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**Observations on the Transformation of the  
Forest Service: The Effect of the National  
Environmental Policy Act on U.S. Forest  
Service Decision Making**

by

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# OBSERVATIONS ON THE TRANSFORMATION OF THE FOREST SERVICE: THE EFFECTS OF THE NATIONAL ENVIRONMENTAL POLICY ACT ON U.S. FOREST SERVICE DECISION MAKING

By  
STARK ACKERMAN\*

*This Article describes the co-evolution of NEPA and the Forest Service over the last twenty years, asserting that the Forest Service has integrated NEPA into its basic decision making process. It cautions, however, that the high complexity, cost, time requirements and public disagreement associated with Forest Service decisions warrant changes in how those decisions are made.*

## I. INTRODUCTION

The first twenty years of the National Environmental Policy Act of 1969 (NEPA)<sup>1</sup> coincide with the most significant period of change that the United States Forest Service has undergone since it was established at the turn of the century.<sup>2</sup> While many of the forces that have transformed the Forest Service are the same forces that led to the passage of NEPA—as well as the flood of environmental legislation passed during the 1960s and 70s—NEPA has accelerated and stimulated the Forest Service change. This Article describes how NEPA has been implemented by the Forest Service, and how its implementation has changed

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1. 42 U.S.C. §§ 4321-4370 (1982 & Supp. V 1987).

2. The predecessor to the Forest Service, the Department of Agriculture's Division of Forestry, was created in 1831. At that time, however, the Division had no forest lands under its management. Only with the Transfer Act of 1905 were the federal forest reserves given to the Department of Agriculture to administer under the theory that growing trees was comparable to growing agricultural crops. H. STEEN, *THE U.S. FOREST SERVICE: A HISTORY* (1976).

the agency.

The Article is organized around a series of observations and accompanying discussions about how the Forest Service and NEPA have interacted over the last twenty years.<sup>3</sup> Within this format, Section II describes NEPA's broad effects on the Forest Service over this period—focusing particularly on how the agency implemented NEPA and how this implementation changed the agency. Sections III through V expand upon this discussion by looking at specific examples of how the Forest Service has used NEPA at three different levels of decision making. Based upon the previous discussions, Section VI poses some unanswered questions that may shed light on future changes in Forest Service NEPA implementation. Finally, Section VII concludes that while NEPA has resulted in significant benefits to the Forest Service, it has also imposed tremendous costs—particularly with regard to decisions allocating scarce resources. Unless the Forest Service and society handle these resource allocation issues more effectively, the next twenty years will be difficult ones for the Forest Service, NEPA, and the public.

## II. NEPA AND THE FOREST SERVICE OVER THE LAST TWENTY YEARS: A CO-EVOLUTION

### *Observation 1: The Forest Service and NEPA Are Products of the Society Around Them*

The last twenty years have been a time of transformation for the Forest Service. This period has seen the passage of a remarkable number and variety of statutes that directly and indirectly affect the Forest Service's management of the national forests,<sup>4</sup> punctuated by the passage of the National Forest Management

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3. These observations are based upon my discussions with people involved with the Forest Service's implementation of NEPA over the last 20 years and upon my own experience with that implementation over the last 12 years—10 of which were spent working for the Forest Service at the national and regional levels.

4. *E.g.*, Clean Air Act, 42 U.S.C. §§ 7401-7642 (1982 & Supp. V 1987); Clean Water Act, 33 U.S.C. §§ 1251-1387 (1988); Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1988); Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C. §§ 518h, 1600-1610 (1988); and Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1782 (1982 & Supp. V 1987).

Act of 1976<sup>5</sup> (NFMA), which established, with unprecedented specificity, standards and procedures for such management.<sup>6</sup> This period has seen increasing demands on the national forests for a growing spectrum of consumptive and nonconsumptive uses—demands that cannot be met simultaneously. This period also has seen a fundamental change in the desire of the “users” of the national forests to participate in Forest Service decision making, not only within the agency’s process, but also through administrative appeals, lawsuits, and political action.

The Forest Service transformation over the last twenty years has been a product of the changing economic and social climate that began in the post-war expansion of the 1950s and 60s. During those years, the demand for the resources of the national forests grew at an unprecedented rate as the population boom and increase in leisure time created an increasing demand for construction materials and recreational activities. This increasing demand for a broad spectrum of often conflicting uses has continued through the 1970s and 80s.

As the social climate changed, so did the Forest Service. Politically astute since the time of its first chief, Gifford Pinchot, the Forest Service read the political winds and began modifying its policies in the 1950s and 60s to react to the changing public values. In response to criticism that it was too preoccupied with managing the national forests for timber production, the Forest Service gave increased attention to recreation and nonconsumptive resources.<sup>7</sup> As a result of these social changes, the Forest Ser-

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5. Pub. L. No. 94-588, 90 Stat. 2949 (1976) (codified as amended in scattered §§ of 16 U.S.C.).

6. Despite its specificity, NFMA was the less prescriptive of the two bills that Congress considered. The passage of the less prescriptive bill was due in part to the Forest Service’s pleas for continued management flexibility and assurances that public concerns could be resolved by the agency, and in part to Congress’s desire to avoid having to choose between competing interest groups. Congress left a clear signal, however, that if the Forest Service did not resolve public concerns, a future bill would be more prescriptive.

The scope and specificity of NFMA are even more remarkable considering that the statutory direction for the management of the national forests remained essentially unchange for 63 years from the passage of the Organic Act of 1897, ch. 2, 30 Stat. 35, to the passage of the Multiple-Use Sustained Yield Act of 1969, 16 U.S.C. §§ 528-531 (1988), and that even these statutes provided little substantive direction.

7. The Multiple-Use Sustained-Yield Act of 1960 (MUSY, 16 U.S.C. §§ 528-

vice emerged from an earlier isolation to find itself at the forefront of public attention—particularly in the Pacific Northwest. During this time, the Forest Service evolved from an independent steward of the national forests to a controversial public servant operating in a fishbowl—with a diminishing pie to slice and increasing appetites demanding satisfaction.

Many of the same social and political forces that led to the changes in the Forest Service in the 1950s and 60s also led to the passage of NEPA—particularly the increased prosperity and leisure time that resulted in increased concern for the environment and increased desire by the public to have greater access to and influence on governmental decision making. These same forces, as they have evolved over the last twenty years, have continued to shape both the Forest Service and NEPA. If anything, these forces have strengthened over the last two decades.

*Observation 2: The Forest Service Has Integrated NEPA into Its Basic Decision Making Process*

At the time of NEPA's passage, the Forest Service was already changing in response to the same forces that led to the enactment of NEPA. It is not surprising, therefore, that the Forest Service was an agency more willing and able than most to accept NEPA. This is not to say that the Forest Service's implementa-

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531 (1988)) provides a vivid example of the attempt by the Forest Service to alter the public perception that it had a timber production bias. The Forest Service proposed MUSY to codify existing agency policy, send a signal to the timber industry that the national forests would be managed for resources other than timber, and counter attempts to transfer all recreational responsibilities for national forests to the National Park Service.

To place added emphasis on the importance of recreation, the Forest Service went out of its way to list the resources to be considered under MUSY in a way that gave recreation a preeminent position. Although the resources were listed in alphabetical order, the names given different resources were altered so that recreation was listed first. "Fish and wildlife" became "wildlife and fish" so that it would not be listed first and "recreation" became "outdoor recreation" so that it would come before range. S. DANA & S. FAIRFAX, *FOREST AND RANGE POLICY* 202-03 (2d ed. 1980).

Despite the greater attention given nonconsumptive resources, however, the Forest Service still views its mission as the wise *use* of resources—a concept that originated from Gifford Pinchot's definition of conservation. Consequently, the agency finds it difficult to accept preservation as a major management objective, even though a significant segment of the public may favor it.

tion of NEPA was immediate and total. Understandably, the Forest Service had some initial uncertainty about NEPA's true meaning and how best to implement it. But even though there were many, at all levels of the Forest Service hierarchy, who wanted to implement the statute, it was another matter to get the entire organization to go along.

Historically, the Forest Service has been a decentralized line and staff organization with a tradition of independent decision making focused at the lowest levels of the hierarchy. In addition, for much of its history, the Forest Service exercised virtually unchallenged stewardship of the national forests. Faced with NEPA's mandate to change the way it made decisions, the Forest Service was more willing to change its decentralized decision making process than it was to give the public a role in decision making. Even as challenges to management decisions increased, the Forest Service believed in the virtue of its own decisions. While some within the agency embraced NEPA as a means of obtaining greater public support, others resisted full NEPA implementation because it meant opening up the previously insulated Forest Service decision making process to public scrutiny, involvement and challenge.

Other factors, however, pushed the agency toward assimilation of NEPA procedures. One factor was the political acceptance at the policymaking level that assimilation was necessary for the agency's survival. A second factor was the growing consensus throughout the agency supporting and, in fact, demanding such an approach.<sup>8</sup> A third factor was the administrative appeals and lawsuits that forced the agency to adequately comply with NEPA. A final factor was the planning process mandated by NFMA.

The NFMA planning process—which has been the center of recent Forest Service NEPA activity—is required by statute and

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8. Policy makers have not always followed the staff consensus. For example, despite internal dissent, the Forest Service often has decided to sell timber in roadless areas even where such decisions were not supported by EISs that considered the impact of the action on an area's wilderness character as required by numerous court decisions. Rather than undertake such analyses prior to the completion of forest plans, the agency chose to pursue sales in what it believed were noncontroversial or low risk areas in the hope that the decisions would not be appealed. Where such decisions were appealed, the decisions were withdrawn to avoid almost certain defeat in court.

regulation to incorporate NEPA procedures.<sup>9</sup> This linkage is important for two reasons. First, the significant overlap between the NFMA planning process and the NEPA environmental review and disclosure process makes it hard to distinguish those changes to Forest Service decision making that are a result of NEPA from those that are a result of NFMA. Second, the Forest Service planning process increasingly is becoming the fundamental decision making process for Forest Service resource activities. As this occurs, NEPA—linked as it is with the planning process—becomes more integrated into Forest Service decision making.

As a consequence of all of these factors, NEPA has come far—although the incorporation of NEPA into the Forest Service's decision making process is not complete. NEPA has become a part of decision making at virtually all levels and in all programs of the Forest Service. This is not to say that the evolution toward integration has ended or is consistent throughout the agency. The integration still needs to evolve.<sup>10</sup> It also varies across the country and for different resources. Nevertheless, the incorporation of NEPA is widespread, deep, and growing.

*Observation 3: NEPA Has Led to Clear Changes in Forest Service Decision Making*

The Forest Service's embrace of NEPA has resulted in distinct changes in how the agency makes decisions. NEPA has fostered an *interdisciplinary approach* to forest management and decision making. In making decisions about one resource, the agency now considers how managing that resource impacts other resources. NEPA has also fostered *integrated decision making*. In contrast to the past—when the Forest Service prepared separate, "functional" plans for different resources with little coordination between the plans—the agency now generally prepares a single coordinated plan for all resources within a national forest. Interdisciplinary analysis, however, has proven much easier to achieve than integrated decision making. The Forest Service has found it far simpler to consider the broad impacts of proposed decisions

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9. 16 U.S.C. § 1604(g)(1) (1988); 36 C.F.R. § 219.12(a) (1989).

10. See e.g., *Sierra Club v. United States Forest Serv.*, 843 F.2d 1190 (9th Cir. 1988) (Forest Service violated NEPA when it decided not to prepare an EIS for timber sales in the Sequoia National Forest where no programmatic EIS for the forest existed).

than to effectively coordinate and balance management decisions for multiple resources that interact in complex ways.

The embrace of NEPA by the Forest Service has also fostered *expanded public information and involvement efforts*. However, while more information is being given to the public than ever before, it is not clear that this information is what the public wants or needs to be adequately informed about Forest Service activities and decision making. The information is frequently incomplete, too technical, or attempts to serve too many purposes for too many different public groups. In addition, the public is usually not given a meaningful way to participate in decision making. In most cases, public involvement is limited to the submission of written or verbal comments on which issues should be addressed by a decision or which alternative decisions best resolve the chosen issues. This limited and structured participation—combined with the often polarized nature of public comments—frequently results in the Forest Service making little use of the public input. The agency often takes refuge in a middle road position, which usually carries the dual benefit for the agency of being not only just an incremental change to the “accepted” status quo but also a decision with interest group comments on either side that can be said to “offset” each other. In defense of the Forest Service, however, it is not at all clear how an agency can effectively use public input, such as 42,000 responses to an EIS on habitat guidelines for managing spotted owls, especially where a large majority of those responses are form letters.

The Forest Service assimilation of NEPA and NFMA has produced not only an *expansion of Forest Service personnel and expertise* beyond the traditional and limited forestry focus, but also *better staffed and documented decisions*. Until approximately twenty years ago, a majority of Forest Service professional employees were foresters.<sup>11</sup> That has changed significantly. Now there is also a broad complement of engineers, landscape architects, wildlife biologists, computer analysts, sociologists, range conservationists, public involvement specialists, geologists, archaeologists, and even some lawyers. In response to the requirements of NEPA and NFMA (and the threat of challenge), these professionals have improved not only the information and analy-

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11. H. STEEN, *supra* note 2, at 318.



sis prepared for decisions, but also the documentation of those decisions in agency files and formal decision documents.

The Forest Service embrace of NEPA over the last twenty years coincided with an *increase in public challenges* of Forest Service decisions and an *increased centralization* of decision making within the agency. Again, these changes are the result of a variety of factors, with NEPA being just one—albeit an important one. The social forces that demanded increased public opportunity to participate in the management of the environment in general—and the national forests in particular—led to expanded opportunities for the public to influence and dispute Forest Service decisions.<sup>12</sup> Over time, the public became increasingly sophisticated at using these opportunities through public involvement, administrative appeals, lawsuits, legislative lobbying, and even influencing public opinion.

In response to increasing scrutiny given to Forest Service decisions and increasing legal requirements placed on agency decision making, the Forest Service consolidated authority at higher levels and standardized procedures to better control variations in management that create increased vulnerability to challenge. As federal legislation established more agency-wide standards and as Forest Service decisions became more politicized, the Forest Service's Washington Office role increased correspondingly. The agency now recognizes that the key to its success is not dealing with local interests, as in the past, but dealing with regional and national lobbying groups and pressures.

*Observation 4: The Forest Service Implementation of NEPA  
Has Its Problems*

The Forest Service integration of NEPA is not without problems. One difficulty is that NEPA's procedures are frequently better suited to discrete projects than to the continuous and dynamic land management programs implemented by the Forest Service. Discrete projects involve a choice between whether or not to undertake specific action, and if so, how. If a decision on a project is delayed or invalidated, no action is taken and the status quo is maintained. As a land manager, however,

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12. Often the very information made available by the NEPA and NFMA procedures supplies the ammunition to challenge the decisions.

the Forest Service must continuously manage the national forests. When programmatic change in this management is warranted, delay or failure to approve change means the continuation of unwarranted policies. Unlike the failure to act on a proposed project, which preserves the status quo, the failure to approve a new land management policy—even though it may not take affirmative action—can significantly affect national forest lands by continuing obsolete or undesirable practices. With Forest Service programs, failure to take new action is a decision to continue past action, which may be clearly unwarranted.<sup>13</sup>

Another problem with NEPA, as it is implemented by the Forest Service, involves the multiple layers of required analyses. As discussed in more detail in the sections below, on-the-ground, project level decisions may be tiered to one or more programmatic decisions made years earlier. As a result, conducting the multi-levelled analyses required to reach project level decisions often requires extraordinary amounts of time, money, and manpower. Also, once decisions are made, their finality is suspect.<sup>14</sup>

These problems are compounded by the increasingly political nature of Forest Service decisions and the fundamental inability of the Forest Service decision making process (of which NEPA procedures are an integral part) to result in effective and permanent solutions to broad public issues. The wilderness allocation decisions the Forest Service attempted to make in the late 1970s through its Roadless Area Review and Evaluation process illustrate this dilemma. A first attempt to make the wilderness decisions was aborted due to NEPA inadequacies.<sup>15</sup> A second attempt reached a final decision, but that decision was also found to be flawed because of inadequate NEPA compliance.<sup>16</sup> Ultimately, Congress decided to designate wilderness on a state-by-state ba-

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13. For an example of this problem, see *infra* text following note 20.

14. See *infra* text accompanying notes 59-62 (Observation 19).

15. The effort ended when a federal court enjoined development pursuant to the review until an EIS was completed. Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1244 (10th Cir. 1973) (action seeking injunctive relief on ground that Forest Service had not complied with NEPA in relation to sales of timber from Teton National Forest).

16. California v. Block, 690 F.2d 753 (9th Cir. 1982) (EIS did not comply with NEPA since it did not contain adequate discussion of the site-specific environmental consequences of the allocation of roadless national forest among three management categories).

sis. Similar situations may be developing in relation to management of the northern spotted owl and adoption of forest plans for certain national forests. To the extent that these decisions involve the allocation of scarce resources, extraordinarily complex procedures, protracted preparation time, and political decisions in technical wrappings, they create a difficult problem for the agency—and for NEPA itself—because they do not lend themselves to manageable, easily defensible, and permanent agency decisions. This conclusion is even truer in light of the evolving changes in judicial interpretation under which courts retroactively apply increasingly sophisticated legal standards to prior decisions.<sup>17</sup>

In conclusion, at the abstract level, the Forest Service has come a long way in incorporating NEPA in its management and decision making. Perhaps the true test of the effect of this incorporation—and the effect of NEPA on Forest Service decision making—is visible only through a more specific review of how NEPA is applied in practice. The following sections give three examples of different ways that NEPA affects Forest Service decision making.

### III. NEPA APPLIED TO FOREST SERVICE REGIONAL LEVEL DECISIONS: MANAGEMENT FOR THE NORTHERN SPOTTED OWL

On December 9, 1988, the Chief of the Forest Service signed a Record of Decision amending the Pacific Northwest Regional Guide to establish revised management standards and guidelines for northern spotted owl habitat in Oregon and Washington.<sup>18</sup> This Record of Decision was supported by a Final Supplement to the Final Environmental Impact Statement for the Pacific Northwest Regional Guide (Supplement). The volatile and controversial issues surrounding this decision pit those who desire protection of the spotted owl and the old growth habitat upon which it allegedly depends against timber and development interests that desire to maintain traditional timber harvest levels. This decision

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17. See, e.g., *Save Our Ecosystems v. Clark*, 747 F.2d 1240 (9th Cir. 1984) (enjoining federal herbicide program in the Pacific Northwest).

18. A Regional Guide is an intermediary planning document linking the national level Forest and Rangeland Renewable Resources Planning Act (RPA) Program, with the forest plans developed for individual national forests. See 36 C.F.R. §§ 219.8, 219.9 (1989).

illustrates several facets of the Forest Service's implementation of NEPA—particularly NEPA as it affects broad programs with controversial and national policy ramifications.

*Observation 5: NEPA, In Combination With the Forest Service's Administrative Appeal Process, Can Create a Procedural Labyrinth*

The Chief's Record of Decision amended the Pacific Northwest Regional Guide as originally approved on June 14, 1984. After its approval, the Regional Guide was administratively appealed on the issue of the management of the spotted owl. That appeal was heard by the Deputy Assistant Secretary for Natural Resources and Environment of the Department of Agriculture, who on March 8, 1985, remanded the Regional Guide to the Regional Forester for preparation of a Supplemental EIS addressing recent biological information and certain principles presented in the remand decision.

As a result of the remand, the Forest Service spent three and one-half years—and undoubtedly hundreds of thousands of dollars—to issue a new Record of Decision. In spite of this effort, the amendment was quickly found inadequate,<sup>19</sup> and was soon overshadowed by the United States Fish and Wildlife Service's decision to list the northern spotted owl as a threatened species.<sup>20</sup> During the entire time that the Supplement was being developed, the Forest Service was in a precarious position with regard to its interim management of spotted owl habitat. The original Regional Guide was the only NEPA-based decision that the Forest Service had made concerning spotted owl management, but the agency knew that the management standards in that decision were inadequate. As the Supplement development proceeded, the Forest Service stated that its policy was to maintain options to implement the alternatives being considered in the Supplement. The application and enforcement of that interim policy, however, was uneven and ill-defined. Options for managing habitat for the spotted owl undoubtedly were narrowed as the original Regional Guide was being appealed and the Supplement was being

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19. See, e.g., Judge Dwyer's Order Granting Preliminary Relief in Seattle Audubon Soc'y v. Robertson, No. C89-160WD (W.D.Wash. Mar. 24, 1989).

20. 55 Fed. Reg. 26,114 (1990).

prepared.<sup>21</sup>

*Observation 6: An Agency Often Has Broad Discretion in How It Characterizes the Decision to be Made in an EIS*

The choice of the scope of an EIS is within the discretion of the federal agency.<sup>22</sup> The definition of scope can significantly affect the basic nature of the EIS, including the range of alternatives considered. For the Supplement, for example, the Forest Service had a clear choice of defining the decision in terms of management guidelines for the spotted owl or in terms of the broader question of the general management of old growth timber. The Forest Service chose to focus on the narrower decision. The reason for this was a desire to limit the discussions surrounding the Regional Guide amendment to spotted owl management and to avoid the more controversial and more intractable issues surrounding old growth protection (with its broad social, economic, ecological, and even religious facets).

To the environmental groups, the real issues involved not only protection of the spotted owl for its own sake, but also pro-

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21. 40 C.F.R. § 1506.1(a) (1989) prohibits an agency from taking any action concerning a proposal undergoing NEPA analysis that would have an adverse environmental impact or limit the choice of reasonable alternatives prior to the issuance of a Record of Decision (ROD). Interim actions are allowed by 40 C.F.R. § 1506.1(c) (1989) if they are independently justified, covered by an adequate EIS, or do not prejudice the ultimate decision. Regarding the Forest Service's actions during the preparation of the Supplement, the question is whether one of these three exceptions was met.

The question of interim action during the preparation of an EIS is even murkier with regard to the preparation of forest plans. Since many of the plans in effect during the development of forest plans predated NEPA, there were no existing adequate EISs to support the decisions. Given the almost 10-year period taken to prepare forest plans, the EISs that did exist very probably became so outdated as to be inadequate. Since during the lengthy time taken to develop forest plans, operation under the existing plans inevitably prejudiced decisions, there is little basis upon which to support interim management under the CEQ regulations' standards. In another indication of the political nature of these issues, Congress came to the rescue, and in the 1987 Interior and Related Agencies Appropriation Act validated the continued management under existing plans. See Continued Resolution, H.R.J. Res. 395, 100th Cong., 1st Sess. § 314 (1988). This validation was reenacted in 1988 and 1989. Pub. L. No. 100-446, 102 Stat. 1825 (1988); Pub. L. No. 101-121 § 312, 103 Stat. 701, 743, (1989).

22. See 40 C.F.R. § 1508.25 (1989); *California v. Block*, 690 F.2d 753, 765 (9th Cir. 1982).

tection of old growth ecosystems in general (for a host of reasons) and restriction of the area managed by the Forest Service for timber production. To the timber interests, on the other hand, the real issues involved the protection of jobs from the environmentalists' threats to the traditional timber base. The millions of acres of highly valuable timber and thousands of jobs at issue made the situation even more volatile. These were the real issues involved in spotted owl management—whether the Forest Service chose to explicitly recognize them or not. By defining the scope of the EIS narrowly to exclude facets of the real issues, the Forest Service may have improved its ability to defend its Regional Guide amendment, but virtually guaranteed that the unresolved larger questions would jeopardize the political integrity of the decision.

*Observation 7: An EIS Is the Product of Different Staff People and Decision Makers with Different Tasks and Agendas in Mind*

The preparation of Forest Service programmatic EISs—covering millions of acres of land under a wide variety of environmental conditions—inevitably involves a large and diverse complement of line and staff personnel. The Supplement exemplifies this particularly well. While the Chief of the Forest Service was officially responsible for the decision, the analyses and recommendations were largely developed at the regional level based upon information and analyses prepared by people at the regional, forest, and subforest levels. This breadth and variability of people working on the decision created a variety of problems. Given their different roles and degree of access to decision makers, different people had different understandings of the issues to be addressed and the questions to be answered. The situation was further complicated by the comparatively short time frames established—requiring some decisions to be made in the absence of desired information—and the fact that the questions asked by the decision makers evolved over time.

At the staff level, the focus of the NEPA analysis was on spotted owl management. For the Forest Service wildlife biologists in particular, the fundamental question was how to manage habitat to maintain viable populations of spotted owls as required

by NFMA regulations.<sup>23</sup> The dilemma for these biologists was how to formulate alternatives and recommendations as part of the NEPA analysis and documentation given the limited (but rapidly increasing) information available<sup>24</sup> and the lack of scientific precedent and agreement for defining viability even with complete information. The biologists were confronted with the need for an answer; the difficulty was to give one with any scientific certainty. They were asked to give answers to questions the data base was not designed to answer. They were also asked to fit their biological analyses into the decision framework desired by the decision makers—a framework broader than their biological one. At times, this meant that they were asked to change their characterization of the data and conclusions in order to change emphases and perceptions.

The point of view of the Forest Service decision makers and other policymakers was often quite different than that of the staff biologists. In fact, the point of view of the decision makers was often different at different levels within the Forest Service hierarchy. The decision and policymakers, in focusing on the decision to be made rather than the environmental disclosure of the NEPA analysis, considered spotted owl management in the broader context of other forest management issues. The question for them was not simply species viability, but achieving viability with an “acceptable” trade-off of other resources. At these policy levels, in keeping with the “political” nature of the decision, there was greater emphasis on expediency, appearances, and finding a middle ground between the opposing interest groups. Among those involved at this level of the Supplement, both formally and informally, were the Pacific Northwest Regional Forester, the Chief of the Forest Service, policymakers within the Department of Agriculture, certain affected policy officials in other agencies (particularly the Bureau of Land Management and the Fish and Wildlife Service), and certain members of Congress.

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23. 36 C.F.R. § 219.19 (1989) requires that “[f]ish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area.”

24. The Supplement was one of the first EISs prepared under CEQ’s revised regulation on incomplete and unavailable information, 40 C.F.R. § 1502.22 (1989), which replaced the worst case analysis requirement.

*Observation 8: The Quality of an EIS Is Limited by the Quality of Its Data Base*

Decisions concerning the management of the national forests—and NEPA analyses to support those decisions—increasingly rely on sophisticated data bases that describe and simulate the characteristics of national forest lands. However, the increased time, cost, and difficulty of developing such data bases mean that decisions often must be made without the quantity or quality of information or analysis desired. The Forest Service decision on the management of habitat for the spotted owl is a case in point.

The Forest Service used multiple data bases to conduct the analyses in the Supplement: a data base developed for the original Regional Guide, one developed for each individual forest plan being prepared in the region, and one developed especially for the Supplement.<sup>25</sup> Despite these multiple data bases, the available information was insufficient. In fact, the multiple data bases often made the situation more difficult. The data bases were limited because of the inadequacy of prior research and constraints on time for new research. The data was frequently inconsistent due to its collection at different times from different locations and in response to different questions. In addition, the data constantly changed as new information developed and new questions were asked. These limitations restricted the ability of the biologists to evaluate alternatives and effects accurately, and therefore, affected the quality of the EIS and the decision.

*Observation 9: Programmatic and Policy Decisions Are Often Based upon Factors Broader Than the Issue Explicitly Under Consideration*

In acting on the controversial and high impact issue of spotted owl management, the Forest Service considered a variety of other factors relevant to the broader context of the decision. First, the agency and the Department of Agriculture were determined to avoid having the spotted owl listed under the Endan-

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25. Even now, additional data bases are being developed to identify related information—e.g., a Forest Service old growth research effort and a contract project to develop old growth and habitat information based upon satellite imagery.



gered Species Act.<sup>26</sup> The concern went beyond a desire to comply with the viability requirements of in the NFMA regulations.<sup>27</sup> At issue was loss of Forest Service control over land management decisions. If the spotted owl were listed as a threatened or endangered species (as it subsequently was<sup>28</sup>), the United States Fish and Wildlife Service would acquire jurisdiction over the definitions of critical habitat and the management standards applied in those circumstances.<sup>29</sup> The Forest Service not only did not want to lose control over its lands, but feared the havoc such loss would have on management of other resources.

Second, the Forest Service was concerned about the precedent the spotted owl decision would set for the analysis or protection of other species. Given the sizable controversy and investment involved in the Supplement's analysis of spotted owls, the Forest Service wanted to avoid creating expectations that other species would be given similar analysis and decisions.

Third, the Forest Service was concerned about the implications of its decision for spotted owl management on other federal lands—especially those of the Bureau of Land Management—and nonfederal lands. Because spotted owls are found on other lands, the Forest Service conclusions regarding habitat needs would be precedential for land under other agency management. In response, the Forest Service coordinated with other affected agencies—particularly in the Department of the Interior—during the development of the Supplement.

The Forest Service was concerned at a broader level about the political ramifications of its decision. The controversy over the spotted owl issue attracted the attention of both environmental and timber industry interests. Because the amount of habitat protection being considered could remove significant amounts of high volume old growth timber from available harvest, the potential impact on timber dependent communities was great. This decision was so potentially explosive that the Forest Service scrutinized its political consequences—even considering the views of Congress. Consequently, the decision was not made purely on a biological basis, even though the scope of the EIS was framed in

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26. 16 U.S.C. §§ 1531-1544 (1988).

27. 36 C.F.R. § 219.19 (1989).

28. 55 Fed. Reg. 26,114 (1990).

29. See 40 C.F.R. § 424 (1989).

that context.<sup>30</sup>

Finally, the Forest Service was also concerned about how the new spotted owl management standards would be integrated with the forest planning process. The spotted owl management standards were designed to be incorporated in the analyses and direction of forest plans. Forest plans, however, had been under development for nearly ten years, and a few plans for national forests with spotted owls were already published in draft form. The ideal use of the spotted owl management standards would have been to fully incorporate them in the forest plans and revise the analyses and plans accordingly. However, given the significant time and money invested in the forest plans and the agency's interest in maintaining momentum for finalizing the plans, the Forest Service decided not to fully revise the forest plan analyses. Instead, the Forest Service chose to minimally adjust the forest plan analyses and decisions to "reflect" the new spotted owl management standards.

#### IV. NEPA APPLIED TO FOREST SERVICE FOREST LEVEL DECISIONS: THE FOREST PLAN AND EIS

The forest planning process provides another example of how the Forest Service is implementing NEPA. This planning process is mandated by the Forest and Rangeland Renewable Resources Planning Act of 1974 as amended by NFMA.<sup>31</sup> The implementing regulations provide copious detail on how the statutory requirements will be met.<sup>32</sup>

#### *Observation 10: Agency NEPA Implementation Direction Comes in Many Forms*

Although the Forest Service has no formal regulations to im-

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30. A further suggestion of the political nature of this decision can be seen by § 318 of the Fiscal Year 1989 Interior and Related Agencies Appropriation Act in which Congress modified the direction in the Supplement to establish interim standards to balance the protection of spotted owls and the maintenance of timber harvest levels during fiscal years 1989 and 1990. Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-21, § 318, 103 Stat. 701 (1989).

31. 16 U.S.C. §§ 1601-1687 (1988).

32. See 36 C.F.R. § 219 (1989).

plement NEPA, it implements NEPA through other forms of internal agency direction. The agency's basic NEPA implementing policies and procedures are found in Chapter 1950 of the Forest Service Manual and in Forest Service Handbook 1909.15.<sup>33</sup> This agency direction is established at the national level and applies throughout the Forest Service. Additional agency policies and procedures are established through regional and sometimes forest supplements to the Manual and Handbook. In addition to the formal direction, miscellaneous informal guidance is given in the form of letters, checklists, advice, and prototypes. This informal direction varies widely in quantity and accessibility between regions, forests, and agency staff areas. As a result, it is often difficult to be certain what rules are being followed for any particular decision.

*Observation 11: Two Key Questions Guide the Use of NEPA for Forest Planning Decisions: (1) What Is the Nature of the Decision Being Made? and (2) What Is the Level of Analysis Needed to Support that Decision?*

Within the Forest Service, there is some uncertainty and lack of clarity regarding the nature of the forest plan. The clear trend—and the likely outcome—is that the forest plan will be a programmatic document.<sup>34</sup> However, there are certain forest plans and subject areas within forest plans for which site specific decisions may be made.

At the heart of the uncertainty is the question of when the site specific impacts of a decision must be evaluated. The Ninth Circuit Court of Appeals set this threshold at the point at which an “agency proposes to make an ‘irreversible and irretrievable commitment of the availability of resources’ to a project at a particular site.”<sup>35</sup> Linked to this determination is the level of detail that is necessary in different NEPA documents to support the decisions being made.

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33. See 50 Fed. Reg. 26,078 (1985). A revision of the procedures is expected to be published in the Federal Register in the Fall of 1990.

34. Forest Service Manual Chapter 1922 takes this position, at least for the next round of planning. See Introduction to Forest Service Manual 1922, 53 Fed. Reg. 26,809 (1988).

35. *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982) (citing *Sierra Club v. Hathaway*, 579 F.2d 1162, 1168 (9th Cir. 1978)).

To the extent that a forest plan makes programmatic decisions, the accompanying EIS need not be site specific. To the extent that a forest plan makes a final commitment of resources at a particular site, the accompanying NEPA analysis must be site specific—which most forest plans are not. Furthermore, if forest plans are not site specific, there must be site specific NEPA analysis at some later decision point when the resource commitment is made. This later analysis can be tiered to the forest plan EIS through either an EIS or an environmental assessment (EA).<sup>36</sup> Although the Forest Service resists the idea that implementation of project level decisions—particularly timber sales—requires an EIS, that opinion seems to be changing.<sup>37</sup> While the CEQ regulations do not provide much guidance in this area, recent court decisions are filling the void.<sup>38</sup> Thus, two key questions define how NEPA applies to forest plans: (1) What is the nature of the decisions being made? (2) What is the level of detail necessary to support those decisions?<sup>39</sup> With respect to forest plan EISs, the answers are not at all clear.

*Observation 12: Forest Plan Decisions Represent Political Decisions Being Made Under the Cloak of Technical Expertise*

Historically, the management of individual national forests was based primarily on local needs and interests because of the autonomy forest supervisors held in the agency's decentralized organization and because national forests were used almost exclusively by local people. As previously discussed, this local focus has changed significantly in recent years. Changing political, social, and economic realities shifted the arena of Forest Service decision making from the local level to the regional and national levels. In response to these new realities, Congress placed additional sideboards on how the Forest Service manages the national forests.

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36. An EIS, as opposed to an EA, is required for major federal actions which may significantly affect the quality of the human environment. See 42 U.S.C. § 4332(2)(C) (1982); 40 C.F.R. pt. 1502 (1989).

37. See, e.g., 54 Fed. Reg. 52,434 (1989) (giving notice of intent to prepare an EIS for several timber sales and related projects on the Siskiyou National Forest).

38. See *Oregon Natural Resources Council v. Mohla*, 895 F.2d 627 (9th Cir. 1990); *Portland Audubon Soc'y v. Lujan*, 884 F.2d 1233 (9th Cir. 1989); *Oregon Natural Resources Council v. Lyng*, 882 F.2d 1417 (9th Cir. 1989).

39. In fact, these are the key questions for any level of decision involving NEPA compliance.

Congress, however, has left the task of deciding how the competing demands will be addressed to the agency.<sup>40</sup>

With the adoption of the NFMA regulations and the preparation and approval of forest plans, the Forest Service is called upon to carry out its promise of successfully reconciling competing interests. A successful reconciliation requires a solution to the fundamental question at issue in forest plans: how to distribute the scarce national forest resources. NFMA and its implementing regulations—with all their detailed attention to the proper standards for multiple resource management—do not resolve this question. Even though the Forest Service may have special expertise with which to decide technical questions (such as how to protect riparian areas or harvest a stand of trees) that special expertise cannot instantly create trees where there are none or manage for mutually exclusive uses. Decisions about how to distribute scarce resources involve political choices and trade-offs. Yet the Forest Service addresses these decisions—and is expected to address them—as if they were technical questions with technical solutions. While the Forest Service makes its decisions by evaluating all resources and in some analytical way optimizing their use, such a decision making process is unlikely to result in a widely accepted resolution of the allocation issues, and may eventually lead to challenges to the decisions. These decisions should be recognized for what they are—“political” decisions involving the balancing of competing public interests—and then should be made in a political forum. Anything less is likely to be fraught with technical challenges, instability, and a lack of finality. For the major national forest policy decisions—like forest plans and wilderness allocations—Congress is the appropriate arbiter of the public interest.<sup>41</sup>

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40. See *supra* note 6.

41. Congressional decisions, while they do “balance” interests, and are final, often have their own shortcomings. Congressional decisions usually lack the scientific foundation and the flexibility needed for lasting, realistic natural resource management decisions. While Congress seemingly recognized its limitations in the past, see *supra* note 6, if it acts prescriptively now, the future is likely to hold problems of a new ilk—how to deal with the difficulties created by the inadequacies of the congressional solution.

*Observation 13: Forest Plan Data Bases Are Frequently Outdated Before the Plans Are Completed*

Almost fifteen years have passed since NFMA was enacted with its requirement that the Forest Service prepare forest plans for each national forest.<sup>42</sup> It has been over ten years since the Forest Service adopted regulations implementing NFMA and setting guidelines for the preparation of forest plans. Forest plans have been under development for at least this ten-year period. Yet, despite this span of time, many forest plans have only recently been completed.

There are reasons why it has taken so long to complete forest plans. First, the forest planning effort is probably the most comprehensive and complex natural resource planning effort ever attempted. It has taken time to develop and implement this new process. In addition, there were several politically motivated delays—particularly in the heavy timber producing areas of California and the Pacific Northwest—as planning procedures were fine-tuned and improved.<sup>43</sup>

Whatever the reasons, forest plans have taken between five to more than ten years to complete. The data bases for these plans, however, were developed in the late 1970s and early 1980s. Even before the plans were finished, those data bases were over ten years old and frequently out of date. Changing conditions and improved techniques made the data—and even the planning issues—inaccurate reflections of the current situation. Yet the forest plan analyses are based upon that data. Much time, energy, and investment was put into the analysis, and the Forest Service was reluctant to spend the time and money to revise the analysis based on updated information. Even if a forest plan acceptably resolves all of the planning issues, the plan is already five to ten years old when it is adopted. This brings into question the valid-

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42. 16 U.S.C. § 1604(c) (1988) required the Forest Service to attempt to complete such plans by September 30, 1985.

43. In large part, this fine-tuning was a desire to alter a process that led to unacceptably low timber harvest levels, in the hope of achieving higher levels. These partisan adjustments to the planning process never explicitly criticized substantive results. Instead, they turned traditional NEPA theory on its head. Rather than concluding that if the correct process was not followed, the substantive decision must be flawed, these adjustments were based on the notion that if the substantive decision was "wrong" (i.e., undesirable), the process must be flawed.

ity of the forest planning and NEPA analyses, and the conclusions drawn from them<sup>44</sup>. The question is particularly relevant because forest plan decisions establish the direction for national forests for a ten- to fifteen-year period.<sup>45</sup>

*Observation 14: The Forest Plan NEPA Analysis Is Conducted Using Techniques that Manipulate the Data in Unapparent Ways*

The data used in the forest planning process is not always data collected just for that process or data collected knowing what its eventual use might be. As a result, the data is often consolidated, aggregated, separated, or modified in some other way for its use in forest planning. This results in manipulations of the original data that may distort conclusions drawn from it.

More significantly, the Forest Service uses a linear programming model to develop alternatives that best meet a given set of objectives. This linear programming model—called FORPLAN—can manipulate the data and influence the “optimum” solution in a variety of ways unforeseen and unknown except by technical experts. For instance, while a forest plan EIS alternative may be presented as an optimum means of achieving the stated goals and objectives, the FORPLAN model can only analyze those resources that are quantifiable—those for which a known value and a relationship with other resources can be established. These quantifiable resources, therefore, can exert a dominant influence on the optimization of the model, with the qualitatively measured resources added toward the end of the process so that the total solution seems heuristically reasonable. Alternatively, the model can also be designed to add the qualitatively measured resources at the beginning, in predetermined amounts, which distorts the optimization of the model. Either way the

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44. The accuracy of national forest data, because it deals with dynamic biological conditions, will always diminish quickly. Such data bases are best used for decisions that are either of short duration (so that a new decision can be made based upon information from dynamic data bases which are easily updated and managed) or based upon more generalized data less subject to change. The key is to determine at the outset what level of accuracy is needed for the decision being made.

45. NEPA imposes a continuing duty to consider new information and changed circumstances and, where needed, to prepare a supplement to an EIS. See 40 C.F.R. § 1502.9(c) (1989).

model is built, the undue influence of these silent assumptions and relationships on the alternatives is not readily apparent to the casual reviewer. There is the potential for a hidden and imbalanced consideration of resources which flies in the face of NEPA's mandate for environmental disclosure to both the public and decision makers. FORPLAN establishes a black box within which decisions are at least partially made. This black box conflicts with the basic mandates of NEPA.<sup>46</sup>

*Observation 15: Although One of the Forest Plan's Primary Objectives Is to Establish the Timber Sale Level for a National Forest, That Decision Is Largely Made Elsewhere in a Process not Tied to the Forest Plan and Its NEPA Analysis*

To all appearances, one of the main decisions in a forest plan is the establishment of the national forest's allowable sale quantity—the quantity of timber planned for sale during the plan period.<sup>47</sup> In reality, however, a national forest's annual timber sale level is set by more than just the forest plan. The Program required by the Forest and Rangeland Renewable Resources Planning Act of 1974<sup>48</sup> (RPA Program), for example, considers possible combined timber sale levels for all national forests and selects a set of national goals and objectives and corresponding timber sale levels. To implement the RPA Program, the Washington Office of the Forest Service tentatively disaggregates those levels to individual national forests, and displays that disaggregation in the regional guides.<sup>49</sup> The regional guide "targets" are not intended to be binding on individual national forests, but serve as starting points for forest calculations.<sup>50</sup>

To complicate matters further, the stated timber sale level is subject to congressional funding. As part of its annual appropriation process, Congress—usually influenced by members from high

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46. Notwithstanding these potential problems with FORPLAN, its use has been upheld. See *Griffin v. Yeutter*, No. 88-1415G(CM) (S.D.Cal. Nov. 1, 1989).

47. See 36 C.F.R. § 219.3 (1989). The allowable sale quantity is a ten-year total, but is usually expressed on an averaged annual basis.

48. 16 U.S.C. § 1602 (1988) (requires a national level plan).

49. 36 C.F.R. § 219.9(a)(3) (1989).

50. *Id.* § 219.12(f)(6). An earlier version of the NFMA regulations required a reconciliation of differences between RPA Program targets (based on top down planning) and the forest plan targets (based on bottom up planning).



timber producing states—directs the timber sale levels for the fiscal year with great precision. Even though consideration is given to the forest-based recommendations, congressional sale levels frequently differ from the levels established under either the RPA Program and regional guides, or existing forest plans.<sup>51</sup> It is the congressionally mandated timber sale levels established through the budgeting process that really dictate what occurs on the ground. Since the allowable sale quantity established by forest plans represents a ten-year total, the plans contain some flexibility to absorb divergent, congressionally mandated sale levels. But several years of such discrepancies could require an amendment or revision to a plan to reflect the changes and the impacts they create.<sup>52</sup>

*Observation 16: Forest Planning and Its Associated NEPA Analyses Are Part of a Never-Ending Process*

Unlike project decisions, forest plan decisions are long-term programmatic decisions addressing dynamic situations. While forest plan decisions are made at a particular point in time, changes in the national forest resource base (such as catastrophic changes due to fire, weather, insect infestation, or disease), changes in economic conditions, or changes in public values can alter a key element of the forest plan decision. In addition, the experience in implementing a plan can identify the need to change the assumptions and projections made as part of the original NEPA analysis.<sup>53</sup> Such changes or experience can result in an altered vision of the appropriateness of the forest plan decision, as well as the adequacy of the NEPA analysis that supports it. As a result, action to amend, revise or supplement the decision with accompanying

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51. One of the key objectives of the RPA Program was to create a long-range plan that Congress could use to coordinate and integrate funding decisions from year to year. The RPA Program, despite its component of political manipulation, provides such an integrated long-range plan. Congress, however, has consistently refused to fund the program in an integrated manner.

52. Discrepancies between planned and actual funding can occur for projects other than timber sales. For example, 36 C.F.R. § 219.10(e) (1989) and Forest Service Manual § 1922.5(3), 53 Fed. Reg. 26,809, 26,812 (1988), recognize that changes in the timing of projects may be required due to such funding discrepancies.

53. Identifying the need to change the forest plan in light of implementation experience is one of the primary objectives of the forest plan monitoring process. See *infra* text accompanying notes 57-58 (Observation 18).

NEPA analysis might be required. Given the ten- to fifteen-year life expectancy of forest plans (and possibly more if new plans also take ten years to develop), the age of the forest plan data bases by the time the plans are adopted, the congressional budgetary changes to national forest management, the active interest group efforts to change the Forest Service agenda, and the unpredictable, but likely, changes in resource and social conditions, forest plans will probably be subject to frequent, if not regular, amendments or revisions to keep them relevant and defensible.<sup>54</sup>

#### V. NEPA APPLIED TO FOREST SERVICE PROJECT LEVEL DECISIONS: TIMBER SALES

The Forest Service implements its programmatic decisions through individual projects or groups of related projects supported by site specific NEPA analysis and documentation. The types of projects span a range of national forest uses—from special use permits for roads, recreational facilities, or transmission towers to grazing allotments and wildlife research projects. Timber sales represent perhaps the most common project in the heavy timber producing national forests, and, in the era of integrated plans, involve management of a variety of resources affected by the timber harvesting activity.

#### *Observation 17: It Is Not Clear What Level of NEPA Analysis Will Be Necessary to Support Project Level Decisions Implementing Forest Plans*

Traditionally, Forest Service timber sale decisions were made through environmental assessments, not full-fledged EISs. There is a growing belief, however, that individual timber sales—or perhaps groups of timber sales within an area—may require a sepa-

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54. In fact, a possible solution to the political and management nightmare of trying to develop and adopt a new forest plan (with its attendant reevaluation of all program decisions and new opportunities for appeal) may be to make planning decisions through incremental changes to existing direction based upon a NEPA analysis that regularly identifies needed decisions through a scoping process. Such a solution would shift emphasis away from the forest plan as a once-in-a-decade product (where all battles must be won or lost) toward viewing the decision making process as a means to dynamically and flexibly address issues in a more manageable, incremental and less absolute way. In the final analysis, the decision making process may be more important than the product.

rate EIS.<sup>55</sup> This is particularly likely under the new forest plans in which timber sale levels have been established on a programmatic basis without site-specific analysis. While project level NEPA analysis can tier to an EIS prepared for a programmatic document such as a forest plan, there is no guarantee that the project level decision may not significantly affect environmental quality. If the site specific impact of a timber sale decision may have a significant environmental effect, which has not already been evaluated in an EIS, another EIS is required. If the impact of the timber sale decision is not significant or it has already been evaluated in an EIS, another form of NEPA documentation, such as an environmental assessment or a categorical exclusion is warranted.<sup>56</sup> Careful attention must be paid to the significance of these project level decisions and whether they require an additional EIS.

*Observation 18: By Implementing and Testing the Validity of a Forest Plan, Project Level Decisions Are Indicators of a Forest Plan's Success*

In most cases, the practical effect of a forest plan is measured by the project level decisions that implement the forest plan's programmatic direction. These project level decisions determine actual on-the-ground management, and consequently, determine how successfully the goals and objectives of a forest plan are met. During the process of making these project level decisions, a forest plan's assumptions and analyses are reassessed and validated. The project level decisions will, in all likelihood, tier their NEPA analysis to that of the forest plan. Since the project level analysis will be completed after the forest plan analysis and will be based upon site specific data, the project level analysis will provide a more accurate picture of the site-specific situation than that provided in the forest plan analysis.

The increased accuracy, site specificity, and currency of the project level analysis allows that analysis to contribute to forest plan monitoring and evaluation efforts. Forest plan monitoring has three facets.<sup>57</sup> First, "implementation monitoring" insures

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55. See *supra* notes 34-39 and accompanying text (Observation 11).

56. See 40 C.F.R. §§ 1508.4, 1508.9 (1989).

57. See Forest Service Manual § 1922.7, 53 Fed. Reg. 26,813 (1988).

that the project and other implementation activities comply with the direction in the forest plan. Second, "effectiveness monitoring" insures that implementation activities achieve the goals and objectives of the forest plan. Finally, "validation monitoring" insures that the assumptions and values used in developing the forest plan are correct.

Evaluation of forest plan monitoring may identify the need to amend or revise the direction in the forest plan or supplement its NEPA analysis. In the context of project decisions, such evaluation also determines whether the project level NEPA analysis can tier to the forest plan NEPA analysis and what type of NEPA document and level of site specificity is required. If the project level analysis suggests that the forest plan assumptions or data bases have changed significantly, additional forest plan level NEPA analysis may be required. This will be particularly likely as the implemented projects are separated in time from the actual analysis and adoption of the forest plan.<sup>58</sup>

*Observation 19: NEPA, In Conjunction With Liberal Forest Service Appeal Regulations, Has Led to a Proliferation of Appeals That Thwart Forest Service Land Management*

NEPA is a procedural statute. Its procedures are often very complicated and judicial scrutiny is often rigorous. These factors—in combination with a Forest Service administrative appeal process that places few limits on who can appeal Forest Service decisions—have been regularly and often frivolously exploited by supporters of the status quo and opponents of proposed actions.<sup>59</sup>

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58. Forest plans include monitoring plans designed to measure the achievement of specified parameters. The success of monitoring plans, however, is uncertain. Success depends on the adequacy of the monitored parameters and the diligence with which the monitoring plan is followed. In the past, the Forest Service has not been very successful in carrying out monitoring efforts. Monitoring was one of the first items to fall to the budget ax or the pressures of competing time demands. Forest plans, however, should change the nature of Forest Service monitoring, since monitoring is no longer discretionary. Following formal monitoring plans is now a legal requirement and the Forest Service can not only be held accountable for monitoring, but the public arguably can act through the courts to force such compliance or require forest plans to be appropriately amended or revised.

59. Appeals of Forest Service decisions are often called postage stamp appeals because they can be made by simply mailing a letter of appeal. This open appeal

Appeals are clearly the exception rather than the rule—only a small fraction of Forest Service decisions are appealed. In addition, appeals serve a positive role by alerting the agency to public concerns and internal problems, and by providing an avenue for legitimate public protest and redress. But where appeals are brought against entire programs, or simply to delay decisions, they can cause great time and resource drains on the agency and its decision making, as well as detrimental impacts on the national forests that may be denied needed changes in direction. As the Forest Service has made increasingly controversial programmatic decisions, such as those concerning the spotted owl and forest plans, the appeal situation has become so severe that the Forest Service and Congress recently acted to limit appeal rights. In January 1989, the Forest Service revised its appeal regulations to limit appeals to one level of review in certain circumstances and to limit standing to appeal non-NEPA permit decisions to persons with a direct interest in those decisions.<sup>60</sup> Congress has limited judicial review of Forest Service decisions in riders to annual appropriations bills.<sup>61</sup> In addition, Senator Packwood introduced a bill in the first session of the 101st Congress to limit and streamline judicial review of Forest Service and Bureau of Land Management plans and implementing decisions.<sup>62</sup>

## VI. QUESTIONS FOR THE FUTURE

Having now considered NEPA's effect on the Forest Service over the last twenty years, it is appropriate to look forward to changes that may lie ahead. Changes will likely be in response to

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process has been abused by certain appellants to inhibit agency decision making or harass other parties to an appeal. Examples of such abuse include appeals of every decision made in a certain area, appeals of multiple decisions using boiler plate forms with generic complaints, and joining 50 or more parties in an appeal so that an opposing party must mail correspondence to all.

60. See 36 C.F.R. pts. 217, 251 (1989).

61. A recent example of such a limitation was the amendment to the Fiscal Year 1990 Interior and Related Agencies Appropriations bill. This amendment limited and expedited judicial review of Congress's temporary measures protecting habitat for northern spotted owls and insuring specified timber sale levels for Fiscal Years 1989 and 1990. Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, § 318, 103 Stat. 701, 745-50 (1989).

62. The bill, which would result in the "Land Management Review Act of 1989," was introduced on July 31, 1989. It was referred to the Committee on the Judiciary. S. 1436, 101st Cong., 1st Sess., 136 CONG. REC. 14 (1990).

three questions relating to the efficiency, cost, and appropriateness of the current Forest Service decision making process.

*Question 1: Can NEPA Be Efficiently and Effectively Applied to Broad, Complex, Dynamic, and Ongoing Programs Such as Those of the Forest Service?*

Even though the Forest Service has a solid and generally successful NEPA process, it has found it difficult to implement effectively a NEPA supported decision making process that covers the entire range of its decisions. This is due in part to the diversity, complexity, and breadth of the Forest Service responsibilities for managing the national forests. This is also due to the new and comprehensive nature of the forest planning requirements of the NFMA and the increasing challenges made to Forest Service decisions. Whatever the causes, the Forest Service is currently saddled with a complex, comprehensive, multi-leveled decision making process that required more than a decade to produce the first level programmatic documents—the forest plans. Additional time will be needed to produce intermediate—if necessary—and project level decisions.

Admittedly, the first use of any process is the least efficient. But even recognizing that a process of this scope and complexity will inevitably be slow, that the data base is subject to constant change, and that decisions are subject to challenges that bring their finality into doubt, it is still legitimate to ask whether such a decision making process can ever be effective. To be effective, the process must be more timely and final. This could be accomplished by streamlining the process to relax or remove some analysis standards,<sup>63</sup> by shifting the emphasis from periodic large-scale forest plans to a more regular and continuous incremental decision making process,<sup>64</sup> and by elevating major programmatic planning decisions to the political arena.<sup>65</sup>

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63. This could not only simplify analysis and decision making, but also the consideration of appeals.

64. These suggestions are perhaps more directly applicable to the NFMA planning process, but also affect the Forest Service's NEPA process supporting forest planning.

65. See *infra* notes 66-70 and accompanying text (Question 3).

*Question 2: Are the Results of the Forest Service Decision Making Process Worth the Cost?*

There are legitimate questions about whether the ultimate decisions that the Forest Service makes through its NEPA process are "better" than pre-NEPA decisions. Certainly more information is available to the decision makers and the public, and the public is more openly involved. It is clear that a wider range of alternatives is being considered. And it is also true that the Forest Service has developed a more broadly trained and informed employee base, better able to make and document resource decisions. However, in many instances, final decisions represent only incremental changes from existing plans, decisions that probably are not significantly different than decisions that would have been made without the costly, time-consuming, and cumbersome NEPA process.

Forest planning offers the most extreme example of decision making costs—with a conservative price tag of over one billion dollars and over ten years to complete (during which time old obsolete plans continued to be followed). The time and financial costs of administrative appeals, lawsuits, and implementation planning are certain to add significantly to the total. Given these substantial costs—whether or not the ultimate decisions are different than they would have been without this sophisticated process—it is appropriate to question whether the public is receiving value for the money and time spent. This is a question that needs to be openly addressed, and as yet, has not been.

*Question 3: What Is the Proper Role of Congress and the Courts in Resolving Disputes that Use NEPA as a Basis to Challenge Forest Service Decisions?*

As public interest groups have become increasingly involved and take stands against Forest Service decisions, they also increasingly turn to Congress and the courts to achieve objectives that they feel the Forest Service ignores. The passage of NFMA is one example of congressional action prompted by an environmental group lawsuit and by timber industry pressure to address the resulting court decision.<sup>66</sup> Other examples include the lawsuits

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66. Cf. *West Virginia Div. of the Izaak Walton League v. Butz*, 522 F.2d 945

that resulted in an injunction prohibiting timber harvesting in the Mapleton District of the Siuslaw National Forest<sup>67</sup> and in another enjoining the herbicide program of the Forest Service and the Bureau of Land Management in the Pacific Northwest.<sup>68</sup> The controversy surrounding Forest Service programmatic decisions is so great that all available forums are being utilized by one or more interest groups to challenge decisions and seek a way to further their own agendas.

Virtually all interest groups, at one time or another, criticize the unworkability of the Forest Service decision making arena—an arena which includes the agency, the courts, and Congress. As limited as each of these three forums may be, the most lasting decisions seem to come from Congress. Given the apparent political nature of the Forest Service programmatic decisions dealing with the allocation of scarce resources and the political balancing of public interest that entails, Congress appears to be the logical final arbiter of such decisions. Yet Congress is the most reluctant of the three forums. Consequently, while Congress may be the most appropriate ultimate decider, it seems likely that the Forest Service and the courts will continue to be intimately involved in these decisions until the situation becomes so pressing that it overcomes congressional inertia.

Pressing situations are becoming increasingly frequent. While Congress has not recently taken comprehensive action to deal with forest management issues, it has done so gradually, particularly through riders to annual appropriations bills. In the past, such riders have lifted the injunction on the Mapleton Ranger District, and, more recently, established a timber harvest level and expedited the judicial review process to deal with the limitations on harvesting of old growth timber for the protection of spotted owls.<sup>69</sup> Congressional consideration has also been given to whether the Forest Service appeals process should be limited because of the perceived abuses that delay or thwart Forest Service decision making.<sup>70</sup>

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(4th Cir. 1975).

67. *National Wildlife Fed'n v. United States Forest Serv.*, 592 F. Supp. 931 (D. Or. 1984).

68. *Save Our Ecosystems v. Clark*, 747 F.2d 1240 (9th Cir. 1984).

69. See *supra* note 61 and accompanying text.

70. See *supra* note 62 and accompanying text.



These actions—and the recognition that forest plan decisions really allocate scarce resources—clearly suggest that some Forest Service decisions are not technical ones, but rather political decisions that the agency cannot itself resolve in this era of increasing demand and decreasing availability of desired resources. More open consideration should be given to the appropriate channels for resolving such political decisions—through clearer direction given to the Forest Service or through Congress accepting its role as final arbiter for decisions that are truly political.

### VIII. CONCLUSION

The last twenty years have been a period of co-evolution for NEPA and the Forest Service. Forest Service changes resulted from the same forces that led to the adoption of NEPA. NEPA reinforced and further stimulated the Forest Service changes, resulting in an acceptance of NEPA as part of the Forest Service decision making process.

In recent years, NFMA and the forest planning process have significantly affected the Forest Service decision making process. Today, the NFMA planning process—inextricably linked with the Forest Service's NEPA process—is the most significant decision making process within the agency and the focus of most NEPA attention. While decision making has improved in many ways, it has also become cumbersome. Decision making requires years and even decades to complete—at astronomical financial costs. When decisions are made, they are frequently challenged and the challenges are made easier by the delays and process complexities. Complicating the situation even more is the fact that the forest plan level decisions are largely political choices about allocating scarce resources. Unless these problems are addressed, the next twenty years will be a difficult time for NEPA and Forest Service decision making.