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Forest Plan Implementation: Gateway to Compliance With NFMA, NEPA, and Other Federal Environmental Laws

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Critique of Land Management Planning

Forest Plan Implementation: Gateway to Compliance With NFMA, NEPA, and Other Federal Environmental Laws

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Contents

Executive Summary v

Introduction 1
- Reexamining Forest Management Issues 1
- The Crazy Quilt 2
- The Role of the Courts 3
- Multiple-Use Management 4

National Forest Management Act 6
- The Nature of Land and Resource Planning and Forest Management Under NFMA 6
- Relationship of Plans to Project-Level Decisionmaking and Other Laws 18
- Administrative Appeals 32

National Environmental Policy Act 34
- The Purpose of NEPA 34
- The Courts and NEPA 35
- Congressional Intervention in NEPA 36
- NEPA Disclosure Documents 38
- Whether an Environmental Impact Statement Must Be Prepared 41
- The Scope of NEPA Analysis 44
- Alternatives 54
- Mitigation of Environmental Consequences 59
- Continuing Duty To Supplement Environmental Documentation 61
- Addressing Uncertainty 62
- Methodology, Technology, and Scientific Decisionmaking 63

Conclusion 65
- Integrated Plan and Project Multiple-Use, Sustained-Yield Decisionmaking 65
- Tension Between Plans for Supply and Production and Plans for Protection of National Forests 66
- Considering the Future of Multiple-Use, Sustained-Yield Forest Management 67

References 69

Executive Summary

The purpose of this report is to provide an overview of the current legal situation the Forest Service faces in making and implementing decisions regarding National Forest System lands. A particular focus is how the Forest Service decisionmaking process achieves both public participation and compliance with Federal environmental laws.

The bulk of this report is divided into two main chapters. The first focuses on the National Forest Management Act (NFMA) planning requirements affecting Forest Service decisionmaking and addresses the interplay of the planning requirements, the National Environmental Policy Act (NEPA), and other laws. The Forest Service has attempted in its early administrative appeals decisions of the land and resource management plans (forest plans) to explain how NFMA and NEPA can work in harmony. The Forest Service has developed forest plan- and project-level decisionmaking to meet the requirements of these and other environmental laws.

The second major chapter provides an overview of NEPA and examines problem areas encountered by the Forest Service and other Federal agencies. The intent is to highlight some of the most important NEPA issues facing the Forest Service and other agencies.

National Forest Management Act

The forest plans stand as the gateway to compliance with NFMA and other environmental laws. Forest plans are promulgated in conformance with statutory and regulatory direction. The plans are developed to achieve 14 planning principles to fulfill the statutory obligation of multiple-use and sustained-yield management of the national forests.

Forest plan approval establishes multiple-use goals (desired future condition) and objectives (statement of intentions) for the planning unit. Forest plans put in place management area prescriptions and standards and guidelines for future project-level decisionmaking, and they are adjustable through monitoring and evaluation and then amendment and revision. Coupled with the laws and regulations that apply to plan implementation, the plans create a dynamic, two-level (plan/project) management system for future decisionmaking.

Approval of a forest plan is subject to administrative appeal. Project-level decisions and other activities also may be appealed. These appeals opportunities allow the public additional access to agency decisionmakers.

The forest plans establish a framework to harmonize the "crazy quilt" of sometimes conflicting laws and regulations governing national forest management. Those who view the plans as a panacea to resolve all disagreements over the management of the national forests simply ask too much of this one set of documents. As the plans are issued, it has become obvious that they will and must be allowed the opportunity to evolve. This evolution will come through several sources: project decisionmaking, monitoring and evaluation, amendment and revision, administrative appeals decisions, and even litigation.

National Environmental Policy Act

NEPA was designed to bring environmental considerations into Federal decisionmaking. NEPA's mandate has been largely defined through the Federal courts. The Council on Environmental Quality, at the President's direction, issued regulations to assist Federal agencies in meeting NEPA's procedural obligations. While the regulations have assisted in creating a uniform approach to NEPA compliance, several of the goals of the regulations have not yet been achieved.

The Supreme Court has held that NEPA has "twin aims": (1) to inject environmental considerations into decisionmaking and (2) to inform the public that the agency has considered environmental concerns. Environmental considerations were not intended to take priority over other considerations. The judiciary's role is to ensure that environmental consideration takes place, but not to interject itself within the area of discretion constitutionally and statutorily granted to executive agencies.

Federal agencies must determine the relationship of a proposal to past, present, and reasonably foreseeable future actions. Alternatives to the proposal, including taking "no action," must be explored. An environmental impact statement must be prepared if the agency's evaluation discloses that the activity "may significantly affect the quality of the human environment." A Federal agency need not prepare a full environmental impact statement if it can mitigate the proposal's environmental consequences below the "significance" threshold. There is a continuing duty to evaluate effects during implementation, and supplemental documentation may be required. There is no single methodology or scientifically approved technique for analyzing or monitoring environmental effects. Similarly, agencies often face disagreement over the quality of existing information and the need for developing additional information.

The intricate set of procedural NEPA requirements developed through 20 years of judicial rulings presents fundamental challenges to Federal decisionmakers. Federal agencies must interpret and reconcile these opinions in a manner that meets the letter and intent of the rulings and regulations. Just as NEPA continues to evolve, Federal agencies continue to experiment and learn as they search for ways to best meet NEPA's twin aims in an efficient and effective manner.

Multiple-Use Management, NFMA/NEPA, and Other Environmental Laws

The Forest Service estimates that it makes about 40,000 project decisions every year involving the multiple uses (timber, water, range, recreation, fish and wildlife, and wilderness). This would average out to more than 3,000 decisions each year per national forest unit. The Forest Service also makes decisions regarding nonrenewable resources, such as mineral exploration and development.

Those who would have the forest plan attempt to make project-level decisions ignore the simple mathematics of the situation—3,000 decisions per year times 10 years equals 30,000 decisions. How could each forest plan expressly consider and disclose the environmental consequences of more than 3,000 individual decisions? The plans and the accompanying environmental impact statements currently exceed 500 pages each. An attempt to cover individual future decisions would produce a speculative encyclopedia that would threaten to trivialize the entire NFMA process.

There is little chance that a plan's environmental impact statement could disclose NEPA, Endangered Species Act, and other environmental law compliance for all possible projects during the 10- to 15-year plan period. Most of the environmental laws Congress enacted in the 1970's and 1980's include "continuing obligations" that are time- and site-specific. Federal environmental law compels incremental decisionmaking with a holistic view. No matter how sophisticated forest models become, it is doubtful that the order and relationship of possible activities can be forecast with enough precision to fulfill environmental laws or the realities of a changing world.

Many of the activities that can occur in a particular management area are initiated by forest users and not the Forest Service. The relationship of projects initiated by others and projects planned by the Forest Service is continuously changing. In addition, new information regarding the relationship and effects of actions within any given ecosystem is constantly being developed. The appropriate time to forecast the environmental consequences with a proposed project is at the time of the project decision (that is, the irretrievable commitment).

Is it a sensible view of NFMA to believe that at one time the Forest Service could be prescient enough to make 10 years' worth of discrete decisions in the forest plans? The best view of plans is as a dynamic management system (forest-wide and management area direction) that is kept current through monitoring and evaluation and then amendment and revision. The Forest Service must address all the laws and regulations, the changing natural system of the forest, and volatile social issues. The plans, coupled with project-level decisionmaking, ensure a broad but flexible management system. Forest managers must be able to involve the public and think holistically, but act incrementally.

The Forest Service fulfills NFMA/NEPA and other laws as the forest plans are approved and implemented through project decisionmaking. The experience gained to date is invaluable, but Forest Service plan and project decisionmaking will continue to evolve.

Introduction

Federal environmental law is a complex and intricate subject. Entire books, treatises, and law reviews are devoted to the study of environmental law. This report is not intended to provide a detailed analysis but rather an overview of the Forest Service experience with NFMA/NEPA and other environmental laws.

In recent years, Forest Service decisionmaking involving timber management and road building, oil and gas leasing, recreational special-use authorizations, right-of-way issuance and administration, hard rock mineral exploration and development, and land exchanges has been challenged in administrative appeals and Federal court as violating NEPA and other environmental laws. Individuals or groups initiating these appeals and lawsuits are normally attempting to stop the activity rather than seeking adequate "environmental disclosure." They act from strong beliefs as to how they think the national forests should be managed.

Reexamining Forest Management Issues

The Forest Service uses a multilevel planning process in land and resource management decisionmaking. Decisionmaking takes place at national, regional, forest, and project levels. At each level, the Forest Service must comply with all applicable laws and regulations. (See 36 CFR 219.4; see also the Chief's Office memorandum on forest plan implementation, February 6, 1989; 36 CFR 219.4 and Forest Service Manual 1920; and Forest Service Handbook 1909.12 (53 FR 26807, July 15, 1988).) See also *National Wildlife Federation* v. *Coston*, 773 F.2d 1513, 1518 (9th Cir. 1985), which states:

> Road construction and other land management activities of the Forest Service are conducted in compliance with NEPA requirements at various planning levels. The Forest Service prepares EIS to analyze its recommended five-year national resource program. EISs are prepared in connection with the development of the Forest Service's Regional Guides, which direct land management planning at the regional level. In addition, each Forest Supervisor prepares an EIS to accompany a comprehensive Forest-level Land and Resource Management Plan. 16 U.S.C. § 1604(g)(1); 36 CFR 219.10(c)(1), (f), (g), (h) (1984). At the site level, environmental analyses are undertaken in conjunction with the planning of individual construction projects.

Note that the Forest Service did not prepare an environmental impact statement with the 1990 RPA Program. However, the agency did publish notice of availability in the *Federal Register* and circulated the 1990 Draft Program for public comment.

The value of the multilevel approach is that it allows for flexible management that responds to new information and circumstances. However, there is a cost associated with this increased flexibility. Because each level allows opportunity for additional information gathering and public involvement, those that are not satisfied with the "resolution" of a particular issue at one level may attempt to alter the outcome by recycling their issue at the next level.

On January 9, 1989, the U.S. Supreme Court heard oral argument of *Robertson* v. *Methow Valley Citizens Council* (____ U.S. ____, 109 S.Ct. 1835 (1989)) and *Marsh* v. *Oregon Natural Resources Council* (____ U.S. ____, 109 S.Ct. 1851 (1989)). The cases involved challenges to a proposed ski area development on the Okanogan National Forest and a Corps of Engineers dam project on Bureau of Land Management land. One of the issues discussed was the need to supplement a completed environmental impact statement in light of "new information." Chief Justice Rhenquist inquired of counsel for the environmental groups:

"[A]nother question is when are these things [environmental impact statements] over? I mean, when, when [sic] do you decide them? Because someone can always bring new information to light and you can just have a great big paper shuffling operation where nothing is ever decided finally. (Official Transcript of Proceedings Before the Supreme Court of the United States in *Robertson* v. *Methow Valley Citizens Council*, and *Marsh* v. *Oregon Natural Resources Council*, page 31)

This question highlights the difficulty of reaching a final decision when new information regarding environmental effects of development is constantly forthcoming and when many laws, especially NEPA, require Federal agencies to consider and disclose all environmental information before taking any action.

The Crazy Quilt

This report also discusses the integration of NEPA and other environmental laws with NFMA's planning and management requirements. A quote from Judge Karlton regarding the reconciliation of Federal laws applying to the surface use of national forests for mineral exploration and development is especially relevant:

> With the growth of the environmental movement, the tension between the power of the Secretary to administer the surface of the national forests and the right to prospect and mine in the national forests became evident. With the passage of the Multiple Use Act and other statutes and amendments to preexisting statutes, the unresolved tension has been incorporated into law. Indeed, the crazy quilt of apparently mutually incompatible statutory directives are enough to drive any Secretary of Agriculture interested in discharging his lawful duties to drink. Congress can, of course, lead a Secretary to booze, but Congress cannot force the Secretary to drink. Thus the Secretary, by nature of his rule-making powers, has the opportunity to bring order out of chaos. (*United States* v. *Brunskill*, Civil S–82–666LKK (E.D. Cal. 1984), unpublished opinion, *aff'd*, 792 F.2d 9938 (9th Cir. 1986))

NFMA's public participation requirements have heightened the visibility of Forest Service decisionmaking. To implement decisions in light of opposing

values and beliefs as to the proper use of the national forests, Forest Service officers must attempt to successfully address the recycling management issues and harmonize the "crazy quilt" of sometimes conflicting and uncoordinated laws and regulations that apply to national forest management. Indeed, the administrative appeal and litigation opportunities under the "crazy quilt" virtually ensure that, despite Senator Humphrey's desire to get the "practice of forestry out of the courts," resolution of many of these disputed issues will be in court.

The Role of the Courts

The role of the Federal judiciary in determining whether the Executive Branch has met its congressionally designed legal obligations has evolved over the last 25 years. The role has been greatly expanded because of the elimination of judicial doctrines of restraint and the establishment of congressional policies favorable to judicial review. Congress amended the Administrative Procedure Act in 1976 to ensure that persons would not be barred by sovereign immunity from obtaining judicial review of agency decisionmaking when they could otherwise satisfy the requirements of the act. Forest Service decisionmakers, as other Federal managers, have found that if Congress is looking over their right shoulder, then the Federal district courts are looking over their left shoulder. (For a discussion of the evolution of judicial review regarding the Forest Service, see Brizee (1975).)

Congress did not include a specific judicial review provision in NEPA or NFMA. Therefore, judicial review is governed by Congress' mandate from the "Federal question" statute and the Administrative Procedure Act (28 U.S.C. 1331 and 5 U.S.C. 702 and 706). Some environmental laws include specific judicial review provisions, such as the Endangered Species Act, the National Historic Preservation Act, and the Clean Water Act. Federal law allows agency compliance with NEPA to be challenged by private citizens and groups. Principles regarding compliance with NEPA and other environmental laws are most often established when an individual or group challenges Federal agency action in the courts. While this is a very American approach to government accountability, it means that legal standards continuously evolve through judicial decision.

There are some indications that the pendulum has begun to swing toward a more restrictive interpretation of the judiciary's role in Federal land management. In upholding a Bureau of Land Management grazing plan, Federal District Court Judge Burns commented on this phenomenon, stating:

> Boiled down and stripped of its legalese this is a case in which plaintiffs ask me to become—and defendants urge me not to become—the rangemaster for about 700,000 acres of Federal lands in western Nevada. For some reason, over the past 15 years or so, I and my Article III colleagues have become or have been implored to become forestmasters, roadmasters, schoolmasters, fishmasters, prisonmasters, watermasters, and the like. This trend has not escaped the notice and criticism of academic commentators. (*Natural Resources Defense Council (NRDC)* v. *Hodel*, 624 F. Supp. 1045, 1062–63 (D. Nev. 1985), *aff'd*, 819 F.2d 927 (9th Cir. 1987) (citations and footnotes omitted))

The Supreme Court's recent decision in *Lujan* v. *National Wildlife Federation* (____U.S.____, 110 S.Ct. 3177 (1990)) reaffirms that environmental plaintiffs must establish "standing" to sue and narrowly interprets what constitutes "agency action" under the American Procedure Act.[1]

The Supreme Court rejected the National Wildlife Federation's claims of rampant violations regarding the Bureau of Land Management's implementation of its Forest Land Management Planning Act responsibilities, finding that the overall implementation is not "agency action" subject to review under the American Procedure Act (*Lujan* at 3190). As the Court stated, the "respondent cannot seek wholesale improvement of this program by court degree, rather than in the offices of the Department of the hall of Congress, where programmatic improvements are normally made" (*Lujan* at 3190).

Although it noted the potential hardship to the National Wildlife Federation's environmental objectives, the Court nevertheless maintained that "[e]xcept where Congress explicitly provides for our correction of administrative process at a higher level of generality, we intervene in the administration of the laws only when, and to the extent that, a specific 'final agency action' has an actual or immediately threatened effect" (*Lujan* at 3191). The Court concluded its opinion stating that the Bureau of Land Management's "program" is not an "identifiable action of event" and the "respondent cannot demand a general judicial review of BLM's day-to-day operations" (*Lujan* at 3194).

Multiple-Use Management

The Forest Service administers the National Forest System under the Multiple Use–Sustained Yield Act. Under this act, the Forest Service is directed to administer the national forests for multiple use and sustained yield of the renewable products and resources, with consideration given to the relative values of the various resources in particular areas but not necessarily the combination of uses that will give the greatest dollar return or greatest unit output. (See *Intermountain Industry Assn.* v. *Lyng*, 683 F. Supp. 1330, 1338 (D. Wyo. 1988)—"There is nor principled basis for plaintiffs' assertion that the national forests must be managed primarily to produce economic benefits.") Deputy Chief Jeff Sirmon recently noted the following on December 5, 1989:

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[1] "Standing" is a doctrine of legal jurisdiction. Its purpose is to assure that the party litigating an issue has a sufficient stake in the outcome so that the court can be assured that it will be provided with a full and fair presentation of the factual and legal circumstances involved in the action. The Government has successfully argued lack of standing in two recent Forest Service cases. In *Donham* v. *United States Department of Agriculture*, 725 F. Supp. 985 (S.D. Ill. 1989), the court found that Mr. Donham had not demonstrated adequate use of the land to establish the injury-in-fact necessary to support standing. In *Idaho Conservation League* v. *Mumma*, CV 88–197–M–CCL (D. Mont. decided Aug. 8, 1990), the court ruled that the environmental plaintiffs lacked standing to challenge the roadless evaluation in the Idaho Panhandle National Forests' Land and National Resource Plan because the alleged injury was too remote from the decisions made by the plan.

> Let me say at the outset that multiple-use management is conflict management. The basic tenet of the multiple-use philosophy is that all the uses are sub-optimized—no single resource is produced to its maximum. This means that everyone is a little teed off all the time because they know they could have more if only their interests were featured. There is probably some resentment too that a nonelected official makes the decisions about the allocation of these public resources, so there is constant pressure on elected representatives to "fix" the situation. And if my elected representative can't fix it in my favor, maybe I can stave off a final decision until my stars line up and then it will be "fixed." This strategy has worked often enough that those dissatisfied with decisions use it constantly. Because the pendulum swings back and forth with such frequency, the Federal administrator is never sure of the soundness or tenure of a particular policy. Add to this the definite trend toward citizen's enforcement of laws instead of units of government enforcing laws, and there is additional uncertainty for the Federal manager, not to mention industry which requires capital investment decisions. Further consider the recent cycles to litigate then legislate—litigate, legislate, and one can describe today's situation.

The Public Land Law Review Commission (1970) recommended modifying the multiple-use mandate to provide for a "dominant use" zoning system (Chapter 3, pages 48–52). Congress did not alter the words of the Multiple Use–Sustained Yield Act in enacting NFMA, but rather made the multiple-use, sustained-yield mandate the cornerstone of land and resource management plan development, maintenance, and revision (16 U.S.C. 1604(e)).

National Forest Management Act

Appeals and lawsuits challenging land and resource management plan approvals have raised many issues regarding plan promulgation, implementation, administration, and maintenance. (As of August 1990, there have been 15 lawsuits involving judicial review of approval or amendment of plans. There are 5 lawsuits involving judicial review of the Pacific Northwest Region's regional guide supplement. The Southern Region's amendment of forest planning direction for management of the threatened red-cockaded woodpecker is also the subject of litigation. There have been 943 administrative appeals of the 111 final forest plans. Of these appeals, 641 have been decided, and 62 plans have cleared the administrative appeals process.) Many of the appellants, interveners, and litigants request that some portion or the entire plan and environmental impact statement be redone. It often seems that forest planning has generated controversy and division rather than agreement regarding national forest land management. In the heat of the debate over forest planning, it is easy to lose sight of the purpose and nature of the plan.

To fully appreciate the nature of plan approval, it is necessary to review Forest Service decisionmaking. The Forest Service, as most other Federal agencies, is subject to many levels of planning and decisionmaking. This report focuses on the plan and project levels.

Other levels of decisionmaking also affect the plan and project level, such as the President's Statement of Policy, the 5-year RPA Program, the regional guide (36 CFR 219.4 and 219.9) and most directly the annual budget appropriations process. (For a discussion of the RPA Program and the regional guide levels of planning, see 36 CFR 219.4. For a discussion of the Statement of Policy and RPA Program, see Wilkinson and Anderson (1985), pages 37–40 and 76–99.) These other levels of planning and decisionmaking do not have a precise relationship to plans and project decisions. The Statement of Policy, the RPA Program, and the annual budget and appropriations process are part of the ongoing relationship of the executive and legislative branches of the U.S. Government. (In *National Wildlife Federation* v. *U.S.*, 626 F.2d 917, 924 (D.C. Cir. 1980), the court declined to intervene in the wrangling between the executive and congressional branches over the Forest Service budget where a violation of RPA was alleged.)

The Nature of Land and Resource Planning and Forest Management Under NFMA

Forest plan and project management under NFMA is a continuous process consisting of three phases as shown in the box on page 8. (The regional guides are not included, but do provide the regional standards and guidelines for forest planning.) To understand the function of forest plans under NFMA, it is helpful to consider the laws and policies under which the National Forest

System is managed for the benefit of the whole country. The requirements of NFMA, NEPA, and the Forest Service administrative appeals process form a system for making and reviewing decisions. The forest plans are part of an ongoing management system to guide future decisionmaking rather than an aggregation of project decisions (irretrievable commitments of resources).

Legal Authorities for National Forest Planning and Management

There are many laws, regulations, and policies that relate to planning and administration of the National Forest System. While all of these must be considered in national forest management, there are some particular ones that bring forest planning into focus.

Two constitutional provisions directly relate to forest planning. The Property Clause of the U.S. Constitution is the source of the power of Congress to determine the rules and regulations respecting property belonging to the United States. Congress authorized the executive branch to establish and manage the forest reserves through enactment of the Creative Act of March 3, 1891 (26 Stat. 1103), the Organic Act of June 4, 1897 (30 Stat. 35), and the Transfer Act of 1905 (33 Stat. 628). The Commerce Clause of the Constitution also is important to National Forest System management because statutes such as the Endangered Species Act, Clean Water Act, and Clean Air Act are premised on the commerce power of Congress.

In 1960, Congress recognized and enacted into law the multiple-use policy for renewable resources of the national forests that the Department of Agriculture and Forest Service had been following. In the Multiple Use–Sustained Yield Act of 1960, Congress declared "that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes" (16 U.S.C. 528). The act also defined multiple use of the various renewable surface resources and sustained yield of the renewable resources (16 U.S.C. 531(a) and (b)).

Attempts to challenge Forest Service decisions as violating the act have been generally unsuccessful:

> These sections of MUSYA (16 U.S.C. §§ 528, 529, 531) [footnote omitted], contain the most general clauses and phrases. For example, the agency is "directed" in section 529 to administer the national forest "for multiple use [footnote omitted], and sustained yield of the several products and services obtained therefrom," with "due consideration [to] be given to the relative values of the various resources in particular areas." This language, partially defined in section 531 in such terms as "that [which will best meet the needs of the American people]" and "making the most judicious use of the land," can hardly be considered concrete limits upon agency discretion. Rather, it is language which "breathe[s] discretion at every pore." (*Perkins* v. *Bergland*, 608 F.2d 803, 806–07 (9th Cir. 1979)—The complex and broad nature of the congressional delegation to the Secretary of Agriculture under the Property Clause, Article IV, Section 3, Clause 2, U.S. Constitution, to plan, manage, and administer uses of the national forests has generally led to limited judicial review. See *Griffin* v. *Yeutter*, Civ. No. 88–1415G(CM) (S.D. Calif. decided November 1, 1989), slip op. at 3–4, 20 ELR 20400 (1990)—limited judical review of Cleveland National Forest Land and Resource Management Plan approval; *Sierra Club* v. *Hardin*, 325 F. Supp. 99, 123 (D. Alaska 1971), *rev'd*

Phases of Land and Resource Management Planning and Implementation

Phase I—Promulgation of the Plan

Proposed plan and draft environmental impact statement issued for review and comment.

Forest Service review and response to public comments on the proposed plan and draft environmental impact statement.

Approval and issuance of the plan, record of decision, and final environmental impact statement. (The plan goes into effect 30 days after publication of the notice of availability in the *Federal Register*.)

Phase II—Plan Approval Appeals

Appeals of plan approval under 36 CFR 219.10(d) and 36 CFR 217 (previously 36 CFR 211.18).

Possible judicial review of appeal decisions.

Phase III—Plan Implementation and Administration

Project consistency with plan under 16 U.S.C. 1604(i) and 36 CFR 219.10(e).

Amendments under 16 U.S.C. 1604(f)(4) and 36 CFR 219.10(e) and (f).

Monitoring and evaluation of projects and activities.

Possible appeals under 36 CFR 217 of projects as to consistency, amendment, or for other reasons.

Possible judicial review of project appeal decisions.

Revision of the plan under 16 U.S.C. 1604(f)(5) and 36 CFR 219.10(g).

sub nom. on grounds of new evidence, *Sierra Club* v. *Butz*, 3 ELR 20, 292 (9th Cir. 1973)—limited review of preferences between multiple uses; *Hi-Ridge Lumber Co.* v. *United States*, 443 F.2d 452, 455 (9th Cir. 1971)—court deference to rejection of timber sale bids; *Ness Investment Corp.* v. *USDA*, 512 F.2d 706, 712 (9th Cir. 1975)—court refrained from second-guessing special-use permit decision; *Perkins* v. *Bergland*, 608 F.2d 803 (9th Cir. 1979)—limited review of grazing decision; and *United States* v. *Means*, 858 F.2d 404, 410 (8th Cir. 1988)—denial of special-use permit sustained by agency record. See also *Wilkinson*, *supra* note 17, at 52–75.)

Congress enacted the Wilderness Act of 1964 (16 U.S.C. 1131–1136) as an expansion and legislative confirmation of a Forest Service management policy. The Wilderness Act provided for the establishment and administration of the National Wilderness Preservation System for the use and enjoyment of the American people in such a manner as will leave the lands designated unimpaired for future use and enjoyment as wilderness.

In the late 1960's and 1970's, Congress enacted several statutes of application to all Federal agencies to expand public participation in Federal decisionmaking and provided procedures for consideration and disclosure of the effects of Federal actions on the environment. These statutes included NEPA, the National Historic Preservation Act, the Endangered Species Act, the Clean Air Act, the Clean Water Act, and the Archaeological Resources Protection Act. Congress, in establishing these procedural and sometimes substantive requirements, often required promulgation of regulations to implement these statutes. The enactment of these site-specific environmental laws with consequent judicial review has greatly changed the process of national forest management. These laws have increased the accountability of national forest decisionmaking to those not satisfied with agency decisions.

Congress enacted the Forest and Rangeland Renewable Resources Planning Act (RPA) in 1974 (Public Law 93–378, 88 Stat. 476 (1974)). This act requires the Secretary of Agriculture to develop national planning documents to be known as the RPA Assessment at a 10-year frequency and the RPA Program at a 5-year frequency (16 U.S.C. 1601 and 1602). RPA also calls for a Statement of Policy to be issued to Congress by the President for use in forming budget requests by the executive branch for Forest Service activities (16 U.S.C. 1606). Although RPA did not significantly change the existing land management planning procedures for National Forest System lands, it did make resource management unit plans a statutory requirement (RPA, Section 5, 1974, as amended).

By 1974, the Forest Service had evolved from Gifford Pinchot's "working plans" for all timber sales (USDA Forest Service 1905) through multiple-use plans for each ranger district and single-resource plans to land management unit plans. (The evolution of planning for uses of the National Forest System was summarized in the environmental impact statement for the Forest Service planning regulation 36 CFR 219, 44 FR 53934–53935, September 17, 1979. See also volume 64 (numbers 1 and 2) of the *Oregon Law Review*, pages 19–36 (1985), for a summary of national forest planning for the years 1897 to 1974.) The unit planning process was never completed because of the enactment of NFMA. The Forest Service did attempt to use an interdisciplinary analysis approach, public review, and comment to comply with NEPA in the planning process.

Congress enacted NFMA in 1976 to amend RPA. (For reflective discussions of NFMA by two of the executive branch actors in the legislative process, see Brizee (1987) and Peterson (1988).) A part of NFMA was the legislative compromise to address the timber management controversy arising from *West*

Virginia Division of Izaak Walton League v. *Butz* (the Monongahela case) (552 F.2d 945 (4th Cir. 1975)). NFMA went beyond a simple remedy to the court's narrow interpretation of the Organic Act regarding timber sales to create a land management planning and administration system.

Major highlights of NFMA are integrated land and resource management planning, regulation of timber management actions, and public participation in Forest Service decisionmaking. NFMA requires the development, maintenance, amendment, and revision of land and resource management plans for each unit of the National Forest System. These plans help create a dynamic management system so that an interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences will be applied to all future actions on the unit (16 U.S.C. 1604(b), (f), (g), and (i)). The Forest Service is to ensure coordination of the multiple uses and sustained yield of products and services of the National Forest System (16 U.S.C. 1604(e)(1)).

At the time of enactment in 1976, members of Congress involved in the legislative process had quite different views as to what NFMA was about and how it would change national forest management. In a U.S. Senate Committee of Agriculture, Nutrition and Forestry (1979) report, Senator Humphrey stated:

> This is an act designed to build our forest as a bulwark of renewable resources. It is a full storehouse, providing a perpetual high yield of multiple use benefits. It is a managed system of forest and rangeland with the water, wildlife, soil, and beauty maintained. This is an act that assures that our public forests are managed with advice from the several publics, and managed in a framework that makes ecological and environmental sense.
>
> It is an act that recognizes the role of economic analysis but puts that topic in the perspective of long term, not being submerged to short-term objectives.
>
> This is a sound conservation act. It places on the professional resource manager the obligation and the opportunity to do a better job than has been done in the past by giving him better tools and policy guidance to exercise effectively the expertise that he has.
>
> It creates the policy machinery for making certain that professional expertise and public desires are brought together in the public interest.
>
> In short, this bill is designed to get the practice of forestry out of the courts and back in the forests. (page 768)

On page 774 of the same U.S. Senate report, Senator Randolph warned, "[t]he Congress has not adequately addressed a needed remedy to respond to the impact of the Monongahela decision. Instead, this legislation will be the subject of intense litigation." And Senator Packwood noted:

> I think the conference committee has met the essential objectives for good forest management legislation. We have a bill designed to cover a broad range of forest conditions and management practices. Yet, this is accomplished without the Congress tying the hands of the Forest Service. Invariably, it seems to me,

> Congress finds itself prescribing rules and regulations as if everybody and everything were the same; as if every situation needed the same treatment. Instead, here we have a bill that mandates planning for each Forest System unit on an individual basis. It is a recognition that no two forests are alike, and that prescriptive legislation is more often a handicap than a help to forest management professionals.
>
> S. 3091 is a welcome contrast to some of the original Senate proposals, Mr. President, particularly those for limiting clearcuts to a maximum of 25 acres, or preventing separate clearcuts to [a] maximum of 25 acres, or preventing separate clearcuts from being closer than 1,000 feet apart, regardless of forest conditions.
>
> Under the compromise worked out in conference, the Forest Service will be able to work creatively within the sustained yield principle established in the Multiple Use–Sustained Yield Act of 1960. I see no need to carve into firm statute an inflexible standard of nondeclining yield as the Senate passed legislation would have done. I am also satisfied with the modifications that were made to provisions dealing with "marginal lands" and the building of roads by timber purchasers. These provisions now allow the flexibility essential to good forest management. (page 775)

The same report also contained an observation from Congressman Foley:

> In my opinion, the conference report reflects a good compromise which preserves access to an important reserve of timber but at the same time protects the National Forest by establishing the strongest environmental and silvicultural controls ever imposed by any legislation dealing with the National Forests. (page 782)

Also in the report, President Ford, on signing NFMA into law, recounted some history regarding the establishment of the National Forest System by stating:

> While the National Forest Management Act of 1976 evolved from a timber management controversy, the act goes far beyond a simple remedy of the court's decision. Basically, the act expands and refines the forest resource assessment and planning requirements of the Forest and Rangeland Renewable Resources Planning Act of 1974—one of the first acts I signed upon taking office. This act reaffirms and further defines the concept of multiple-use, sustained-yield management and outlines policies and procedures for land management planning in the National Forest System. Emphasis throughout the act is on a balanced consideration of all resources in the land management process.
>
> Of equal importance, this act guarantees the public full opportunity to participate in National Forest land and resource planning. Finally, it recognizes the importance of scientific research and cooperation with State and local governments and private landowners in achieving wise use and management of the Nation's forest resources.
>
> In my consideration of this legislation, a statement made in 1907 by Gifford Pinchot, the first Chief Forester of the Forest Service, was brought to my attention. Mr. Pinchot said:
>
> > There are many great interests on the National Forests which sometimes conflict a little. They must all be fit into one another so that the machine runs smoothly as a whole. It is often necessary for one man to give way a little

> here, another a little there. But, by giving away a little at the present, they both profit by it a great deal in the end. (page 790)

The above quotations of President Ford, senators, and representatives show that there was not complete agreement regarding NFMA. This is common when legislative enactments address controversial and comprehensive questions. It is clear that Congress rejected the idea of prescribing management direction. Congress did not address or include a judicial review provision in NFMA. (Several bills have been introduced to alter the procedures and standards that apply to judicial review of forest plans and project-level decisions. In 1989, Senator Packwood introduced a bill, S. 1436, that provides for direct review of forest plan approval, amendment, and revision in the courts of appeals under statutory standards. It also provides for district court review of project decisions under statutory standards and limitation. Similar proposals have followed; see S. 2762 (Senator Hatfield) and H.R. 5094 (Representative AuCoin). See also Congressional Research Service (1990).) Congress recognized that for land management plans to be useful, they must be dynamic—thus the statutory requirements for monitoring, evaluation, consistency, amendment, and revision.

Given the statements of the senators and representatives involved in enacting NFMA, it stretches common sense to believe that the forest plans would end controversy over national forest management. Indeed, the ongoing nature of NFMA forest planning and management with continued public involvement demonstrates a realization of the limitations of macroplanning. The inability to "finally resolve" complex social and political problems in macroplanning exercises has been noted by scholars of planning. For instance, the abstract to Wildasky's (1973) article reads:

> Where planning does not measure up to expectations, which is everywhere, planners are handy targets. They have been too ambitious or they have not been ambitious enough. They have perverted their calling by entering into politics or they have been insensitive to the political dimensions of their task. They ignore national cultural mores at their peril or they capitulate to blind forces of irrationality. They pay too much attention to the relationship between one sector of the economy and another while ignoring analysis of individual projects, or spend so much time on specific matters that they are unable to deal with the movements of the economy as a whole. Planners can no longer define a role for themselves. From old American cities to British new towns, from the richest countries to the poorest, planners have difficulty in explaining who they are and what they should be expected to do. If they are supposed to doctor sick societies, the patient never seems to get well. Why can't the planners ever seem to do the right thing?

There is no reason to believe that forest planning of such highly important lands in a democratic society would not encounter the same problems as planning in general.

The Planning Regulations

NFMA required that the Secretary of Agriculture promulgate regulations for developing and maintaining the forest plans. Congress called for the regulations to be completed within 2 years of enactment and also provided that the

Secretary appoint a Committee of Scientists to provide scientific and technical advice on the proposed guidelines.

NFMA established basic requirements and considerations for the regulations in Section 6 (16 U.S.C. 1604). These requirements and considerations, while not prescriptive in nature, are comprehensive of all aspects of renewable resource management.

Draft regulations were published in the *Federal Register* for comment on August 31, 1978 (43 FR 39046). Two public hearings were held, and 737 individual responses were received. In response, a second draft regulation (36 CFR 219) was published in the *Federal Register* on May 4, 1979 (44 FR 26554), and 245 individual comments were received. The Committee of Scientists advised the Forest Service regarding each draft and the 1979 final regulation. The final planning regulation was published on September 17, 1979 (44 FR 53928).

The Secretary published a proposed revised planning regulation (36 CFR 219) on February 22, 1982 (47 FR 7678). A total of 2,020 comments were received on the proposed regulation. On September 30, 1982, the final revised 36 CFR 219 was published in the *Federal Register* (47 FR 43026). The planning regulation was also amended in 1983 to make changes regarding wilderness evaluation as a result of *California* v. *Block* (690 F.2d 753 (9th Cir. 1982)).

The planning regulations have numerous requirements for renewable resource planning and coordination. The appellants and interveners in forest plan approval appeals often question the regional forester's compliance with law and regulation requirements. Without overlooking the specific requirements, it is important to recognize that the thrust of the regulations is to provide guidance for the promulgation of the forest plans as the key part of the management system for future decisionmaking.

The NFMA regulations set forth the purpose of National Forest System land and resource management planning and the principles under which the forest plans are to be developed and maintained (36 CFR 219.1). It is particularly important to be mindful of the principles on which the regional guides and plans are based. The 14 principles listed in the NFMA regulations are based on the laws applicable to the national forests and major policies of the Forest Service. The principles are to be applied not only to promulgation of the plans but also to the ongoing management of the national forests.

In the planning regulations, the Secretary emphasized an interdisciplinary approach with public involvement and opportunity for comment (36 CFR 219.5, 219.6, 219.8, and 219.10). The regulations provide for the administrative appeal of plan approval (36 CFR 219.10(d)). (Note that the draft planning regulations published on May 4, 1979, excluded forest plan approval from administrative appeal. The draft did allow appeal of plan implementation decisions "on the grounds of nonconformity with the plan or because a decision otherwise constitutes an appealable grievance" (draft 36 CFR 219.7(o),

44 FR 25554, 25589). This approach was dropped in the 1979 final regulation (36 CFR 219.11(c), 44 FR 53928, 53930).)

The planning regulations also provide a process for developing and maintaining regional guides (36 CFR 219.8 and 219.9) and plans (36 CFR 219.10, 219.11, and 219.12), and they establish direction for integrating individual forest resources into the planning process (36 CFR 219.13 to 219.26). The planning regulations also initiate compliance with other laws, such as the Endangered Species Act, the Clean Water Act, the National Historic Preservation Act, and the Archaeological Resources Protection Act. (See 36 CFR 219.13 through 219.25.)

The regulations (36 CFR 219.27) also give direction regarding the management requirements for forest plans to meet the Multiple Use–Sustained Yield Act (16 U.S.C. 1604). For example, the regulations set of the Secretary's design for compliance with the "planned timber sale program" requirement of NFMA section 6(f)(2). This is achieved through several regulatory mechanisms.[2]

First, the forest plan is to identify a "timber base sale schedule which provides the allowable sale quantity" in accordance with 36 CFR 219.16. (Limitations on the "base sale schedule can be found under its definition in 36 CFR 219.3.) The regulations define *sale schedule* as "[t]he *quantity* of timber planned for sale by time period from an area covered by a forest plan. The first period, usually a decade, of the sale schedule provides the allowable sale quantity" (36 CFR 219.3, emphasis added). The *allowable sale quantity* is "[t]he *quantity* of timber that may be sold from the area of suitable timber covered by the forest plan for a time period specified by the plan" (36 CFR 219.3, emphasis added). Thus, the requirement to identify a "planned timber sale program" in section 6(f)(2) is accomplished through the regulatory process of identifying the upper limit *quantity* of timber that could be sold over the entire planning period (that is, the allowable sale quantity).[3]

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[2] The Committee of Scientists not only anticipated the need for a holistic consideration of the regulations, but expressly warned readers that "the regulations must be read in their entirety to be understood. The regulations are a complex, finely tuned, document. Many requirements cannot be understood without reading several sections and observing the relationship between requirements in the several sections" (44 FR 53928, 53968 (September 17, 1979)).

[3] Of course, forests are not limited to implementing their section 6(f)(2) responsibilities exclusively through identification of the allowable sale quantity. For example, the forest plans contain management area designations that identify what types of future actions are permissible within the areas assigned that management designation. The management area designations are also displayed on the map accompanying the forest plan. Management area designations can include an estimated schedule of management practices on an average annual basis. See, for example, the Flathead National Forest Land and Resource Management Plan, MA–8 (unroaded timberlands in areas of high scenic value), pages III-30 to 33. See also the descriptions in that plan on pages III-69 to 74. Appendix M (10-year Schedule of Management Activities) provides an additional form of notice by

The regulations point out that the allowable sale quantity is often expressed on an annual basis as the "average annual allowable sale quantity" (36 CFR 219.3, definition of *allowable sale quantity*). This means that "within the planning period, the volume of timber to be sold in any one year may exceed the average annual allowable sale quantity so long as the total amount sold for the planning period does not exceed the allowable sale quantity" (36 CFR 219.27(c)(2)). Actual sale levels may vary depending on a number of items, including annual timber sale funding levels, timber market conditions, evaluation of monitoring results, project-level analyses, and other factors. Just as the Administration is not required to offer the allowable sale quantity (see below in the discussion on *Intermountain Forest Industry Association* v. *Lyng*), Congress is not required to provide funding to meet the quantitative output targets for any other programs on each forest. Also, the Forest Service obviously does not have the authority to commit to expenditures beyond the time period associated with its congressionally enacted appropriation.

The regulations require that the regional forester make projections of multiple-use goods and services under the plan and alternatives to the plan (36 CFR 219.12(e), (f), (g), and (h)). The forecasts of these outputs are made using various computer models. (The use of these computer models as tools to help make estimates on the future was the subject of the appeal of the Rio Grande National Forest Land and Resource Management Plan, NFS #1184, May 28, 1987. The role of the models as aids to decisionmaking was explained at page 12 of that decision.) The forecasts are used to help link the forest plan to the RPA Program and Assessment (36 CFR 219.4), and they also are helpful in making some broad predictions about the relationship of resource uses. Although there is no assurance that the outputs will actually occur at the projected number, the plan goals and objectives do state the Forest Service intention for the unit. The actual outputs may vary from model predictions because of the limitations of modeling and projections and because the on-the-ground conditions may vary from broad model assumptions (see Barber and Rodman 1990, page 18). Two Forest Service analysts (Barber and Rodman 1990) state:

> However, it's also important to stress FORPLAN's usefulness as an aid to understanding the nature of forest planning problems, not as a methodology to provide a set of numbers that may represent some optimal answer to a problem. Its major

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identifying potential activities (both timber and nontimber activities). The introduction identifies that "[t]hese estimates are tentative and subject to change as site-specific analysis and needs change during the first decade" (page M-1). All of these mechanisms provide interested groups and individuals early notice of actions that may be proposed in the future. This fulfills NFMA's requirement that "[p]lans . . . reflect proposed and possible actions. . . ." These efforts should not be read as an attempt to make a decision to proceed with any activity. As the preamble to the 1982 NFMA regulations states, "[I]t was never contemplated that individual sales would be actually located in the forest planning process" (47 FR at 43036 (September 30, 1982)).

> purpose is to provide insight into the behavior of multiple resources and their interactions, which in turn can be used to guide the development of effective plans and decisions. The model is more appropriately used to prevent wrong decisions than for making "right" decisions. (page 21)

New information regarding resource uses and ecological relationships is constantly forthcoming.

The actual outputs also are affected by changes in the laws and regulations, national and local economic conditions and demands, and appropriated budget levels. (In *Intermountain Forest Industry Association* v. *Lyng* (683 F. Supp. 1330 (D. Wyo. 1988), Judge Brimmer, in denying a motion for preliminary injunction, held that the timber management plan harvest program did not have the force and effect of law and a court could not order the Secretary to offer timber for sale in the target quantity stated in the timber management plan. The judge relied in part on the planning regulation definitions of goals and objectives.) As with the management direction, the projected outputs can be adjusted through changes in implementation schedules (36 CFR 219.10(e)) and amendments to the plan.

Finally, the planning regulations set forth requirements for the consistency of future decisions with the forest plans (36 CFR 219.10(e) and 219.12(k)), amendments (36 CFR 219.10(f)), and plan revisions (36 CFR 219.10(g)). (See FSM 1922.5 and FSH 1909.12, Chapter 5 (53 FR 26807, July 15, 1988) for more on amendments.) It is through consistency, monitoring and evaluation, and amendment and revision that plans maintain the dynamic nature required by Congress in NFMA.

Plan-Level Decisions

An approved plan is the product of a comprehensive notice and comment process established by Congress in NFMA. (See 16 U.S.C. 1604(d) and (j).) (The comprehensive national forest land-use planning requirements established by statute and regulation are set forth in 16 U.S.C. 1604(a) through (m), 1607 through 1614, and 36 CFR 219.) The approval of a forest plan establishes direction so that all future decisions in the planning area will include an "interdisciplinary approach to achieve integrated consideration of physical, biological, economic and other sciences" (16 U.S.C. 1604(b), (f), (g), and (i)). (The 14 planning principles set forth in 36 CFR 219.1(b)(1)–(14) clearly show that plans are met to control future decisionmaking. The planning principles establish the plans as a guide to future decisionmaking rather than the "decision.") The plan provides direction to ensure the coordination of multiple uses (outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness) and sustained yield. The Chief has held in administrative appeals that plan approval results in:

1. Establishment of forest multiple-use goals and objectives (36 CFR 219.11(b)).

2. Establishment of forest-wide management requirements (standards and guidelines) to fulfill the requirements of 16 U.S.C. 1604 applying to future

activities—both resource integration requirements (36 CFR. 219.13 to 219.26) and management requirements (36 CFR 219.27).

3. Establishment of management areas and management area direction (management area prescriptions) applying to future activities in that management area—both resource integration requirements and minimum specific management requirements (36 CFR 219.11(c)).

4. Establishment of allowable timber sale quantity (16 U.S.C. 1611 and 36 CFR 219.16) and designation of lands not suitable for timber management (16 U.S.C. 1604(k) and 36 CFR 219.14).

5. Nonwilderness allocations or wilderness recommendations where 36 CFR 219.17 applies.

6. Establishment of monitoring and evaluation requirements (36 CFR 219.11(d)).

7. Project- and activity-level decisions as specifically identified in the record of decision and plan and adequately disclosed for NEPA purposes in the plan's environmental impact statement.

The courts have adopted the Chief's characterization of the nature of forest plans. Judge Finesilver's decision in *Council for Environmental Quality* v. *Lyng* (731 F.Supp. 970, 977–978 (D. Colo. 1989), on appeal) contains an almost verbatim characterization. Judge Lovell's decision in *Idaho Conservation League* v. *Mumma* further supports this characterization (CV 88–197–M–CCL (D. Mont. decided August 7, 1990); see discussion of postprogrammatic NEPA documentation, *infra*).

The plan is subject to adjustment through monitoring and evaluation and then amendment and revision. The planned multiple-use goals and objectives indicate the intentions of the Forest Service regarding the planning unit. The plan approval puts in place a dynamic management plan for making future decisions. In addition to providing multiple-use goals and objectives, the plan has some features of a "zoning ordinance" as it permits, prohibits, and establishes standards and guidelines that regulate activities.

It is not possible for the Forest Service to promulgate plans that will completely satisfy all of the "great interests" of national forest management. Nor is it realistic to believe that at one point in time future questions regarding national forest land use and management can be *finally* answered. The plans are never really "completed." The march of science, discovery of new relationships, and information about ecosystems does not stop. For example, the controversy over red-cockaded woodpecker protection on the National Forests in Texas illustrates the need to make adjustments in forest plans and ongoing management when new information becomes available. In this case, the court has become involved in the adjustment—*Sierra Club* v. *Lyng*, 694 F.Supp. 1260 (E.D. Tex. 1988). The Government has the decision on appeal to the Fifth

Circuit, but in any event the Forest Service will be making changes to the management contemplated by the plan because of the new information regarding the protected species. The real value of plans is their role in the management system for future decisionmaking. As amendments and revisions are made, the plans continue to evolve.

The plans are not collections of 10 to 15 years' worth of project decisions (irretrievable commitments of natural resources). Such a view would create plans that would become administrative straitjackets inhibiting the use of new information, adjustment to changes in demands and needs, improvements in technology, and evidence from monitoring. Such a view would read out of the law of the requirements for monitoring, amendment, and revision. (See Judge Burns' discussion of the Bureau of Land Management's framework plan for the Reno Planning Area, stating that the plan itself need not contain the future decisions and that the kind of plan envisioned by the plaintiffs was "an administrative straight-jacket [sic] which eliminates the room for flexibility to meet changing conditions" (*NRDC* v. *Hodel,* 624 F.Supp. 1045, at 1059–60, *aff'd,* 819 F.2d 929 (9th Cir. 1987)).)

Relationship of Plans to Project-Level Decisionmaking and Other Laws

Appellants, interveners, and litigants often allege that the regional forester in approving the forest plan violated NEPA, the Endangered Species Act, the Clean Water Act, and other environmental laws. The nature and purpose of forest plans are closely connected to the application and coordination of these laws to plan approval and subsequent project-level decisionmaking. Judge Karlton's statement that it is the role of the Secretary of Agriculture to make order out of the "crazy quilt of apparently mutually incompatible statutory directives" applying to the national forests certainly fits this situation (*United States* v. *Brunskill,* Civil S–82–666–LKK (E.D. Cal. November 8, 1984) unreported opinion, pp. 9–10, *aff'd,* 792 F.2d 938 (9th Cir. 1986)). Although Judge Karlton was referring to hard rock mineral exploration and development, the "crazy quilt" analogy applies even more to national forest land-use planning and management that must take into account the multitude of legal authorities applicable to renewable and nonrenewable resources.

Forest plans set out management prescriptions, as well as standards and guidelines for future decisionmaking, and are adjustable through monitoring and evaluation and amendment and revision (plan-level decisionmaking). As projects and activities are proposed and reviewed, the plan is used in project-level decisionmaking. The plan management area prescriptions and forest-wide direction form the "ordinance" under which future decisions are made. Forest plan approval establishes multiple-use goals (desired future condition) and objectives (statements of planned results) for the planning unit. Coupled with the laws and regulations applicable to plan implementation, the plans create a two-level management system (plan and project level) for future decisionmaking.

Congress, through NFMA, established a dynamic management system that is somewhat like a county zoning ordinance. (The analogy of forest plans to a

zoning ordinance may draw some criticism because the forest plan has elements of both a comprehensive plan (multiple-use goals and objectives) and a zoning ordinance (forest-wide standards and guidelines and management area prescriptions). See Yokley (1978), Sec. 1-2, page 4, planning and zoning distinguished, "[L]et us say that zoning is almost exclusively concerned with use regulation, whereas planning is a broader term and indicates development of a community. . . .") A county zoning ordinance is promulgated through public notice and hearings. A zoning ordinance constrains and governs future decisionmaking. The consistency requirement of NFMA acts as a control on all contracts, permits, licenses, resource plans, and activities that arise in the planning area of the plan. This requires the Forest Service to measure proposed activities against the forest-wide standards and guidelines and management area prescription of the forest plan. Once the plan is in effect, a proposed action inconsistent with the plan direction may not be taken. The plan may be amended (36 CFR 219.10(f)) to allow the action. (FSM 1922.41(1) and FSH 1909.12, Chapter 5.31a(1). See Preamble to USDA Oil and Gas Resource Regulations, 55 FR 10423, 10430 (March 21, 1990). Also, see Wilkinson and Anderson (1985).) Somewhat like a zoning ordinance, the plan allows or prohibits some uses and establishes standards and guidelines that regulate all resource use. In *City of Tenakee Springs* v. *Block* (778 F.2d 1402, 1406 (9th Cir. 1985)) it was held that the Tongass National Forest Land Management Plan land-use prescriptions were permissive rather than mandates for development. The Tongass plan was prepared after the enactment of NFMA, but before the 1979 promulgation of the NFMA planning regulations (36 CFR 219).

A part of any zoning ordinance is a procedure to address change—that is, through amendments, rezoning, and variance. All these processes for change require some sort of notice and appeal. Much like a zoning ordinance, the dynamic nature of the forest plan is maintained through NFMA monitoring and evaluation and then amendment and revision. Public notice of changes and public involvement in amendments and revisions are required. Project decisionmaking also is subject to public involvement and the Forest Service administrative appeals regulation.

During plan administration and implementation, forest land use remains subject to compliance with NEPA, which adds notice, public involvement, and analytical recordkeeping requirements. A preliminary question in project decisionmaking is: What does the plan say? The answer to this question requires review of the plan in light of the activity, project, or issue under review. There may be project decisions that require a change in the plan (amendment). There may be requests to change (amend) the plan. There also are "consistency" determinations and other NFMA findings. NFMA project-level findings in FSH 1509.12, Chapter 5, 5.31a, state that:

> The National Forest Management Act and complementary regulations require specific findings to be made when implementing the Forest Plan. In deciding on proposed management practices, the following findings must be made and documented. . . . (53 FR 26836, July 15, 1988)

As with promulgation, plan administration and implementation require public notice and involvement.

The Plan and Environmental Impact Statement as a Gateway for Project Decisionmaking and Compliance With NFMA and Environmental Laws

In enacting NFMA and the plan requirement, Congress did not repeal the many laws and regulations that apply to land- and resource-use decisions of national forest lands. The plan must be harmonized with the many legal authorities that also control or affect land- and resource-use decisions. The plan acts as a gateway to fulfilling many of these laws. Because the plan is a guiding "ordinance" rather than a group of project decisions, the Forest Service has developed a two-level decision process (plan and project levels) so that the many other legal requirements are fulfilled prior to "critical" project decisions. According to *Vermont Yankee Nuclear Power Corp.* v. *National Resources Defense Council*, absent constitutional constraints or extremely compelling circumstances, "administrative agencies 'should be free to fashion their own rules of procedure and pursue methods of inquiry capable of permitting them to discharge their multitudinous duties'" (435 U.S. 519, 543 (1978), citation omitted). The court has also noted that the power of an agency to administer a congressionally created program necessarily requires the formulation of policy and the making of rules to fill any gaps left by Congress (*Chevron U.S.A., Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 843–844 (1984)).

Except as specifically stated in the plan's record of decision, no project, contract, lease, or other right to use National Forest System land results from plan approval. There is another level of decisionmaking. For NEPA, the Endangered Species Act, and other environmental law purposes, the plan approval "proposed action" is direction to control future decisionmaking rather than irretrievable commitments to timber sales, road building, mineral activities, and other uses. (See the July 18, 1989, amended biological opinion of the Fish and Wildlife Service for the Flathead National Forest Land and Resource Management Plan, pages 2–3. This opinion is being challenged in *Swan View Coalition, Inc.* v. *Turner*, CV-89-H-CCL (D. Mont.).)

While Congress did not precisely require staged decisionmaking (plan and project level) in NFMA, it did order that the Secretary promulgate regulations and procedures regarding Forest Service activities and the fulfillment of NEPA (16 U.S.C. 1604(g)(1) and *Texas Commission on Natural Resources* v. *Bergland*, 573 F.2d 201, 208 (5th Cir. 1978)), that certain projects have interdisciplinary review (16 U.S.C. 1604(g)(3)(F)(ii)—interdisciplinary review of each advertised sale area where harvested to regenerate an even-aged stand), and that all activities and projects be consistent with approved plans (16 U.S.C. 1604(i) and 36 CFR 219.10(e)).

As part of the plan and environmental impact statement development, the Forest Service must attempt to address the various Federal environmental laws. The focus of this effort should be for the plan to establish management direction that acts as a gateway to ensure compliance with these environmental laws at the project and activity levels. This gateway consists of the standards and

guidelines included in the plan and the project review process that applies to plan implementation.

NFMA and NEPA

In NFMA, Congress directed the Secretary to include in the planning regulations "procedures to insure that land management plans are prepared in accordance with the National Environmental Policy Act of 1969, including, but not limited to, direction on when and for what plans an environmental impact statement" be prepared (16 U.S.C. 1604(g)(1)). The Secretary fulfilled this requirement in the planning regulations by requiring a draft environmental impact statement to accompany the proposed plan and a final environmental impact statement to accompany the plan (36 CFR 219.10(b) and (c) and 219.12(c) and (j)). (See FSM 1922 (two levels of decisions), FSM 1922.4 (analysis and evaluation of proposed actions), and FSH 1909.12, Chapter 5 (forest plan implementation).)

NFMA has other provisions that are important to NEPA compliance. Section 6(i) requires "[r]esource plans and permits, contracts and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans" (16 U.S.C. 1604(i)). This demonstrates Congress' recognition that the plans will not contain all decisions regarding the use and occupancy of that unit of the National Forest System.

NFMA supports the plan- and project-level approach to land management and use decisionmaking. Congress required the plans to include some information about "proposed and possible timber sale" (16 U.S.C. 1604(f)(2)), but with regard to even-aged harvesting, Congress specifically required the Secretary to conduct an interdisciplinary review of the potential environmental, biological, aesthetic, engineering, and economic impacts of each advertised sale (16 U.S.C. 1604(g)(3)(F)(ii)). The Secretary and the Forest Service have applied the statute more broadly, taking the position that "it was never contemplated that individual sales would actually be located in the forest planning process."[4] The Secretary's September 30, 1982, response to a comment on the revision of 36 CFR 219 (47 FR 43035–43036) is instructive:

> The proposed 219.14(h) was viewed by many as easing the way for development of roadless areas. The proposed language was viewed by some as requiring timber sales to be planned on all lands that are considered suitable for timber management, a requirement they felt is clearly in violation of the Multiple Use–Sustained Yield Act of 1960.

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[4] See also the Decision of Chief in the Idaho Panhandle National Forests Land and Resource Management Plan Appeal of Idaho Conservation League #2130, August 15, 1988, and the modified Chief's Decision in the Bighorn National Forest Land and Resource Management Plan Appeal #375, December 21, 1989, page 2 (assurance of adequate restocking in 5 years at plan and project levels).

The Secretary's reply to these comments states:

> While the intent of 219.14(h) was to plan to harvest a volume equal to the volume of growth on all suitable lands, it was never contemplated that individual sales would actually be located in the forest planning process. The proposed language is not necessary, however, and it is deleted in the final rule.

Congress recognized in NFMA that the management of the Nation's renewable resources was highly complex and subject to change (16 U.S.C. 1600(1)).

Another important NFMA provision is Section 15, which provides that the Secretary "shall prescribe such regulations as he determines necessary and desirable to carry out the provisions of [NFMA]" (16 U.S.C. 1613). The planning regulations require that "[a]ll management prescriptions shall . . . [b]e assessed *prior to project implementation* for potential physical, biological, aesthetic, cultural, engineering, and economic impacts and for consistency with multiple uses planned for the general area" (emphasis added) (36 CFR 219.27(a)(7)). This requirement for staged decisionmaking was part of the original planning regulations in 1979 (36 CFR 219.13(a)(7)). The Forest Service regulatory scheme set forth in Title 36 of the Code of Federal Regulations contains numerous examples of the systematic multilevel nature of national forest management and decisionmaking. The plan is a controlling consideration, but project decisions (irretrievable commitment of resources) are normally only made after further site-specific review. Examples within 36 CFR Part 200 of site-specific review before making the "irretrievable commitment" include: hardrock minerals operating plans (228.4); land exchanges (254.3 and 254.10); timber (223.30); range (222.2); special uses (251.54); and wilderness (293.3). The project decisionmaking level is not always a single step; it also may have stages. Multistage decisionmaking beneath the forest plan is illustrated by—

1. Grazing allotment management plans and grazing permits (36 CFR 222.1 to 222.3 and Chief's Appeal Decision on the Toiyabe National Forest Land and Resource Management Plan #1694 and #1696, May 3, 1988).

2. Multistage recreational development, such as ski areas.

3. Hard rock mining operating plans for prospecting, exploration, or development (36 CFR 228.1 to 228.15).

The Forest Service issued regulations to cover the multiple decision points in oil and gas leasing, exploration, and development (31 U.S.C. 226(g) and (h)) on March 21, 1990 (55 FR 10423).

The stepping-down process from plan- to project-level decisionmaking also is Service-wide direction:

> Planning for units of the National Forest System involves two levels of decisions. The first is the development of a forest plan that provides direction for all resources management programs, practices, uses, and protection measures. . . . The

> second level planning involves the analysis and implementation of management practices designed to achieve the goals and objectives of the forest plan. This involves site-specific analysis to meet NEPA requirements for decisionmaking. (FSM 1922.4; 53 FR 26807, 26812, July 15, 1988)

Chapter 5 of the Forest Service's Land and Resource Planning Handbook (FSH 1909.12) provides additional procedural direction for implementing the forest plan (53 FR 26834–26836 (July 15, 1988)). As stated in that direction, "[i]mplementation involves analysis of proposed and management practices to meet both NFMA and NEPA requirements." This national direction further provides that "[t]he purpose of analysis and evaluation is to make site-specific decisions based on Forest Plan direction. The analysis process includes an assimilation of management direction, current issues, and site-specific data to make site-specific decisions on land management. Th[e] analysis assists in determining costs, schedules, and direct, indirect, and cumulative effects of related management practices."

The Forest Service's NEPA procedures provide for environmental analysis and public involvement even when a project or group of projects is consistent with the plan. The procedures also require the consideration of a no-action alternative (FSH 1909.15, Sec. 23; 50 FR 26088 (June 24, 1985)).

The plan's environmental impact statement is the classic programmatic statement, as it discusses the broad environmental effects of plan approval. Two district courts have recognized the programmatic nature of the forest plan's environmental impact statement and deferred site-specific NEPA compliance until the project level (*Council for Environmental Quality* v. *Lyng*, 731 F. Supp. 970, 977–978 (D. Colo. 1989) (on appeal) and *Idaho Conservation League* v. *Mumma*, CV 88–197–M–CCL (D. Mont. decided August 7, 1990)). Generally, environmental impact statements for plans do not cover site-specific projects or actions. The statements are not prepared at the point of irretrievable commitment; they are the beginning of NEPA compliance. They will be used for "tiering." This means that subsequent environmental impact statements and environmental assessments may incorporate by specific reference discussions from the plan's environmental impact statement so that the subsequent environmental document may concentrate on issues specific to the subsequent proposed action (40 CFR 1502.20, 1508.28, and 1508.18(b)(2)). (See "Forty Most Asked Questions," 24(b) and 24(c), 46 FR 18026, 18033 (1981).)

The plan's environmental impact statement is an aid to project NEPA compliance. Often, programmatic environmental impact statements do not disclose site-specific environmental effects, project alternatives, and connected actions. The systematic stepping down from the plan's environmental impact statement provides the necessary site-specific review, alternatives to the project, and current environmental review required by NEPA. (See *Ventling* v. *Bergland*, 479 F.Supp. 174, 180 (D. S.D. 1978), *aff'd*, 615 F.2d 1365 (8th Cir. 1979). See also 40 CFR 1500.4(c), 1502.4, 1502.20, 1508.18(b)(2), and 1508.28.) This stepping down or "tiering" of environmental review has been upheld in two postplan lawsuits on the Shoshone and Superior National Forests. In *Park*

County (Wyoming) Resource Council v. *U.S.* (683 F.Supp. 842, 844-45 (D. Wyo. 1986)), the court relied in part on the forest plan to uphold an environmental assessment/finding of no significant impact for oil and gas drilling. In *Preserve the Burntside Spirit* v. *Chief of USFS* (No. 5-87 Civ. 289 (D. Minn. April 22, 1988)), the court upheld a challenge to land exchange, relying in part on the forest plan. It is critical that NEPA be fulfilled at the point of irreversible and irretrievable commitment of the resources to a project at a particular site.

The NFMA/NEPA relationship is controlled by the fact that the plan generally does not make the go/no go project decision. Environmental review and public involvement also apply to project and activity decisions. The Forest Service must comply with NEPA, the Council on Environmental Quality NEPA regulations, and the Forest Service NEPA procedures in making project and activity decisions.

On August 17, 1989, the Acting Assistant Secretary stated in an appeal decision (#1575 and #1596) involving the Beaverhead National Forest plan:

> However, I must stress the need to remember the purposes of an LRMP. An LRMP does not, unless specifically indicated, make site-specific decisions. Under the staged decisionmaking procedure used by the Forest Service (see Chief's Decision at 4-6), mandatory review at each stage (LRMP and project) prevents the telescoping of any and every projected environmental concern, such as those concerning sensitive species, into one overwhelming obstacle which must be addressed at the LRMP stage. Attempts to read site-specific decisions or direction into an LRMP can only lead to confusion, as shown above. An LRMP provides the sideboards and requirements that site-specific decisions must meet. However, an LRMP does not specify *how* each project is to comply with these requirements, which is sensible given the variety of site-specific conditions. For these reasons all parties must be careful to view and use the LRMP for what it is, programmatic direction for management of the various resources of a Forest. (pages 2–3)

NFMA and the Endangered Species Act

The Endangered Species Act (16 U.S.C. 1531–1543) was enacted to ensure the protection and conservation of endangered and threatened species. Congress focused the majority of its attention for achieving these goals on Federal agencies. Is so doing, Congress made "a conscious decision . . . to give endangered species priority over the 'primary missions' of federal agencies" (*Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 185 (1978)).

The Endangered Species Act contains both substantive and procedural requirements. Generally, the courts have recognized that Federal agencies meet their substantive responsibilities under the act through compliance with the proeedural requirements of the statute. One of the primary procedural responsibilities of the act is found in the consultation provision of Section 7. The Departments of Commerce and the Interior have issued regulations that establish the mechanism through which consultation occur (50 CFR 402).

Judicial Review

Section 706 of the Administrative Procedure Act (5 U.S.C. 706) governs judicial review of administrative decisions involving the Endangered Species Act (*Friends of Endangered Species, Inc.* v. *Jantzen*, 760 F.2d 976, 981 (9th Cir. 1985)). Under section 706, the reviewing court will determine whether the agency's decision is "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law" (at 981–982). The relevant inquiry is whether the agency considered the relevant factors and articulated a rational connection between the facts found and the choice made (at 981–982). It is not the judiciary's prerogative to substitute its own judgment for that of the agency (*Avoyelles Sportsmen's League* v. *Marsh*, 715 F.2d 897 (5th Cir. 1983)).

The Endangered Species Act contains a citizen suit provision that allows private parties to enforce the statutory prohibitions against any "person" (16 U.S.C. 1540(g)). The act (at 1532(13)) broadly defines *person* to include virtually any conceivable entity, including Federal and State agencies and private individuals (*Christy* v. *Hodel*, 857 F.2d 1324 (9th Cir. 1988), upholding criminal violation of taking provision against private individual). However, the act (at 1540(g)(2)(A)) provides that "[n]o action may be commenced . . . prior to sixty days after written notice of the violation has been given to the Secretary [of the Interior], and to any alleged violator. . . ." The notice requirement is a jurisdictional prerequisite to the authority of the district court and cannot be waived (*Save the Yaak Committee* v. *Block*, 840 F.2d 714, 721 (9th Cir. 1988)).

Section 7 Responsibilities

Section 7 of the Endangered Species Act (16 U.S.C. 1536) is applicable only to Federal agencies. It provides two mechanisms through which Federal agencies achieve the goal of the act. First, section 7(a)(1) establishes a grant of authority to aid in the conservation and recovery of listed species through existing agency programs (at 1536(a)(1)). Second, section 7(a)(2), by comparison, substantively limits Federal agency action by requiring each agency to ensure that the implementation of its programs is not likely to jeopardize the continued existence of an endangered species (at 1536(a)(2)). It is clear that Congress considered the jeopardy provision of section 7(a)(2) to be the fundamental obligation of section 7. For example, *North Slope Borough* v. *Andrus* (642 F.2d 589, 607 (D.C. Cir. 1980)) states, "The principle substantive import of ESA is in the section 7(a)(2) requirement. . . ." See also S. Rep. No. 151, 96th Cong., 1st Sess. 4 (1979), which states:

> The term "is likely to jeopardize" is used because the *fundamental* obligation of Section 7(a) of the Act is that Federal Agencies insure their actions [and] do not jeopardize the continued existence of an endangered or threatened species. (emphasis added)

Section 7(a)(2) provides a substantive requirement that each agency ensure that the implementation of its programs is not likely to jeopardize the continued existence of an endangered species (16 U.S.C. 1536(a)(2)). An agency's compliance with its duty to avoid jeopardy is achieved primarily through consultation with the U.S. Fish and Wildlife Service. The agency is required to review every proposed project to determine whether it may affect a listed species (at 1536(c)). If the impact is likely to be adverse, the agency is required to consult with the Fish and Wildlife Service (at 1536(a)(2); 50 CFR 402.13 and 402.14).

Section 7(b) of the act sets out the procedures for formal consultation between the Fish and Wildlife Service and the action agency (at 1536(b)). The Fish and Wildlife Service has promulgated regulations that provide both "formal" and "informal" consultation (50 CFR 402). While formal consultation is in progress, the agency must not make an irreversible commitment of resources that would foreclose implementation of alternative measures designed to avoid jeopardy (at 1536(d)).

The Fish and Wildlife Service prepares its evaluation, known as a Biological Opinion, which constitutes its judgment whether the proposed action would jeopardize the continued existence of the species (at 1536(b)). If the Fish and Wildlife Service concludes the species would be jeopardized, it must identify reasonable and prudent measures that would avoid jeopardy (at 1536(b)(3)(a)). (According to *Tribal Village of Akutan* v. *Hodel* (869 F.2d 1185, 1193 (1988)), the action agency is not required to adopt the alternatives suggested in the Biological Opinion, but failure to do so puts the agency at risk of not meeting the standards of section 7(a)(2).) These Biological Opinions form the basis for agency compliance with the provisions of section 7(a)(2). Substantive weight is given to the Fish and Wildlife Service's Biological Opinion as evidence of the action agency's compliance with the jeopardy standard (*National Wildlife Federation* v. *Coleman*, 529 F.2d 359, 375 (5th Cir.), *reh'g denied*, 532 F.2d 1375 (5th Cir.), *cert. denied*, 429 U.S. 979 (1976); see also H.R. Conf. Rep. No. 697, 96th Cong. 1st Sess. 12 (1979)). Such an Opinion is not self-enforcing, however. The agency whose project is under consideration is not prevented from proceeding despite the adverse Opinion of the Fish and Wildlife Service (*Coleman* at 371; *Tribal Village of Akutan* v. *Hodel*, 859 F.2d 651, 661 (9th Cir. 1988)). The agency may also choose to modify and resubmit the proposal for consultation in response to the Opinion.

An agency's responsibility under section 7(a)(1) differs radically from that under section 7(a)(2). The "duty to conserve" confers discretionary authority on Federal agencies to promote the conservation and recovery of endangered and threatened species (*Carson-Truckee Water Conservancy District* v. *Clark*, 741 F.2d 257, 261 (9th Cir. 1984), *cert. denied sub nom. Nevada* v. *Hodel*, 470 U.S. 1083 (1985)). The conservation requirement, unlike the project-specific requirement of section 7(a)(2), focuses on a Federal agency's overall program authorities and responsibilities for conservation of these species. Judicial review of whether or not an agency has complied with those responsibilities should therefore necessarily involve consideration of all conservation

activities undertaken by the agency, not simply one proposed action. (See, for example, Chief's Administrative Appeal Decision in the Flathead National Forest Land and Resource Management Plan Appeal #1467 and #1513, August 31, 1988, pages 50–55.)

Conservation is defined as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary" (16 U.S.C. 1532(3)). This concept is carried through in the Endangered Species Act regulations' definition of *recovery*—"improvement in the status of the listed species to the point at which listing is no longer appropriate" (50 CFR 402.02).

The Secretary of the Interior is required to develop and implement "recovery plans" for the conservation and survival of listed species, "unless he finds that such a plan will not promote the conservation of the species" (16 U.S.C. 1533(f)). One court determined that even once prepared, the court would "not attempt to second-guess the Secretary's reasons for not following the recovery plan" (*National Wildlife Federation* v. *National Park Service*, 669 F. Supp. at 389 (D. Wyo. 1987)).

Only a few courts have considered section 7(a)(1). Two early judicial conclusions are: (1) section 7(a)(1) provides an affirmative obligation to conserve endangered species (*Pyramid Lake Paiute Tribe* v. *U.S. Dept. of Navy*, 898 F.2d 1410 (9th Cir. 1990)) and (2) the methods of conservation are within the discretion of the Federal agency (*Pyramid Lake Paiute Tribe* and *National Wildlife Federation* at 384).

Section 9 Responsibilities

The other mechanism adopted by Congress for the protection of endangered species is the section 9 prohibition on "taking" an endangered species (16 U.S.C. 1538(a)). (The Endangered Species Act authorizes the Secretary of the Interior to promulgate special regulations that prohibit "taking" threatened species (at 1538(a)(1)(G)). Instead of a species-by-species approach, the Secretary promulgated regulations that generically prohibit taking any threatened species, except as otherwise provided for by regulation (50 CFR 17.31). The statute defines the word *take* to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct" (16 U.S.C. 1532(19)). In addition, the Secretary of the Interior has promulgated regulations defining some of these terms, including the word *harm*, which states:

> "Harm" in the definition of "take" in the [Endangered Species] Act means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. (50 CFR 17.3)

To prove a section 9 violation, the plaintiff must demonstrate the defendant's action "had some prohibited impact on endangered species" (*Palila* v. *Hawaii Dept. of Land & Natural Resources*, 636 F.2d 495, 497 (9th Cir. 1981)). (See also *Pyramid Lake Paiute Tribe*—"The evidence does not demonstrate that any one year's diversion of Project water has actually caused the cui-ui's spawning problems.") The courts have imposed section 9 liability where the defendant's decision will necessarily result in on-the-ground consequences and where there is no intervening decisionmaking or authorization prior to the activity. For example, the State of Hawaii's maintenance of feral sheep that actually ate the critical habitat of the Palila was sufficient to invoke section 9 liability (*Palila* v. *Hawaii Dept. of Land & Natural Resources*, 636 F.2d 495, 497 (9th Cir. 1981)). The Environmental Protection Agency was found to have violated section 9 as a result of registering certain strychnine pesticides. The court found that EPA had clear evidence that past registration had resulted in the death of endangered species and continued registration left future decision-making entirely in the hands of third parties (*Defenders of Wildlife* v. *Administrator, EPA*, 892 F.2d 1294 (8th Cir. 1989)).

A Fish and Wildlife Service Biological Opinion predicts how a proposal will affect the species or its critical habitat, including the impact of "incidental takings" of the species. (Failure to include an incidental take finding does not necessarily violate the Endangered Species Act (*Tribal Village of Akutan*).) *Incidental takings* are "takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant" (50 CFR 402.02). The Endangered Species Act has a special provision that covers such incidental takings. Section 7(o)(2) states:

> [A]ny taking that is in compliance with the terms and conditions of a written statement provided under subsection (b)(4)(iv) of this section shall not be considered a prohibited taking of the species concerned. (16 U.S.C. 1536(o)(2))

Section 7(o)(2) expressly declares that takings are not prohibited if they occur when the agency or applicant is in compliance with the "dos and don'ts" component of a Biological Opinion. The legislative history clearly shows that this provision was designed to protect parties from section 9 liability when they rely in good faith on a Fish and Wildlife Service Biological Opinion (see S. Rep. No. 97-418 (May 25, 1982), pages 21–22). The Eight Circuit Court of Appeals has expressly recognized the section 7(o)(2) defense to section 9 liability in *Defenders of Wildlife* v. *Administrator, EPA* (at 1301).

Forest Plans and the Endangered Species Act

As described above, the proposed action in a forest plan is very broad and programmatic in nature. The biological opinion issued by the Fish and Wildlife Service for the Flathead National Forest Land and Resource Management Plan contains an excellent discussion of the nature of the consultation process for forest plans. It states:

Project Description

The proposed Flathead Forest Plan sets forth Forest-wide goals and objectives, land use allocations, management area prescriptions, standards and guidelines, and monitoring and evaluation requirements to establish direction for management of the Flathead National Forest.

Grizzly Bear

While the Forest Plan projects the amonnt of grazing, timber to be harvested, and facilities to be constructed as well as the acres to be developed in the management areas, it is impossible to: (1) identify site specific impacts of programs or activities; (2) relate site specific project impacts to specific biological components of grizzly habitat and how they will affect the manner in which grizzlies use an affected area; (3) identify cumulative impacts; or (4) predict the degree of compliance/coordination with grizzly bear management prescriptions and guidelines. Therefore, it is impossible through one consultation to render a biological opinion on all programming and activities identified in the LRMP. Thus, additional consultation will be required on each program activity or project that the Forest Service determines may effect threatened and endangered species at the time it is designed and implemented. (Final Environmental Impact Statement, page VI-30)

The Fish and Wildlife Service recognized that Section 7 consultation for the forest plan is an ongoing process. While the Fish and Wildlife Service determined that implementation of the plan was not likely to jeopardize any threatened or endangered species, it noted that consultations may be necessary on particular projects or activities. In the July 18, 1989, Amendment to the Flathead biological opinion, the Fish and Wildlife Service stated:

> The Forest Plan does not provide a "right" to any company, corporation, agency or individual to conduct an activity. An activity/program implemented under the Forest Plan direction undergoes separate NEPA and Section 7 reviews, after which a decision notice is prepared for activity. Thus, no irreversible or irretrievable commitment of forest resources is made in the Forest Plan, but rather at the point in time when a particular activity/program is proposed and undergoes its own NEPA and Section 7 reviews and a decision notice signed. (page 2)

This biological opinion is being challenged in *Swan View Coalition, Inc.*, CV–89–H–CCL (D. Mont.).

The plan does not make an "irreversible or irretrievable commitment of resources." Go/no go decisions will be made on the basis of site-specific information when activities are sufficiently developed to constitute concrete proposed actions. When a concrete proposed action is contemplated, the responsible official must evaluate its environmental consequences, including any impact to threatened or endangered species. This analysis will conform with Section 7 consultation requirements and will be completed before any decision is made on the proposed action.

This system of compliance has been recognized in other instances. In reviewing actions taken under the Outer Continental Shelf Leasing Act, the courts have stated:

> Mandatory stage-by-stage review prevents the telescoping of any and every projected hard to endangered life and to the environment into one overwhelming statutory obstacle. . . . By ensuring graduated compliance with environmental and endangered life standards, OCSLA makes ESA requirements more likely to be satisfied in both an ultimate and proximate sense. (*Tribal Village of Akutan* at 1193–1194, quoting *North Slope Borough* at 609)

While the quoted case dealt with a particular statutory scheme, the Ninth Circuit in *Friends of Endangered Species, Inc.* v. *Jantzen* authorized staged NEPA and Endangered Species Act compliance that did not involve any particular statutory scheme (at 988, upholding Endangered Species Act compliance for a proposal where "staged development of the Mountain calls for corresponding staged reconsideration of environmental impacts under the Plan. . ."). (However, see *Conner* v. *Burford*, 848 F.2d 1441 (9th Cir. 1988).)

Processes are in place to (1) ensure compliance with Section 7 of the Endangered Species Act, (2) provide for further consultation with the Fish and Wildlife Service if a "may affect" determination is made, (3) appropriately implement NEPA procedures, (4) provide for public involvement, and (5) provide the opportunity for administrative appeal.

Forest Plans and Viability

The Endangered Species Act represents a comprehensive statutory scheme for the prevention of extinction of species. This is in sharp contrast with the requirements of NFMA, which is primarily a planning statute, designed to guide development, amendment, and revision of forest plans for the multiple use and sustained yield of the Nation's national forests. Its goals and mandates are broader and therefore less detailed than those of the Endangered Species Act. Thus, the Forest Service's obligation under NFMA with respect to endangered species are subsumed by the more comprehensive requirements of the Endangered Species Act.

NFMA does not use the words *viable* and *viability*. These terms were introduced for the first time in the Secretary's NFMA regulations. Section 219.19 of the regulations states:

> Fish and wildlife *habitat shall be managed* to maintain viable populations of existing native and desired non-native species in the planning area. For planning purposes, a viable population shall be regarded as one which has the estimated number and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area. In order to insure that viable populations will be maintained, *habitat must be provided* to support, at least, a minimum number reproductive individuals and habitat must be well distributed so that those individuals can interact with others in the planning area. (36 CFR 219.19, emphasis added)

The focus of this long-range planning regulation is *managing the habitat* necessary for maintaining viable populations. This is because management of wildlife populations has traditionally been left to the States, absent some

overriding Federal concern (*Hunt* v. *United States*, 278 U.S. 96 (1928)). The Multiple Use–Sustained Yield Act of 1960 (later incorporated in NFMA) made clear that "[n]othing herein shall be construed as affecting the jurisdiction or responsibilities of the several states with respect to wildlife and fish on the National Forests" (16 U.S.C. 528). (See similar provision in the Federal Land Management Policy Act of 1976 (43 U.S.C. 1732(b)).)

Indeed, it would be illogical to apply the generalized language of NFMA to an endangered species. As a practical matter, the Forest Service cannot "maintain" a viable population if the population was not already at a viable level. An endangered species is defined by the Endangered Species Act as "any species which is in danger of extinction throughout all or a significant portion of its range. . ." (16 U.S.C. 1532(6)). Clearly, a species in danger of extinction lacks the numbers and distribution of reproductive individuals needed to *ensure* its continued existence (36 CFR 219.19, emphasis added).

The Chief of the Forest Service recently interpreted 36 CFR 219.19 in two appeal decisions regarding the Nicolet (#1733, #1746, and #1757, January 8, 1990) and Chequamegon (#1732, #1747, and #1760, January 31, 1990) National Forest Plans. The Chief's administrative interpretations in appeal decisions are entitled to due deference from the courts (*Intermountain Forest Industry Assn.* v. *Lyng*, 643 F. Supp. 1330, 1342 (D. Wyo. 1988)), and an agency interpretation of its own regulations is "controlling" unless it is clearly erroneous or inconsistent with the regulation itself (*Robertson* v. *Methow Valley Citizens Council*, ____ U.S. ____, 109 S.Ct. 1835, 1850 (1989)). In the Chequamegon decision, the Chief states:

> There is no requirement for the Forest Plan to evaluate viability of a species listed as threatened or endangered under the Endangered Species Act (ESA). A species listed as threatened or endangered has been found by the United States Fish and Wildlife Service not to have a viable population in the area in which it is listed. Therefore, once a species is listed under the ESA, the viability requirements of 36 C.F.R. 219.19 are superseded by the requirements of the ESA. This can be seen in that the species' recovery is directed through nondiscretionary compliance with the recovery plan.

Thus, in complying with the stringent requirements of the Endangered Species Act, the Forest Service collaterally conforms with the more generalized viability requirements of the NFMA regulations. (See *Environmental Defense Fund* v. *Froehlke*, 473 F.2d 346, 356 (9th Cir. 1972); *County of Bergen* v. *Dole*, 620 F. Supp. 1009, 1064 (D. N.J. 1985, *aff'd*, 800 F.2d 1130 (1986)—wildlife conservation measures required under Fish and Wildlife Coordination Act part of those already required under NEPA.)

Moreover, the only specific requirements of the NFMA regulations that do address threatened or endangered species are already part of the more elaborate requirements of the Endangered Species Act. 36 CFR 219.19(a)(7) calls for compliance with the Endangered Species Act by prescription of measures to prevent destruction or adverse modification of critical habitat designated by the Fish and Wildlife Service pursuant to the act (16 U.S.C. 1533(a)(3)(A)). The

Endangered Species Act precludes "destruction or adverse modification" of critical habitat (16 U.S.C. 1536(a)(2)).

Administrative Appeals

In addition to the continuing public involvement in monitoring and evaluation, amendments, revision, and project decisions, the Forest Service maintains an administrative appeals opportunity in which plan approval and later project and activity decisions can be reviewed. This allows consistency determinations, project decisions, amendments, and revisions to be reviewed by higher level Forest Service line officers.

The Forest Service revised its administrative appeals regulation in 1989 (36 CFR 217 and 251; 54 FR 3342, January 23, 1989). The appeals regulation was amended March 6, 1990, to provide for published notice of appealable decisions in 36 CFR 217 (55 FR 7892). The 36 CFR 217 appeals process was described in the *Federal Register* notice (54 FR 3343) as:

> The second appeal process, to be codified at 36 CFR 217, involves decisions made during the planning and decisionmaking process and documented according to the National Environmental Policy Act (NEPA) and the National Forest Management Act (NFMA) implementing instructions. It affords interested individuals and organizations who do not have [a] business-type relationship with the agency one more opportunity, following and in addition to their input during the planning process, to seek agency oversight and reconsideration at a higher level. It emphasizes public participation features currently found in planning and future decisionmaking for future actions.

Another important aspect of the new appeals regulations is the emphasis placed on negotiating and resolving disputes (36 CFR 217.12). The Forest Service has been given high marks for using a voluntary alternative means of dispute resolution approach (Reenie 1989). Many groups and individuals have used the administrative appeals process. In January 1986, The Wilderness Society published a handbook entitled "How To Appeal a Forest Plan" to assist its members in challenging plan approvals. (The Wilderness Society also published a companion guide titled "Issues To Raise in a Forest Plan Appeal" in June 1986.) On page 22, the handbook states:

> There are two basic approaches to [a plan] appeal—the shotgun approach where you raise all the issues you can think of, or a more focused approach where you raise a limited number of issues.
>
> A possible compromise is to do an in-depth legal and factual analysis—backed by the affidavits of experts of the issues that are most important to you and then treat issues that are of secondary importance in a more cursory fashion. As long as an issue is discussed, it is preserved for higher levels of appeal and ultimately for court.

Judge Lovell's decision in *Idaho Conservation League* v. *Mumma* confirms that "[p]laintiffs are not excused from their obligation to raise issues at the administrative level" (CV 88–197–M–CCL (D. Mont. decided August 8, 1990) slip op. at 9). Citing the traditional rule that courts should refuse to hear

issues not timely raised during administrative proceedings, the court rejected the plaintiffs' arguments, stating, "[p]laintiffs failed to assert those issues in its administrative appeal. Therefore, plaintiffs are barred from raising these claims on judicial review." The court expressly rejected plaintiffs' arguments that they were entitled to a "public interest" exemption or that the Department's regulations somehow put the Government on notice of plaintiffs' concerns.

The Forest Service has received appeals that cover the spectrum as to the specificity and range of issues raised. However, many of the issues being raised are not ripe at plan approval because they are issues of plan implementation rather than plan approval. See the following decisions in appeals to plans:

- Routt National Forest Appeal of RMOGA (May 25, 1984)—lands designated "no lease" in the forest plan to be relabeled as decision made at more site-specific point.

- Pike and San Isabel National Forests Appeal of Maas #1130 (February 13, 1986)—possible ski area designation affirmed but no final decision or appeal opportunity on whether a ski area would be developed.

- Routt National Forest Appeal of Wahl (April 23, 1986)—assignment of timber harvesting prescription affirmed but no final decision on development, further NEPA, and appeal opportunity).

- Kisatchie National Forest Appeal of Wiener #1378 and #1379 (November 13, 1986)—optimality finding for clearcutting at sale or group of sales decision point.

- Idaho Panhandle National Forests Appeal of Idaho Conservation League #2130 (August 15, 1988)—Panhandle plan did not make decisions on, or disclose the environmental effects of, individual projects in roadless areas not recommended for wilderness designation; future NEPA review must be conducted.

- Flathead National Forest Appeal of Swan View Coalition et al. #1467 and #1513 (August 31, 1988)—planning for units of the national forests involves two levels of decisions (pages 4–9 and 63–65).

- Shoshone National Forest Appeal of Mountain States Legal Foundation #1552 (December 6, 1988)—oil and gas leasing and the Shoshone plan.

Appeals are likely to become more specific and correctly timed as the forest planning process and the Forest Service's plan- and project-level decision-making approach to plan implementation become better understood.

National Environmental Policy Act

The scope of NEPA's application to the Forest Service cannot be overestimated. This is attributable largely to judicial interpretations broadly applying the language of the statute and the Council on Environmental Quality's direction that Federal agencies integrate NEPA compliance with decisionmaking processes (see 40 CFR 1500.2 (c)). Integrating NEPA's procedural requirements with other agency decisionmaking requirements has made it more difficult to distinguish between procedural and substantive obligations.

This NEPA discussion has two focuses. The first examines NEPA as it applies to all Federal agencies. The second examines Forest Service experience with NEPA. This is not meant to be a definitive review, nor are the topics displayed an exhaustive listing of the challenges facing the Forest Service. The intent is to highlight some of the most important NEPA issues facing the Forest Service and other agencies.

The Purpose of NEPA

In the words of the Supreme Court in *Baltimore Gas & Electric Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. at 97 (1982):

> NEPA has twin aims. First, it "places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action." Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process. Congress in enacting NEPA, however, did not require agencies elevate environmental concerns over other appropriate considerations. Rather, it required only that the agency take a "hard look" at the environmental conseqnences before taking a major action.

(See also *Weinberger* v. *Catholic Action of Hawaii*, 454 U.S. 139, 143 (1982).)

The courts have recognized that controversial policy decisions are often at the heart of NEPA lawsuits (*Northwest Coalition for Alternatives to Pesticides (NCAP)* v. *Lyng*, 844 F.2d 588 (9th Cir. 1988); *Natural Resources Defense Council (NRDC)* v. *Hodel*, 819 F.2d 927, 930 (9th Cir. 1987)). It is not surprising that decisions of public land managers (or other Federal decisionmakers) generate debate. Resource allocation decisions regarding wilderness status, recreational opportunities, watershed management, public rangelands, energy and mineral development, and timber production are, as Gifford Pinchot once said, the "many great interests on the National Forests which sometimes conflict a little."

The courts have resisted becoming the arbitrator of these public policy disputes by identifying that the function of NEPA is not to force a particular result (*Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227

(1980)), but to ensure that environmental concerns are available to decision-makers, and that they receive good faith attention from Federal decisionmakers (*Warm Springs Dam Task Force* v. *Gribble*, 565 F.2d 549 (9th Cir. 1977)). The Supreme Court has warned that "administrative proceedings should not be a game or a forum to engage in unjustified obstructionism" (*Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553–54 (1978)).

Public involvement is both necessary and welcome in achieving the twin aims of NEPA. The Forest Service's NEPA procedures (FSM 1950 and FSH 1909.15; see 46 FR 56998 (June 24, 1985), as amended) provide for extensive public involvement in its decisionmaking and opportunities for administrative review of line officer's decisions (36 CFR 217 and 251, Subpart C).

The Courts and NEPA

Congress did not include a judicial review provision in NEPA. As Frederick Anderson (1974) points out, neither the act nor its legislative history mentions judicial review.[5] Without an expressed statement in the legislation, the question of the judicial role was left to the courts to decide. Not surprisingly, the courts normally found that they possessed the authority and ability to review compliance with NEPA. Justice Marshall's dissent in *Kleppe* v. *Sierra Club* may be the quintessential expression of this philosophy:

> In fact, this vaguely worded statute seems designed to serve as no more than a catalyst for development of a "common law" of NEPA. To date, the courts have responded in just that manner and have created such a "common law." (427 U.S. 390, 421 (1976))

Despite consistent Supreme Court rulings that "[t]he role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary and capricious" (*Baltimore Gas & Electric* at 97), a complex and intricate system of procedural requirements has been established through judicial interpretation of NEPA. In one of the early books on NEPA, Anderson (1974) stated:

> The courts have been vigorous in reviewing agency compliance with NEPA. They have enforced strict standards of procedural compliance, and in instances where Congress failed to specify how the Act should be implemented, they have imposed judge-made requirements which give it a wider scope. As a result, the courts are thought of as the principal enforcers of NEPA. Through its procedures, they have expanded and enhanced their roles as overseers of the administrative process for a very large category of agency decision making. (page 16)

In an effort to standardize NEPA compliance and reduce paperwork and delay from NEPA, the Council on Environmental Quality issued regulations in 1978

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[5] Professor Mandelker (1984) writes that "[j]udicial review may not have been contemplated because Congress believed that compliance with NEPA was to be determined by the federal agencies."

attempting to codify existing case law (40 CFR 1500; 43 FR 55, 978 (November 29, 1978)). The Supreme Court has held that while the Council on Environmental Quality's regulatory interpretation is not binding on the courts, their interpretation should be given "substantial deference" (*Andrus* v. *Sierra Club,* 442 U.S. 347, 358 (1979)).

The regulations have only been amended once to account for developments in the case law during the last dozen years. (See 50 FR 15618 (1986) and 50 FR 15846 (1986). Even the courts themselves must give way to evolving interpretations of the law. See, for example *Olmstead Citizens for a Better Community* v. *United States,* 793 F.2d 201, 206 (8th Cir. 1986)—regarding consideration of socioeconomic effects—and *North Buckhead Civic Assn.* v. *Skinner,* 903 F.2d 1533, 1538 (11th Cir. 1990)—adjusting judicial standard of review for environmental impact statement.) Nevertheless, Federal agencies are called on to comply with an ever-expanding body of case law. This presents a substantial challenge to fulfilling statutory missions and congressional objectives. Absent a congressional judicial review preclusion, only the judiciary can apply the "acid test" of legal sufficiency. This forces Federal agencies to operate in an atmosphere of uncertainty regarding their efforts to comply with NEPA.

Congressional Intervention in NEPA

Congress can intervene in NEPA matters in several ways. First, it can directly amend NEPA. This has been done only once; in 1975, Congress amended NEPA to remedy administrative difficulties resulting from a Second Circuit ruling in *The Conservation Society* v. *Secretary of Transportation,* 7 E.R.C. 1236 (1974). (See Public Law 94–83.) Second, Congress may deem existing NEPA documentation as having satisfied NEPA. This was done for the Mount Graham International Observatory (Section 607, Arizona-Idaho Conservation Act, Public Law 100–696). Another method is to exempt activities or programs from NEPA. For example, Congress has exempted all of the Environmental Protection Agency's actions under the Clean Air Act and many of its actions under the Clean Water Act, recognizing the environmentally protective nature of those programs (15 U.S.C. 793(c)(1); 33 U.S.C. 1371(c)(2)). Congress also has enacted legislation exempting specific projects such as the Alaska Pipeline (15 U.S.C. 719h(c)). See *Earth Resources Co.* v. *FERC,* 617 F.2d 775 (D.C. Cir. 1980) (upholding exemption).

But as Mandelker (1984) points out, exemption language

> often provides that action taken under the exempted program shall not constitute a major federal action significantly affecting the environment. This language would exempt the agency from preparing an environmental impact statement. . . . This language would not necessarily exempt the agency from other NEPA requirements which are independent of the impact statement requirement, such as the requirement to consider alternatives. Because the impact statement must also consider alternatives, a court could conclude that the "major federal action" exemption, though literally limited to the impact statement requirement, also includes the independent obligation to consider alternatives. (Chapter 5, page 11)

The courts have agreed that "where a clear and unavoidable conflict in statutory authority exists, NEPA must give way" (*Flint Ridge Development Co.* v. *Scenic Rivers Association*, 426 U.S. 788 (1975)). As a general rule, however, the courts have been reluctant to recognize an "implied" exemption from NEPA (see *Izaak Walton League of America* v. *Marsh*, 655 F.2d 346 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981)).

Appropriation language has been a device for exempting Federal agency NEPA compliance or precluding judicial review of agency compliance. Some have argued that by simply appropriating funds for a project, Congress has evaluated the projects environmental costs and determined to go forward, thus eliminating the need for NEPA compliance. The Supreme Court rejected the implied repeal concept in the Tellico Dam case (*Tennessee Valley Authority* v. *Hill*, 437 U.S. 153 (1978)). Noting the general rule against implied repeal of a statute, the court stated:

> [T]he policy applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act . . . [which has] the limited and specific purpose of providing funds for authorized programs. When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation. . . . (at 190)

Appropriation language has been used to preclude judicial review of agency activities. While this approach has succeeded in some instances, it has not always been successful. An illustration is section 314 of the 1988 Continuing Budget Resolution, which provides:

> The Forest Service and Bureau of Land Management are to continue to complete as expeditiously as possible development of their respective Forest Land and Resource Management Plans to meet all applicable statutory requirements. Notwithstanding the date in section 6(c) of the NFMA (16 U.S.C. 1600), the Forest Service, and the Bureau of Land Management under separate authority, may continue the management of lands within their jurisdiction under existing land and resource management plans pending the completion of new plans. Nothing shall limit judicial review of particular activities on these lands: Provided, however, that there shall be no challenges to any existing plan on the sole basis that the plan in its entirety is outdated, or in the case of the Bureau of Land Management, solely on the basis that the plan does not incorporate information available subsequent to the completion of the existing plan: Provided further, that any and all particular activities to be carried out under existing plans may nevertheless be challenged. (Continuing Resolution, H.J. Res. 395, § 314, Public Law 100–202, 101 Stat. 1329-254, 133 Cong. Rec. H 12468 (daily ed. December 21, 1987))

(The above section was reenacted without change as H.R. 4867 and signed by the President on September 27, 1988, and is now found in Public Law 100–446.)

The Ninth Circuit has ruled that section 314 precludes judicial review of individual Bureau of Land Management timber sales where such an attack would

result in a challenge to the Bureau's underlying plan (*Portland Audubon Society* v. *Lujan*, 884 F.2d 1233 (9th Cir. 1990)). The language has been applied similarly to the Forest Service (*Oregon Natural Resources Council* v. *Mohla*, 884 F.2d 1233 (9th Cir. 1990)). (See also *Marble Mountain Audubon Society* v. *Rice*, Civ. No 5–89–1701 EJG/EM (E.D. Calif. memorandum order filed March 29, 1990) (appealed August 1990), where the finding was that section 314 precludes certain challenges to a fire salvage timber sale environmental impact statement because of the allegation of failure to take into account new scientific studies regarding biological corridors amounts to attack on existing management plans.)

NEPA Disclosure Documents

There are three classes of NEPA documentation: environmental impact statements, environmental assessments, and categorical exclusions. Of the three, only the environmental impact statement has a statutory basis (see NEPA, section 102(2)(C)). Environmental assessments and categorical exclusions are the result of judicial rulings and the Council on Environmental Quality regulations. One of the most fundamental decisions a Federal agency must make in complying with NEPA is determining whether it must prepare an environmental impact statement or may instead proceed with the less formal environmental assessment or categorical exlusion.

Environmental Impact Statements

Section 102(2)(C) of NEPA requires Federal agencies to prepare a "detailed statement" of a proposed project's environmental consequences, including "adverse environmental effects which cannot be avoided," "alternatives to the proposed action," the relationship between "local short-term uses" and "long-term productivity," and "any irreversible and irretrievable commitments of resources." This "detailed statement" is commonly referred to as an *environmental impact statement.*

Section 102 thus assures that all Federal agencies will take environmental concerns into account in their decisionmaking processes. (See *Weinberger* v. *Catholic Action*, 454 U.S. at 143; *Strycker's Bay*, 444 U.S. at 227; *Andrus* v. *Sierra Club*, 442 U.S. at 347, 350–351. See also 40 CFR 1501.1.) But Section 102 does not dictate what actions the agency should take in response to anticipated environmental consequences; indeed, "the Act mandates no particular substantive outcomes" (*City of New York* v. *United States Dep't of Transportation*, 715 F.2d 732, 748 (2d Cir. 1983), cert. denied, 465 U.S. 1055 (1984)). Instead, NEPA leaves substantive decisions to the agency.

As the Fifth Circuit Court of Appeals has noted, "under the laws and regulations governing [Federal agencies], the EIS and other NEPA requirements are but factors in the decisionmaking process; the EIS itself is not a decisionmaking document" (*Sierra Club* v. *Sigler*, 695 F.2d 957, 967 (5th Cir. 1983)). See 40 CFR 1502.2(g); the environmental impact statement serves to assess potential environmental impacts rather than justification for decisions. The Council on Environmental Quality regulations identify that environmental impact statements will normally be less than 150 pages or 300 pages for

complex proposals (40 CFR 1500.4 and 40 CFR 1502.7). In practice though, most forest plan environmental impact statements are more than 500 pages and have hundreds of pages of appendices as well.

Environmental Assessments

An environmental assessment serves the purpose of documenting an agency's consideration of the significance of potential environmental consequences. An environmental assessment also serves to demonstrate agency compliance with section 102(2)(E) of NEPA, which requires that even when an environmental impact statement is not necessary, the agency must study, develop, and describe appropriate alternatives for any proposal that involves unresolved conflicts concerning alternative uses of available resources. (For a discussion of the requirements of section 102(2)(E), see *Bob Marshall Alliance* v. *Hodel*, 852 F.2d 1223 (9th Cir. 1988).)

In its landmark decision, *Fritiofson* v. *Alexander* (772 F.2d 1225 (5th Cir. 1985)), the court exhaustively analyzed the requirements pertaining to the scope of environmental analysis required in an environmental assessment. The court found that while an assessment need not contain the level of analysis required in an impact statement, it must document the environmental consequences of a broader scope of activities than is required in an impact statement (at 1240–43). Still, the time and resources necessary to produce an assessment are substantially less than that necessary to prepare an impact statement. This is a very important consideration to such agencies as the Forest Service that have limited monetary resources to fulfill their statutory obligations.

While the Council on Environmental Quality has indicated that environmental assessments should normally be only 10 to 15 pages in length ("Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," Question 36, 46 FR 18026, 18037; also 40 CFR 1500.4 and 1502.7), the courts have not enforced this view. Indeed, given the factors that the Council has required be considered (40 CFR 1508.27) and the level and scope of analysis required by the courts, it is unclear whether Federal agencies could comply with the strict enforcement of a 15-page limit.

In promulgating the 1978 NEPA regulations, the Council on Environmental Quality (on page 396 of its December 1979 tenth annual report) attempted to accomplish three principal aims—"to reduce paperwork, to reduce delays, and at the same time produce better decisions, thereby better accomplishing the law's objective, which is to protect and enhance the quality of the human environment." (See 43 FR 55978, 55978–80 (November 29, 1978).) The environmental assessment is an important tool in implementing the goals of NEPA and the Council's regulations.

However, bringing environmental consequences into agency decisionmaking was an ongoing process in the Forest Service long before the passage of NEPA. The area where the Forest Service and other Federal agencies have often fallen short of judicial expectations is how the agencies have documented their environmental consideration. In the spirit of the Council on

Environmental Quality regulations, and in the face of limited fiscal resources, the Forest Service has focused its attention on environmental analysis, rather than producing paper trails. Plaintiffs have seized this advantage and used the sometimes limited paper trail to allege nonconsideration. Judicial rules of review have also sometimes precluded evidence demonstrating agency consideration of environmental consequences. (See *California* v. *Block*, 690 F.2d 753, 765–66 (9th Cir. 1982) (wilderness attribute ratings inadmissible) and *National Wildlife Federation* v. *U.S. Forest Service*, 592 F. Supp. 931 (sedimentation information inadmissible).) Thus, the procedural handles of NEPA sometimes provide opportunities to halt activities even though the agency believes it has met the underlying intent of NEPA.

The last decade of NEPA litigation does not show success in meeting the paperwork and reducing delay aims of the Council on Environmental Quality regulations. To meet the rigorous disclosure requirements of NEPA, Federal agencies must anticipate every possible argument and criticism a litigant may raise. This kind of "legal armor plating" has not decreased the amount of paperwork or delay and provides only marginal returns in improving the quality of the decision. The Council's regulations and case law have to a degree led to the very game playing, fly-specking, and chronic fault-finding that they intended to eliminate.

Categorical Exclusions

The Council's regulations direct Federal agencies to define categories of actions that are exempt from the requirements to prepare an environmental impact statement or assessment (40 CFR 1500.5 and 1508.4). The categories are known as categorical exclusions, which are an appropriate and effective way of meeting the intent of NEPA while minimizing administrative cost and delays (Preamble to the Council's regulations, 43 FR at 55979). The Forest Service's direction on the use of categorical exclusions was recently published in the *Federal Register* (54 FR 34533 (August 21, 1989)). (Recently, a Federal Magistrate found that an earlier version of the Forest Service's categorical exclusion procedures were not properly developed, in *Felis Concolor* v. *U.S. Forest Service*, Civ. No. 89–6428–E (D. Or. decided July 12, 1990).)

A leading case on categorical exclusions is *National Trust for Historic Preservation* v. *Dole* (819 F.2d 1164 (D.C. Cir. 1987)). The court held that "[b]y definition, CE's are categories of actions that have been predetermined not to involve significant environmental impacts, and therefore require no further agency analysis absent extraordinary circumstances" (at 1170). (The court also noted that it would apply the "arbitrary and capricious" standard for judicial review of an agency's categorical exclusion determination.) Thus, agencies evaluate the environmental consequences of all activities to be categorically excluded at the time of the rulemaking that creates the categories.

The basis for the regulatory determination of no significant impacts is the experience the agency has gained from prior activities as documented in previous environmental analyses. The agency's responsibilities are then limited to assuring that a proposal is within a category and no exceptional circumstances

exist. Importantly, the court did not equate "significance" and "exceptional circumstances" and expressly held that they are different determinations (at 1169).

However, a district court opinion, *Greenpeace, U.S.A.* v. *Evans* (688 F. Supp. 579 (W.D. Wash. 1987)), analyzed the use of categorical exclusions with a substantially different result. The *Greenpeace* case involved the issuance of a scientific research permit to study killer whales in Puget Sound by the National Marine Fisheries Service. The court found that the Service's procedures equated "exceptional circumstances" with "significance" as defined by 40 CFR 1508.27(b) and that the agency had violated NEPA because it failed to develop an administrative record demonstrating the reasonableness of its decision to use a categorical exclusion. The case also suggests, but does not actually hold, that agencies must study, develop, or describe alternative courses of action even when categorical exclusions are used.

The *Greenpeace* case presents several contradictions to the underlying principles that influenced the development of categorical exclusions. Extensive analysis and documentation conflict with the Council on Environmental Quality's intent to diminish analysis and documentation, streamline NEPA compliance, increase efficiency, and avoid unnecessary paperwork by creating categorical exclusions. (See 40 CFR 1500.4(p).) Taken to its extreme, the case can be read such that there is no difference between a categorical exclusion and an environmental assessment (that is, documentation of consideration of the significance of the proposed action and its alternatives).

At this time, it is impossible to tell what affect the *Greenpeace* case will have ultimately on the use of categorical exclusions; the case serves to highlight the uncertainty facing agencies as conflicting case law is resolved. *Greenpeace* has been cited in at least one subsequent case; see *Progressive Animal Welfare Soc.* v. *Department of Navy*, 725 F. Supp. 475 (W.D. Wash. 1989).

Functional Equivalents

The courts sometimes have recognized an agency action or report as being the "functional equivalent" of an environmental impact statement. The Tenth Circuit has long "permitted a related study to serve as the functional equivalent of an EIS, when the other study 'was very similar in objectives and in content to an environmental impact statement'" (*Sierra Club* v. *Hodel*, 848 F.2d 1068, 1095 (10th Cir. 1988) quoting *State of Wyoming* v. *Hathaway*, 525 F.2d 66, 72 (10th Cir. 1975), *cert. denied*, 426 U.S. 906 (1976)). An excellent summary of "functional equivalency" and related doctrines can be found in *Merrill* v. *Thomas*, 807 F.2d 776 (9th Cir. 1986), where the Ninth Circuit ruled that Congress did not intend for NEPA to apply to the registration of pesticides.

Whether an Environmental Impact Statement Must Be Prepared

Section 102(2)(C) provides that an environmental impact statement must be prepared for every major Federal action *significantly* affecting the quality of the human environment. The Council on Environmental Quality regulations direct Federal agencies to determine the significance of the environmental

consequences of a proposed action based on the criteria set out in 40 CFR 1508.27.

There was no formal procedure for documenting an agency's "negative declaration" of significance until the 1978 version of the Council's regulations. It was not until 1977 that the President directed the Council to make regulations with Government-wide affect regarding compliance with NEPA—Executive Order 11991, May 24, 1977. Until that time, the Council had issued "guidelines" that were not binding on Federal agencies. The courts filled the void by applying three basic principles of law in deciding "no environmental impact statement" cases: (1) standard of review, (2) review on the record, and (3) burden of proof. These principles were codified in the development of the "negative declaration" provisions (environmental assessment/finding of no significant impact) in the 1978 regulations.

Standard of Review

The Administrative Procedure Act governs judicial review of agency action under NEPA (*North Buckhead Civic Assn.*, 903 F.2d 1533, 1539 (11th Cir. 1990); *Sierra Club* v. *Penfold*, 857 F.2d 1307, 1315 (9th Cir. 1988); *Wyoming Outdoor Coordinating Council* v. *Butz*, 484 F.2d 1244, 1249 (10th Cir. 1973)). The Supreme Court recently announced in *Marsh* v. *ONRC* that an agency's determination not to prepare an environmental impact statement is reviewed under the "arbitrary and capricious" standard. (The courts have not been unanimous in selecting the appropriate legal standard for review of agency action under NEPA. Some judicial circuits apply a "reasonableness" standard while others use an "arbitrary and capricious" standard. For a more detailed discussion, see Hoskins (1988).)

The question of whether to prepare an environmental impact statement is initially left to the discretion of the Federal agency (*Hanley* v. *Kleindienst (Hanley II)*, 471 F.2d 823, 828 (2d Cir. 1972); *Jette* v. *Bergland*, 579 F.2d 59, 62 (10th Cir. 1978); *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears* v. *Peterson*, 685 F.2d 678, 681 (D.C. Cir. 1982); *City of Aurora* v. *Hunt*, 749 F.2d 1457, 1468 (10th Cir. 1984)). The legal sufficiency of the agency's decision depends on whether the agency prepared its NEPA documentation in observance of the procedural requirements of NEPA (*Vermont Yankee* at 558; *Baltimore Gas & Electric Co.* at 97; *Citizens for a Balanced Environment* v. *Volpe*, 650 F.2d 455, 460 (2d Cir. 1981); *Save the Yaak Comm.* v. *Block*, 840 F.2d 714, 717 (9th Cir. 1988)). A reviewing court may not interject itself into the agency's statutorily designated area of discretion as to the ultimate choice of action to be taken (*Strycker's Bay*, 444 U.S. at 227–228; *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.21 (1975); *Cabinet Mountains* at 684; *Citizens for a Balanced Environment* at 460; *Friends of Endangered Species* v. *Jantzen*, 760 F.2d 976, 986 (9th Cir. 1985)).

Review on the Record

Federal agencies have an affirmative duty to prepare a reviewable record when making the threshold determination whether a proposed Federal action requires the preparation of an environmental impact statement (*Hanley* v. *Mitchell*

(Hanley I), 460 F.2d 640, 467 (2d Cir. 1972); *Citizen Advocates for Responsible Expansion, Inc. (CARE)* v. *Dole*, 770 F.2d 423, 433 (5th Cir. 1985); *First National Bank of Chicago* v. *Richardson*, 484 F.2d 1369, 1381 (7th Cir. 1973); *LaFlamme* v. *FERC*, 852 F.2d 389, 399 (9th Cir. 1988)). Generally, judicial review of agency action is limited to the review of the administrative record in existence at the time of the agency's decision (*Sierra Club* v. *Hodel*, 848 F.2d 1068, 1093 (10th Cir. 1988); *Friends of the Earth* v. *Hintz*, 800 F.2d 822, 828 (9th Cir. 1986); *CARE* at 433). The record is necessary to demonstrate that the agency took the requisite "hard look" at the environmental consequences of the proposal at the time of the decision and that the agency understood its statutory obligations under NEPA (*Kleppe* at 410 n. 21; *Natural Resources Defense Council* v. *Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972); *Sierra Club* v. *Peterson*, 717 F.2d 1409, 1413 (D.C. Cir. 1983); *LaFlamme* at 399; *Kelly* v. *Butz*, 404 F. Supp. 925, 934 (D. Wisc. 1975)).

Burden of Proof

The Supreme Court's recent decision on the standard of review in *Marsh* v. *Oregon Natural Resources Council ONRC* (____ U.S. ____, 109 S.Ct. 1851 (1989)) may have implications for how the burden of proof will be handled in environmental assessment cases. In at least one case, the Government has argued that *Marsh* alters the traditional burden-shifting approach to one where plaintiffs must demonstrate that there will be significant affects (*Oregon Natural Resources Council* v. *Grossartn*, CV 89–6451–E (D. Or.) (Federal Defendants Memorandum in Opposition to Plaintiffs Motion for Summary Judgment and Permanent Injunction, March 2, 1990)).

While it may change as the courts sort out the implications of the *Marsh* case, the traditional approach has been that when an environmental assessment/finding of no significant impact is challenged in court, the initial burden of proof lies with the plaintiff (*Sierra Club* v. *Hodel* at 1089; *Park County Resources Council* v. *USDA*, 817 F.2d 609, 621 (10th Cir. 1987)). To prevail, the plaintiff need only allege facts that, if true, show that the proposed project *may* significantly affect some environmental factor (*Save Our Ten Acres* v. *Kreger*, 472 F.2d 463, 467 (5th Cir. 1973); *City of Davis* v. *Coleman*, 521 F.2d 661, 673 (9th Cir. 1975); *Foundation for Northern American Wild Sheep (FNAWS)* v. *USDA*, 681 F.2d 1172, 1178 (9th Cir. 1982); *State of Louisiana* v. *Lee*, 758 F.2d 1081 (5th Cir. 1985); *Save the Yaak* at 717). A showing that significant effects *will in fact* occur is not necessary (*City of Davis* at 673; *City and County of San Francisco* v. *United States*, 615 F.2d 498, 500 (9th Cir. 1980); *FNAWS* at 1178; *Fritiofson* at 1238 n.7; *Sierra Club* v. *U.S. Forest Service*, 843 F.2d 1190, 1193 (9th Cir. 1988)).

If there is a substantial question regarding whether or not a proposed action may have a significant effect on the quality of the human environment, an environmental impact statement must be prepared (*Minnesota Public Interest Research Group* v. *Butz*, 498 F.2d 1314, 1320 (8th Cir. 1974); *Columbia Basin Land Protection Assn.* v. *Schlessinger*, 643 F.2d 585, 597 (9th Cir. 1981); *FNAWS* at 1181; *Sierra Club* v. *USFS* at 1193). Thus, the function of the environmental assessment/finding of no significant impact is to conclusively

demonstrate that the proposal will have no potentially significant environmental consequences and therefore the agency can avoid the procedural requirement of preparing an impact statement (*State of Louisiana* v. *Lee* at 1085). According to *Sierra Club* v. *Penfold* (at 1312), "If the proposed action will not significantly affect the environment, the agency can issue a finding of no significant impact." According to *Cabinet Mountains* (at 682), "If, however, the proposal is modified prior to implementation by adding specific mitigation measures which completely compensate for any possible adverse environmental impacts stemming from the original proposal, the statutory threshold of significant environmental effects is not crossed and an EIS is not required." (See discussion in the text regarding mitigation and findings of no significant impact.)

The Scope of NEPA Analysis

One of the most fundamental questions facing interdisciplinary teams conducting NEPA analyses is determining the scope of the analysis to be conducted. Preparers must have a clear understanding of what is the proposed action and its relationship to past, ongoing, and future decisions to effectively and efficiently prepare NEPA documentation. This is not always an easy task. The Council on Environmental Quality regulations work very well when a single, one-time project is being considered. However, the operation of the regulations tends to become confused when multiple or ongoing projects are evaluated. Much of this confusion is the result of the Council's artificial segmentation of effects (direct, indirect, secondary, cumulative, connected, and so on); see 40 CFR 1502.16. Attempts to categorize environmental consequences have baffled both courts and agencies. Agency (and subsequently judicial) time and resources would be better spent considering and disclosing all significant environmental effects rather than worrying over how to categorize or label them.

The Forest Service gives early and careful consideration to the nature and scope of a proposed action. The courts have held that Federal agencies have great discretion in determining the scope of the proposal it wishes to consider (*California* v. *Block* at 753, 765; *NCAP* v. *Lyng* at 588), but such discretion does not allow the agency to determine the specificity of environmental disclosure required by NEPA (*City of Tenakee Springs* v. *Block*, 778 F.2d 1402, 1407 (9th Cir. 1985)). The Council on Environmental Quality regulations state that a *proposal* "exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated" (40 CFR 1508.23). The regulations recognize essentially both programmatic and site-specific NEPA analysis. They address programmatic NEPA documentation in several places; see 40 CFR 1508.18(b)(3), 1500.4(i), 1502.4, and 1502.20.

Forest Service Litigation Involving Programmatic Environmental Impact Statements

There are several NEPA cases involving Forest Service use of programmatic environmental impact statements. To demonstrate the Forest Service's historical use of these impact statements, five cases that typify the Forest

Service's experiences are discussed below. The courts have found that the critical elements in determining NEPA compliance for programmatic documents are the nature and scope of the decision being made and the agencies' commitment to future NEPA compliance. Analyzing the issue of "programmatic" versus "site-specific" NEPA documentation is best approached as a question of the *scope* of the proposed action and decision being made, rather than how to *label* a NEPA document. The key is that the fulfillment of NEPA must coincide with the irretrievable commitment of resources.

California v. *Block*

In *California* v. *Block* (690 F.2d 753 (9th Cir. 1982)), the programmatic NEPA documentation in question was the environmental impact statement for RARE II—a nationwide, site-specific, roadless area management review and allocation of 62 million acres of National Forest System lands. The Forest Service did not intend to prepare further NEPA documentation regarding the environmental consequences of the wilderness/nonwilderness determination. The Ninth Circuit stated (at 761) that "the critical inquiry in considering the adequacy of an EIS prepared for a large scale, multi-step project is not whether the project's site-specific impact should be evaluated in detail, but when such detailed evaluation should occur." The court went on to state that "[t]his threshold is reached when, as a practical matter, the agency proposes to make an 'irreversible and irretrievable commitment of the availability of resources' to a project at a particular site." The court (at 765) found that a decisive allocative decision had been made to commit 32 million acres to nonwilderness uses and therefore the Forest Service was obligated to consider the environmental impacts of this decision. While the court recognized the enormity of this task, it would not excuse the absence of site-specific analysis, stating that "[t]he scope of the undertaking here, however, was the Forest Service's choice and not the courts'." In other words, the court said that it is up to the agency to decide how big a bite of the apple it wishes to take, and in this case, the agency had bitten off more than it could chew.

City of Tenakee Springs v. *Block*

In *City of Tenakee Springs* v. *Block* (778 F.2d 1402 (9th Cir. 1985)), the action challenged was the construction of a prelogging road on the Tongass National Forest. In 1979, the Forest Service completed the Tongass Land Management Plan, with an accompanying programmatic environmental impact statement covering the entire forest for a 10-year period. In 1980, the Forest Service issued a "site-specific" environmental impact statement describing the 1981 to 1986 Five Year Operating Plan for the Alaska Lumber & Pulp Co.'s 50-year timber sale contract. No further NEPA compliance was prepared. Plaintiffs sought to enjoin the construction of an 11-mile section of preroading. After reviewing the forest plan and associated impact statements, the court stated that "[a]lthough the agency does have discretion to define the scope of its actions, such discretion does not allow the agency to determine the

specificity required by NEPA" (at 1407, citation omitted). Thus, the court found that despite having prepared two environmental impact statements, the Forest Service had still not documented an environmental analysis sufficiently detailed (that is, site-specific) to describe the environmental consequences of the project-level activities it wished to conduct.

In *Tenakee Springs* v. *Courtright,* No. J86-024 (D. Alaska June 24, 1987), the district court similarly found that there was insufficient site-specific detail regarding the effects of alternative road and harvest configurations on fish and wildlife resources to allow the construction of a proposed 8.8-mile road into a previously unroaded upper portion of a watershed (at 10). The court also concluded that the 1981–1986 Operating Plan for the 50-year APC contract, without further supplementation, was inadequate under NEPA for any other contracts under the 5-year operating plan (at 12).

Ventling v. *Bergland*

The *Ventling* v. *Bergland* case (479 F. Supp. 174 (D.S.D.), *aff'd,* 615 F.2d 1365 (8th Cir. 1979)) resulted from the Forest Service's decision to conduct four timber sales on the Black Hills National Forest. The Forest Service had prepared an environmental impact statement for the Forest Timber Management Plan in 1977. In 1978, the forest prepared an environmental analysis report for the four timber sales. The court determined that "[it] is clear that the Timber Management Plan for the entire Forest would have the type of cumulative or synergistic environmental impact upon the region that requires the preparation of a programmatic impact statement" (at 179). The court went on to hold that:

> It is recognized that a programmatic EIS will often be insufficient as it relates to site-specific actions. The EIS may not be detailed enough to satisfy the requirements of NEPA. Or, the program may be so broad in scope that a site-specific EIS is the only manner in which the objectives of NEPA can be met. But, where the programmatic EIS is sufficiently detailed, and there is no change in circumstances or departure from the policy in the programmatic EIS, no useful purpose would be served by requiring a site-specific EIS. (at 180, citations omitted)

However, the court found that before the agency may determine that a site-specific environmental impact statement is not necessary, the agency has an obligation to consider and document that the conditions cited above (the programmatic environmental impact statement is sufficiently detailed and there are no changes in circumstances or policy) have been met. The court stated:

> It is expected that the Forest Service will prepare Environmental Analysis Reports on future timber sales in the Black Hills National Forest. If the EAR reveals significant differences between the specific site and the prevalent conditions examined in the programmatic EIS, a site-specific EIS would be required. Likewise, a departure from the policy scrutinized in the programmatic EIS would necessitate a site-specific EIS. Absent such circumstances individual actions taken pursuant to the Timber Management Plan should not require subsequent statements. (at 180)

National Wildlife Federation v. *United States Forest Service*

In *National Wildlife Federation* v. *U.S. Forest Service* (592 F. Supp. 931 (D. Or. 1984), vacated in part, appeal dismissed as moot), the Federation challenged the Forest Service's NEPA compliance for the Seven Year Action Plan on the Mapleton Ranger District of the Siuslaw National Forest. The Forest Service argued that the Seven Year Action Plan was a "flexible planning schedule" and not a "major federal action" within the meaning of 40 CFR 1508.23. The court disagreed, finding that the Seven Year Action Plan was within the meaning of "major federal action" (at 939). The Forest Service argued in the alternative that the 1979 environmental impact statement for the Timber Resources Plan and the environmental assessments prepared for each proposed timber sale fulfilled the requirements of NEPA. The court stated that a "programmatic environmental impact statement presents a broad-based, long-range plan that discusses the overall impacts of a proposed action" (at 940 n.17) and held that the 1979 impact statement was programmatic in nature.

The court ruled that the Forest Service could in theory comply with NEPA by preparing a programmatic environmental impact statement and site-specific environmental assessments (at 941). The court found that the land area involved was not "homogeneous" as was the situation in the *Ventling* case (at 941). After reviewing the programmatic statement and site-specific environmental assessments that had been prepared for timber sales listed in the Seven Year Action Plan, the court held that the existing documents taken together did not fulfill the Forest Service's NEPA obligations (at 941–942).

Thomas v. *Peterson*

In *Thomas* v. *Peterson* (753 F.2d 754 (9th Cir. 1985)), the plaintiffs sought to enjoin the construction of a logging road. The plaintiffs' NEPA challenge centered on the failure of the Forest Service's environmental assessment to consider the cumulative and combined environmental effects of future timber sales associated with the road (at 757). The Forest Service based its defense on the theory that the cumulative effects could be analyzed in subsequent assessments and/or impact statements that would be prepared for future individual timber sales (at 760). The court found that the Forest Service had not demonstrated sufficient "independent utility" of the road apart from the timber sales (at 759–760). Thus, for NEPA purposes, the consideration of the environmental effects of the road could not be severed from the consideration of the environmental effects of the timber sales. The court then held that because the projects were related, the timing of the NEPA compliance was governed by the earlier rather than the later event. The court's rationale was that "[t]he location, the timing, or other aspects of the timber sales, or even the decision whether to sell any timber at all affects the location, routing, construction techniques, and other aspects of the road, or even the need for its construction. But the consideration of cumulative impacts will serve little purpose if the road has already been built" (at 760). Countering the Forest Service's argument that future sales were too far in the future to analyze, the court stated, "if the

sales are sufficiently certain to justify construction of the road, then they are sufficiently certain for their environmental impacts to be analyzed along with those of the road" (at 760).

This case demonstrates several important features related to programmatic environmental impact statements. Despite the fact that the environmental assessment was not labeled as "programmatic," once cumulative effects and connected actions were identified, the court ordered that they must be analyzed. In other words, even though a document is "site-specific," there may be cumulative effects that were not addressed in previous "programmatic" documentation that must be analyzed. An example of this can be found in *Sierra Club* v. *Penfold,* 659 F. Supp. 965 (D. Alaska 1987). In this case, the Sierra Club challenged the Bureau of Land Management's failure to prepare environmental impact statements prior to approval of placer mining claims in the watershed of a designated national wild river. The Bureau contended that a cumulative impacts analysis was not necessary, but in the alternative argued that its 1984 environmental impact statement for the Resource Management Plan for the Steese National Conservation Area had already considered the cumulative impacts (at 969). The court stated, "[w]hile the Steese EIS may be entirely adequate for its intended function—to review alternative plans for management of the Conservation Area—it simply cannot be stretched to . . . defend this suit" (at 970). Thus, simply having a programmatic environmental impact statement does not guarantee compliance with the requirement to consider cumulative impacts.

Thomas also shows that the key to conducting cumulative impacts analysis is the specific project(s) involved. While specific projects must be evaluated in the context of past, present, and reasonably foreseeable future activities in the affected geographic area, it is the *activity,* not the *geographic area,* that drives the NEPA compliance. The case also demonstrates the reluctance of courts to permit staged NEPA compliance when no environmental impact statement has been prepared—that is, courts are more willing to allow agencies to conduct their NEPA compliance on a series of distinct decisions when a sufficient overview has been conducted.

Current Forest Service Use of Programmatic Environmental Impact Statements

The most significant group of programmatic environmental impact statements are those accompanying the land and resource management plans.[6] The plans and records of decision have specified that these documents are programmatic

[6] There is some question whether and environmental impact statement need really be prepared in association with the forest plans. NFMA granted the Secretary the authority to promulgate rules to determine "when and for what plans an EIS is required under [NEPA]" (16 U.S.C. 1604(g)(1)). The current regulations provide for producing and environmental impact statement (36 CFR 219.10(b)). However, agency interpretations of statutes are not written in stone and may be adjusted from time to time. The Supreme Court has made it clear that this does not diminish the deference due the agency's new interpretation (*Chevron U.S.A., Inc.* v. *NRDC,* 104 S.Ct. 2778, 2792 (1984)). The courts also have agreed that an agency is entitled to

in nature and do not normally contain site-specific decisions—for example, see the Monongahela National Forest Land and Resource Management Plan's Record of Decision, pages 6 and 49, and the Flathead National Forest Land and Resource Management Plan's Record of Decision, page 3. Other types of environmental impact statements, however, have been both programmatic and site-specific in nature—for example, see "Oil and Gas Exploration and Leasing" within the Washakie Wilderness Draft Environmental Impact Statement, which states on page 1, "[t]he actions dealt with in this EIS fall under both a project and program type of EIS."

Insect control is another area where the Forest Service is using programmatic documents. One of the most litigated insect control environmental impact statements is the USDA's Gypsy Moth Suppression and Eradication Control Program Environmental Impact Statement. It is an excellent example of a "programmatic" document as the record of decision does not authorize any site-specific activities to be conducted, but only decides that the USDA will participate in cooperative suppression and eradication programs that meet certain criteria. The Ninth Circuit has found this programmatic environmental impact statement legally sufficient (*Oregon Environmental Council* v. *Kunzman*, 817 F.2d 484 (9th Cir. 1987)). Other programmatic statements in use or being developed are the vegetation management environmental impact statements being prepared by several Forest Service regions.

Post-Programmatic NEPA Documentation

Once programmatic NEPA documentation has been completed, the agency must determine what, if any, additional NEPA documentation must be prepared before implementing project-level activities. As indicated above, if the agency has completed a programmatic environmental impact statement, there will normally not have been a "critical decision" irreversibly and irretrievably committing resources to a particular project at a particular site. Thus, the agency must still consider the environmental significance of its project-level, site-specific activities. Circumstances may be such that the site-specific impacts of activities were adequately considered in the programmatic NEPA analysis.

The forest plan environmental impact statements make up the majority of the Forest Service's programmatic NEPA documents. The determination that the plans are not generally site-specific is a long-standing administrative judgment. This determination has also been made by the Chief in his April 23, 1986,

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great deference when interpreting its own NEPA regulations (*Sylvester* v. *U.S. Army Corps of Engineers*, 871 F.2d 817 (1988)). Furthermore, the nature of the plans could well fit within the category of activities that are exempt from NEPA as having an essentially environmental protection function, or at least under the functional equivalency theory. Given the nature of the forest plan as the starting point for future decisionmaking, one could question the efficiency of devoting so much energy and expense to a document whose effect is felt only after the implementing decision is recycled through the very same legal and decisionmaking process.

administrative appeal decision on the Routt National Forest Land and Resource Management Plan (NFS #1010). (See also the Chief's appeal decisions for the Flathead National Forest plan (NFS #1497/1513) and the Idaho Panhandle National Forests plan (NFS #2130).) In the Routt appeal, the appellants alleged the plan's final environmental impact statement was insufficient because the location and extent of local roads, road closures, and timber sales were not disclosed. The Chief determined that this information was not required to be included in the final environmental impact statement because the plan and statement "identif[y] the resource management practices, the projected levels of production of goods and services and management, and the location where various types of resource management activities may occur on the Routt National Forest." The Chief also stated that "[d]etailed site-specific decisions and concomitant impacts are beyond the scope of the plan. Such decisions are more properly addressed at the project level" (NFS #1010 at 12).

Judge Lovell's decision in *Idaho Conservation League* v. *Mumma* confirms this interpretation of the nature of the forest plans (CV 88–197–M–CCL (D. Mont. decided August 8, 1990)). This case involved a challenge by environmental plaintiffs to the Chief's administrative appeal decision affirming the roadless area evaluation in the forest plan of the Idaho-Panhandle National Forests. The plaintiffs sought to litigate the forest plan's compliance with NFMA, NEPA, and the Administrative Procedure Act. The plaintiffs initially argued that the assignment of nonwilderness management prescriptions in the forest plan constituted an irreversible commitment to develop those roadless areas. The Chief's appeal decision had refuted plaintiffs' characterization, stating that the Forest Service uses a staged decisionmaking process and that the forest plan did not make project-level decisions. In rejecting the plaintiffs' position, the court noted:

> The plan does not deal with any specific development of those areas which were designated as non-wilderness. It does not even propose any future development; it merely allows for the possibility of development in the future. (at 5–6)

The court noted that "[i]n this case any future development which might take place will again be determined by the Forest Service and will be subject to the requirements of NEPA" (at 6).

The court later addressed plaintiffs' claims that the Forest Service had not adequately considered the economic and environmental consequences of its decision. The plaintiffs had originally claimed that because forest plans make site-specific decisions, they must include site-specific disclosure. Judge Lovell responded to plaintiffs' backing away from this position during the litigation as follows:

> There is no question that the Forest Service must consider the economic and environmental aspects of its decisions in developing the Plan. However, the parties now agree that because the Plan does not make an "irretrievable commitment" of resources, this evaluation does not need to be the site-specific evaluation which is required when there is a specific proposal for development in as specific area. (at 12)

The court went on to find ample evidence that economic and environmental aspects were appropriately considered given the nature of the forest plan decision.

The forest supervisor or other responsible official reviews the plan's environmental impact statement to determine whether or not it provides sufficient NEPA coverage for a project-level, site-specific activity. In holding that the environmental impact statement for the Boundary Waters Canoe Area Management Plan was sufficient, except with regard to future timber sales, the court in *Minnesota Public Interest Research Group* v. *Butz* (541 F.2d 1292 (8th Cir. 1976)) stated:

> The Plan and EIS are designed to serve as the Forest Service's major decision-making tools for ten years. Yet neither contain any criterion, beyond that relating to the existing sales, for determining what sites are to be logged, when the logging will take place, at what rate the logging will take place or what species will be logged.
>
> * * *
>
> The EIS before us is adequate in most respects. However, more specific information is needed to apprise the decision makers as to where, when, what species of trees, and at what rate logging will occur in the Portal Zone throughout the life of the Plan. (at 1306)

Thus, even though the document was sufficient as a programmatic environmental impact statement, it was not adequate as to the site-specific analysis necessary to conduct specific future projects.

Although not referring to a plan's environmental impact statement, the court in *Tenakee Springs* v. *Courtright* found a similar need for full disclosure of site-specific impacts when it stated:

> The election to combine study of the Upper Game Creek project with study of other operations does not reduce the agency's obligation to provide information and analysis specifically relevant to the Upper Game Creek project, *Tenakee I*, 778 F.2d at 1407. The project complies with NEPA only if the 81–86 EIS contains as much information and analysis applicable [to] Upper Game Creek as would be required in a full EIS addressed solely to Upper Game Creek. (at page 9)

Because the forest supervisor or other responsible official's determination will in most instances be that a full site-specific analysis has not been disclosed in the plan's final environmental impact statement, the next question to be resolved is: What additional NEPA analysis is required? The answer will of course depend on the type, size, and other relevant details of the proposed action. The responsible official must follow the Council on Environmental Quality's NEPA regulations and the Forest Service NEPA procedures to conduct this review.

Tiering

"Tiering" involves the relationship of site-specific NEPA disclosure and programmatic NEPA disclosure. The tiering concept is identified in the Council on Environmental Quality regulations at 40 CFR 1502.20 and 1508.28.

Tiering promotes the goal of reducing duplication and delay by eliminating repetitive discussions of the same issues. (See 40 CFR 1500.4(i), 1502.4(d), 1502.20.) It is not a device for issue avoidance. As described in 40 CFR 1508.28, tiering refers to incorporation by reference (40 CFR 1502.21) of general discussions previously discussed in broader impact statements to allow concentration on the issues specific to the new proposed action being considered. Recently, some groups have confused "tiering" with the NFMA consistency requirement. As used in NFMA, consistency is a substantive restriction on management activities that guarantees that future decisions will be in accord with a forest plan's management or direction. Tiering, on the other hand, is merely a procedural mechanism that allows Federal agencies to not repeat in one environmental disclosure document what was already stated in previous documents. It is simply a method of implementing the familiar and sensible concept of staged project decisionmaking. According to Dannenbring and Starr (1981), page 548: "A project is itself a combination of many varied and complex tasks or activities. These tasks are interdependent in that most cannot begin until some other task has been completed."

The Cumulative Effects Paradox

One of the most hotly debated NEPA issues today is "cumulative effects" analysis. The requirement to consider "cumulative effects" and "connected actions" is found at 40 CFR 1508.25. As discussed above, the courts have frequently found that unit plan or mid-level planning impact statements are inadequate to fulfill NEPA and other environmental laws for decisions on individual activities and projects. The Council on Environmental Quality suggests that "when an area-wide or overview EIS is prepared for projects that share common timing or geography, [the] area-wide EIS should be followed by site-specific or project specific EISs" ("Forty Questions," 46 FR at 18033).

The recent Silver Fire Recovery Project case illustrates the potential difficulty in preparing site-specific environmental impact statements that cover large areas or multiple projects (*National Wildlife Federation* v. *U.S. Forest Service*, No. 88–752–RE (D. Or. July 29, 1988)). The Forest Service devoted unprecedented resources to the production of a detailed impact statement on proposed fire recovery actions in a 43,000-acre area. Even though the court concluded that the statement contained adequate site-specific information, the court cautioned that preparing an environmental impact statement for such a large area was "risky" without tiering to subsequent site-specific NEPA documentation.

Attempts to address a multitude of projects in a single environmental impact statement may be a reaction to recent "cumulative effects" cases, such as *Thomas* v. *Peterson, Save the Yaak Committee* v. *Block*, and *Sierra Club* v. *U.S. Forest Service*. In *Save the Yaak* (at 714), an environmental assessment for the reconstruction of a 17-mile section of a 70-mile road was found to have violated NEPA in three ways. First, the assessment failed to adequately consider the effects, particularly on grizzly bears and other wildlife, of reconstructing the 17-mile segment. Second, the agency again failed to consider the effects of "connected actions"—in this case, other segments of the road reconstruction project and timber sales that justified the project. Third, the

assessment did not evaluate the cumulative effects of the "connected actions and unrelated, but reasonably foreseeable, future actions." As a result, the court prohibited further reconstruction and timber sales.

In *Sierra Club* (at 1190), the court found that the Sierra Club had presented facts to show that the nine proposed timber sales may significantly degrade some environmental factor within the terms established by 40 CFR 1508.27(b). First, based on the comments and testimony of the plaintiff's experts, there was substantial controversy regarding the effects of the proposal. Second, the plaintiff's experts had raised substantial questions regarding the existence of unknown risks in modified clearcutting of sequoia groves. Third, the court concluded that the plaintiffs had raised substantial questions as to whether the nine timber sales may have significant cumulative effects. Finally, the court found that the Sierra Club presented facts suggesting that harvesting of the nine timber sales may violate California's water quality standards.

It is important to recognize that these cases involved the use of environmental assessments where the court found that the Forest Service's finding of no significant impact was unreasonable because the assessments did not adequately address connected actions and the cumulative effects of proposed and contemplated actions. As identified above, the scope of activities to be analyzed in an assessment is broader than that which must be reviewed in an impact statement.

Recent administrative appeals and litigation demonstrate that the Forest Service is being whipsawed by contentions that NEPA documents do not adequately consider connected actions and cumulative effects and that the NEPA documents are not sufficiently site-specific or contain an inadequate range of alternatives to the proposed actions.

The Ninth Circuit has provided a very useful discussion for those examining the question of which activities should be considered together. In *Sylvester* v. *U.S. Army Corps of Engineers*, 871 F.2d 817, 822 (1989), the court stated:

> Environmental impacts are in some respects like ripples following the casting of a stone in a pool. The simile is beguiling but useless as a standard. So employed it suggests that the entire pool must be considered each time a substance heavier than a hair lands upon its surface. This is not a practical guide. A better image is that of scattered bits of a broken chain, some segments of which contain numerous links, while others have only one or two. Each segment stands alone, but each link within each segment does not.

In exercising its discretion to determine the scope of an environmental impact statement, the Forest Service must carefully consider the incentive to group several projects into a single statement, and thereby consider the broad cumulative effects, against the requirement to document detailed site-specific information and reasonable alternatives for each individual proposed action.

Efforts to combine multiple proposed and contemplated actions can result in several problems, including (1) difficulties in focusing on specific proposals,

(2) the broad scope impeding the required documentation of site-specific impacts, (3) the mix of multiple proposals preventing a clear presentation of the reasonable alternatives that were considered, and (4) as a result of these difficulties, additional NEPA documentation on individual projects being needed before conducting the activities. A more manageable approach is to limit each environmental impact statement to only a few related actions currently ripe for decision. In an environmental impact statement, less imminent activities should be identified, but the full site-specific analysis may be deferred. This is consistent with recent Chief's Office direction. (See the memorandum of Deputy Chief Overbay, "Implementation of Forest Plans," dated February 6, 1989.)

Alternatives

Section 102(2)(C)(iii) of NEPA requires that an environmental impact statement include alternatives to the proposed action. Section 102(2)(E) requires the study and development of alternatives whether or not an impact statement is prepared when a proposal "involves unresolved conflicts concerning alternative uses of available resources." (This discussion focuses on alternatives considered in an environmental impact statement. Agency consideration of alternatives in an environmental assessment may be expected to be somewhat more narrow than those considered in an environmental impact statement (*City of New York* v. *Dept. of Transportation*, 715 F.2d 732, 742 n. 10 (2d Cir. 1983); *Olmstead Citizens for a Better Community* v. *United States*, 793 F.2d 201 (5th Cir. 1986); *River Road Alliance, Inc.* v. *Corps of Engineers of United States Army*, 764 F.2d 445, 452 (7th Cir. 1985), *cert. denied*, 106 S.Ct. 1286 (1986)—"But the smaller the impact, the less extensive a search for alternatives can the agency reasonably be expected to conduct.")

While the alternatives section of an environmental impact statement has been called the "linchpin" (*Monroe County Preservation Council, Inc.* v. *Volpe*, 472 F.2d 693, 699–700 (2d Cir. 1972)), an impact statement need only set forth those alternatives necessary to permit a reasoned choice (*Life of the Land* v. *Brinegar*, 485 F.2d 460, 472 (9th Cir. 1973); *Save Lake Washington* v. *Frank*, 641 F.2d 1330, 1334 (9th Cir. 1981)). NEPA does not require exhaustive detail regarding alternatives, only the furnishing of information to enable those who did not have a part in compiling the environmental impact statement to understand and consider meaningfully the factors involved (*Sierra Club* v. *Marsh*, 772 F.2d 1043, 1054 (2d Cir. 1985)). Commentors have a duty to structure their participation regarding other alternatives so that it is meaningful (*Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553 (1978); *City of Angoon* v. *Hodel*, 803 F.2d 1016, 1022 (9th Cir. 1986), *cert. denied*, ____ U.S. ____, 108 S.Ct. 197 (1987)). It is not enough to make a facially plausible suggestion; rather, the commentor must offer a specific, detailed counterproposal (*City of Angoon* at 1022; *Friends of the Earth* v. *Coleman*, 513 F.2d 295, 298 (9th Cir. 1975)). Some courts have indicated that commentors must provide tangible evidence that their alternative may offer a substantial measure of superiority (*New England Coalition on Nuclear Pollution* v. *NRC*, 582 F.2d 87, 95–96 (1st Cir. 1978)—"obvious superiority"; *Roosevelt Campobello International Park* v. *U.S. EPA*, 648 F.2d

1041, 1047 (1st Cir. 1982)—substantially preferable; *Seacoast Anti-Pollution League* v. *NRC*, 598 F.2d 1221, 1228–1233 (1st Cir. 1979)).

The U.S. Supreme Court in *Vermont Yankee Nuclear Power Corp.* v. *NRDC* at 551 (citations omitted), discussed alternatives to the proposed action, stating:

> But, as should be obvious even upon a moment's reflection, the term "alternatives" is not self-defining. To make an impact statement something more than an exercise in frivolous boilerplate the concept of alternatives must be bounded by some notion of feasibility. As the Court of Appeals for the District of Columbia Circuit has itself recognized:
>
> > "There is reason for concluding that NEPA was not meant to require detailed discussion of the environmental effects of 'alternatives' put forward in comments when these effects cannot be readily ascertained and the alternatives are deemed only remote and speculative possibilities, in view of basic changes required in statutes and policies of other agencies—making them available, if at all, only after protracted debate and litigation not meaningfully compatible with the time-frame of the needs to which [the] underlying proposal is addressed."
>
> Common sense also teaches us that the "detailed statement of alternatives" cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man. Time and resources are simply too limited to hold that an impact statement fails because the agency failed to ferret out every possible alternative, regardless of how uncommon or unknown that alternative may have been at the time the project was approved.

Range of Alternatives

Several lawsuits and administrative appeals have raised the question of whether the forest plan environmental impact statements considered and displayed adequate alternatives regarding forest resources and management practices—for example, *Idaho Conservation League* v. *Mumma*, CV 88–197–M–CCL (D. Mont. decided August 8, 1990), *Nevada Land Action Assn.* v. *U.S.*, CV–S–88–889–HDM(LRL) (D. Nev.), timber harvest methods in NFS #1378/1379 (Kisatchie National Forest) and in NFS #1300 (Francis Marion-Sumter National Forests), timber projections in NFS #1435 (Medicine Bow National Forest), roading in NFS #1010 (Routt National Forest), grizzly bears and old growth in NFS #1497/1513 (Flathead National Forest), fish in NFS #1575/1596 (Beaverhead National Forest), and wilderness in NFS #2130 (Idaho Panhandle National Forests).

The courts have identified that the scope of the proposed action fundamentally defines the range of the alternatives (*NCAP* v. *Lyng* at 593). Given the nature of the forest plan as a framework for managing all multiple uses rather than as an absolute commitment to conducting a specific set of projects, the final environmental impact statement reflects the estimation and consideration of outputs and activities that can reasonably be expected to be produced. Thus, there is really very little environmental impact associated with the programmatic approval decision. The range of alternatives that reasonably must be considered by a Federal agency decreases as the environmental impact of its proposed

action becomes less substantial (*Olmstead Citizens For A Better Community* v. *United States*, 793 F.2d 201 (5th Cir. 1986)).

As stated above, an agency need only set forth those alternatives necessary to permit a "reasoned choice." The Council on Environmental Quality regulations (40 CFR 1502.14(a)) require only a brief discussion of the reasons for eliminating an alternative from detailed consideration. The courts have confirmed that the specificity of treatment of alternatives is within the sound discretion of the agency (*Vermont Yankee* at 551; *North Slope Borough* v. *Andrus*, 642 F.2d 589, 601 (D.C. Cir. 1980); *City of New York* v. *United States Dept. of Transportation*, 715 F.2d 732, 742 (2d Cir. 1983)). Alternatives may be rejected for nonenvironmental reasons (*Valley Citizens for a Safe Environment* v. *Alderidge*, 695 F. Supp. 605, 611 (D. Mass. 1988)).

In applying the "rule of reason," the courts have provided guidance to help define what are reasonable alternatives. The criteria listed below represent a synthesis of the criteria the courts have applied in determining what is a "reasonable alternative." First, NEPA does not require agencies to consider alternatives that do not achieve the stated purpose of the proposed action (*Northwest Coalition for Alternatives to Pesticides* v. *Lyng*, 844 F.2d 588, 593 (9th Cir. 1988); *City of Angoon* v. *Hodel*, 803 F.2d 1016, 1021 (9th Cir. 1986), *cert. denied*, ____ U.S. ____, 108 S.Ct. 197 (1987); *Trout Unlimited* v. *Morton*, 509 F.2d 1276, 1286 (9th Cir. 1974)). The recent decision in *North Buckhead Civic Assn.*, 903 F.2d 1533, 1542 (11th Cir. 1990), discussed the case-by-case nature of this determination, stating, "an alternative partially satisfying the need and purpose of the proposed project may or may not need to be considered depending on whether it can be considered a 'reasonable alternative.'" While an agency cannot create an arbitrarily narrow proposal to avoid environmental disclosure (*City of New York* at 732), when the agency's purpose is to accomplish one thing, it makes no sense to require that agency to consider alternatives by which another thing might be achieved (*City of Angoon* at 1021).

Second, the agency need not examine separate alternatives that have essentially the same environmental consequences (*Northern Plains Resource Council* v. *Lujan*, 874 F.2d 661, 666 (9th Cir. 1989); *NRDC* v. *SEC*, 606 F.2d 1031, 1054 (D.C. Cir. 1979)). Third, an environmental impact statement need not consider alternatives whose effects cannot be ascertained and whose implementation is deemed remote and speculative (*Life of the Land* v. *Brinegar*, 485 F.2d 460, 472 (9th Cir. 1973), *cert. denied*, 416 U.S. 961 (1974); *California* v. *Block*, 690 F.2d 753, 767 (9th Cir. 1982); *Grazing Fields Farms* v. *Goldschmidt*, 626 F.2d 1068, 1074 (1st Cir. 1980)—"Courts cannot force agencies to include within an EIS alternatives that are too fanciful or hypothetical"; *NRDC* v. *Morton*, 148 U.S. App. D.C. 5, 15, 458 F.2d 827, 837 (1972)—". . .the requirement of NEPA to discuss reasonable alternatives does not require 'crystal ball' inquiry"). Agencies are normally not required to consider alternatives outside of their jurisdiction or statutory authority (*City of Angoon* at 1021—"If an alternative requires Congressional action it will qualify for inclusion in an EIS only in very rare circumstances"). (The case law often states this in the

reverse—that is, an alternative should not be discarded from analysis solely because it is outside the preparing agency's authority. Despite this, the Council on Environmental Quality regulations (40 CFR 1502.14) state that reasonable alternatives not within the jurisdiction of the lead agency should be included in an environmental impact statement.)

Finally, agencies need not reconsider alternatives that Congress has recently addressed and resolved (*Kilroy* v. *Ruckelshaus*, 738 F.2d 1448, 1454 (9th Cir. 1984)—"But in deciding whether an alternative is reasonable, we may certainly take into account the strength and vitality of the legislation that forbids it"). (See also *Izaak Walton League of America* v. *Marsh*, 655 F.2d 346, 372 (D.C. Cir.), *cert. denied sub nom., Atkinson, T. & S.F. Ry. Co.* v. *Marsh*, 454 U.S. 1092 (1981)—once Congress authorizes a specific dam and lock project, the agency's obligation to discuss alternatives is narrow.)

In the land management planning context, there are two areas that have evoked the most discussion:

1. What is the appropriate "range of alternatives" to be reviewed?

2. What is the function of the "no action" alternative for the forest plan's environmental impact statement and subsequent documentation.

NFMA regulation 36 CFR 219.12(f) states that alternatives prepared for consideration as a forest plan are to provide for a broad range of reasonable management scenarios for the various uses of the forest. Alternatives cannot be completely specified by a single output. Displays of estimated output levels or the various resources under the alternatives are presented to help the public better understand the possible consequences of implementing a particular alternative. Output levels themselves are not subject to the NEPA requirements for a reasonable range of alternatives.

In developing a land and resource management plan for a 10- to 15-year planning period, there are virtually an infinite number of alternatives that could be evaluated in detail. Consideration of all of these is obviously an impossible task. With this in mind, planning regulations contemplate development of a reasonable range of alternatives. In developing this range, the forests are required to evaluate the potential to maximize different resources and objectives by performing "benchmark" analyses (36 CFR 219.12(e)(1)). The benchmarks serve as one of the partial bases for alternative selection, but they are not full alternatives themselves because they do not necessarily reflect budgetary, geographical, environmental, or other considerations.

Much of the evaluation of benchmarks, and the subsequent development of alternatives, is performed using a linear programming model (called FORPLAN) to simulate the possible interactions among resource uses of a forest over time. This analysis is contained in the planning records, which is available to the public and is discussed and referenced in the forest plan and final environmental impact statement. In the process of selecting reasonable

alternatives, many possible combinations or permutations of alternatives will not be fully developed. The process of narrowing the possible alternatives to be considered to a manageable and reasonable set is appropriate under NEPA. Detailing the infeasibility of every conceivable alternative would risk trivializing the environmental inquiry NEPA intends.

In developing a forest plan, it is reasonable to expect that on an already managed national forest, alternatives designed to meet the established goals and objectives, which are developed to meet the intent of 36 CFR 219.12(f), may produce similar outputs. Forest plans demonstrate variation in management emphasis between alternatives. The fact that alternatives have similar outcomes regarding projected resource outputs does not, by itself, establish a violation of NEPA (*Natural Resources Defense Council* v. *Hodel*, 624 F. Supp. 1045, 1053 (D. Nev. 1985), *aff'd, NRDC* v. *Hodel*, 819 F.2d 927 (9th Cir. 1987)).

No-Action Alternatives for Projects and Forest Plans

The Council on Environmental Quality regulations require consideration and discussion of a "no-action" alternative (40 CFR 1502.14(2)). Council guidance states that a discussion of the no-action alternative is always appropriate, even if the agency is under a court order or legislative command to act ("Forty Questions," Question 3, 46 FR at 18027). One court has held that the Forest Service should have included a no-action alternative that contemplates canceling existing timber sale contracts (*Hanlon* v. *Barton*, Civil J88–025, slip op. at pages 25–28 (D. Alaska, November 14, 1988)).

Council guidance recognizes two types of no-action alternatives ("Forty Questions," Question 3, 46 FR at 18027). In either case, the no-action alternative presents a benchmark from which the agency can consider and disclose altering the status quo. The more typical situation involves a single, one-time project decision, such as the approval of a water development project or a timber sale. Here, the no-action alternative would consider the environmental consequences of not undertaking the action or project at all. This type of action is sometimes called the "go/no go" alternative.

An example of this is where the agency proposes a timber sale in a previously unroaded area that was allocated in the forest plan to a nonwilderness management prescription. As the court pointed out in *Tenakee Springs* v. *Block*, the decision not to recommend for Wilderness System designation and assign a management prescription allowing timber harvesting in the Tongass National Forest plan was not sufficient to preclude a true no-action (no-development) alternative when evaluating a timber sale in a site-specific analysis (at 1406). In essence, what the court determined was that the plan did not make an irreversible or irretrievable commitment to develop areas when it assigned a management area prescription. The plan's land-use designations were declared permissive rather than mandatory (at 1406).

The second type of no-action alternative addresses large ongoing activities, such as producing a land management plan. Council guidance states:

> In these cases "no-action" is "no change" from current management direction or level of management intensity. To construct an alternative that is based on no management at all would be a useless academic exercise. Therefore, the "no-action" alternative may be thought of in terms of continuing with the present course of action until that action is changed. Consequently, projected impacts of alternative management schemes would be compared in the EIS to those impacts projected for the existing plan. In this case, alternatives would include management plans of both greater and lesser intensity, especially greater and lesser levels of resource development. ("Forty Questions," Question 3, 46 FR at 18027)

This distinction is critical to the determination of what are reasonable alternatives. In its case against Hodel, the Natural Resources Defense Council argued that the Bureau of Land Management should have considered a full "no grazing" alternative when it reviewed its management of approximately 700,000 acres of public lands in Nevada (624 F. Supp. 1045 (D. Nev. 1985), *aff'd*, 819 F.2d 927 (9th Cir. 1987)). The court found that "[i]n sum, 'no grazing' is not the same as the 'no action' alternative suggested by the CEQ regulations, nor is it such a manifestly reasonable alternative that the court can require its inclusion in the EIS as a matter of NEPA law" (624 F. Supp. at 1055). Although the Council on Environmental Quality has strived to make this system workable, this is another instance that demonstrates that the Council's regulatory model is really designed for single, one-time activities.

Mitigation of Environmental Consequences

The use of mitigation measures remains an evolving area of NEPA law. The Council on Environmental Quality regulations (40 CFR 1508.20) state that mitigation includes:

1. Avoiding the impact altogether by not taking a certain action or parts of an action.

2. Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

3. Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

4. Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

5. Compensating for the impact by replacing or providing substitute resources or environments.

Mitigation measures fulfill different purposes in environmental assessments and impact statements. Cases challenging mitigation measures in assessments normally arise when an agency has concluded that the restrictions imposed on the proposal ensure that the proposal's environmental consequences will not be significant. Thus, the requirement to prepare an impact statement is not triggered.

In the Ninth Circuit, mitigation measures will support a finding of no significant impact "so long as significant measures are taken to 'mitigate the project's effects' they need not completely compensate for adverse environmental impacts" (*Friends of Endangered Species* at 987). The D.C. Circuit, however, has been less than clear on this point. In *Cabinet Mountains* (at 682), the D.C. Circuit found that changes in the project (mitigation) are legally adequate to avoid preparation of an environmental impact statement when the mitigation permits a determination that all impacts remaining after the mitigation are not significant. Other language in the opinion, however, suggests that to use mitigation to support a finding of no significant impact, specific mitigation measures must "completely compensate for any possible adverse environmental impacts."

No matter what level of mitigation is necessary, it remains clear that to effectively use mitigation in their environmental documents, Federal agencies must develop a record that specifically explains how the conditions would mitigate the impact of the project, and they must ensure that those requirements are applied and enforced. (See *The Steamboaters* v. *F.E.R.C.*, 759 F.2d 1382, 1394 (9th Cir. 1985).) Proposed mitigation methods may not consist of vague statements of good intentions by third parties not within the control of the agency (*State of Louisiana* v. *Lee* at 1081, 1083). Nor will a mere listing of mitigation be sufficient to qualify as the reasoned discussion required by NEPA (*Northwest Indian Cemetery Protection Assn.* v. *Peterson*, 764 F.2d 581, 588 (9th Cir. 1985)).

The second aspect of mitigation is its role when an agency prepares an environmental impact statement. The Supreme Court's recent decision in *Robertson* v. *Methow Valley Citizens Council* serves as an excellent platform for examining the role of mitigation when an impact statement has been prepared. (This portion of the report is drawn largely from the Government's Supreme Court briefings in the *Methow Valley* case.)

Methow Recreation applied for a special-use permit in 1978. An environmental impact statement was prepared, and the permit was issued in 1984. That decision was affirmed in 1985 through the Forest Service appeals system. The plaintiffs unsuccessfully sought to overturn the decision in district court and appealed to the Ninth Circuit. On December 1, 1987, the Ninth Circuit reversed the district court concluding that NEPA requires Federal agencies to assume substantive and procedural obligations with respect to mitigation of environmental consequences. The Ninth Circuit's premise that NEPA requires Federal agencies to mitigate adverse environmental effects prompted it to construct a rigid procedural regime for developing mitigation measures. The Government sought review by the U.S. Supreme Court, which reversed the decision on May 1, 1989.

The Supreme Court found that the requirement to discuss mitigation in an environmental impact statement is implicit in NEPA and expressly addressed in the Council on Environmental Quality regulations (*Methow Valley*,

____ U.S. ____, 109 S.Ct. at 1846). However, the Supreme Court rejected the Ninth Circuit's interpretation, stating:

> There is a fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other. (at 1847)

The Supreme Court identified that the offsite adverse effects at issue were not within the control of the Forest Service and:

> [I]t would be incongruous to conclude that the Forest Service has no power to act until the local agencies have reached a final conclusion on what mitigating measures they consider necessary. Even more significantly, it would be inconsistent with NEPA's reliance on procedural mechanisms—as opposed to substantive, result-based standards—to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act.
>
> We thus conclude that the Court of Appeals erred, first, in assuming that "NEPA requires that 'action be taken to mitigate the adverse effects of major federal actions,'" and, second, in finding that this substantive requirement entails the further duty to include in every EIS "a detailed explanation of specific measures which *will* be employed to mitigate the adverse impacts of a proposed action." (at 1847, citations omitted, emphasis in original)

The Council on Environmental Quality regulations allow Federal agencies to consider mitigation opportunities in a systematic fashion and to provide a flexible approach when considering and discussing such measures. They preserve the agency's basic discretion under NEPA to determine in any particular case how far-ranging, thorough, or detailed the mitigation discussion should be. The regulations ensure that an agency can target its discussion of mitigation to the particular decision at hand.

Continuing Duty To Supplement Environmental Documentation

Marsh v. *Oregon Natural Resources Council* is the leading case on NEPA supplementation. In upholding the Army Corps of Engineers decision not to prepare a supplement, the court recognized that Federal agencies have a continuing duty to gather and evaluate new information relevant to the environmental impacts of its action (at 1858). The court noted that both the Corp's and Council on Environmental Quality regulation require supplementation if there are significant new circumstances or information relevant to environmental concerns bearing on the proposed action or its impacts (at 1858). However, "an agency need not supplement an EIS every time new information comes to light. . ." (at 1859). The decision of whether or not to prepare a supplement is a factual dispute that "implicates substantial agency expertise" (at 1860) and is reviewed under the deferential arbitrary and capricious standard set out in section 706(2)(A) of the Administrative Procedure Act (at 1860).

Although decided under the now inapplicable "reasonableness" standard of section 706(2)(D), the Ninth Circuit's 1980 decision in *Warm Springs Dam*

Task Force v. *Gribble* (621 F.2d 1017) identifies four factors that were used in reviewing supplementation cases. The court identified that the need for supplementation

> depends on the environmental significance of the new information, the probable accuracy of the information, the degree of care with which the agency considered the information and evaluated its impact, and the degree to which the agency supported its decision not to supplement with a statement of explanation or additional data. (at 1438)

As a "rule of thumb," the Council on Environmental Quality has identified that supplements should be prepared for actions being taken pursuant to an environmental impact statement that is over 5 years old ("Forty Questions," Question 32, 46 FR 18036). The Ninth Circuit has held that the continuing duty to evaluate new information relevant to the impact of Federal agency action "is especially relevant where the original EIS covers a series of actions continuing over a decade (*Southern Oregon Citizens Against Toxic Sprays, Inc. (SOCATS)* v. *Clark*, 720 F.2d 1475, 1480 (9th Cir. 1983), *cert. denied*, 469 U.S. 1928 (1984)).

There is a question of the applicability of the "rule of thumb" to environmental impact statements that were developed in connection with forest plans. The statutory provisions of NFMA provide for a 10- to 15-year lifetime for the forest plans (16 U.S.C. 1604(f)(5)). Given the dynamic nature of the environment and the forest planning process, there will be a natural form of supplementation that occurs through plan implementation. The Forest Service's implementation process is sufficient to meet the requirement for ongoing environmental review.

Chief Justice Rhenquist's concern that there must be a point when "enough is enough" must be remembered. There will always be new scientific information being developed that adds to the body of knowledge regarding forest ecology. If the requirement to have ongoing study became a standard that one must have perfect and absolute knowledge prior to undertaking any activities, the multiple-use mission of the Forest Service would be further complicated.

Addressing Uncertainty

NEPA itself prescribes no particular method for addressing the problem of scientific uncertainty (*Methow Valley* at 1831, 1838). The courts have required a "reasonably thorough discussion of the significant aspects of the probable environmental consequences" (*Trout Unlimited* v. *Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974)) but need not consider remote or speculative effects amounting to crystal ball inquiry (*Warm Springs* at 1017, 1026; *Scientists' Institute for Public Information, Inc.* v. *Atomic Energy Committee*, 481 F.2d 1079, 1092 (D.C. Cir. 1973)).

Federal agencies have had considerable legal difficulties addressing scientific uncertainty in the context of "worst case analysis." The Forest Service has had several adverse judicial opinions in this area, including herbicide projects (*Save Our Ecosystems (SOS)* v. *Clark/Merrell* v. *Block*, 747 F.2d 1240 (9th Cir.

1984)) and potential sedimentation effects resulting from road construction (*National Wildlife Federation* v. *U.S. Forest Service*, 592 F. Supp. 931). Worst case analysis also is an issue in several ongoing lawsuits. The *Methow Valley* decision resolved much of this problem when it affirmed the council's removal of the "worst case analysis" requirement (*Methow Valley* at 1831, 1849). Under the old 1985 regulation (40 CFR 1502.22), when information relevant to adverse impacts was essential but incomplete or unavailable, an agency was required to weigh the need for the action against the risk and severity of possible adverse impacts and to provide a worst case analysis.

The new 1988 regulation (40 CFR 1502.22(b)) states that if information relevant to reasonably foreseeable significant adverse impacts cannot be obtained, the environmental impact statement must include—

1. A statement that the information is incomplete or unavailable.

2. A statement of the relevance of the incomplete or unavailable information to evaluating impacts.

3. A summary of existing credible scientific evidence relevant to evaluating impacts.

4. The agencies' evaluation of the impacts based on theoretical approaches or research methods generally accepted in the scientific community.

In short, the new regulation "retains the duty to describe the consequences of a remote, but potentially severe impact, but grounds the duty in evaluation of scientific opinion rather than in the framework of a conjectural 'worst case analysis'" (50 FR 32,237 (1985)). There is no immediate indication how the lower courts will respond to the *Robertson* decision, but it is unlikely that potential plaintiffs will abandon their traditional call for more information before any action can be initiated.

Methodology, Technology, and Scientific Decisionmaking

The technical and scientific nature of resource integration and management needs require judicial deference. In preparing NEPA documents, especially those associated with forest plans, the Forest Service makes predictions regarding the interaction of resources within its special area of expertise that are at the frontiers of environmental science. The U.S. Supreme Court has held that a court must be at its most deferential in such situations (*Baltimore Gas & Electric* at 103). (See also *United States* v. *Alpine Land & Res. Co.*, 887 F.2d 207 (9th Cir. 1989)—deference particularly due when questions involve scientific or engineering matters.)

The courts agree that NEPA does not require that an environmental impact statement be based on the best scientific methodology,[7] nor does it require the courts to resolve disagreements between various scientists regarding methodology. In *Friends of Endangered Species* (at 986), the court stated that "NEPA does not require that we decide whether an EIR is based on the best scientific methodology available, nor does NEPA require us to resolve disagreements among various scientists as to methodology." The Fifth Circuit has similarly stated that "[a]t most, the dispute over the degree of salinity change in the delta marsh amounts to a scientific disagreement among experts. Such disagreements are not the type that the federal courts are in the business to resolve" (*Sierra Club* v. *Froehlke*, 816 F.2d. 205, 2114 (5th Cir. 1987)). (See also *Perkins* v. *Bergland*, 608 F.2d 803, 807 (9th Cir. 1979), regarding litigation over the appropriate grazing level; the court stated that the "contesting party must show there is virtually no evidence in the record to support the agency's methodology in gathering and evaluating the data."

As the Supreme Court stated in *Marsh* v. *ONRC* (at 1851, 1861), "[w]hen specialists express conflicting views, an agency must have the discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." In sum, a court's task is simply to ensure that the procedure followed by the agency is a reasoned analysis of the scientific information before it and that the agency made the information available to all concerned (*Friends of Endangered Species* v. *Jantzen* at 986).

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[7] The courts have long recognized that "NEPA does not demand that every federal decision be verified by reduction to mathematical disputes for insertion into a precise formula" (*Sierra Club* v. *Morton*, 510 F.2d 813, 827 (9th Cir. 1975) quoting *Sierra Club* v. *Lynn*, 502 F.2d 43, 61 (5th Cir. 1974)). The court noted that even when predictions are required by regulations, "[s]uch opinion estimates can be precise when systems are simple. As they become more complex and interactive, the ability to forecast becomes more a guess and less a prediction" (*Morton* at 827).

Conclusion

The Forest Service has taken action to better manage its decisionmaking process. The agency has attempted to control the recycling of forest management issues and harmonize the "crazy quilt" of conflicting laws and regulations that apply to forest management.

Integrated Plan and Project Multiple-Use, Sustained-Yield Decisionmaking

The major differences between pre-NFMA plans and an approved land and resource management plan can be summarized by the process to develop the plan and the effect of the plan. A comprehensive promulgation process is established by statute and regulation. The effect of the plan is different because all projects and activities must be consistent with the plan's direction.

Plan- and project-level decisionmaking is to ensure that NEPA and other environmental laws are fulfilled prior to the critical decision point at which resources are committed. NEPA and other environmental laws do not allow Federal decisionmakers to meet their responsibility by "locking the barn door after the horses are stolen" (*Cady* v. *Morton*, 527 F.2d 786, 794 (9th Cir. 1975)). The staged decisionmaking (plan and project) developed by the Forest Service to harmonize NFMA, NEPA, and other environmental laws is similar to other judicially approved staged decisionmaking. (See the following decisions: *Conner* v. *Burford*, 484 F.2d 1441, 1451 (9th Cir. 1988), *cert. denied sub nom.*; *Sun Exploration & Production Co.* v. *United States*, ____ U.S. ____, 109 5 Ct. 1121, 103 L. Ed. 2d 184 (1989); and *Northern Plains Resources Council* v. *Lujan*, 874 F.2d 661, 666 (9th Cir. 1989).) For example, in *Northern Plains Resources Council* v. *Lujan*, the Ninth Circuit Court said:

> Moreover, the NEPA does not require Interior to make site-specific analysis of the impacts of all possible development alternatives. Instead, the NEPA merely requires that Interior estimate the impacts of a likely or probable development alternative; it need not prepare an EIS for speculative development alternatives, so long as it reserves the right to preclude or prevent actions with unacceptable environmental consequences.

The Department of the Interior has taken a similar approach to the Bureau of Land Management's resource management plans for public lands. The Secretary of the Interior has provided that the Bureau of Land Management plans are not "[f]inal implementation decisions on actions which require further specific plans, process steps, or decisions under specific provisions of law and regulations" (43 CFR 1601, 0–5(k)). (See *Harold E. Carrasco*, 90 IBLA 39 (December 10, 1985); *Wilderness Society et al.*, 90 IBLA 221 (January 30, 1986); and *Wilderness Society*, 109 IBLA 175 (June 9, 1989).)

The land and resource management plans establish multiple-use goals (desired future condition) and objectives (statements of planned results) for the planning unit. The plans, coupled with the laws and regulations that apply to plan implementation, put in place a dynamic management system for future decisionmaking. The plans set goals and objectives, prohibit certain activities, and establish standards and guidelines for future actions. They are adjustable through monitoring and evaluation and then amendment and revision.

The nature of a plan is comparable to a zoning ordinance. Forest planning is an ongoing system of management in which the Forest Service provides an opportunity for involvement in plan- and project-level decisionmaking. Plan approval puts in place a management system (ordinance) that controls future project-level decisionmaking.

Senator Humphrey spoke of NFMA integrated decisionmaking in 1976:

> The days have ended when the forest may be viewed only as trees and trees only as timber. The soil and water, the grasses and the shrubs, the fish and wildlife, and the beauty that is the forest must become integral parts of the resource manager's thinking and actions.

NFMA ended single-resource plans and plans that do not have full public involvement and review. NFMA gave the Forest Service a charter to make project decisions under the framework of the land and resource management plans and all laws and regulations applicable to the decision.

Tension Between Plans for Supply and Production and Plans for Protection of National Forests

The "crazy quilt" of laws and regulations applicable to national forest management gives every interest group something to rely on in the great debate over use of the national forests. Some seek assurance of supply and access to natural resources, while others focus on limiting production to sustainable levels.

Criticism of forest planning under NFMA may be more a result of unfounded and unfulfilled expectations than inadequacies in NFMA. Was it sound to assume that, as the Forest Service promulgated land and resource management plans—involving many Americans and bringing to bear on forest management the many laws and regulations regarding the national forests—the debate would be resolved? The application of the substantive requirements of NFMA and the integration of the many laws and regulations means change from historic operations.

Deputy Chief Sirmon (1989) recently noted the transition to fuller accounting of environmental laws:

> If there is no one area we haven't done too well in, its pricing out the cost of doing an adequate job under the various statutes. We are always lagging behind in being able to finance the quality level called for in legislation. To be procedurally correct in all the 40,000 significant decisions I mentioned earlier, more dollars, time, and skills would be required. Consider 40,000 decisions per year and the average planning period of say 3 years—some longer; some shorter—that means there are 120,000 actions in the pipeline at any one time. If new requirements

> come on the scene or new interpretations, that means going back to fix or check on 120,000 projects—or deciding to take your chances that you won't be challenged. We simply haven't built into our cost of doing business the true up-to-date needs. We are always lagging.

Supply and production projections are a necessary and often controversial part of land and resource management plans. The beauty of the planning statute is not the numerical "answer" or "prediction" (outputs and present net value); rather, it is the development of a system for handling future decisions that ensures there is integrated consideration of all resources and that performance standards are established, monitored, and changed when necessary. Indeed, Congress annually debates the timber sale volume, road construction and reconstruction, recreation, and fish and wildlife budgets during the appropriation process. In recent years, this has been highly contentious. Although some hoped that the 1974 Resources Planning Act would make Congress take a longer view, the annual wrangling has actually heightened.

The allowable timber sale quantity is one of the most controversial of plan output projections. The allowable sale quantity is a maximum level of timber that may be sold for the planning period (decade) from lands suitable for timber management. The figure is given in board feet or cubic feet and is developed using a computer model. The assumptions used in a model are based on average or representative situations rather than complete inventories of the specific conditions of the forest. The Forest Service has found that sometimes model forecasts do not match what is found on specific site examinations. This is inherent in modeling projections of possible resource outputs for 1 to 2 million acres over long periods. (See Barber and Rodman (1990).)

Congress anticipated that the Forest Service could not establish a permanent allowable sale quantity or a one-time classification of lands suitable for timber production. NFMA requires continuous monitoring and evaluation and periodic adjustment of the allowable sale quantity and the suitable timber land designations. Forest management without continued scrutiny and site-specific decisionmaking would dispense with the need for public involvement and for foresters, biologists, hydrologists, engineers, range experts, recreation specialists, geologists, economists, and managers. A rigid interpretation of the land and resource management plan would be an administrative straitjacket that would eliminate flexibility to meet changing conditions. If so limited, predetermined projects would simply be implemented mindlessly with no observance of the dynamic nature of the forest ecological system or the limitations of forecasting.

Considering the Future of Multiple-Use, Sustained-Yield Forest Management

Trends toward more judicial review of government actions and the growth of Federal environmental law has made the fulfillment of the Forest Service's multiple-use, sustained-yield mission even more complex. Those who seek certainty in resource outputs (whether economic or amenity) will continue to find recycling of competition between uses and management emphasis. Forest managers must be prepared to respond to administrative appeals and litigation under a long list of laws and regulations.

The Chief's Office has issued recent direction to promote compliance with NEPA's rigorous provisions (Forest Service memorandum, "National Environmental Policy Act and Project Decisions," February 3, 1989). That direction, when added to the plan and project-level NFMA/NEPA decision process set forth in the July 15, 1988, Forest Service Planning Handbook and the Chief's administrative appeals decisions, should help improve NEPA compliance. It is unlikely, however, that these actions will decrease the controversial nature of Forest Service decisionmaking. Nor is it likely that NEPA case law has fully matured. Indeed, despite early success in the district courts, the Forest Service's plan- and project-level decisionmaking process continues to be challenged.

Recent judicial rulings provide encouraging news for those seeking orderly review of Federal agency action. The Supreme Court's decision in the *Lujan* v. *NWF* decision reaffirms that traditional standing requirements are important and necessary in environmental cases. The Court's narrow interpretation of what constitutes "agency action" subject to judicial review should also assist in moving policy disputes out of the courts and back to policymakers in the executive and legislative branches. The *CFEQ* v. *Lyng* and *Idaho Conservation League* v. *Mumma* decisions affirming the Forest Service's staged decisionmaking process may help to resolve the ongoing debate over the nature of the forest plans.

Those who had hoped that the plan environmental impact statements would be a "magic bullet," allowing the Forest Service to avoid conducting and documenting project NEPA reviews, will be disappointed. Whether NEPA is working or not is something of a value judgment. Congress has been unwilling to alter the role of judicial review in accountability for the procedural requirements of NEPA and other environmental laws.

Absent congressional action, changes in the status quo will come slowly. Despite these uncertainties, the Forest Service has made considerable progress in building a systematic approach for decisionmaking that integrates the requirements of NFMA and the other laws. The question now seems to be how much time the Forest Service will be allowed to let the process evolve. This evolution will come through several sources: administrative appeals decisions, project implementation, monitoring and evaluation, amendment and revision, and even litigation.

The words of Aldo Leopold (1971) should be carefully considered by those proposing changes to NFMA before we have gained real experience coordinating it with existing laws and regulations (the crazy quilt) and the dynamic natural and social environment:

> If the biota, in the course of eons, has built something we like but do not understand, then who but a fool would discard seemingly useless parts. To keep every cog and wheel is the first precaution of intelligent tinkering.

Leopold's admonition for natural systems aptly pertains to the complex picture of laws and regulations applicable to national forest management.

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