the protection of national forest resources from the adverse consequences of natural events, such as forest fires, but not from resource extraction and development."¹³⁸ Key actions in furtherance of this policy include enacting the "Healthy Forests Restoration Act" (HFRA)¹³⁹ and reversing the Clinton Administration's Roadless Rule.

HFRA

HFRA, which was signed into law in December 2003, is described by the White House as an initiative "to reduce the threat of destructive wildfires while upholding environmental standards and encouraging early public input during review and planning processes."¹⁴⁰ The basic premise of HFRA is that today's forests "often have unprecedented levels of flammable materials including . . . underbrush, needles, and leaves" and "are often so dense that they "form huge reservoirs of fuel awaiting ignition". Accordingly, HFRA provides an expedited process to "remove hazardous fuels and make them unavailable for fire's inevitable appearance,"¹⁴¹ efforts referred to by HFRA as "hazardous fuel reduction projects."¹⁴²

In the name of "reducing unneeded paperwork" and "shortening the time between when a hazardous fuels project is identified and when it is actually implemented on the ground,"¹⁴³ however, HFRA eliminates important NEPA review requirements and opportunities for public participation.¹⁴⁴ Specifically, HFRA "reduces environmental review, limits citizen appeals, and pressures judges to quickly handle legal challenges to logging plans, all of which will likely speed up and increase commercial logging on federal forestlands."¹⁴⁵ Ultimately, HFRA focuses less on reducing the build up of underbrush, needles and leaves than on allowing timber sales without the full measure of protections required by the NFMA.¹⁴⁶

Roadless Rule Reversal

Another action by the Bush Administration to favor private, commercial interests in the national forests over those of

the public at large was its reversal of the Clinton Administration's Roadless Area Conservation Rule (Roadless Rule), which prohibited most road construction and timber harvesting activities in roadless areas of the national forests.¹⁴⁷ In recognition of the "strong public sentiment for protecting roadless areas and the clean water, biological diversity, wildlife habitat, forest health, dispersed recreational opportunities and other public benefits" they provide, the Clinton Administration's Forest Service proposed rules in May 2000 designed to put an immediate stop to activities likely to degrade desirable characteristics of inventoried roadless areas.¹⁴⁸ The final Roadless Rule was issued eight days before the end of the Clinton Administration, in January 2001, and prohibited road construction, reconstruction, and timber harvesting in inventoried roadless areas.¹⁴⁹

One of the Bush Administration's first acts upon taking office, however, was to postpone for 60 days the effective date of all regulations that had been published in the Federal Register but had not yet taken effect, which included the Roadless Rule.¹⁵⁰ Six months later, the Forest Service published an advance notice of proposed rulemaking and a request for comments on

the basis that numerous states, Indian tribes, organizations and citizens had raised concerns regarding the Roadless Rule. These comments indicated a preference toward making decisions on the management of roadless areas through local planning rather than on the basis of a national rule.¹⁵¹ In May 2005, the Forest Service issued its final rule to replace the Clinton-era Roadless Rule's nationwide protection of inventoried roadless areas with a process by which a state governor could file a petition with the Secretary of Agriculture to establish management requirements for inventoried roadless areas in the national forests within that state.¹⁵² The Bush Administration's rule authorizes the Secretary of Agriculture to grant or deny such a petition, although the proposed rules (like many aspects of the 2004 planning rule) provide no standards to govern the exercise of the Secretary's discretion.¹⁵³ Absent a successful petition, decisions about the range of activities to be permitted in roadless areas would default back to the uses allowed in the applicable land management plan for each national forest.¹⁵⁴

Stated succinctly, the Bush Administration's policy with regard to national forests 'emphasizes the protection of private property rights and the protection of national forest resources from the adverse consequences of natural events, such as forest fires, but not from resource extraction and development.' Key actions in furtherance of this policy include enacting the 'Healthy Forests Restoration Act' and reversing the Clinton Administration's Roadless Rule.

The Bush Administration's Final Forest Planning Rule

The USDA press release that accompanied the announcement of the Bush Administration's final forest planning regulations in 2004 proclaimed that the new rule: 1.) will help forest managers provide future generations with "healthier forests, cleaner air and water, and more abundant wildlife"; 2.) "emphasizes science and public involvement"; and 3.) will, through the use of an Environmental Management System (EMS) "improve performance and accountability."¹⁵⁵ Examined in the context of the NFMA and prior regulations, however, it becomes clear that the Bush Administration's forest planning rule falls far short of fulfilling any of these grand claims. Rather, the 2004 rule is another building block in the administration's systemic shift away from protecting ecological integrity and natural systems in the national forests and toward promoting private interests such as timber harvesting.

Shift in Emphasis from Ecological to Economic Sustainability

Given USDA's announcement that the new forest planning rule will help to provide "healthier forests, cleaner air and water, and more abundant wildlife,"¹⁵⁶ one might expect the rule to retain its focus on ecological sustainability in order to promote improved environmental conditions. Indeed, according to the Forest Service, the new rule "makes sustainability the overall goal for [National Forest System] planning" "[a]s did the 2000 planning rule."¹⁵⁷

Such claims mischaracterize the fundamental nature of the 2004 rule. Unlike the 2000 rule, which explicitly established ecological sustainability as the first priority for national forest management,¹⁵⁸ the Bush Administration's rule emphasizes economic sustainability. Whereas the 2000 rule specifically defined "ecological sustainability,"¹⁵⁹ the new rule does not define "sustainability" at all. Without a regulatory definition of the term to guide judicial oversight, the courts will likely defer to the Forest Service's interpretation of "sustainability." While the section on "sustainability" contains a hollow recitation of the concept's "interrelated and interdependent . . . social, economic and ecological" elements,¹⁶⁰ the emphasis on productivity in the Forest Service's preamble to the rule illustrates which of the three elements the Bush Administration has elevated to first priority:

Managing for sustainability will provide for management of the various renewable resources without impairment of the productivity of the land, as required by the MUSYA. Sustaining the

productivity of the land and its renewable resources means meeting present needs without compromising the ability of those lands and resources to meet the needs of future generations.¹⁶¹

Additionally, the rule itself states that the "overall goal of managing the National Forest System is to sustain the multiple uses of its renewable resources in perpetuity while maintaining the long-term productivity of the land."¹⁶² As this language indicates, the rule incorporates a shift toward the primacy of use of the forest lands and away from protection of non-use values, which the NFMA also clearly protects.

The repeated use of terms like "productivity of the land" and "multiple uses of renewable resources" explicitly harkens back to the 1960 MUSYA. The 2004 rule, however, completely fails to reflect the NFMA's emphasis on non-use and other hard-to-monetize values. The primacy placed by the Forest Service on the economic element of sustainability (and, thus, timber harvests and other associated uses) is underscored by the placement of the section on "sustaining social and economic systems" before that addressing "sustaining ecological systems."¹⁶³ Successful management of the national forests, according to the new rule, will enable the National Forest System "to provide a sustainable flow of uses, benefits, products, services and visitor opportunities." Though the 2000 rule used similar terms in describing the functions of the national forests, it was careful to define its goals in terms of forest "uses, values, products and services," including:

outdoor recreation, forage, timber, wildlife and fish, biological diversity, productive soils, clean air and water, and minerals. [The national forests] also afford intangible benefits such as beauty, inspiration, and wonder.¹⁶⁴

The Bush Administration's regulations contain no such enumeration of hard-to-monetize and non-use values that would indicate that the Administration understands the importance of non-extractive uses of the national forests or that "healthier forests, cleaner air and water, and more abundant wildlife" are even desired goals, let alone goals the regulation will actually help to achieve.¹⁶⁵

Easing Hurdles to Timber Harvests

The 2004 rule's shift in emphasis from ecological to economic sustainability is further demonstrated by the relaxation and/or elimination of important checks on timber harvests in the National Forest System. Environmental safeguards such as those put in place by

President Reagan's Forest Service are entirely absent from the new rule. The safeguards previously required by the regulations to protect national forest resources from timber harvesting and related activities included the establishment of 100-foot buffer areas surrounding streams, lakes and other bodies of water within which management practices were restricted to those that would not harm water conditions or fish habitat;¹⁶⁶ the imposition of maximum sizes limitation on clearcuts;¹⁶⁷ and the application of comprehensive standards for identifying the appropriate management intensity for lands suitable for timber production.¹⁶⁸

The absence of specific environmental protections from the new planning regulations does not merely demonstrate a shift in focus, however; it is also illegal under the NFMA.¹⁶⁹ The statute unequivocally mandates that the national forest planning regulations specify guidelines to ensure that timber will be harvested, and that clearcutting will be used as a cutting method, only where explicit and detailed environmental safeguards are met.¹⁷⁰ In contravention of the clear statutory language requiring that the planning *regulations* include such guidelines, the Forest Service has decided it can relegate such guidelines to its internal directives. Although Congress took nearly a full page of the statute to elaborate the required standards to be included in Forest Service regulations, the Forest Service purports to comply with this mandate by one sentence that refuses to incorporate the standards in its regulations:

The Chief of the Forest Service must include in the Forest Service Directive System procedures to ensure that plans include the resource management guidelines required by 16 U.S.C. § 1604(g)(3).¹⁷¹

The Forest Service claims that in order to streamline the planning regulations, and to make them “more strategic and adaptive,” it is moving “procedural and technical details” to the Forest Service Directive System.¹⁷² Congress did not intend, however, that specific statutory mandates, such as the environmental conditions specified by the NFMA for when timber harvests and clearcutting may occur on national forest lands, be downgraded to mere “procedural and technical details.” Further, the agency lacks the authority to use the planning regulations to “adapt” standards set forth by Congress in the NFMA in place of implementing them. Moreover, as discussed below, Forest Service directives occupy a different legal status than do regulations. Accordingly, moving environmental standards to the directives is not a mere “streamlining” step to lessen the number of pages the planning rule takes up in the Code of Federal Regulations; it has serious legal consequences. Finally, if the Interim Directives recently issued by the

Forest Service are any indication, the agency has abdicated its responsibility to establish meaningful guidelines, as required by the NFMA. The Interim Directives simply parrot the NFMA itself, and state that plans should be consistent with the NFMA's management requirements.¹⁷³

A Distorted View of Economic Sustainability

As is suggested above, the new rule fails to set forth standards to achieve ecological sustainability and elevates the role of economic and social sustainability. A further examination of how the rule accounts for economic and social sustainability reveals that the rule distorts these concepts.

First, the rule describes the goal of the social and economic elements of sustainability as “to contribute to sustaining social and economic systems within the plan area.”¹⁷⁴ This formulation departs from the traditional focus of a sustainability analysis, which is to determine whether the relevant decisions lead to “use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations,”¹⁷⁵ including social, economic and ecological needs.¹⁷⁶ In place of a focus on sustainability, the Forest Service proposes an analysis whose goal is to determine whether and how to support external social and economic systems. This appears to describe an analysis focused on ensuring that Forest Service decisions subsidize and support existing social and economic systems – without regard to whether they are sustainable or not and to whether the Forest Services practices are sustainable or not – rather than an assessment of the sustainability of the relevant Forest Service decisions.

Second, the rule fails to account for the profound limitations of traditional micro-economic analysis, which virtually ensures that the analysis will not promote economic sustainability.¹⁷⁷ Nowhere does the rule mandate that the Forest Service employ analytic methods or data that a true analysis of sustainability would require. The rule fails to consider the finite nature of various resources, overlooks non-use or other hard-to-monetize values, and fails to account for the short-term time horizon incorporated in many market indicators. Without explicit efforts to account for the shortcomings of standard analytic methods, the rule virtually guarantees a distorted economic analysis that does not advance sustainability.

Also conspicuously absent from a rule that relies heavily on economic goals, promulgated by an administration fixated on cost-benefit analysis in other contexts, is any requirement that timber harvest decisions be subjected to

cost-benefit analysis. This represents a marked contrast with the 2000 rule's requirement that to establish timber production as a plan objective, the costs of timber production in the plan area be justified by associated "ecological, social, or economic benefits."¹⁷⁸

Weakening the Role of Science

Despite its unconvincing protestations to the contrary, the Bush Administration has provided diminished emphasis on science in its forest planning rule. The tone was set by the failure of the Forest Service to convene a COS before promulgating its new regulations, as required by the NFMA. As noted earlier, the NFMA requires that the USDA, in carrying out the planning provisions of the Act, appoint a COS comprised of members "who are not officers or employees of the Forest Service" in order to provide "scientific and technical advice and counsel on proposed guidelines and procedures to assure that an effective interdisciplinary approach is proposed and adopted."¹⁷⁹ Former Secretary of Agriculture Glickman complied with the COS requirement when he convened a COS in 1997, whose report, in turn, served as the basis for the 2000 regulations.

In contrast, the Bush Administration's Forest Service decided, based upon its internal and one-sided *NFMA Planning Rule Review*, to devise a new set of planning regulations without convening a new COS. The final 2004 rule announces that the self-proclaimed "paradigm shift in land management planning" is "based on the agency's expertise and experience."¹⁸⁰ When Congress enacted the NFMA, the Forest Service had been in existence and charged with managing the National Forest System for over 70 years. Seven decades of "expertise" notwithstanding, Congress specified that a panel of experts *outside the Forest Service* provide scientific and technical advice and counsel on the development of planning procedures and standards. An additional 25 years of experience does not warrant nullification of congressional direction that new forest planning regulations be developed with the benefit of outside counsel. Confronted with the concern that no COS was convened to develop the 2002 proposed rule, the Forest Service responded by stating that:

the NFMA does not require a committee of scientists for revision of the planning rule. Nonetheless, the Department based the 2002 proposed rule on the major recommendations from the 1999 Committee of Scientists Report.¹⁸¹

The Forest Service is technically correct – the NFMA provides that "the Secretary *may*, from time to time, appoint similar committees when considering revisions of

the regulations."¹⁸² Yet when the Forest Service revised its 1979 regulations, it reconvened the COS to obtain its input on the proposed revisions,¹⁸³ just as it convened a new COS in 1997 when seeking to revise substantially the 1982 rule. Moreover, it borders on the farcical to classify the 2004 rule as a mere revision. The 2004 rule is a "revision" in the sense that prior regulations also addressed land management planning in the national forests. However, whether the 2004 rule is described as a "paradigm shift" in or a "radical overhaul" of forest planning, neither its proponents nor its critics pretend that it merely tweaks the 1982 or 2000 regulations. Accordingly, to shield the failure to convene a COS behind the NFMA's language regarding regulatory *revisions* elevates form over substance and ignores the stated intent of Congress.

The other explanation offered by the Forest Service – that the prior COS's recommendations provided an adequate substitute for convening a new COS – is similarly specious. The intent of Congress as expressed in the NFMA was to have real-time involvement by live people from outside the Forest Service providing counsel on the proposed regulations. The NFMA's stipulation that the COS terminate "upon promulgation of the regulations"¹⁸⁴ supports the idea that Congress intended that the COS be actively engaged in the development of the regulations to be proposed. Secretary Glickman followed this statutory direction, stipulating in the Charter for the COS convened in 1997 that the "Committee will terminate upon the publication in the Federal Register of a proposed rule revising the land and resource management regulations at 36 C.F.R. Part 219."¹⁸⁵

Couched within the Forest Service's two-sentence response to criticism of its failure to convene a COS, quoted above, is yet another statement that sounds good but that flies in the face of the facts: the assertion that the new rule is based on the major recommendations of the 1999 COS Report. One major recommendation of the 1999 report was the retention of the species viability approach to ensuring species diversity as required by the NFMA. This critical protection, established during the Reagan Administration, and "second only to the Endangered Species Act . . . in . . . importance as a federal protection for species conservation," is completely removed from the final rule.¹⁸⁶

In contrast, the COS highlighted the species viability requirement in its report as critical to compliance with the NFMA's diversity requirement. "Diversity is sustained only when individual species persist; the goals of ensuring species viability and providing for diversity are inseparable."¹⁸⁷ Recognizing that monitoring the status and assessing the viability of all species is impossible, the COS

also reaffirmed the focus on focal species, the key characteristic of which is that “its status and time trend provide insights to the integrity of the larger ecological system.”¹⁸⁸ The COS concluded that

perhaps the single best metric of sustainable use of land is the persistence of species over time. The public needs to understand that the productivity of an ecosystem can be sustained over the long term only if species persist.¹⁸⁹

The 2000 regulations responded to the COS’s conclusions regarding species viability by adopting its recommendations almost verbatim, requiring evaluation of species diversity based on, among other things, assessment of “focal species,” the “key characteristic” of which is “that its status and trend provide insights into the integrity of the larger ecological system to which it belongs.”¹⁹⁰ The Forest Service claim that it adopted the “major recommendations” of the 1999 COS report is plainly inaccurate and the claimed reliance on the 1999 COS thus fails as a justification for its failure to convene a new COS. The Forest Service completely rejected the 1999 COS recommendation for implementing the NFMA’s diversity requirement. Instead, and without supporting scientific analysis, the rule eliminates the use of focal species and establishes the concept of “ecosystem diversity” as the “primary means by which a plan contributes to sustaining ecological systems,” and vaguely instructs that “plan components . . . establish a framework to provide the characteristics of ecosystem diversity in the plan area.”¹⁹¹

Watered Down Monitoring Requirements and ISO 14001

Consistent with the Forest Service’s rejection of the species viability approach is its decision not to include the 2000 rule’s extensive requirements for species population monitoring.¹⁹² However, the shift to focus on ecosystems does not eliminate the need to monitor populations of species that comprise the ecosystem. The real change the rule effects is to make the monitoring less systematic by eliminating any clear standard or focus to govern what, where and how the Forest Service is required to collect data, making its monitoring highly susceptible to manipulation. According to the agency, “[p]opulation data are difficult to obtain and evaluate because there are so many factors outside the control of the Forest Service that affect populations.”¹⁹³ The nominal “monitoring” section of the rule is exceedingly vague, requiring only:

(i) Monitoring to determine whether plan implementation is achieving multiple use objectives;

(ii) Monitoring to determine the effects of the various resource management activities within the plan area on the productivity of the land;

(iii) Monitoring of the degree to which on-the-ground management is maintaining or making progress toward the desired conditions and objectives for the plan; and (iv) Adjustment of the monitoring program as appropriate to account for unanticipated changes in conditions.¹⁹⁴

Yet without adequate monitoring, the kind of iterative adaptation that characterizes the adaptive management that the 2004 rule hopes to achieve will be difficult if not impossible to achieve.¹⁹⁵

The emphasis on monitoring progress toward vague and self-identified goals rather than standards set forth in the regulations themselves both undermines the NFMA’s mandates and discourages the systematic and well-focused data collection that is essential to promote agency accountability through meaningful public participation and effective judicial review. The shift from accountable monitoring to a vague, generalized duty to monitor is repeated in the 2004 rule’s adoption of a requirement that each plan area adopt an Environmental Management System (EMS). The Forest Service trumpets the EMS as a key component of adaptive management, describing it as a “systematic approach to identify and manage environmental conditions and obligations to achieve improved performance and environmental protection.”¹⁹⁶ The EMS developed by each plan area “must conform to the consensus standard developed by the International Organization for Standardization (ISO) and adopted by the American National Standards Institute (ANSI) as ‘ISO 14001: Environmental Management Systems—Specification With Guidance For Use’ (ISO 14001).”¹⁹⁷

Just what is ISO 14001? The public may well find itself asking this question, as the 2004 planning rule offers only a circular definition (“ISO 14001 describes EMSs and outlines the elements of an EMS”) and directs the public to a website where, provided they have access to the internet and \$81 to spare, they may purchase ISO 14001.¹⁹⁸ For those who would prefer a less costly explanation, Dorothy Bowers, Chair of the Environmental Protection Agency’s National Advisory Council for Environmental Policy and Technology has explained:

People might be surprised to find out they can read ISO 14001 in ten minutes. It’s only five pages long, with nine pages of annexes. It requires an environmental policy, planning, management programs, targets, and procedures to maintain compliance with legal requirements. And so forth.

How an individual organization executes these requirements will vary. Some people say it's like a building code, which can produce living shelters ranging anywhere from a bungalow to a mansion.¹⁹⁹

In other words, ISO 14001 “has no substantive standards or requirements – it only requires certain processes be followed.”²⁰⁰ Bowers explains the value of an EMS to private companies:

We need a regulatory system, so that people know what the limits are. We need an enforcement system to ensure that the limits have meaning. And we need facility management systems to provide for an organized approach to meeting the limits.²⁰¹

Turning this relationship on its ear, the Forest Service included the requirement that each national forest plan adopt an EMS in place of imposing regulatory limits that an organized process such as the EMS might otherwise have helped Forest Service managers attain. Thus, while the Forest Service has predicted that the EMS will improve performance and environmental protection, in fact the “EMS structure sets the bar so low that it [will] likely lead to forest plans with no real meaning or effect.”²⁰²

Moreover, the 2004 rule's reliance on EMSs to ensure environmental protection ignores the fact that forest plans “are substantive, enforceable documents with real-world impacts.”²⁰³ Among other things, plans designate specific national forest lands for specific uses, establish appropriate levels and locations of timber harvests and determine how the impacts of such uses on wildlife will be monitored.²⁰⁴ Under a system where the only progress monitored is toward self-established objectives, these crucial, statutorily mandated functions of forest plans will indeed become meaningless. Stated differently, adopting ISO 14001 EMSs “is another way to diminish the importance of forest plans, free the Forest Service from mandatory standards and practices, and give forest managers maximum discretion to manage the public's forests as they see fit.”²⁰⁵

Given that the Forest Service has freed itself from such scientific constraints as the need to: 1.) convene a COS; 2.) ensure species viability through monitoring population data; and 3.) monitor progress toward anything but self-established and broadly stated objectives, it is apparent that

the 2004 forest planning rule significantly diminishes the overall role of science in planning. The 2000 rule required that Forest Service officials “ensure that the best available science is considered in planning.”²⁰⁶ The 2004 rule requires only that Forest Service officials “take into account the best available science,”²⁰⁷ a phrase that “better expresses that *formal science is just one source of information* for the Responsible Official and only one aspect of decisionmaking.”²⁰⁸

Diminished Opportunities for Public Participation

The Forest Service has touted the 2004 rule as one which emphasizes not only science, but also public involvement, and “expects that, compared with prior planning rules, this final rule will allow more members of the public to be more effectively engaged.”²⁰⁹ To the contrary, however, just as an examination of the rule's provisions demonstrates the distinct *lack of* emphasis on science, so does it demonstrate

that in fact opportunities for public participation are severely compromised.

The most significant change in the public's ability to participate at the planning stage is the Forest Service's proposal to categorically exclude plans, plan amendments, and plan revisions from NEPA documentation.²¹⁰ The Forest Service justifies this sea

change with reasoning to the effect that the “forest plan only has an environmental effect if it is knocked off the table and lands on the ground.”²¹¹

In doing so, it relies on two Supreme Court decisions that, according to the Forest Service, emphasize the strategic nature of forest plans.²¹² Absent extraordinary circumstances, NEPA analysis will no longer be performed at the planning level, but only “when considering specific projects or making other project-specific decisions affecting the environment.”²¹³ The Forest Service bases this deferral of NEPA compliance to the point at which the agency makes site-specific decisions on the argument that plans themselves have no environmental impact. But this argument ignores the plain language of the NFMA, which specifically directs that “land management *plans*” be prepared in accordance with NEPA.²¹⁴

The Forest Service assures the public that despite the removal of the EIS process from plan development, the 2004 rule provides “extensive opportunity” for public participation.²¹⁵ Though the final rule does require that

Given that the Forest Service has freed itself from such scientific constraints as the need to: 1.) convene a COS; 2.) ensure species viability through monitoring population data; and 3.) monitor progress toward anything but self-established and broadly stated objectives, it is apparent that the 2004 forest planning rule significantly diminishes the overall role of science in planning.

public notice be provided when a plan, plan amendment, or plan revision is initiated²¹⁶ and that a “collaborative and participatory approach to land management planning” be used,²¹⁷ the methods and timing of public involvement opportunities are left entirely to the discretion of the Responsible Official.²¹⁸ Further, the removal of substantive standards from the planning rule means there are no identified goals to govern the kind of “collaboration” with stakeholders that is supposed to take place.

Additionally, though the public is to be involved in designing the monitoring program, monitoring information “may be changed and updated as appropriate, at any time,” and the Forest Service has indicated that it will treat such changes as administrative corrections that “do not require a plan amendment or revision.”²¹⁹ Accordingly, the statutory public participation and notice requirements do not apply. Other such “administrative corrections” not requiring any public participation include changes in timber management projections.²²⁰ Finally, unlike the 2000 rule, which allowed anyone to object to a plan amendment, or revision,²²¹ the 2004 rule requires that in order to object²²² to a plan, plan amendment or plan revision, an interested party must have “participated in the planning process through the submission of written comments.”²²³ Consequently, if the Responsible Official decides to hold a public meeting, and a member of the public attends and speaks but does not follow her appearance with written comments, she may not object to the plan. Taken together, these provisions illustrate that the Bush Administration’s revised planning rule does not improve opportunities for public participation, but severely curtails them.

Reduced Forest Service Accountability

Among the other purported improvements the 2004 rule makes to prior forest planning rules is that plans developed and maintained using an EMS will improve the accountability and transparency of planning for the national forests.²²⁴ To the contrary, the adoption of an EMS will do nothing to ameliorate the reduction in accountability caused by the removal of objective, verifiable standards from the regulations.

The agency asserts that “by requiring an EMS, combined with the procedures in the Forest Service directives, the final rule provides for agency accountability through impartial and objective audits, management reviews, and public disclosure of the results of those reviews.”²²⁵ That statement is problematic in two respects. First, because an EMS only establishes processes that need be followed rather than substantive standards for forest management, and because the rule’s monitoring requirements consist only

of “vague instructions to monitor, in any fashion whatsoever, progress toward self-established goals,” impartial and objective audits “would only assess whether self-identified plan objectives are being met, which could be done by consulting firms with no forest expertise.”²²⁶ Further, since the ISO 14001 standard is not publicly available except through purchase, the entire EMS framework may elude monitoring by the public.

Second, the Forest Service may not be held accountable to the “procedures in the Forest Service directives” to the same extent as it would be held accountable to regulatory standards. Courts have taken different approaches to the legal status of manual provisions, with several concluding that they are not enforceable to the same extent as regulations promulgated under the Administrative Procedure Act.²²⁷

Regulations governing the formulation of Forest Service directives do require that the public be notified and given an opportunity to comment on the proposal when the agency determines that substantial public interest or controversy concerning a proposed manual directive can be expected.²²⁸ Though the Forest Service issued Interim Directives to complement the 2004 rule that are effective immediately, it did request public comments on the Interim Directives, which it indicated will be considered in the development of final directives.²²⁹ However, in the absence of a finding of substantial public interest or controversy, the process for developing Forest Service directives will be considerably less transparent than the regulatory system, making it more difficult for the public to track changes in the standards governing Forest System management that Congress mandated be contained in the regulations themselves.

The Forest Service’s approach to the development of detailed regulatory management standards contravenes the explicit intent of Congress, as evidenced in the NFMA itself, and the statute’s legislative history. The Report of the Conference Committee explains that the Committee considered two alternatives: 1.) the Senate proposal to require that USDA promulgate regulations pursuant to the APA, which regulations would prescribe the planning process and implement the specific guidelines and standards as set forth in the statute; and 2.) an amendment by the House of Representatives that would not require a rulemaking, but rather would require the Forest Service to incorporate proposed standards into individual forest plans.²³⁰ The Conference Committee rejected the House proposal and adopted the provision of the Senate bill that required that planning regulations include specific standards and guidelines promulgated in accordance with the APA.²³¹ Thus, Congress specifically considered an option that would

allow the Forest Service greater flexibility and discretion in forest planning and rejected it in favor of a scheme that required the Forest Service to implement statutory directives through a transparent and open rulemaking process.

Additionally, abandonment of the species viability requirement deprives the public of a crucial check on the Forest Service's activities. The former requirement that the Forest Service obtain data sufficient to analyze population trends of indicator species and their relationship to habitat changes caused by management activities in the National Forests has been a benchmark against which the public has been able to track the agency's performance.²³² Numerous lawsuits brought by parties tracking Forest Service compliance with that requirement have resulted in judicial invalidation of harmful site-specific projects.²³³ Elimination of the species viability requirement results in elimination of the public's ability to check attempts by the Forest Service to implement environmentally harmful projects.²³⁴

Conclusion

Arguing that forest plans on their own have no impact, the Bush Administration's revised forest planning rule ensures that plans will indeed be meaningless. The Forest Service, ignoring the statutory requirement that it seek the advice and counsel of outside experts, has taken it upon itself to overturn by administrative fiat protections specifically mandated by Congress to ensure the protection of the full range of forest values. Arguing that plans in and of themselves are meaningless, the Forest Service ignores the fact that "[p]lans are the central reform" of the NFMA, "designed to force an autonomous, timber-driven agency to look beyond the next clearcut for a period of 15 years, manage for non-timber resources, and involve the public."²³⁵ Claiming its new rule builds upon the themes of sustainability developed by the 2000 rule while improving accountability and opportunities for public participation, in fact the Forest Service has reverted to a myopic focus on economic values, freed itself from compliance with mandatory standards, and ramped down the ability of the public to participate in the development of national forest plans. If Congress was indeed correct that "[i]t is upon the quality of our stewardship of the land that our society will ultimately be judged,"²³⁶ history will not look favorably upon the Bush Administration's sleight of hand in divesting the forest planning regulations of their crucial role in protecting the national forest lands.

About the Authors

Alyson Flournoy is a tenured full Professor and Director of the Environmental and Land Use Law Program at the University of Florida Levin College of Law in Gainesville. She is also a Board Member of the Center for Progressive Reform. She has taught a range of environmental law courses as well as Administrative Law and Property. Prior to joining academia, she served as a law clerk to Chief Justice Robert Wilentz of the New Jersey Supreme Court, and then practiced environmental law in Covington and Burling's Washington, D.C. office. Her scholarship focuses on environmental ethics, decision-making processes under environmental and natural resource laws, and on the intersection of science and law. She has addressed these themes in writings about endangered species and forest management, wetlands conservation and restoration, and regulation of toxic substances. Professor Flournoy chaired the effort to create the University of Florida's Environmental and Land Use Law Program and has served as its Director since its inception in 1999.

Robert L. Glicksman holds the Robert W. Wagstaff Chair at the University of Kansas School of Law. His areas of expertise include pollution control, public natural resources management, and administrative law. Prior to joining the faculty of the University of Kansas, Professor Glicksman practiced in the Washington, D.C. office of Cleary, Gottlieb, Steen & Hamilton, serving industrial clients in the energy and chemical industries. Professor Glicksman is the co-author (with George C. Coggins) of the leading treatise on public land and resource management, *Public Natural Resources Law*, as well as a student nutshell on the same subject, *Modern Public Land Law*. His law review articles have been published in a range of distinguished journals including the *Pennsylvania Law Review*, the *Duke Law Journal*, the *Vanderbilt Law Review*, and the *Columbia Journal of Environmental Law*. Professor Glicksman has been instrumental in the expansion of the environmental law curriculum at the University of Kansas School of Law, and helped to establish a certificate program in environmental and natural resources law.

Margaret Clune is a Policy Analyst at the Center for Progressive Reform. She is a 2002 graduate of the University of Maryland School of Law. Prior to joining CPR, Ms. Clune practiced law in the Baltimore office of Piper Rudnick LLP.

Endnotes

- ¹ S. REP. NO. 94-893, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6662, 6667.
- ² *Id.*
- ³ *Id.*
- ⁴ <<http://www.fs.fed.us/aboutus/meetfs.shtml>> (site visited 03/07/05).
- ⁵ See Defenders of Wildlife Press Release: *Lawsuit Filed Against New National Forest Rules*, <<http://www.defenders.org/releases/pr2005/pr021705.html>> (site visited 03/02/05).
- ⁶ <<http://www.fs.fed.us/aboutus/meetfs.shtml>> (site visited 03/07/05); See also 16 U.S.C. § 1600(6).
- ⁷ 16 U.S.C. § 475.
- ⁸ George Cameron Coggins & Robert L. Glicksman, PUBLIC NATURAL RESOURCES LAW § 10F:29 (2005).
- ⁹ *Id.*, § 10F:29; 1960 Multiple-Use, Sustained-Yield Act, 16 U.S.C. § 529.
- ¹⁰ 16 U.S.C. § 531.
- ¹¹ 16 U.S.C. § 529.
- ¹² Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests*, 64 OR. L. REV. 1, 37 (1985-86) (citing S. 2296, 93d Cong., 1st Sess., 119 CONG. REC. 26,797 (1973), *reprinted in* SENATE COMM. ON AGRICULTURE, NUTRITION AND FORESTRY, 96TH CONG., 1ST SESS., COMPILATION OF THE FOREST AND RANGELAND RENEWABLE RESOURCES ACT OF 1974, at 20 (Comm. Print 1979) (remarks of Sen. Humphrey)).
- ¹³ Coggins & Glicksman, PUBLIC NATURAL RESOURCES LAW, *supra*, n. 8, § 10F:29; As amended, 16 U.S.C. § 1600-1614.
- ¹⁴ Wilkinson & Anderson, *Land and Resource Planning in the National Forests*, *supra*, n. 12, 41 (citing Forest Service, U.S. Department of Agriculture, REPORT OF THE CHIEF, 14 (1959) (reporting timber sales for 1959 of 9.4 billion board feet) and Forest Service, U.S. Department of Agriculture, ANNUAL REPORT OF THE CHIEF 1970-71, 20 (1972) (reporting timber sales for 1970 of 13.4 billion board feet)).
- ¹⁵ *Id.* at 41 (citing SUBCOMM. ON PUBLIC LANDS OF THE SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, 92ND CONG., 2D SESS., CLEARCUTTING ON FEDERAL TIMBERLANDS 3-4 (Comm. Print 1972), *reprinted in* FOREST AND RANGELAND MANAGEMENT: JOINT HEARINGS BEFORE THE SUBCOMM. ON ENVIRONMENT, SOIL CONSERVATION, AND FORESTRY OF THE SENATE COMM. ON AGRICULTURE AND FORESTRY AND THE SUBCOMM. ON THE ENVIRONMENT AND LAND RESOURCES OF THE SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, 94TH CONG., 2D SESS. 953-54 (Comm. Print 1976)).
- ¹⁶ *Id.* at 41 (citing ENVTL. POLICY DIVISION, CONG. RESEARCH SERVICE, LIBRARY OF CONGRESS, 92ND CONG., 2D SESS., AN ANALYSIS OF FORESTRY ISSUES IN THE FIRST SESSION OF THE 92ND CONGRESS 3-8 (Comm. Print 1972); also citing Robert Wolf, *Architects and Architecture*, in THE RPA PROCESS: MOVING ALONG THE LEARNING CURVE 5, 6 (G. Stairs & T. Hamilton ed., 1982), an influential staff advisor on the NFMA who observed:
- It would be comforting to think that the fervor raised over clearcutting was simply an attempt by a few environmentalists to lock all forest land into wilderness; but the concern that existed had a base among solid citizens, people who felt that what happens on public land is public business. Neither a slaughterhouse worker who daily stood up to his knees in blood from beef carcasses nor a surgeon who daily was up to his wrists in blood at the operating table could accept clearcutting as a wound that in a few years would be healed with a new forest. Because it occurred on public forest, they believed they had every right to say, “Stop!”)
- ¹⁷ *Izaak Walton League of America v. Butz*, 522 F.2d 945 (4th Cir. 1975).
- ¹⁸ S. REP. NO. 94-893 at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6662, 6669.
- ¹⁹ Wilkinson & Anderson, *Land and Resource Planning in the National Forests*, *supra*, n. 12, 42 (citing SUBCOMM. ON PUBLIC LANDS OF THE SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, 92ND CONG., 2D SESS., CLEARCUTTING ON FEDERAL TIMBERLANDS 3-4 (Comm. Print 1972), *reprinted in* FOREST AND RANGELAND MANAGEMENT: JOINT HEARINGS BEFORE THE SUBCOMM. ON ENVIRONMENT, SOIL CONSERVATION, AND FORESTRY OF THE SENATE COMM. ON AGRICULTURE AND FORESTRY AND THE SUBCOMM. ON THE ENVIRONMENT AND LAND RESOURCES OF THE SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, 94TH CONG., 2D SESS., *passim* (Comm. Print 1976)).
- ²⁰ S. REP. NO. 94-893 at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6662, 6670.
- ²¹ Wilkinson & Anderson, *supra*, n. 12, 40.
- ²² S. REP. NO. 94-893 at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6662, 6671.
- ²³ 16 U.S.C. §§ 1604(a), (b).
- ²⁴ 16 U.S.C. § 1604(g).
- ²⁵ 16 U.S.C. §§ 1604(g)(3)(A) – (g)(3)(F).
- ²⁶ 16 U.S.C. § 1604(g)(3)(B).
- ²⁷ 16 U.S.C. § 1604(g)(3)(C).
- ²⁸ 16 U.S.C. §§ 1604(g)(3)(E)(i) – (E)(iv).

- ²⁹ 16 U.S.C. §§ 1604(g)(3)(F)(i) – (v).
- ³⁰ 16 U.S.C. § 1604(g)(1).
- ³¹ 16 U.S.C. § 1604(h)(1).
- ³² S. REP. NO. 94-893 at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6662, 6693.
- ³³ 16 U.S.C. § 1604(h)(1).
- ³⁴ *See* Coggins & Glicksman, PUBLIC NATURAL RESOURCES LAW, *supra*, n. 8, § 16:1.
- ³⁵ *Id.*; 16 U.S.C. §§ 1604(a), (b).
- ³⁶ *See Report of the United Nations Conference on Environment and Development*, General Assembly, § 2(b), U.N. Doc. A/CONF.151/26 (Vol. III) (1992).
- ³⁷ Wilkinson & Anderson, *Land and Resource Planning in the National Forests*, *supra*, n. 12, n. 211 (citing 43 Fed. Reg. 39,057 (1978)).
- ³⁸ *Id.* The members of the COS were: Thaddeus Box, Utah State University; R. Rodney Foil, Mississippi Agricultural and Forestry Experiment Station; Ronald W. Stark, University of Idaho; Dennis E. Teegarden, University of California, Berkeley; William L. Webb, previously State University of New York, Syracuse; and the chairman, Arthur W. Cooper, North Carolina State University. *Id.*
- ³⁹ 44 Fed. Reg. 53,928 (1979); *See also* Wilkinson & Anderson, *Land and Resource Planning in the National Forests*, *supra*, n. 12, 43, n. 216 (noting that the COS published an extensive technical review of the draft regulations, *Final Report of the Committee of Scientists*, 44 Fed. Reg. 26,599, 26,607 (1979)).
- ⁴⁰ 47 Fed. Reg. 7678 (1982).
- ⁴¹ 47 Fed. Reg. 43026 (1982) (noting that due to the large amount of public interest generated by the proposed revisions, USDA extended the comment period and announced a meeting, open to the public, of a panel of consultants (including members of the former COS) to discuss and consider major topics emerging from public comments on the proposed revisions).
- ⁴² Wilkinson & Anderson, *Land and Resource Planning in the National Forests*, *supra*, n. 12, 44 (citing 36 C.F.R. §§ 219.4(b)(2), 219.9 (1984)).
- ⁴³ *Id.* (citing 36 C.F.R. § 219.12 (1984)).
- ⁴⁴ *Id.* (citing 36 C.F.R. §§ 219.14, 219.16 (1984)).
- ⁴⁵ *Id.* (citing 36 C.F.R. §§ 219.18-25 (1984)).
- ⁴⁶ *Id.* (citing 36 C.F.R. § 219.27 (1984)).
- ⁴⁷ 36 C.F.R. § 219.27(e) (July 1, 2000).
- ⁴⁸ 36 C.F.R. § 219.27(d)(2) (July 1, 2000).
- ⁴⁹ 36 C.F.R. § 219.14 (a) (July 1, 2000).
- ⁵⁰ 36 C.F.R. § 219.14 (b) (July 1, 2000).
- ⁵¹ 36 C.F.R. § 219.19 (July 1, 2000).
- ⁵² 36 C.F.R. § 219.19(a)(1) (July 1, 2000).
- ⁵³ *Inland Empire Pub. Lands Council v. United States Forest Serv.*, 88 F.3d 754, 762 n.11 (9th Cir. 1996).
- ⁵⁴ 36 C.F.R. § 219.19 (July 1, 2000).
- ⁵⁵ *Id.*
- ⁵⁶ *Id.*
- ⁵⁷ First Supplemental Complaint for Declaratory and Injunctive Relief, ¶34, *Defenders of Wildlife v. Johanns*, Case No. 04-4512 PJH (N.D. Cal.), Docket Entry No. 19 (filed February 17, 2005).
- ⁵⁸ 36 C.F.R. § 219, *passim*, see, e.g., § 219.10 (stating that the forest supervisor is responsible for preparing and implementing the forest plan and preparing the EIS for the plan) (July 1, 2000).
- ⁵⁹ 36 C.F.R. § 219.6(c) – (k) (July 1, 2000).
- ⁶⁰ 36 C.F.R. § 219.6(b) (July 1, 2000).
- ⁶¹ 40 C.F.R. § 1502.9 (April 1, 2005). This implements NEPA's requirement that an EIS be prepared for any major federal action significantly affecting the environment.
- ⁶² 40 C.F.R. § 1503.1 (April 1, 2005).
- ⁶³ 40 C.F.R. § 1503.4 (April 1, 2005).
- ⁶⁴ *See National Forest System Land and Resource Management Planning; Proposed Rules*, 67 Fed. Reg. 72770-71 (December 6, 2002). The summary report was entitled, "Synthesis of the Critique of Land Management Planning" (1990). *Id.*
- ⁶⁵ *National Forest System Land and Resource Management Planning; Advance Notice of Proposed Rulemaking*, 56 Fed. Reg. 6508 (Feb. 15, 1991).
- ⁶⁶ *National Forest System Land and Resource Management Planning; Proposed Rule*, 60 Fed. Reg. 18886 (Apr. 13, 1995).
- ⁶⁷ 64 Fed. Reg. 54074, 54075 (Oct. 5, 1999).
- ⁶⁸ *See National Forest System Land and Resource Management Planning; Proposed Rules*, 67 Fed. Reg. 72770-71 (Dec. 6, 2002); *See also* Deann Zwright, *Smokey and the EMS*, THE ENVIRONMENTAL FORUM (July/August 2004), 30.
- ⁶⁹ Committee of Scientists, *Sustaining the People's Lands: Recommendations for Stewardship of the National Forests and Grasslands into the Next Century*, xiii (March 15, 1999), available at: <http://www.fs.fed.us/news/news_archived/science/cossynop.pdf> (site visited 03/14/05).
- ⁷⁰ 16 U.S.C. § 1604(h)(1).
- ⁷¹ Dr. K. Norman Johnson of the College of Forestry, Oregon State University, chaired the COS. Other members were: Dr. James Agee, College of Forest Resources,

University of Washington; Dr. Robert Beschta, College of Forestry, Oregon State University; Dr. Virginia Dale, Environmental Sciences Division, Oak Ridge National Laboratory; Dr. Linda Hardesty, Department of Natural Resources Science, Washington State University; Dr. James Long, Department of Forest Resources, Utah State University; Dr. Larry Nielsen, School of Forest Resources, Pennsylvania State University; Dr. Barry Noon, Department of Fishery and Wildlife, Colorado State University; Dr. Roger Sedjo, Forest and Economic Policy Program, Resources for the Future; Dr. Margaret Shannon, Buffalo School of Law; Dr. Ronald Trosper, College of Ecosystem Science Management, School of Forestry, Northern Arizona University; Charles Wilkinson, School of Law, University of Colorado; and Dr. Julia Wondolleck, School of Natural Resources and the Environment, University of Michigan. Committee of Scientists, *Sustaining the People's Lands: Recommendations for Stewardship of the National Forests and Grasslands into the Next Century*, xiii (March 15, 1999), available at: <http://www.fs.fed.us/news/news_archived/science/cosfrnt.pdf> (site visited 03/14/05).

⁷² USDA News Release, *Glickman Accepts Recommendations on Improving Management of National Forests*, March 15, 1999, available at: <<http://www.fs.fed.us/emc/nfma/includes/cosreport/0104.txt>> (site visited 03/14/2005).

⁷³ Committee of Scientists, *Sustaining the People's Lands: Recommendations for Stewardship of the National Forests and Grasslands into the Next Century*, (March 15, 1999), available at: <<http://www.fs.fed.us/emc/nfma/includes/cosreport/Committee%20of%20Scientists%20Report.htm>> (site visited 03/14/05).

⁷⁴ *National Forest System Land and Resource Management Planning: Proposed Rule*, 64 Fed. Reg. 54074, 54075 (Oct. 5, 1999); see also *National Forest System Land and Resource Management Planning: Final Rule*, 65 Fed. Reg. 67514, 67517 (Nov. 9, 2000).

⁷⁵ *National Forest System Land and Resource Management Planning: Final Rule*, 65 Fed. Reg. 67514, 67517 (Nov. 9, 2000).

⁷⁶ *National Forest System Land and Resource Management Planning: Final Rule*, 65 Fed. Reg. 67514, 67517 (Nov. 9, 2000); See also 36 C.F.R. § 219.19 (July 1, 2001).

⁷⁷ 36 C.F.R. § 219.36 (July 1, 2001).

⁷⁸ 36 C.F.R. § 219.20 (July 1, 2001).

⁷⁹ 36 C.F.R. § 219.20(a)(2)(ii)(A) (July 1, 2001).

⁸⁰ 36 C.F.R. § 219.20(a)(2)(ii)(B) (July 1, 2001).

⁸¹ 36 C.F.R. § 219.20(a)(1)(i)(E) (July 1, 2001).

⁸² 36 C.F.R. § 219.36 (July 1, 2001).

⁸³ 36 C.F.R. § 219.1(b)(3) (July 1, 2001).

⁸⁴ 36 C.F.R. §§ 219.21(a), (b) (July 1, 2001).

⁸⁵ 36 C.F.R. § 219.28 (a) (July 1, 2001).

⁸⁶ 36 C.F.R. § 219.28(b) (July 1, 2001).

⁸⁷ 36 C.F.R. §§ 219.29(a), (b) (July 1, 2001). The “responsible official” was that “officer with the authority and responsibility to oversee the planning process and make decisions on proposed actions.” 36 C.F.R. § 219.36 (July 1, 2001).

⁸⁸ 36 C.F.R. §§ 219.22, 219.23 (July 1, 2001).

⁸⁹ Adaptive management involves the formulation of regulatory policy through an ongoing process pursuant to which the agency continually reassesses and adapts its approaches through assessment of feedback generated by prior regulatory experience. See SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, *RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH* 167 (2003).

⁹⁰ 36 C.F.R. § 219.11 (July 1, 2001).

⁹¹ 36 C.F.R. § 219.11(f) (July 1, 2001).

⁹² 36 C.F.R. § 219.2(d) (July 1, 2001).

⁹³ 36 C.F.R. § 219.2(d)(4) (July 1, 2001).

⁹⁴ 36 C.F.R. §§ 219.12-18 (July 1, 2001).

⁹⁵ 36 C.F.R. § 219.16(a) (July 1, 2001).

⁹⁶ 36 C.F.R. § 219.16(c) (July 1, 2001).

⁹⁷ 36 C.F.R. § 219.16(d) (July 1, 2001).

⁹⁸ 36 C.F.R. § 219.32(a) (July 1, 2001).

⁹⁹ Society of American Foresters, *Mission Statement*, <<http://www.safnet.org/who/whoweare.cfm>> (site visited 04/11/05).

¹⁰⁰ Letter from William H. Banzhaf, Executive Vice President, Society of American Foresters, to The Honorable Ann M. Veneman, Secretary of Agriculture, USDA (February 8, 2001), available at: <<http://www.safnet.org/policyandpress/psst/road42701.cfm>> (site visited 03/15/2005).

¹⁰¹ *Id.* at 1.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ The roadless rule, issued by the Forest Service at the end of the Clinton Administration, is described below.

¹⁰⁵ Letter from William H. Banzhaf, Executive Vice President, Society of American Foresters, to The Honorable Ann M. Veneman, Secretary of Agriculture, USDA 3 (February 8, 2001), available at: <<http://www.safnet.org/policyandpress/psst/road42701.cfm>>

www.safnet.org/policyandpress/psst/road42701.cfm> (site visited 03/15/2005).

¹⁰⁶ Memorandum from Larry Larson, Team Leader to David Tenny, Acting Deputy Under Secretary, Natural Resources & Environment, USDA 3-4 (April 10, 2001) (hereafter referred to as “*NFMA Planning Rule Review*”) (on file with authors). The environmental groups that filed the suit were: Citizens for Better Forestry, Ecology Center, Gifford Pinchot Task Force, Kettle Range Conservation Group, Idaho Sporting Congress, Friends of the Clearwater, Utah Environmental Congress, Cascadia Wildlands Project, Klamath Siskayou Wildlands Center, Southern Appalachian Biodiversity Project, Headwaters, and The Lands Council. *Citizens for Better Forestry v. USDA*, No. 01-CV-728 (N.D. Cal.) (Complaint filed February 16, 2001).

¹⁰⁷ *NFMA Planning Rule Review*, 4.

¹⁰⁸ *Id.* at 4. The review team consisted of: 1.) Larry Larson, Director of Planning, Appeals and Litigation, USDA Forest Service, Intermountain Region; 2.) Bob Breazeale, Senior Fellow, the Pinchot Institute for Conservation Studies; 3.) Steve Brink, Director of Engineering, USDA Forest Service, Intermountain Region; 4.) Kathie Hauser, Communications Analyst, USDA Forest Service, Intermountain Region; 5.) Gary Pierson, Director of Planning, USDA Forest Service, Southern Region. A team of “Peer Reviewers” included: 1.) George Leonard, Retired Associate Chief, USDA Forest Service; 2.) Tom Mills, Station Director, USDA Forest Service, PNW; 3.) Jim Perry, Retired, Office of General Counsel, USDA; 4.) Hal Salwasser, Dean, School of Forestry, Oregon State University; and 5.) Jack Ward Thomas, Retired Chief, USDA Forest Service. *Id.*, Appendix E.

¹⁰⁹ *Id.* at 4.

¹¹⁰ *Id.* at 1.

¹¹¹ *Id.*, Appendices A & D (April 10, 2001) (on file with authors) (listing letter from William Banzhaf, Society of American Foresters to Secretary Veneman (February 8, 2001)).

¹¹² *Id.*, Appendices A & D (listing letter from Douglas Leisz, National Association of Forest Service Retirees to Secretary Veneman (February 5, 2001)).

¹¹³ *Id.* (listing letter from Tom Mills to Dombeck and Lyons (June 17, 2000)).

¹¹⁴ *Id.* (listing Testimony of James Perry before the Subcomm. on Forests and Public Land Management, U.S. Senate, May 10, 2000, available in Westlaw, 2000 WL 728943 (F.D.C.H.) (explaining that Mr. Perry is a “career civil servant, having retired from the Office of General

Counsel, U. S. Department of Agriculture on October 1, 1998, after more than 32 years of service”) (also listing testimony of Steven P. Quarles, American Forest & Paper Association, available in Westlaw, 2000 WL 728944 (F.D.C.H.)).

¹¹⁵ <<http://www.ruffedgrousesociety.org>> (site visited 03/15/2005).

¹¹⁶ See <<http://www.ruffedgrousesociety.org/corporatesponsors.asp>> (site visited 03/15/2005).

¹¹⁷ *NFMA Planning Rule Review*, *supra*, n. 106, 1 (on file with authors).

¹¹⁸ *Id.* at 1, 19.

¹¹⁹ Plaintiffs in the industry suit challenging the 2000 regulations included: American Forest and Paper Association, Alaska Forest Association, American Forest Resource Council, Arkansas Forestry Association, California Forestry Association, Intermountain Forest Association, Lake States Lumber Association, Inc., Lake States Resource Alliance, Inc., Minnesota Timber Producers Association, Inc., National Cattlemen's Beef Association, National Hardwood Lumber Association & Ouachita Timber Purchasers Group. *American Forest and Paper Assoc. v. Veneman*, No. 1:01-cv-00871-GK (D. D.C.) (Complaint filed 04/20/2001).

¹²⁰ See Docket Report for *American Forest and Paper Assoc. v. Veneman*, No. 1:01-cv-00871-GK (D. D.C.) (Complaint filed 04/20/2001); See also *NFMA Planning Rule Review*, *supra* n. 106, 4-5 & Appendices A & D (citing and listing testimony of Steven P. Quarles, American Forest & Paper Association, available in Westlaw, 2000 WL 728944 (F.D.C.H.)).

¹²¹ Katherine Pflieger, *Clinton's Rules on Protecting Forests Face Big Overhaul*, CHICAGO TRIBUNE, Apr. 29, 2001.

¹²² *National Forest System Land and Resource Management Planning: Extension of Compliance Deadline; Interim Final Rule*, 66 Fed. Reg. 27552 (May 17, 2001).

¹²³ *Id.* at 27553.

¹²⁴ *National Forest System Land and Resource Management Planning: Extension of Compliance Deadline; Interim Final Rule*, 67 Fed. Reg. 35431 (May 20, 2002).

¹²⁵ *Id.* at 35433.

¹²⁶ *National Forest System Land and Resource Management Planning: Proposed Rule*, 67 Fed. Reg. 72770 (Dec. 6, 2002).

¹²⁷ *Id.* at 72770-71.

¹²⁸ *Id.* at 72772.

¹²⁹ *Id.* at 72774.

¹³⁰ Zwright, *Smokey and the EMS*, *supra*, n. 68, 28.

- ¹³¹ Robert L. Glicksman, *Traveling in Opposite Directions: Roadless Area Management Under the Clinton and Bush Administrations*, 34 ENVTL. L. 1143, 1175 (2004) (citing *National Forest System Land and Resource Management Planning: Proposed Rule*, 67 Fed. Reg. 72770, 72778-79 (Dec. 6, 2002)).
- ¹³² *National Forest System Land and Resource Management Planning: Proposed Rule*, 67 Fed. Reg. 72770, 72783 (Dec. 6, 2002).
- ¹³³ Zwight, *Smokey and the EMS*, *supra*, n. 68, 32.
- ¹³⁴ USDA News Release, *Forest Service Publishes Planning Rule for Better Management of National Forests and Grasslands* (December 22, 2004), available at: <<http://www.fs.fed.us/common/scripts/print.php>> (site visited 02/15/2005). The final rule was published in the Federal Register on January 5, 2005. *National Forest System Land Management Planning: Final Rule*, 70 Fed. Reg. 1023 (Jan. 5, 2005).
- ¹³⁵ *National Forest System Land Management Planning: Final Rule*, 70 Fed. Reg. 1023, 1024 (Jan. 5, 2005).
- ¹³⁶ Juliet Eilperin, *New Rules Issued for National Forests; Some Environmental Protections Eased*, THE WASHINGTON POST, December 23, 2004 at A1.
- ¹³⁷ *Id.*
- ¹³⁸ See Glicksman, *Traveling in Opposite Directions: Roadless Area Management Under the Clinton and Bush Administrations*, *supra*, n. 131, 1147.
- ¹³⁹ *Healthy Forests Restoration Act of 2003*, Pub. L. No. 108-148, 117 Stat. 1887 (2003).
- ¹⁴⁰ *Policies in Focus: Healthy Forests – An Initiative for Wildfire Prevention and Stronger Communities*, <<http://www.whitehouse.gov/infocus/healthyforests/>> (site visited 03/29/05).
- ¹⁴¹ *Overview: What is the Healthy Forests Initiative?* <<http://www.healthyforests.gov/initiative/introduction.html>> (site visited 03/29/05).
- ¹⁴² See, e.g., HFRA § 2(1), 16 U.S.C.A. § 6501(1) (enumerating purposes of HFRA, the first of which is to “reduce wildfire risk to communities, municipal water supplies, and other at-risk Federal land through a collaborative process of planning, prioritizing, and implementing hazardous fuel reduction projects”).
- ¹⁴³ *Overview: What is the Healthy Forests Initiative?* <<http://www.healthyforests.gov/initiative/introduction.html>> (site visited 03/29/05).
- ¹⁴⁴ William W. Buzbee, Robert L. Glicksman, Sidney A. Shapiro & Karen Sokol, *Regulatory Underkill: The Bush Administration’s Insidious Dismantling of Public Health and Environmental Protections*, 22 (Feb. 2005) (on file with authors), available at: <http://www.progressiveregulation.org/articles/Underkill_503.pdf> (site visited 03/29/2005).
- ¹⁴⁵ Robert Perks, Natural Resources Defense Council, *Rewriting the Rules: The Bush Administration’s Assault on the Environment*, 3rd Annual Edition, 54 (April 2004), available at: <<http://www.nrdc.org/legislation/rollbacks/rr2004.pdf>> (site visited 03/29/05). See also Buzbee *et al.*, *Regulatory Underkill*, *supra*, n. 144, 22 (citing HFRA §§ 104(d)(1)-(2), 105(a)(1)-(2), 106(b)-(c) (16 U.S.C. §§ 6514(d)(1)-(2), 6515(a)(1)-(2), 6516(b)-(c)).
- ¹⁴⁶ See, e.g., Jesse B. Davis, *The Healthy Forests Initiative: Unhealthy Policy Choices in Forest and Fire Management*, 34 Env’tl. L. 1209 (2004).
- ¹⁴⁷ Glicksman, *Traveling in Opposite Directions: Roadless Area Management Under the Clinton and Bush Administrations*, *supra*, n. 131, 1143.
- ¹⁴⁸ *Id.*, 1155 (quoting *Special Areas; Roadless Area Conservation*, 65 Fed. Reg. 30,276 (May 10, 2000)).
- ¹⁴⁹ *Id.* (citing *Special Areas; Roadless Area Conservation*, 66 Fed. Reg. 3244 (Jan. 12, 2001)).
- ¹⁵⁰ *Id.* at 1165 (citing *Memorandum for the Heads and Acting Heads of Executive Departments and Agencies* from Chief of Staff Andrew H. Card, Jr., 66 Fed. Reg. 7702 (January 24, 2001)).
- ¹⁵¹ *Id.* at 1166 (citing *National Forest System Land and Resource Management Planning: Special Areas; Roadless Area Conservation*, 66 Fed. Reg. 35,918 (Jul. 10, 2001)).
- ¹⁵² *Special Areas; State Petitions for Inventoried Roadless Area Management*, 70 Fed. Reg. 25654 (May 13, 2005); see Glicksman, *Traveling in Opposite Directions: Roadless Area Management Under the Clinton and Bush Administrations*, *supra*, n. 131 (describing proposed rule).
- ¹⁵³ *Special Areas; State Petitions for Inventoried Roadless Area Management*, 70 Fed. Reg. 25654, 25661 (May 13, 2005) (to be codified at 36 C.F.R. §§ 294.12-13). Though the Forest Service received public comments “requesting that the final rule include a specific standard or criteria that the Secretary will apply when reviewing petitions,” it declined to add such criteria in its final rule. *Id.* at 25658. Its reasoning was that “[t]here is no single factor that can assess how to best accomplish” the Service’s stated goal of improving the system for protecting roadless areas, and “no one criteria can be identified given the diverse circumstances that apply across the National Forest System.” *Id.*
- ¹⁵⁴ Glicksman, *Traveling in Opposite Directions: Roadless Area Management Under the Clinton and Bush Administrations*, *supra*, n. 131, 1171.

¹⁵⁵ USDA News Release, *Forest Service Publishes Planning Rule for Better Management of National Forests and Grasslands* (December 22, 2004), available at: <<http://www.fs.fed.us/common/scripts/print.php>> (site visited 02/15/2005).

¹⁵⁶ *Id.*

¹⁵⁷ *National Forest System Land Management Planning: Final Rule*, 70 Fed. Reg. 1023, 1059 (Jan. 5, 2005) (to be codified at 36 C.F.R. § 219.10).

¹⁵⁸ *National Forest System Land and Resource Management Planning: Final Rule*, 65 Fed. Reg. 67514, 67517 (Nov. 9, 2000); *See also* 36 C.F.R. § 219.19 (July 1, 2001).

¹⁵⁹ 36 C.F.R. § 219.36 (July 1, 2001).

¹⁶⁰ *National Forest System Land Management Planning: Final Rule*, 70 Fed. Reg. 1023, 1028 (Jan. 5, 2005).

¹⁶¹ *Id.* at 1029.

¹⁶² *Id.* at 1055 (to be codified at 36 C.F.R. § 219.1).

¹⁶³ *Id.* at 1059 (to be codified at 36 C.F.R. § 219.10).

¹⁶⁴ 36 C.F.R. § 219.1 (July 1, 2001).

¹⁶⁵ USDA News Release, *Forest Service Publishes Planning Rule for Better Management of National Forests and Grasslands* (December 22, 2004), available at: <<http://www.fs.fed.us/common/scripts/print.php>> (site visited 02/15/2005).

¹⁶⁶ 36 C.F.R. § 219.27(e) (July 1, 2000).

¹⁶⁷ 36 C.F.R. § 219.27(d)(2) (July 1, 2000).

¹⁶⁸ 36 C.F.R. § 219.14 (b) (July 1, 2000).

¹⁶⁹ Plaintiffs Defenders of Wildlife, Sierra Club, The Wilderness Society, and Vermont Natural Resources Council have asserted the illegality of the Forest Service's deletion of the NFMA resource standards from the planning regulations in their suit challenging the Bush Administration's planning rule. *See* First Supplemental Complaint for Declaratory and Injunctive Relief, ¶¶64-66, *Defenders of Wildlife v. Johanns*, Case No. 04-4512 PJH (N.D. Cal.), Docket Entry No. 19 (filed February 17, 2005).

¹⁷⁰ 16 U.S.C. § 1604(g) provides: . . . the Secretary shall . . . promulgate regulations . . . that set out the process for the development and revision of the land management plans, and the guidelines and standards prescribed by this subsection. The regulations shall include, but not be limited to . . .

(3) specifying guidelines for land management plans developed to achieve the goals of the Program which . . .

(E) insure that timber will be harvested from National Forest System lands only where—

(i) soil, slope, or other watershed conditions will not be irreversibly damaged;

(ii) there is assurance that such lands can be adequately restocked within five years after harvest;

(iii) protection is provided for streams, streambanks, shorelines, lakes, wetlands, and other bodies of water from detrimental changes in water temperatures, blockages of water courses, and deposits of sediment, where harvests are likely to seriously and adversely affect water conditions or fish habitat; and

(iv) the harvesting system to be used is not selected primarily because it will give the greatest dollar return or the greatest unit output of timber; and

(F) insure that clearcutting, seed tree cutting, shelterwood cutting, and other cuts designed to regenerate an evenaged stand of timber will be used as a cutting method on National Forest System lands only where—

(i) for clearcutting, it is determined to be the optimum method, and for other such cuts it is determined to be appropriate, to meet the objectives and requirements of the relevant land management plan;

(ii) the interdisciplinary review as determined by the Secretary has been completed and the potential environmental, biological, esthetic, engineering, and economic impacts on each advertised sale area have been assessed, as well as the consistency of the sale with the multiple use of the general area;

(iii) cut blocks, patches, or strips are shaped and blended to the extent practicable with the natural terrain;

(iv) there are established according to geographic areas, forest types, or other suitable classifications the maximum size limits for areas to be cut in one harvest operation, including provision to exceed the established limits after appropriate public notice and review by the responsible Forest Service officer one level above the Forest Service officer who normally would approve the harvest proposal: Provided, That such limits shall not apply to the size of areas harvested as a result of natural catastrophic conditions such as fire, insect and disease attack, or windstorm; and

(v) such cuts are carried out in a manner consistent with the protection of soil, watershed, fish, wildlife, recreation, and esthetic resources, and the regeneration of the timber resource.

¹⁷¹ *National Forest System Land Management Planning; Final Rule*, 70 Fed. Reg. 1023, 1059 (Jan. 5, 2005) (to be codified at 36 C.F.R. § 219.12(b)(2)).

¹⁷² *Id.* at 1027.

¹⁷³ Forest Service Manual, Interim Directive No. 1920-2005-2, §§ 1921.17a-17b, available at: <http://www.fs.fed.us/emc/nfma/includes/directives/id_fsm_1920_land_management_planning.pdf> (site visited 04/02/2005).

¹⁷⁴ *National Forest System Land Management Planning; Final Rule*, 70 Fed. Reg. 1023, 1059 (Jan. 5, 2005) (to be codified at 36 C.F.R. § 219.10(a)).

¹⁷⁵ *Convention on Biological Diversity*, U.N. Environment Programme, 1760 U.N.T.S. 79 (December 29, 1993), Article 2 (defining “sustainable use”); available online at: <<http://www.biodiv.org/convention/articles.asp?lg=0&a=cbd-02>> (site visited 04/20/05).

¹⁷⁶ *Report of the United Nations Conference on Environment and Development*, General Assembly, § 2(b), U.N. Doc. A/CONF.151/26 (Vol. III) (1992).

¹⁷⁷ See Douglas A. Kysar, *Sustainability, Distribution, and the Macroeconomic Analysis of Law*, 43 B.C. L. REV. 1 (2001).

¹⁷⁸ 36 C.F.R. § 219.28(b) (July 1, 2000).

¹⁷⁹ 16 U.S.C. § 1604(h)(1).

¹⁸⁰ *National Forest System Land Management Planning; Final Rule*, 70 Fed. Reg. 1023, 1024 (Jan. 5, 2005).

¹⁸¹ *Id.* at 1034.

¹⁸² 16 U.S.C. § 1604(h)(1) (emphasis added).

¹⁸³ 47 Fed. Reg. 43026 (1982) (noting that due to the large amount of public interest generated by the proposed revisions, USDA extended the comment period and announced a meeting, open to the public, of a panel of consultants (including members of the former COS) to discuss and consider major topics emerging from public comments on the proposed revisions).

¹⁸⁴ 16 U.S.C. § 1604(h)(1).

¹⁸⁵ *Charter for Committee of Scientists* (September 8, 1997), available at: <<http://www.cof.orst.edu/org/scicomm/charter.htm>> (site visited 04/01/2005).

¹⁸⁶ The Forest Service’s response to the public comments notes that the “proposed rule” was based on the major recommendations of the 1999 COS report. *National Forest System Land Management Planning; Final Rule*, 70 Fed. Reg. 1023, 1034 (Jan. 5, 2005). The proposed rule offered two options to the public for the section addressing the “ecological component of sustainability.” *National Forest System Land and Resource Management Planning; Proposed Rules*,

67 Fed. Reg. 72785-88 (December 6, 2002). The Forest Service explained the two options:

Both options maintain the agency’s fundamental commitment to the conservation and restoration of ecosystems and species through implementation of the NFMA diversity requirement, but adopt different approaches to doing so. Option 1 establishes a clear viability standard as the primary basis for judging achievement of the NFMA diversity requirement, and as the basis against which to evaluate plan decisions. However, it also specifies a less detailed set of analyses, with much of the detail that was found in the 2000 rule to be moved to the Directive System as optional elements of the analysis. Option 2, in contrast, requires a more complete and robust set of analyses, but replaces the very specific viability standard of Option 1 with a more general biological diversity standard, at both ecosystem and species levels. This biological diversity standard, which is the basis in Option 2 for judging achievement of the NFMA diversity requirement[,] requires that plan decisions foster biological diversity in the plan area within the range of diversity that is characteristic of native ecosystems within the landscape in which the plan area is embedded. In this sense, Option 2 is more like the 2000 rule in terms of specifying more detailed and complete analyses of diversity, whereas Option 1 is more like the 2000 rule in terms of establishing species viability as a primary standard for judging achievement of the NFMA diversity requirement.

Id. at 72787. The final rule, however, adopted neither Option 1 nor Option 2. *Compare National Forest System Land Management Planning; Final Rule*, 70 Fed. Reg. 1023, 1059 (Jan. 5, 2005) (to be codified at 36 C.F.R. § 219.10(b)) *with National Forest System Land and Resource Management Planning; Proposed Rules*, 67 Fed. Reg. 72800-02 (December 6, 2002) (proposed 36 C.F.R. § 219.13(b)). The drastic change between the proposed rule’s ecological sustainability section and that contained in the final rule is but one of numerous “significant, unforeseeable aspects” of the final rule, which collectively form the basis for one of the Claims for Relief contained in the Complaint filed by Defenders of Wildlife, Sierra Club, The Wilderness Society and the Vermont Natural Resources Council against USDA on February 17, 2005. See First Supplemental Complaint for Declaratory and Injunctive Relief, ¶¶67-72, *Defenders of Wildlife v. Johanns*, Case No. 04-4512 PJH (N.D. Cal.), Docket Entry No. 19 (filed February 17, 2005). The plaintiffs allege that the

failure to reissue a second proposed rule violated the APA's notice and comment rulemaking procedures. *Id.*, ¶¶67-72.

¹⁸⁷ Committee of Scientists, *Sustaining the People's Lands: Recommendations for Stewardship of the National Forests and Grasslands into the Next Century*, 38 (March 15, 1999), available at: <http://www.fs.fed.us/news/news_archived/science/cossynop.pdf> (site visited 03/14/05).

¹⁸⁸ *Id.* at 39.

¹⁸⁹ *Id.* at 40.

¹⁹⁰ 36 C.F.R. § 219.36 (July 1, 2001).

¹⁹¹ *National Forest System Land Management Planning: Final Rule*, 70 Fed. Reg. 1023, 1059 (Jan. 5, 2005) (to be codified at 36 C.F.R. § 219(10)(b)(1)).

¹⁹² *See* 36 C.F.R. § 219.11 (July 1, 2000).

¹⁹³ *National Forest System Land Management Planning: Final Rule*, 70 Fed. Reg. 1023, 1029 (Jan. 5, 2005).

¹⁹⁴ *Id.* at 1056 (to be codified at 36 C.F.R. § 219.6(b)(2)).

¹⁹⁵ The generalized duty to “monitor” leaves the agency with broad, unconstrained discretion to determine what, when and how to monitor. The problematic nature of the vague instruction is compounded by the Supreme Court’s decision in *Norton v. Southern Utah Wilderness Alliance*, 124 S.Ct. 2373 (2004). In the wake of that decision, should the agency fail to undertake meaningful monitoring, affected citizens may face particular obstacles in proving that the agency has improperly failed to act and in convincing a court to order the agency to engage in such a broadly-defined ongoing activity as monitoring, absent more specific duties.

¹⁹⁶ *National Forest System Land Management Planning: Final Rule*, 70 Fed. Reg. 1023, 1030 (Jan. 5, 2005).

¹⁹⁷ *Id.* at 1056 (to be codified at 36 C.F.R. § 219.5(b)).

¹⁹⁸ *Id.* The rule advises the public that ISO 14001 is available on the on the web at: <<http://webstore.ansi.org/ansidocstore/>>. *Id.* Clicking on “ISO 14001” brings the user to a screen where the standard may be purchased for \$81.00. <<http://webstore.ansi.org/ansidocstore/product.asp?sku=ISO+14001%3A2004>> (site visited 04/03/2005).

¹⁹⁹ Dorothy Bowers, *Pollution Preventer*, THE ENVIRONMENTAL FORUM (January/February 2004), 44.

²⁰⁰ Mike Leahy, *EMS Ignores True Nature of Planning*, THE ENVIRONMENTAL FORUM (July/August 2004), 31.

²⁰¹ Bowers, *Pollution Preventer*, *supra*, n. 199, 44.

²⁰² Leahy, *EMS Ignores True Nature of Planning*, *supra*, n. 200, 31.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ 36 C.F.R. § 219.22(a) (July 1, 2000).

²⁰⁷ *National Forest System Land Management Planning: Final Rule*, 70 Fed. Reg. 1023, 1059 (Jan. 5, 2005) (to be codified at 36 C.F.R. § 219.11(a)).

²⁰⁸ *Id.* at 1048 (emphasis added).

²⁰⁹ *Id.* at 1027; *see also* USDA News Release, *Forest Service Publishes Planning Rule for Better Management of National Forests and Grasslands* (December 22, 2004), available at: <<http://www.fs.fed.us/common/scripts/print.php>> (site visited 02/15/2005).

²¹⁰ *National Forest System Land Management Planning: Final Rule*, 70 Fed. Reg. 1023, 1032 (Jan. 5, 2005); *See also* National Environmental Policy Act Documentation Needed for Developing, Revising, or Amending Land Management Plans; Categorical Exclusion, 70 Fed. Reg. 1062 (Jan. 5, 2005).

²¹¹ Zwright, *Smokey and the EMS*, *supra*, n. 68, 28.

²¹² *National Forest System Land Management Planning: Final Rule*, 70 Fed. Reg. 1023, 1032 (Jan. 5, 2005). The Forest Service relied on *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726 (1998) and *Norton v. Southern Utah Wilderness Alliance*, 124 S.Ct. 2373 (2004). Notably, counsel for plaintiff Ohio Forestry Association in the former case was Steven P. Quarles, whose congressional testimony on behalf of the American Forest & Paper Association was cited in the Forest Service’s *NFMA Planning Rule Review*, discussed *supra*. That *Review* concluded that problems with the 2000 planning rule were “so serious that it appears impossible for the Forest Service to successfully implement” it. *NFMA Planning Rule Review*, *supra*, n. 106, 1.

²¹³ *National Forest System Land Management Planning: Final Rule*, 70 Fed. Reg. 1023, 1033 (Jan. 5, 2005).

²¹⁴ 16 U.S.C. §1604(g)(1).

²¹⁵ *National Forest System Land Management Planning: Final Rule*, 70 Fed. Reg. 1023, 1033 (Jan. 5, 2005).

²¹⁶ *Id.* at 1058 (to be codified at 36 C.F.R. § 219.9(b)(1)).

²¹⁷ *Id.* (to be codified at 36 C.F.R. § 219.9).

²¹⁸ *Id.* (to be codified at 36 C.F.R. § 219.9(a)).

²¹⁹ *Id.* at 1056 (to be codified at 36 C.F.R. § 219.6(b)).

²²⁰ *Id.* at 1057 (to be codified at 36 C.F.R. § 219.7(b)).

²²¹ 36 C.F.R. § 219.32(a) (July 1, 2001).

²²² Objections must be made in writing and filed with the Reviewing Officer and must contain: 1.) the name, mailing address and telephone number of the person or entity filing the objection; 2.) a statement of the issues, the parts

of the plan to which the objection applies; 3.) an explanation of how the objecting party would be adversely affected; 4.) a concise statement explaining how the objector believes that the plan is inconsistent with law, regulation or policy, or how the objector disagrees with the decision; and 5.) any recommendations for change.

National Forest System Land Management Planning: Final Rule, 70 Fed. Reg. 1023, 1060 (Jan. 5, 2005) (to be codified at 36 C.F.R. § 219.13(b)(1)-(3)). The Reviewing Officer has the authority to make all procedural determinations related to the objection, and must “promptly render a written response to the objection,” which response “shall be the final decision of the Department of Agriculture on the objection.” *Id.* at 1060 (to be codified at 36 C.F.R. § 219.13(c)(1)-(2)).

²²³ *Id.* at 1059 (to be codified at 36 C.F.R. § 219.13(a)).

²²⁴ *Id.* at 1034.

²²⁵ *Id.* at 1041.

²²⁶ Leahy, *EMS Ignores True Nature of Planning*, *supra*, n. 200, 31.

²²⁷ Coggins & Glicksman, PUBLIC NATURAL RESOURCES LAW, *supra*, n. 8, § 7:16 (2005) (citing, *inter alia*, *Hi-Ridge Lumber Co. v. United States*, 443 F.2d 452, 454-55 (9th Cir. 1971) (indicating that Forest Service manual provision “does not rise to the status of a regulation”); *Oregon Nat. Resources Council v. Devlin*, 776 F.Supp. 1440, 1447-49 (D. Or. 1991)

(holding that Forest Service “guide,” in manual form, was merely a statement of policy and did not create actionable duties)).

²²⁸ 36 C.F.R. §§ 216.4, 216.5 (July 1, 2004).

²²⁹ *National Forest System Land Management Planning Directives*, 70 Fed. Reg. 14637, 14642 (March 23, 2005).

²³⁰ S. CONF. REP. NO. 94-1335 at 22 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6720, 6724.

²³¹ *Id.*

²³² First Supplemental Complaint for Declaratory and Injunctive Relief, ¶¶35-36, *Defenders of Wildlife v. Johanns*, Case No. 04-4512 PJH (N.D. Cal.), Docket Entry No. 19 (filed February 17, 2005).

²³³ *Id.*, ¶35, (citing *The Land Council v. Powell*, 379 F.3d 738 (9th Cir. 2004), *amended* 2005 U.S. App. LEXIS 1153 (9th Cir. 2005); *Utah Environmental Congress v. Bosworth*, 372 F.3d 1219 (10th Cir. 2004); *Idaho Sporting Congress v. Rittenhouse*, 305 F.3d 957 (9th Cir. 2002); *Sierra Club v. Martin*, 168 F.3d 1, 7 (11th Cir. 1999); *Forest Guardians v. U.S. Forest Service*, 180 F.Supp.2d 1273 (D. N.M. 2001); *Utah Environmental Congress v. Zieroth*, 190 F.Supp.2d. 1265 (D. Utah 2002)).

²³⁴ *Id.*, ¶35.

²³⁵ Leahy, *EMS Ignores True Nature of Planning*, *supra*, n. 200.

²³⁶ S. REP. NO. 94-893 at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6662, 6667.

About the Center for Progressive Reform

Founded in 2002, the Center for Progressive Reform is a 501(c)(3) nonprofit research and educational organization dedicated to protecting health, safety, and the environment through analysis and commentary. CPR believes sensible safeguards in these areas serve important shared values, including doing the best we can to prevent harm to people and the environment, distributing environmental harms and benefits fairly, and protecting the earth for future generations. CPR rejects the view that the economic efficiency of private markets should be the only value used to guide government action. Rather, CPR supports thoughtful government action and reform to advance the well-being of human life and the environment. Additionally, CPR believes people play a crucial role in ensuring both private and public sector decisions that result in improved protection of consumers, public health and safety, and the environment. Accordingly, CPR supports ready public access to the courts, enhanced public participation and improved public access to information.



1200 New York Ave., NW, Suite 400, Washington, DC 20005

202-289-4026 (phone) / 202-289-4402 (fax)

www.progressivereform.org

© Center for Progressive Reform