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on the Forest Service Experiment with
“Case-by-Case” Categorical Exclusion**

by

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FOREST SERVICE PLANNING

DEFINING NEPA OUT OF EXISTENCE: REFLECTIONS ON THE FOREST SERVICE EXPERIMENT WITH "CASE-BY-CASE" CATEGORICAL EXCLUSION

By
MYRON L. SCOTT*

Congress's attempt to integrate environmental values and analysis into federal agency decision making through the National Environmental Policy Act has only partially succeeded. Agency ingenuity in evading NEPA's procedural requirements has contributed to the slow progress in achieving NEPA's goals. Forest Service "case-by-case" categorical exclusion procedures have undermined that agency's effort to implement a planning and management process that fully incorporates NEPA. Forest managers have used the procedure to limit public participation, expand the scope of their discretion under NEPA, and reintroduce incremental decision making. The agency's recent commitment to rethinking its NEPA procedures is essential to reviving its earlier effort to integrate NEPA and long-range planning and may prove instructive for other agencies.

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I. NEPA AND "CASE-BY-CASE" CATEGORICAL EXCLUSION

Over twenty years after its passage, implementation of the National Environmental Policy Act of 1969 (NEPA) remains plagued by uncertainties over the timing, scope, and necessity of compliance.¹ This continuing confusion reflects a failure to achieve NEPA's central legislative goal, the full integration of environmental analysis into federal agency decision making.² Several factors have contributed to the slow progress in achieving NEPA's goal. The Act's broad, constitution-like language insured initial ambiguity.³ Later, the Council on Environmental Quality (CEQ), charged with NEPA implementation and oversight, found its efficiency limited by Reagan era budgetary constraints.⁴ Judicial confusion over the appropriate scope of agency discretion under NEPA and the Supreme Court's attitude toward the Act provided additional sources of ambiguity.⁵ The complexity of sci-

1. 42 U.S.C. §§ 4321-4370a (1988). For an overview of major timing cases, see D. MANDELKER, *NEPA LAW AND LITIGATION* §§ 8:11-8:13 (1984 & Supp. 1989). Scope issues are reviewed at *id.* §§ 9:01-9:23. Attempts to avoid NEPA applicability altogether take a variety of forms, from claims that there is no proposed "action" or that the action is not "federal," *id.* §§ 8:21-8:23, to case-by-case categorical exclusion. See *infra* text generally.

2. 42 U.S.C. § 4332(2)(A) (1988)("[A]ll agencies of the Federal Government shall utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's [sic] environment . . ."). The Senate Report is equally explicit in calling for integration of environmental analysis and values "into the ongoing activities of the Federal Government." S. REP. No. 296, 91st Cong., 1st Sess. 19 (1969).

3. See Blumm & Brown, *Pluralism and the Environment: The Role of Comment Agencies in NEPA Litigation*, 14 HARV. ENVTL. L. REV. 277, 279 (1990).

4. See 42 U.S.C. §§ 4342 (1988) (establishes CEQ); *id.* § 4344 (describes duties and functions of CEQ). The CEQ has promulgated regulations interpreting NEPA and establishing agency implementation requirements. 40 C.F.R. §§ 1500-1517 (1990). The CEQ regulations bind federal agencies and are entitled to substantial judicial deference. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 356 (1989). Between 1980 and 1989, CEQ's nonsecretarial staff was cut from forty-nine to five. Andreen, *In Pursuit of NEPA's Promise: The Role of Executive Oversight in the Implementation of Environmental Policy*, 64 IND. L.J. 205, 259 (1989).

5. For many years, the Supreme Court refrained from resolving a conflict among the circuits over the proper standard of review for agency decisions not to prepare an EIS. In 1989, the Court decided that issue in favor of the deferential arbitrary and capricious standard, at least as regards decisions not to supplement past EISs. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 375-76

entific issues raised by NEPA sometimes taxed agency resources.⁶ In other instances, agency resources proved formidable but misdirected. Agency ingenuity too often has been applied to devising means of avoiding NEPA, rather than integrating the Act into daily management and planning.⁷

This Article explores some of the ways Forest Service ingenuity has been applied to avoid NEPA processes through the use of "case-by-case" categorical exclusion.⁸ By interpreting CEQ cate-

(1989). In a companion case, the Court finally held definitively that NEPA provides no enforceable substantive standards constraining agency action but is purely procedural. *Methow Valley*, 490 U.S. at 350; see also Rodgers, *NEPA at Twenty: Mimicry and Recruitment in Environmental Law*, 20 ENVTL. L. 485, 500-01 (1990). For conflicting analyses of the Supreme Court's overall NEPA record, compare Shilton, *Is the Supreme Court Hostile to NEPA? Some Possible Explanations for a 12-0 Record*, 20 ENVTL. L. 551 (1990) with Yost, *NEPA's Promise—Partially Fulfilled*, 20 ENVTL. L. 533 (1990) and Farber, *Disdain for 17-Year-Old Statute Evident in High Court's Ruling*, NAT'L L.J., May 4, 1987.

6. NEPA affirmatively commands agencies to "identify and develop methods and procedures . . . [to] insure that presently unquantified environmental amenities and values" are considered. 42 U.S.C. § 4332(2)(B) (1988). The CEQ regulations require analysis of reasonably foreseeable indirect, long-term, and cumulative impacts. 40 C.F.R. §§ 1508.7, 1508.8(b) (1990). On the other hand, the CEQ abandoned an earlier requirement to perform a "worst case analysis" when confronted with scientific uncertainty. 40 C.F.R. § 1502.22(b) (1987). See also *Methow Valley*, 490 U.S. at 354 (reviewing the evolution of CEQ requirements and holding worst case analysis not required). For background on the Forest Service's "knowledge base" and the ways NEPA on the one hand, and political and budgetary pressures on the other have focused the agency's expertise, see S. TAYLOR, *MAKING BUREAUCRACIES THINK: THE ENVIRONMENTAL IMPACT STATEMENT STRATEGY OF ADMINISTRATIVE REFORM* 51-53 & *passim* (1984).

7. The author bases his assessment in part on experiences working for a state resource agency dealing with various federal agencies including the U.S. Forest Service, Bureau of Land Management, Bureau of Reclamation, Army Corps of Engineers, and National Park Service. For similar assessments, see TAYLOR, *supra* note 6, *passim*; Montange, *NEPA in an Era of Economic Deregulation: A Case Study of Environmental Avoidance at the Interstate Commerce Commission*, 9 VA. J. ENVTL. L. 1 (1989); Burdach & Pugliaresi, *The Environmental Impact Statement v. the Real World*, 49 PUB. INTEREST 22 (1979) (examining performance of the Department of the Interior). For a more positive but not entirely inconsistent assessment, see Ackerman, *Observations on the Transformation of the Forest Service: The Effects of the National Environmental Policy Act on U.S. Forest Service Decision Making*, 20 ENVTL. L. 703 (1990).

8. FOREST SERVICE, U.S. DEPARTMENT OF AGRICULTURE, FOREST SERVICE MANUAL § 1952.2 (as set out and clarified by Forest Service Interim Directive No. 17, effective March 22, 1989, and noticed at 54 Fed. Reg. 34,533-34 (Aug. 21, 1989)) [hereinafter FSM]. As defined by the CEQ, a categorical exclusion is a "category

gorical exclusion provisions⁹ to exempt individual decisions from NEPA procedures based on comparison to "typical classes" of low-impact actions,¹⁰ the Forest Service redefined the role of exclusions and of NEPA in agency decision making. Case-by-case exclusion of Forest Service decisions unavoidably undermined NEPA integration into the Agency's ongoing planning and implementation process.¹¹ Controversy over implementation of the case-by-case exclusion procedure has led the Forest Service to propose revised exclusion procedures, eliminating the case-by-case approach.¹² The arguments surrounding case-by-case exclusion and the Forest Service's retreat from its experiment with that approach highlight what is needed to fully integrate "systematic, interdisciplinary" ecological analysis into day-to-day agency decision making, as Congress has required.¹³

A. *The CEQ Categorical Exclusion Provisions*

NEPA set forth a series of ambitious but vague environmental goals,¹⁴ mandated consideration of the environmental effects of all federal agency decisions through what became known as the

of actions which do not individually or cumulatively have a significant effect on the human environment . . . and for which, therefore, neither an environmental assessment nor an environmental impact statement is required." 40 C.F.R. § 1508.4 (1990).

9. 40 C.F.R. §§ 1500.4, 1507.3(b)(2)(ii), 1508.4 (1990).

10. FSM, *supra* note 8, § 1952.2; FOREST SERVICE, U.S. DEPARTMENT OF AGRICULTURE, FOREST SERVICE HANDBOOK ON ENVIRONMENTAL POLICY AND PROCEDURES § 1909.15 (as set out and clarified by Interim Directive No. 2, effective February 28, 1989, and noticed at 54 Fed. Reg. 9073-75 (Mar. 3, 1989), and as republished with Interim Directive No. 17 at 54 Fed. Reg. 34,533-35 (Aug. 21, 1989)) [hereinafter FSH].

11. See 42 U.S.C. § 4332(2)(A) (1988). The NEPA integration requirement is reinforced and elaborated in the CEQ regulations. 40 C.F.R. §§ 1500.2(c), 1501.1(a), 1501.2, 1508.18(b) (1990). The National Forest Management Act explicitly incorporates NEPA into the long-term agency planning process. 16 U.S.C. § 1604(g)(1) (1988).

12. Telephone interview with David Ketcham, Director of Environmental Coordination, U.S. Forest Service (Jan. 3, 1991, *updated* Jan. 17, Mar. 25, 1991). The Forest Service worked on the proposed rule throughout much of 1990. At the time of this writing, the proposal is before the Office of Management and Budget, with publication in the Federal Register projected for late spring, 1991.

13. 42 U.S.C. § 4332(2)(A) (1988); 16 U.S.C. § 1604(g)(1) (1988); see also CEQ regulations cited *supra* note 11.

14. 42 U.S.C. § 4331.

environmental impact statement (EIS),¹⁵ and established the CEQ to oversee NEPA implementation.¹⁶ NEPA requires an EIS for all "major Federal actions significantly affecting the quality of the human environment."¹⁷ Determining whether the "significance" threshold has been crossed involves the chicken-and-egg problem of assessing environmental impacts in order to determine the need for EIS impact analysis. Reasoning that entrusting such threshold determinations entirely to agency discretion could vitiate the action-forcing EIS requirement, the District of Columbia Circuit applied the "hard look" doctrine to agency determinations of no-significant-impact.¹⁸ As Judge Leventhal explained the test in *Maryland-National Capital Park & Planning Commission v. United States Postal Service*, courts should inquire whether "the agency [took] a 'hard look' at the problem, as opposed to [stating] bald conclusions, unaided by preliminary investigation."¹⁹

Judge Leventhal's "preliminary investigation" became the environmental assessment (EA), adopted by CEQ in its NEPA implementing regulations and made binding on all federal agencies.²⁰ Under CEQ regulations, any proposed action not subjected to an EIS must be assessed in an EA adequate to support a formal finding of no significant impact (FONSI).²¹ Although sometimes called a "mini-EIS," the primary purpose of an EA is limited to providing information and analysis to facilitate the EIS threshold determination.²² EA documentation and procedural requirements are less involved than EIS requirements,²³ and a large

15. 42 U.S.C. § 4332(2)(C). Section 102 incorporates NEPA's "action-forcing" mechanisms. 42 U.S.C. § 4332; see Yost, *supra* note 5, at 536, 540.

16. 42 U.S.C. §§ 4341-4347 (1988).

17. 42 U.S.C. § 4332(2)(C).

18. *Maryland-National Capital Park & Planning Comm'n v. United States Postal Serv.*, 487 F.2d 1029 (D.C. Cir. 1973); *Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971). The Supreme Court acknowledged the applicability of the hard look doctrine to NEPA cases in *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

19. *Maryland-National Capital Park*, 487 F.2d at 1040.

20. 40 C.F.R. §§ 1501.3, 1508.9 (1990). For a concise discussion of the evolution of the CEQ regulations and the parameters of an EA, see Blumm, *The Origin, Evolution and Direction of the United States National Environmental Policy Act*, 5 ENVTL. & PLAN. L.J. 179, 183-85 (1988).

21. 40 C.F.R. § 1508.13 (1990).

22. 40 C.F.R. § 1508.9(a)(1).

23. Compare 40 C.F.R. §§ 1502.1-1502.25, 1508.11 (requirements and definition of EIS) with *id.* § 1508.9(b) (definition and purpose of EA).

number of agency proposals are handled through EAs.²⁴ Because the EA and FONSI form the record basis for judicial review of threshold determinations, however, agencies that perform only cursory EAs risk remand and injunction.²⁵ Moreover, the CEQ regulations provide that EAs should contain sufficient information to "[a]id an agency's compliance with the Act when no environmental impact statement is necessary."²⁶

The CEQ created a third NEPA compliance procedure in response to concerns that NEPA had caused unnecessary paperwork and delay in some cases. The categorical exclusion provision enables agencies to lawfully avoid EIS/EA documentation and public participation requirements for proposed actions that normally produce no significant environmental effects.²⁷ The regulations explicitly allow exclusion of categories of actions, reflecting the underlying notion that some actions, such as routine administrative or maintenance activities, typically produce no adverse environmental impacts or only trivial impacts.²⁸ Agencies are authorized to list such routine activities by category, excluding proposed actions from EIS/EA documentation and delay if the actions fit within an identified category.²⁹

The CEQ regulations insure against arbitrary exclusions by requiring agencies to promulgate specified categories through notice and comment rulemaking and formalized findings.³⁰ The regulations constrain overly broad categorical exclusions by requiring agencies to identify "extraordinary circumstances" in which a normally excludable action may significantly impact the environ-

24. Blumm & Brown, *supra* note 3, at 297.

25. MANDELKER, *supra* note 1, §§ 4.29-4:30 (record evidence in NEPA review cases); *id.* §§ 4.46-4:61 (judicial remedies). For a review of NEPA "threshold" cases finding noncompliance since 1980, see Blumm & Brown, *supra* note 3, at 287-92, 297-301.

26. 40 C.F.R. § 1508.9(a)(2) (1990). In practice this provision may be unenforceable owing to the lack of substantive standards in NEPA beyond the EIS/EA requirement. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351-52 (1989). However, the adequacy of the EA may prove significant for purposes of subsequent tiering. See 40 C.F.R. § 1508.28; see also 40 C.F.R. § 1508.9(a)(3) (EA should facilitate EIS preparation if statement is required).

27. 40 C.F.R. §§ 1500.4, 1508.4.

28. 40 C.F.R. § 1508.4.

29. 40 C.F.R. §§ 1507.3(b)(2)(ii), 1508.4 (1990).

30. *Id.*

ment, thus mandating preparation of an EIS or EA.³¹ The regulations also provide that individually trivial but cumulatively significant actions may not be categorically excluded.³²

Thus, the CEQ intended categorical exclusion to function as a structured procedure for avoiding NEPA documentation of no practical value while insuring that adequate analysis occurs whenever a proposed action or surrounding circumstances may produce environmental impacts.³³ Categorical exclusion thereby reduces the inflexibility of the NEPA process, but does not grant agencies discretion to decide whether to comply with NEPA. Rather, designation of excludable categories is a form of NEPA compliance procedure, subject to public participation and judicial review.³⁴ Determinations that individual actions fall within established excludable categories are also subject to judicial review, essentially under the same standard that is applied to NEPA threshold decisions.³⁵ Despite these structural safeguards, however, the Forest Service, alone among federal agencies, promulgated categorical exclusion procedures that sought to expand agency discretion to avoid NEPA compliance.³⁶

B. Forest Service "Case-by-Case" Exclusion

Pursuant to the authorization of the CEQ regulations,³⁷ a vast range of federal agencies have promulgated categorical exclusion rules or procedures, including the Forest Service's "parent" agency, the Department of Agriculture.³⁸ The Forest Service categorical exclusion provisions are unique.³⁹ The procedures include

31. 40 C.F.R. § 1508.4.

32. *Id.*

33. *Id.*; 48 Fed. Reg. 34,264-65 (1983) (CEQ guidance).

34. 40 C.F.R. § 1508.4 (1990); Office of General Counsel, U.S. Department of Agriculture, Memorandum at 4 (May 20, 1987) [hereinafter OGC Memorandum] (unpublished memorandum on case-by-case categorical exclusion in author's files).

35. *E.g.*, Jones v. Gordon, 792 F.2d 821, 828 (9th Cir. 1986) (applying CEQ threshold "significance factors," 40 C.F.R. § 1508.27 (1985), to overturn categorical exclusion determination of National Marine Fisheries Service).

36. OGC Memorandum, *supra* note 34, at 3 & n.7 (only the Forest Service provides for case-by-case exclusion).

37. 40 C.F.R. §§ 1501.4(a)(2), 1507.3(b)(2)(ii) (1990).

38. 7 C.F.R. §§ 16.3-16.4 (1990) (Department of Agriculture categorical exclusion procedures and listing of excluded categories, authorizing sub-agencies to promulgate additional categories).

39. OGC Memorandum, *supra* note 34, at 3 & n.7.

the usual list of categories of low-impact activities, such as sign posting, routine campground maintenance activities, and salvage and "small" harvest timber sale offerings.⁴⁰ In addition, however, the Forest Service procedures provide that "certain other actions may be categorically excluded from documentation" in an EA or EIS, if the deciding Forest Service official concludes that the proposed action will have "no more environmental impact" than the listed "typical classes."⁴¹ The process came to be known by the oxymoron "case-by-case" categorical exclusion.

The Department of Agriculture Office of General Counsel (OGC) objected in a series of internal memoranda that such case-by-case categorical exclusion was not authorized by the CEQ regulations.⁴² Environmental organizations agreed; the Oregon Natural Resources Council (ONRC) and the Wilderness Society initiated administrative challenges to the 1985 procedures, culminating in a petition for rulemaking in 1987.⁴³ Faced with a probable court challenge to its categorical exclusion procedure and warned by the OGC that it would probably lose such a challenge, the Forest Service negotiated with the environmentalists.⁴⁴ Those negotiations initiated a long, slow retreat from the case-by-case exclusion concept.

In addition to its objections to case-by-case exclusion, ONRC felt that the expressly excluded small harvest timber cuts were improperly large.⁴⁵ In August 1987, the Forest Service responded by "clarifying" its categorical exclusion procedures in Interim Directive No. 14.⁴⁶ Interim Directive No.14 reduced the excluded

40. FSH, *supra* note 10, § 1909.15; FSM, *supra* note 8, § 1952.2.

41. FSM, *supra* note 8, § 1952.2. The case-by-case categorical exclusion provision generated the most public comment in response to the 1985 revision of Forest Service NEPA procedures. See OGC Memorandum, *supra* note 34, at 1 n.1 (citing 50 Fed. Reg. 26,079 (June 24, 1985)).

42. See OGC Memorandum, *supra* note 34, at 2 nn. 3 & 5 (citing various internal memoranda).

43. Petition for Rulemaking from Oregon Natural Resources Council and Wilderness Society to the U.S. Forest Service (Apr. 29, 1987).

44. Telephone interview with Michael Axline, attorney, Oregon Natural Resources Council (June, 1989, updated Jan. 2, 1991); OGC Memorandum, *supra* note 34.

45. Axline, *supra* note 44; Ketcham, *supra* note 12.

46. Forest Service, U.S. Department of Agriculture, Interim Directive No. 14 (Aug. 11, 1987) [hereinafter Interim Directive No. 14] (*incorporated as* FSM, *supra* note 8, § 1952.2).

cut to 100,000 board feet, still substantially higher than the board foot limit advocated by ONRC.⁴⁷ The Directive responded to criticisms of case-by-case exclusion by specifying recordkeeping requirements for the "environmental analyses" performed in support of case-by-case exclusion determinations.⁴⁸ The new recordkeeping requirement functioned to facilitate administrative and judicial review, protecting somewhat against post hoc rationalizations for exclusions; but it also ironically undercut the main rationale underlying all categorical exclusion: paperwork reduction. The trend toward increasing documentation requirements for case-by-case exclusions continued through 1989, when the Forest Service mandated that all case-by-case exclusion decisions be announced in a new document, termed a "Decision Memo."⁴⁹

While the Forest Service incrementally increased case-by-case exclusion documentation requirements nationwide, decision makers at the regional, individual forest, and district levels implemented the policy on an essentially ad hoc basis.⁵⁰ ONRC and the Forest Service had arrived at quid pro quo. Although free to challenge individual applications of case-by-case exclusion, the environmentalists agreed not to challenge the procedure itself in court. The agency agreed not to promulgate the interim directives as a final rule.⁵¹ Increased documentation functioned defensively, answering somewhat the OGC argument that case-by-case exclusion did not satisfy NEPA's documentation requirements.⁵² But the interim directives issued from 1985 through 1990 offered no clear standards to guide exclusion decisions except the vague re-

47. *Id.*; OGC Memorandum, *supra* note 34, at 1.

48. Interim Directive No. 14, *supra* note 46 (typical classes of actions that might be excluded are based on "[e]xperience and environmental analysis," which indicate that those actions usually do not significantly affect the environment).

49. 54 Fed. Reg. 3342-70 (January 23, 1989) (Final Rule, U.S. Department of Agriculture, Forest Service Appeal Procedure) (codified at 36 C.F.R. § 217 (1990)); Forest Service, U.S. Department of Agriculture, Interim Directive No. 2 (Feb. 28, 1989) [hereinafter Interim Directive No. 2] (clarifying FSH, *supra* note 10, § 1909.15, and noticed at 54 Fed. Reg. 9073-75 (Mar. 3, 1989)); Forest Service, U.S. Department of Agriculture, Interim Directive No. 17 (Mar. 22, 1989) [hereinafter Interim Directive No. 17] (clarifying FSM, *supra* note 8, § 1952.2, and noticed at 54 Fed. Reg. 34,533-35 (Aug. 21, 1989)).

50. For an overview of the multileveled, decentralized Forest Service decision-making structure, see C. WILKINSON & H. ANDERSON, LAND AND RESOURCE PLANNING IN THE NATIONAL FORESTS 76-81 (1987).

51. Axline, *supra* note 44.

52. See OGC Memorandum, *supra* note 34, at 3.

quirement that the proposed action produce "no more" impact than the listed "typical classes."⁵³

Not surprisingly, such standardless and decentralized discretion resulted in inconsistent implementation.⁵⁴ Early on, several forests attempted to justify exclusion decisions by "tiering" to previously completed environmental assessments and forest-wide land and resource management plan (LMP) EISs, a practice strongly criticized by the OGC.⁵⁵ Five years later such practices recurred, but in different forests and Forest Service regions.⁵⁶ In some forests, case-by-case exclusion created few problems; but by 1990, the agency recognized that the policy had been inconsistently implemented, resulting in multiple abuses.⁵⁷ In the most serious cases, it appeared to have been deliberately employed to evade NEPA and Forest Service planning process requirements.⁵⁸

As a result, the Forest Service now intends to abandon its experiment with case-by-case categorical exclusion, while modify-

53. FSM, *supra* note 8, § 1952.2.

54. Ketcham, *supra* note 12. The author's telephone survey of western states' public interest groups confirms wide variation in the use of case-by-case categorical exclusions. Applications considered inappropriate by informants ranged from few or none, as for post-fire salvage sales in Colorado and Wyoming, to numerous, for Forest-wide proposals such as intermediate planning, and Land and Resource Management Plan (LMP) amendment proposals in Arizona. Wide variations were observed within individual Forest Service Regions (*e.g.*, between New Mexico and Arizona, both in the Forest Service's Southwest Region) and over time (*e.g.*, in the Pacific Northwest, where exclusion monitoring suggests a declining trend in objectionable exclusions). Conversations with Axline, *supra* note 44; Larry Mehlhaf, Sierra Club Coordinator, Wyoming; John Wright, Wilderness Society Southwest Regional Director, Arizona; David Atkin, attorney, Oregon; Jim Norton, Wilderness Society, New Mexico (December 1990 to January, 1991).

55. See OGC Memorandum, *supra* note 34, at 3 nn.9 & 10 (citing Appeal of South Prong Salvage Sale to Forest Supervisor, Jefferson National Forest (Va.), Aug. 15, 1986; Jefferson National Forest LMP at V-2). See also 40 C.F.R. §§ 1500.4(i), 1501.7(a)(3), 1506.3, 1508.28 (1990) (tiering and incorporation of prior analyses).

56. Decision Memo for Amendment Three to the Coconino National Forest (Az.) LMP (Apr. 3, 1989) [hereinafter Coconino Amendment Three]; Decision Memo for Amendment Three to the Apache-Sitgreaves National Forest (Az.) LMP (Sept. 19, 1990); Decision Memo for Amendment Six to the Coconino LMP (Oct. 31, 1990) [hereinafter Coconino Amendment Six].

57. Ketcham, *supra* note 12.

58. *Id.* (attributing misapplications to a combination of deciding officers' misunderstandings and disinclinations to follow the Forest Service NEPA/planning process).

ing and expanding its list of specifically excluded categories.⁵⁹ The experiment, however, was not without value. Rather, it shed a revealing light on several perennial NEPA problems.

II. CASE-BY-CASE EXCLUSION AND THE REDEFINITION OF NEPA'S GOALS

The Forest Service revised its NEPA procedures to include case-by-case exclusion of proposed actions in response to field officer concerns with the documentation burdens imposed by NEPA and Forest Service planning procedures.⁶⁰ Although the agency did not set out to undermine NEPA or its long-term planning process, the extreme flexibility and standardless discretion implicit in the case-by-case procedure had such effects in practice. The Forest Service experiment with case-by-case exclusion was surprising in light of the agency's strong commitment to integrated, structured planning.⁶¹ Less surprisingly, the agency's decentralized decision-making structure and the ongoing, complex nature of the agency's planning process provided numerous occasions for abuse of case-by-case exclusions.⁶² A half-decade of inconsistent application of the categorical exclusion will necessitate a period to unlearn past mistakes in applying NEPA.⁶³

The Forest Service premised its procedure on a redefinition of "categorical exclusion," treating the requirement to list specified categories as authorization to designate "typical actions" lim-

59. *Id.*; see *infra* notes 193-94 and accompanying text.

60. See OGC Memorandum, *supra* note 34, at 5 (citing Forest Service response to comments, 50 Fed. Reg. 26,079 (June 24, 1985)).

61. Congress mandated national long-term Forest Service planning in the Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C. §§ 1600-1687 (1988). Congress mandated planning at the individual Forest level through the National Forest Management Act of 1976 (NFMA), Pub. L. No. 94-588, 90 Stat. 2949-63 (1976) (codified as amendments dispersed throughout 16 U.S.C.).

For the classic assessment of legislatively mandated Forest Service planning, see C. WILKINSON & H. ANDERSON, *supra* note 50. For a recent assessment of the interface between Forest Service planning processes and NEPA, see Ackerman, *supra* note 7.

62. See C. WILKINSON & H. ANDERSON, *supra* note 50.

63. See OGC Memorandum, *supra* note 34, at 5 ("It will take a substantial unlearning effort before Forest Service field personnel will understand the relationship of categorical exclusions, EA/FONSI and EISs.").

ited to an exemplary function.⁶⁴ In practice, the redefinition encouraged NEPA avoidance by analogy, focusing attention on formal similarities to listed actions rather than on foreseeable impacts. Rather than encouraging agency decision makers to focus on integrating NEPA into ongoing planning and management, the procedure tempted officers to simplify their planning tasks through semantic manipulation and avoidance of public scrutiny in direct contravention of fundamental NEPA goals.⁶⁵ Lacking structure and standards sufficient to comply with those goals, the procedure was fundamentally flawed as well as misapplied.⁶⁶ Yet the errors and misapplications of case-by-case exclusion suggest, by negative example, a path more faithful to NEPA's goals.

A. Case-by-Case Exclusion and Public Participation

NEPA decision making involves both a scientific and a political aspect. Although the two aspects may conflict at times, both are strongly reflected in the language of the Act.⁶⁷ NEPA's emphasis on integrating scientific knowledge and research into decision making has encouraged some agencies to increase or broaden their technical expertise significantly, a result frequently cited as one of the Act's main successes.⁶⁸ However, the political reforms instituted in NEPA cut in the opposite direction. Together with other "government-in-the-sunshine" legislation of its time, NEPA challenged the hegemony of agency experts, democratizing agency decision making by encouraging public and inter-agency participation.⁶⁹

64. FSH, *supra* note 10, § 1909.15; FSM, *supra* note 8, § 1952.2.

65. See 42 U.S.C. § 4332(2)(A) (1988); S. REP. No. 296, 91st Cong., 1st Sess. 19 (1969); OGC Memorandum, *supra* note 34, at 3, 5.

66. See OGC Memorandum, *supra* note 34, at 2 ("We must point out that the question here is not solely one of whether Forest Service field managers have misapplied FSM 1952.2 but rather whether FSM 1952.2 is fundamentally flawed. It is our opinion that case-by-case categorical exclusions violate NEPA case law and the CEQ NEPA regulations.").

67. 42 U.S.C. § 4331(a) (1988) (involve public, state and federal commenting agencies); *id.* § 4332(2)(A) (systematic, interdisciplinary integration of scientific analysis); *id.* § 4332(2)(D) (coordinate with state agencies); *id.* § 4332(2)(G) (provide information to public and local government); *id.* § 4332(2)(H) (integrate ecological information into planning).

68. See, e.g., S. TAYLOR, *supra* note 6.

69. NEPA's public participation function has been elaborated upon in the CEQ regulations. 40 C.F.R. § 1500.1(b) (1990) (public informational function); *id.*

Case-by-case exclusion undermined the democratization of agency decision making promoted by NEPA. By requiring specification of excludable categories through notice and comment rulemaking, the CEQ regulations insured opportunities for public participation.⁷⁰ But the hallmark of case-by-case exclusion was limited public participation. Assuming that the environmental analysis supporting case-by-case exclusion adequately addressed foreseeable impacts, case-by-case exclusion differed from an EA only in regard to public notice and publicly available documentation.⁷¹ The OGC stated the problem:

The real problem with the case-by-case categorical exclusion is that, contrary to the fundamental notice and documentation requirements of NEPA, an action may be categorically excluded without any real opportunity for public notice and involvement. Agencies which have promulgated their categorical exclusions as a listing have satisfied the basic notice requirement of NEPA in their regulation. Even so, some agencies still require a categorical exclusion record form be completed each time one of their specified categorical exclusions is used. The other troubling aspect of the [Forest Service Manual Section 1952.2] is the failure to recognize that NEPA is basically a procedural statute and that agencies prove compliance with NEPA through documentation that was made available to the public at the time of the decision.⁷²

Pre-decisional public documentation not only serves a political participation function, but also constrains agency tendencies to engage in post hoc rationalization.⁷³ Thus, NEPA's public participation aspect furthers the Act's pre-decisional information gathering goals.⁷⁴ Seen in this light, the political and scientific components of NEPA are complementary. By democratically

§ 1500.2(d) (encourage public involvement); *id.* § 1501.7(a)(1) (involve public in initial scoping of NEPA analyses). Other examples of public participation legislation include, *e.g.*, Freedom of Information Act, 5 U.S.C. § 552 (1988); Government in the Sunshine Act, 5 U.S.C. § 552b (1988); NFMA, 16 U.S.C. § 1604(d) (1988) (public participation in LMP development). For a more recent application of the democratization approach, see Emergency Planning and Community Right to Know Act of 1986, 42 U.S.C. §§ 11,001-11,050 (1988). *See also* Blumm & Brown, *supra* note 3, *passim* (on the "pluralistic" function of interagency comment).

70. 40 C.F.R. § 1508.4; *see* OGC Memorandum, *supra* note 34, at 4.

71. *See* OGC Memorandum, *supra* note 34, at 3.

72. OGC Memorandum, *supra* note 34, at 4.

73. *See* OGC Memorandum, *supra* note 34, at 4 n.11.

74. *See* 40 C.F.R. § 1501.1(b) (1990); OGC Memorandum, *supra* note 34, at 4.

“politicizing” the decisional process, NEPA inhibits the freedom of agencies to base decisions purely on political considerations without due consideration of the scientific issues involved.⁷⁵

It may be significant that the Forest Service increased the documentation requirements for case-by-case exclusions several years before it mandated public notice of exclusion decisions through the Decision Memo device.⁷⁶ Documentation of exclusion decisions has independent utility as a record source in the event of administrative and judicial review, and the increased record-keeping mandated in 1987 did not render exclusion decisions as publicly visible as did the later Decision Memo requirement.

In any event, the successive modifications of the case-by-case exclusion procedure only imperfectly addressed the public participation problem. Decision Memos provide public notice only after decisions have been made; they do not facilitate pre-decisional public involvement.⁷⁷ In contrast, Forest Service procedures encourage pre-decisional agency and public involvement in both the EA and EIS processes, including the initial “scoping” stage.⁷⁸ The procedures, however, also allowed nonpublic scoping of case-by-case exclusion decisions.⁷⁹ Thus, even in its final 1989 incarnation, case-by-case exclusion functioned to reduce the public visibility of proposed actions.

Case-by-case exclusion shielded the Forest Service from public scrutiny in a second way. Typical classes of excluded actions were based on “[e]xperience and environmental analysis.”⁸⁰ Decision makers frequently interpreted the past experience language as encouraging a form of tiering to prior project analyses,⁸¹ but

75. For a discussion of the interactions between political and scientific factors in Forest Service decision making and some ways in which political considerations may be masked as technical issues, see Ackerman, *supra* note 7, at 724-25.

76. Compare Interim Directive No. 14, *supra* note 46, with 54 Fed. Reg. 3342-70 (Jan. 23, 1989); Interim Directive No. 2, *supra* note 49; and Interim Directive No. 17, *supra* note 49.

77. 54 Fed. Reg. 3342-70 (Jan. 23, 1989); Interim Directive No. 2, *supra* note 49; Interim Directive No. 17, *supra* note 49.

78. FSH, *supra* note 10, § 1909.15 § 11.3; FSM, *supra* note 8, § 1951. “Scoping” defines the issues and framework of the subsequent environmental analysis.

79. FSM, *supra* note 8, § 1951. The procedure mandates scoping commensurate with “the complexity and nature of the action.”

80. FSM, *supra* note 8, § 1952.2.

81. See OGC Memorandum, *supra* note 34, at 3 & n.9.

the language more plausibly refers to past experiences with similar categories of actions and impacts.⁸² Thus, "past experience" analysis of case-by-case exclusions is indistinguishable from the sort of analysis necessary to support promulgation of a listed excludable category.⁸³ The difference in the procedures, however, is that the nationwide rulemaking required for listing categories is far more publicly visible than case-by-case exclusion.⁸⁴

Finally, case-by-case exclusion is antidemocratic in a more subtle sense. Declaring a proposed action "categorically excluded" is semantically different from finding a proposed action unlikely to cause significant impacts. The choice of words focuses scrutiny of the decision differently and may create different assumptions and expectations on the part of the public, the courts, and agency officials. Some circuits, in fact, have given greater deference to categorical exclusion determinations than to FONSIIs.⁸⁵ Courts may also expect less documentation for categorical exclusion decisions than they would demand for EAs.⁸⁶ Inquiry is likely to focus on whether the proposed action fits the definition of the listed category, rather than on the significance of anticipated impacts.⁸⁷ Such lowered scrutiny may be appropriate where the criteria constituting the category have been exposed previously to public scrutiny and comment,⁸⁸ but case-by-case exclusions rely upon individualized impact analyses that have not been subjected to public scrutiny.

By focusing attention away from the no-impact determination, the designation of a proposal as a "case-by-case" categorical exclusion is tantamount to claiming that the proposed activity is not a "major action."⁸⁹ The CEQ regulations, however, clearly fo-

82. Compare FSM, *supra* note 8, § 1952.2 and 36 C.F.R. § 217 (1990).

83. 40 C.F.R. § 1508.4; 7 C.F.R. § 16.

84. 40 C.F.R. §§ 1501.4, 1507.3.

85. See, e.g., *West Houston Air Comm. v. Federal Aviation Admin.*, 784 F.2d 702, 705 (5th Cir. 1988) (upholding exclusion as not "plainly erroneous").

86. See, e.g., *Mississippi v. Moore*, 710 F. Supp. 1488, 1507 n.41 (S.D. Miss. 1987).

87. *But see Jones v. Gordon*, 792 F.2d 821, 828 (9th Cir. 1986) (employing standard Ninth Circuit "may affect" threshold test).

88. See OGC Memorandum, *supra* note 34, at 3 & n.7.

89. NEPA requires an EIS for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (1988). See also 40 C.F.R. § 1508.18 (1990) (defining "major Federal action"). Most litigated "non-action" cases involve ongoing projects or post-NEPA changes to continuing

cus on the nature of the impacts, not the size of the action.⁹⁰ Thus, case-by-case exclusion functions as a form of "double-speak," an official alteration of perception through semantic distortion that shields relevant information from public view.⁹¹

The Forest Service did not initiate its case-by-case exclusion experiment in order to evade public participation. Rather, the agency responded to field officer concerns over NEPA transactional costs created by unnecessary paperwork.⁹² The evolution of the exclusion procedure, however, suggests a growing emphasis on avoiding public controversy. During the last four years of the case-by-case exclusion experiment, the level of paperwork required for case-by-case exclusions was comparable to that necessary for EAs.⁹³ Thus, the only transaction costs avoided were those of public involvement and political controversy, costs that NEPA mandates. The CEQ's truly "categorical" exclusion provisions achieve flexibility within a framework of procedural regularity and public involvement. Case-by-case exclusion, in contrast, delegated virtually standardless discretion to field officers. It is not surprising that the temptation arose to abuse that discretion in order to restrict public participation.⁹⁴

projects. The case law conflicts, but the dominant rule is that an "action" occurs when a new discretionary decision is made. For an overview, see MANDELKER, *supra* note 1, §§ 8:21-8:23.

90. 40 C.F.R. § 1508.18 ("Major reinforces but does not have a meaning independent of significantly."). See *City of Davis v. Coleman*, 521 F.2d 661, 673 n.15 (9th Cir. 1975) (citing *Minnesota Pub. Interest Research Group v. Butz*, 498 F.2d 1314, 1321-22 (8th Cir. 1974) (en banc)). As the court stated in *Butz*:

To separate the consideration of the magnitude of the federal action from its impact on the environment does little to foster the purposes of the Act By bifurcating the statutory language, it would be possible to speak of a "minor federal action significantly affecting the quality of the human environment," and to hold NEPA inapplicable to such an action. . . . [T]he activities of federal agencies cannot be isolated from their impact upon the environment.

498 F.2d at 1323-22.

91. G. ORWELL, 1984 (1949).

92. See OGC Memorandum, *supra* note 34, at 5.

93. *Supra* text accompanying notes 48-49.

94. See OGC Memorandum, *supra* note 34, at 3 (discussing misapplications of tiering and other procedures in conjunction with case-by-case exclusion); *id.* at 5 (attraction of case-by-case exclusion to field personnel).

B. Case-by-Case Exclusion and Agency Discretion

The Forest Service's retreat from its policy of case-by-case exclusion is based in part on its recognition that the procedure has been applied in a widely inconsistent fashion.⁹⁵ The Agency has also concluded that some of the listed categories were too vague to provide field officers with clear direction on the proper scope of the exclusions. Recognizing a tension between the need for allowing field officers reasonable flexibility and the need for consistency, the Agency's rewrite of its categorical exclusion procedures attempts to focus on thorough descriptions of excludable categories that are understandable to agency officers and the public.⁹⁶

Inconsistent application of agency rules undermines the notice essential to meaningful public participation, a significant shortcoming under a statute like NEPA that emphasizes citizen input and involvement. One resolution of the problem is to "check" the discretion of lower-level officials through routine higher-level review.⁹⁷ Forest Service procedures do not provide for automatic review of field officer decisions, but do provide for appeal of decisions through the agency hierarchy.⁹⁸ In practice, however, this "check" on lower-level discretion has not resulted in consistent application of case-by-case exclusion. In a particularly striking example, the Southwest Regional Forester rejected appeals by environmentalists and a state wildlife agency that challenged the categorical exclusion of a seven-year revision of the Coconino National Forest LMP timber offering schedule.⁹⁹ The revision added some seventy million board feet of timber to the harvest.¹⁰⁰ A few months later, however, the Region found merit in a timber industry challenge to the exclusion of a three-year revision of the Apache-Sitgreaves LMP timber offering schedule that actually reduced harvest levels.¹⁰¹ If the proper measure of

95. See *supra* note 54.

96. Ketcham, *supra* note 12.

97. K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 142-61 (1969).

98. 36 C.F.R. § 217 (1990).

99. U.S. Forest Service, Southwest Region, Decision on Consolidated Coconino National Forest LMP Amendment Three Appeals (Appeal No. 89-03-00-0017) (Oct. 6, 1989) [hereinafter Decision, Coconino Amendment Three Appeals].

100. *Id.*

101. Telephone conversations with John Wright, Wilderness Society Southwest Regional Director, Arizona (Jan. 1991); Richard Miller, Habitat Specialist,

the appropriateness of case-by-case exclusion is the extent of adverse environmental impact, it is hard to see how a reduction in timber cutting can have more impact than a sizeable increase.¹⁰²

The experience suggests some limits to the utility of higher-level internal review as a check on agency discretion, particularly when the review occurs only after a final public decision has been made. In such cases, higher-level officials may share a sense of investment in decisions already made. Moreover, higher-level officials may be subject to the same political pressures and share the same agency ethos that motivated the original decision.¹⁰³ If a reasonable degree of consistency in application is to be achieved, the courts must play a role.

NEPA case law is characterized by a recurring tension between the need for judicial scrutiny and the venerable concept of deference to agency decisions. One line of cases emphasizes the judicial, as well as the agency, "hard look" and the need for strict procedural compliance.¹⁰⁴ A second line of cases emphasizes deference to agency expertise and agency discretion to formulate procedures and establish decisional agendas.¹⁰⁵

Arizona Game & Fish Department (Jan. 4, 1991); Norris Dodd, Habitat Specialist, Arizona Game & Fish Department (Jan. 25, 1991). At this writing, the Region is negotiating with the appellants. See Arizona Game & Fish Department, Request for Intervention in Apache-Sitgreaves LMP Amendment Three Appeal, at 7-8, Appeal No. 91-003-00-008 (Nov. 30, 1990); Letter from the Legal Counsel of Timber Industry Appellants to David Jolly, Regional Forester, Southwest Region, U.S. Forest Service (Jan. 10, 1991) (discussing proposed withdrawal of Apache-Sitgreaves Amendment Three Appeal); Letter from John C. Bedell, Apache-Sitgreaves Forest Supervisor, to LeRoy Smith, Duke City Lumber Co. (Jan. 16, 1991) (discussing proposed withdrawal of Amendment Three Appeal).

Recently, in deciding on timber industry and environmentalist appeals of the case-by-case exclusion of yet another Coconino sale schedule change, the Regional Forester found the exclusion improper but refused to order any corrective action, dismissing the situation as "only a minor technical error." U.S. Forest Service, Southwest Region, Decision on Coconino National Forest Plan Amendment Six Appeals (Appeal Nos. 91-03-00-0010, 91-03-00-0011, 91-03-00-0012) (Apr. 17, 1991).

102. For a similarly ironic difference between the degree of impact and the extent of NEPA compliance in a different context, see Funk, *NEPA at Energy: An Exercise in Legal Narrative*, 20 ENVTL. L. 759, 766-68 (1990).

103. See Ackerman, *supra* note 7. See also R. O'TOOLE, *REFORMING THE FOREST SERVICE* 107-09 (1988).

104. MANDELKER, *supra* note 1, § 3:07.

105. *Id.*, §§ 3:02-3:03.

Despite the Supreme Court's recent pronouncement on the appropriate NEPA standard of review,¹⁰⁶ NEPA case law is likely to remain highly fact-specific and context-sensitive.¹⁰⁷ Probably the strongest case for judicial deference arises when the resolution of a factual question depends upon expert judgment.¹⁰⁸ In such cases, courts are likely to defer to the professional expertise of the agencies.¹⁰⁹

The agency expertise concept needs cautious application in the NEPA context, however. Congress clearly intended through NEPA to open up agency decision making to information input from citizens and other agencies and to insure pre-decisional consideration of opposing views.¹¹⁰ A review of NEPA case law suggests that the opinions of resource and environmental commenting agencies, as well as the deciding agency, receive considerable weight.¹¹¹ The case for deference to the deciding agency's expertise is probably greatest after the agency has had the opportunity to weigh conflicting opinions in an EIS and has reached a final decision.¹¹² Where the threshold decision of whether to prepare an EIS is at issue, less deference may be appropriate.¹¹³ Indeed, "controversy," in the sense of informed disagreement over the na-

106. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 376 (1989) (applying arbitrary and capricious standard of review to agency decision not to supplement EIS).

107. *Id.* (characterizing dispute as involving "primarily issues of fact," rather than definition of "significance," or other question of law or the application of legal standards to issues of fact); *id.* at 377 n.23 (doubting that adoption of arbitrary and capricious standard will "require a substantial reworking of established NEPA case law").

108. *Id.* at 376-77 (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976); *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983)).

109. *Id.*

110. 42 U.S.C. §§ 4331(a), 4332(2)(C), 4332(2)(G) (1988).

111. *Blumm & Brown, supra note 3, passim.*

112. For a review of cases holding EISs inadequate and an assessment of the role of conflicting experts therein, see *id.* at 292-96, 301-02.

113. Thus, the Ninth Circuit has held that a plaintiff challenging an agency threshold determination need only raise a "substantial question" whether a project may have a significant adverse impact on the human environment. *E.g.*, *Sierra Club v. United States Forest Serv.*, 843 F.2d 1190, 1193 (9th Cir. 1988); see also, *Missouri Coalition for the Env't v. United States Army Corps of Eng'rs*, 866 F.2d 1025, 1033 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 76 (1989) (plaintiff has initial burden of demonstrating that agency failed to consider facts that could have led to a showing of significant impacts).

ture and extent of potential impacts, is an explicitly listed CEQ "significance factor" which may trigger the EIS requirement.¹¹⁴

Because categorical exclusion decisions, particularly when made on a case-by-case basis, amount to de facto significance determinations, such determinations are entitled to no greater deference than would be appropriate in reviewing an EA and FONSI.¹¹⁵ The Ninth Circuit employed such an approach in a case involving a categorically excluded timber sale under the Forest Service's case-by-case exclusion procedure.¹¹⁶ Finding controversy over the impacts of the excluded sale and the ability to regenerate after clearcutting, the court overturned the exclusion without direct reference to the decisional procedure employed.¹¹⁷

A second line of decisions establishes a principle of judicial deference to certain kinds of fundamentally procedural agency decisions that commonly deal with the timing and scope of NEPA analysis.¹¹⁸ The general proposition that agencies have discretion to set their own decisional agendas enjoys widespread judicial support.¹¹⁹ Yet NEPA and the CEQ regulations necessarily preclude agencies from evading required environmental analysis by simply omitting decisions-in-fact from a place on the official agenda.¹²⁰ Nor should agency discretion to determine the timing and define the scope of environmental analysis be so unconstrained as to undermine the comprehensive examination of indirect, cumulative, and synergistic effects that NEPA mandates.¹²¹

114. 40 C.F.R. § 1508.27(b)(4) (1990).

115. See, e.g., *Jones v. Gordon*, 792 F.2d 821, 828 (9th Cir. 1986).

116. *Sierra Club v. United States Forest Serv.*, 843 F.2d at 1193. The excluded sale was one of nine sales that the court found, together with attendant road construction, might produce cumulatively significant impacts.

117. *Id.*

118. *MANDELKER*, *supra* note 1, §§ 8:11-8:13, 9:01-9:23.

119. E.g., *California v. Block*, 690 F.2d 753, 765 (9th Cir. 1982).

120. The regulations state:

"Proposal" [of a federal action] 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. . . . A proposal may exist in fact as well as by agency declaration that one exists. 40 C.F.R. § 1508.23 (1990). See also 40 C.F.R. § 1501.2 (NEPA to be applied early in decision-making process); *id.* § 1508.25(a)(2) (cumulative actions should be discussed in a single EIS); *id.* § 1508.27(b)(7) (cumulatively significant effects cannot be avoided by segmenting or terming an action "temporary").

121. See CEQ regulations cited *supra* note 120. See also Thatcher, *Under-*

Timely impact analysis, particularly by agencies that, like the Forest Service, are committed by statute to comprehensive, ongoing, long-range planning,¹²² is indispensable to achieving NEPA's central goal of integrating environmental analysis into agency decision making.¹²³ To insure that such integration is maintained, courts must be prepared to scrutinize procedural devices such as case-by-case exclusion that may be used to conceal an agency's true agenda.

C. Case-by-Case Exclusion and Integrated Planning

In addition to requiring the consideration of environmental values and ecological knowledge, NEPA's authors saw the Act as a direct challenge to agency reliance on "incremental planning."¹²⁴ Incremental planning occurs when policy is made in small steps, with little consideration and still less public discussion of long-term outcomes. That decision-making mode was seen as the road the United States took into the Vietnam quagmire, and many lesser bogs as well. Typically, adverse effects became apparent only long after policy was set, thus making extrication difficult. Moreover, the unanticipated consequences of modern technologies and policies, documented in works like Rachel Carson's *Silent Spring*, had made the public conscious of the subtle, synergistic pattern of environmental change and collapse.¹²⁵ The remedy was seen as a new decision-making mode, in which isolated decisions were analyzed in their broader policy context, agency commitments were deferred long enough to weigh their consequences, and the decisional horizon was expanded to include the indirect, cumulative, and secondary impacts of proposals.¹²⁶ It is against this history that NEPA's command to integrate ecologi-

standing Interdependence in the Natural Environment: Some Thoughts on Cumulative Impact Assessment Under the National Environmental Policy Act, 20 ENVTL. L. 611, 628-634 (1990).

122. See sources cited *supra* note 61.

123. 42 U.S.C. § 4332(2)(A) (1988); 40 C.F.R. §§ 1500.2(c), 1500.4(k), 1500.5(a), (f), (g), 1501.1(a), 1501.2, 1506.4 (1990).

124. Thatcher, *supra* note 121, at 612-13.

125. R. CARSON, *SILENT SPRING* (1962).

126. S. REP. NO. 296, 91st Cong., 1st Sess. 5 (1969) ("Important decisions concerning the use and the shape of man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades").

cal and environmental values into agency decision making must be understood.

In succeeding years, the same desire to make agencies take a longer view, to broaden the focus of their inquiries, and to modify the incremental approach to planning led to enactment of major planning legislation affecting the public lands agencies.¹²⁷ Notably, the Resource Planning Act of 1974 and the National Forest Management Act of 1976 imposed a complex, comprehensive planning process on the U.S. Forest Service from the national to the local levels.¹²⁸ Because such statutes imposed clear constraints on agency decisional agendas, NEPA's challenge to incrementalism has proven most successful among the public land managers.¹²⁹ Yet incremental planning does offer some benefits and many enticements to bureaucratic managers operating in a context of imperfect information and persistent interest group pressures.¹³⁰ The temptation to evade integrated environmental planning is perennial, as the Forest Service's case-by-case exclusion experiment demonstrates.

Forest Service planning under the modern planning statutes is continuous and dynamic. It involves the generation of broad, integrated, multi-year, multiple-resource plans; continuing plan monitoring, revision, and amendment; and ongoing plan implementation through site-specific projects.¹³¹ Given the complexity of the process, it is not surprising that confusion and controversy persist over the appropriate role of NEPA at various planning process stages.¹³² Agency thinking commonly follows a dichotomized planning model, in which a bright line is drawn between

127. *E.g.*, Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1784 (1988); Endangered Species Act of 1973 § 7, 16 U.S.C. §§ 1536(a)-(c) (1988) (requiring interagency consultation and preparation of biological assessments); *see also* Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985).

128. *See* sources cited *supra* note 61.

129. For a comparison of the Forest Service and the Army Corps of Engineers approaches to NEPA implementation, *see* TAYLOR, *supra* note 6. By mandating a structured, continuous approach to long-range planning, statutes such as NFMA and FLPMA supplement NEPA's more general goal of integrated, nonincremental planning. *See* Ackerman, *supra* note 7, at 726-27 ("Forest planning and its attendant NEPA analysis are part of a never-ending process").

130. Ackerman, *supra* note 7, at 724-27; *see supra* text accompanying note 75.

131. Ackerman, *supra* note 7, at 726-27.

132. *See* OGC Memorandum, *supra* note 34, at 5; Ketcham, *supra* note 12.

“programmatic” and “site-specific” decisions.¹³³ Discussion then centers around the level of NEPA analysis appropriate at each pole of the dichotomy. In practice, however, Forest Service planning occurs along a continuum, and a more realistic model would posit an initial planning stage (the LMP), an indefinite number of intermediate decision points (including but not limited to LMP amendments or revisions), and ultimate site-specific implementation. At least on paper, the Forest Service requires formalized planning at all important decisional points—for instance, “significant” LMP amendments¹³⁴—accompanied by full public participation and NEPA compliance.¹³⁵

In practice, however, a variety of pressures may induce forest managers to avoid the bureaucratic and political transaction costs of full NEPA integration.¹³⁶ Such avoidance strategies frequently rely on formalistic applications of the dichotomized planning model to support a bifurcated approach to NEPA,¹³⁷ or even to avoid NEPA compliance at either the programmatic or site-specific action stage.¹³⁸ Whether such maneuvers are permissible may

133. *E.g.*, Sample, *Assessing Cumulative Environmental Impacts: The Case of National Forest Planning*, 21 ENVTL. L. 839 (1991) (the model's attraction is not limited to agency personnel). Although Ackerman suggests that the continuous nature of Forest Service planning may require frequent updating of both LMPs and NEPA analyses, Ackerman, *supra* note 7, at 726-27, he also relies on the dichotomous model elsewhere. *Id.* at 714-15. For applications of the model in the case-by-case exclusion context, see, *e.g.*, Jefferson National Forest LMP, *cited in* OGC Memorandum, *supra* note 34, at 3 n.9 (purporting to base exclusion of site-specific actions on tiering to LMP standards and guidelines); Decision, Coconino Amendment Three Appeals, *supra* note 99 (approving Coconino management's bifurcation of programmatic and site-specific analysis as a basis for excluding intermediate planning decision); Coconino Amendment Six, *supra* note 56 (employing similar dichotomous approach).

134. Forest and Rangeland Renewable Resources Planning Act, 16 U.S.C. § 1604(f)(4) (1988); 36 C.F.R. § 219.10(f) (1990); FSM, *supra* note 8, §§ 1922.5-1922.52.

While this Article was in the editing stage, the Forest Service published proposed new rules addressing, *inter alia*, the LMP amendment process. 50 Fed. Reg. 6508-38 (Feb. 15, 1991). The timing of the proposal precluded detailed consideration in this Article. However, the proposed rule appears to move in the right direction by mandating an EIS for “major” amendments. *Id.* at 6533.

135. 16 U.S.C. §§ 1600(3); 1604(d), (f)(4); 1612 (1988).

136. See Ackerman, *supra* note 7; O'TOOLE, *supra* note 103.

137. See Decision, Coconino Amendment Three Appeals, *supra* note 99; Coconino Amendment Six, *supra* note 56.

138. *E.g.*, Jefferson National Forest LMP, *cited in* OGC Memorandum, *supra*

depend on a variety of factors.¹³⁹ In any event, an emphasis on such formalistic strategies conflicts with the spirit of integrated Forest Service planning.¹⁴⁰

Because case-by-case exclusion focused decision makers' attention on possible exceptions to NEPA compliance, the procedure increased the inducements to develop a NEPA avoidance strategy. The procedure also contributed to confusion over the integrated role of NEPA in the ongoing Forest Service planning process.¹⁴¹ By encouraging reliance on "past experience" to justify case-by-case exclusions, the procedure appeared to sanction the bifurcated NEPA compliance model.¹⁴² Although categorical exclusion determinations should focus on the similarity of impacts to excluded actions, forest managers under the sway of the bifurcated model focused instead on the relationship of a proposal to prior planning and anticipated implementation.¹⁴³ As a result, decision makers sometimes "tiered" case-by-case exclusion decisions to prior programmatic analyses or deferred analysis to the anticipated site-specific action stage.¹⁴⁴ Such tiering is appropriate only where the issues raised by the current proposal have been adequately analyzed previously and the prior analysis is adequately incorporated into the decisional record.¹⁴⁵ But the decreased public visibility and documentation inherent in case-by-case exclusion increased the potential to abuse tiering by relying on inadequate prior analysis.¹⁴⁶

Courts generally accord agencies broad discretion to tier.¹⁴⁷ But attempts to avoid detailed analysis of the site-specific and cumulative impacts of proposed actions by tiering onto general

note 34, at 3 n.9.

139. See *infra* notes 147-48 and accompanying text.

140. Quite apart from NEPA compliance issues, such strategies may also conflict with NFMA and internal Forest Service procedural requirements. See OGC Memorandum, *supra* note 34, at 3, 5; *supra* notes 134-35.

141. See OGC Memorandum, *supra* note 34, at 3, 5.

142. See *supra* notes 81-82 and accompanying text.

143. See *supra* notes 137-38.

144. See *supra* note 138.

145. 40 C.F.R. §§ 1500.4(i), 1502.20, 1508.28 (1990).

146. See *supra* note 137.

147. *E.g.*, *Ventling v. Bergland*, 479 F. Supp. 174, 179-80 (D.S.D. 1979); but see *National Wildlife Fed'n v. United States Forest Serv.*, 592 F. Supp. 931, 941 (D. Or. 1984), *vacated in nonrelevant part*, 801 F.2d 360 (9th Cir. 1986) (distinguishing *Ventling*).

discussions in programmatic EISs have been properly rejected.¹⁴⁸ In one celebrated case, the Forest Service sought to avoid detailed cumulative impact analysis of multiple timber sales by tiering to the general discussion in the programmatic EIS for the LMP, and by deferring analysis of site-specific impacts to individual timber sale EAs.¹⁴⁹ The Agency characterized the "Seven-Year Action Plan," which contained a schedule of seventy-five timber sale offerings, as a "non-action" for NEPA purposes, despite the fact that it had begun consummating the sales.¹⁵⁰ The Forest Service argued that the Plan for the landslide-ravaged Mapleton Ranger District of the Siuslaw National Forest was not a major federal action but only a "flexible planning schedule."¹⁵¹ The district court rejected the attempt to define NEPA out of existence, and hence required a cumulative impact EIS.¹⁵²

Six years later, Arizona forest managers adopted a similar approach, using the case-by-case exclusion procedure with the tacit, initial support of the Chief Forester.¹⁵³ Like the Mapleton District Plan, the Coconino National Forest LMP Amendment Three scheduled seven years of timber sales and established the locations, sequence, and total board footage of those sales.¹⁵⁴ Like the Mapleton District, the Coconino Forest began offering the scheduled sales immediately.¹⁵⁵ Like the Mapleton District, the Coconino Forest performed no NEPA analysis, but tiered to a prior programmatic EIS and deferred further analysis to the site-

148. *National Wildlife Fed'n*, 592 F. Supp. at 941; *Southern Oregon Citizens Against Toxic Sprays, Inc. v. Clark*, 720 F.2d 1475, 1480 (9th Cir. 1983); see also Thatcher, *supra* note 121, at 629 n.56.

149. *National Wildlife Fed'n*, 592 F. Supp. at 939-41.

150. *Id.* at 939 ("The Seven Year Action Plan implements an orderly timber sale program . . . by the careful planning and selection of sale areas. The tentative nature of some of the sales is irrelevant [to finding an 'action'].").

151. *Id.*

152. *Id.* at 940-42.

153. Decision, *Coconino Amendment Three Appeals*, *supra* note 99. Because the Chief declined to exercise his discretionary review authority, the decision of the Southwest Region became final agency action.

154. *Compare Coconino Amendment Three*, *supra* note 56 with *National Wildlife Fed'n v. United States Forest Serv.*, 592 F. Supp. 931, 939 (D. Or. 1984). See also *Minnesota Pub. Interest Research Group v. Butz*, 541 F.2d 1292, 1306 (8th Cir. 1976) (Adequate NEPA analysis requires "specific information [contained in a sale schedule] . . . as to where, when, what species of trees, and at what rate logging will occur.").

155. See *National Wildlife Fed'n*, 592 F. Supp. at 939.

specific level.¹⁵⁶ Unlike Mapleton, however, Coconino management used the case-by-case exclusion procedure to evade even EA documentation.¹⁵⁷

As a result, the reviewing officer, relying on a limited decision record, rejected the administrative appellants' challenge to the adequacy of the LMP analysis as the basis for tiering. He also rejected the argument that the increased level of sales would produce significant, previously unanalyzed cumulative effects.¹⁵⁸ In rejecting the appeals, the reviewing officer defended the adequacy of the previous programmatic EIS and stated that the impacts of "connected actions" would be analyzed at the individual sale, site-specific level.¹⁵⁹ The reviewing officer added that the schedule revision, being purely programmatic, made no irretrievable or irreversible commitment of resources.¹⁶⁰

The decision was mooted by subsequent tabling of the amendment and "interim" analysis.¹⁶¹ The arguments used by the Southwest Region to defend the application of case-by-case exclusion, however, are an example of the formalistic dichotomized model applied to questions of the timing and scope of cumulative analysis.¹⁶² Applied literally, the "irretrievable commitment" analysis would obviate the need for NEPA analysis at the LMP as well as at the intermediate planning stages. But that result would conflict with established Forest Service practice, regulations, and statutory requirements.¹⁶³ The argument ignores the real-world commitments of agency resources, project momentum,

156. Compare Coconino Amendment Three, *supra* note 56 with *National Wildlife Fed'n*, 592 F. Supp. at 939.

157. Coconino Amendment Three, *supra* note 56. The Mapleton Plan was not publicized in a formal decision document. See *National Wildlife Fed'n*, 592 F. Supp. at 936.

158. Decision, Coconino Amendment Three Appeals, *supra* note 99. Subsequent analysis, however, validated most of the appellants' contentions. See *infra* note 161.

159. Decision, Coconino Amendment Three Appeals, *supra* note 99. "Connected actions" constitute a subset of "cumulative actions" producing "cumulative impacts." Compare 40 C.F.R. § 1508.25(a)(1) (1990) with 40 C.F.R. § 1508.25(a)(2) (1990). See also Thatcher, *supra* note 121, at 629-30.

160. Decision, Coconino Amendment Three Appeals, *supra* note 99.

161. U.S. FOREST SERVICE, U.S. DEPARTMENT OF AGRICULTURE, COCONINO TIMBER SALES: A CLOSER LOOK, INTERIM MONITORING REPORT (July 1990).

162. See *supra* text accompanying note 133.

163. *Supra* note 134.

and user-group expectations that accompany formal planning.¹⁶⁴ Formal planning amounts to more than mere "contemplation,"¹⁶⁵ and failure to recognize the distinction would mark a reversion to the quagmire of incremental planning.

D. Returning the Forest Service to Integrated Planning

Incremental planning offers seductive advantages to harried agency managers.¹⁶⁶ But deferring all cumulative effects analysis to the site-specific stage presents significant risks. The temptation to confine analysis to too small a geographic area or too short a timeline may prove greater, for example, when individual sales are analyzed at the District Ranger level than when an entire forest engages in multiyear, forest-wide planning. Past forest management has been criticized for a narrow focus on issues apparent at the stand level, at the expense of ignoring landscape and whole forest or ecosystem-wide effects.¹⁶⁷ The CEQ regulations address such scoping problems by forbidding exclusive reliance on individual project level analyses that may fail to capture cumulatively significant impacts.¹⁶⁸

164. The CEQ regulations and some case law appear to recognize such realities. See, e.g., 40 C.F.R. § 1502.5(a) (1990) (EIS on projects directly undertaken by federal agencies should occur at the "feasibility analysis (go-no go) stage," subject to later supplementation); *Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848 (9th Cir. 1979); *Natural Resources Defense Council, Inc. v. Hodel*, 435 F. Supp. 590 (D. Or. 1977) *aff'd on other grounds sub nom* *Natural Resources Defense Council, Inc. v. Munro*, 626 F.2d 134 (9th Cir. 1980).

165. *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

166. In the past and to a lesser extent at present, many forest managers resisted the need to perform site-specific EISs. Ackerman, *supra* note 7, at 721. Retreat from that position, desire to avoid political controversy and litigation-induced delay at the LMP and intermediate planning stages, and the difficulties of quantifying some issues at such programmatic stages may induce a new trend to attempt to defer all serious cumulative impact analysis to the individual project level. Cf. *id.* at 721-27 & n.54.

167. E.g., Franklin, *Toward a New Forestry*, AMERICAN FORESTS (Nov./Dec. 1989). Franklin is a Forest Service ecologist and a leader of the internal agency "New Perspectives" reform movement. See also Yagerman, *Protecting Critical Habitat Under the Federal Endangered Species Act*, 20 ENVTL. L. 811 (1990) (advocating an ecosystem approach).

168. 40 C.F.R. § 1508.27(b)(7) (1990). Inadequately analyzed programmatic actions such as timber sale scheduling can raise particular implementation problems. Whereas some impacts may be more readily identifiable at the implementation stage, Ackerman, *supra* note 7, at 728-29, analysis at the site-specific

Cumulative analysis should occur early enough to prevent unnecessary continuation of cumulatively detrimental policies. For example, the policy of dispersed clearcutting in the Pacific Northwest continued long after its initial justification had been exhausted, and caused major forest fragmentation and other adverse cumulative impacts.¹⁶⁹ Internal agency critics of the policy have attributed its persistence to a combined failure to address impacts at the landscape and broader scales and to reassess policies in a timely fashion.¹⁷⁰ Assuming a sufficiently broad scope for such analyses, site-specific cumulative impact analysis might facilitate earlier identification of such problems. However, it is difficult to see how a district ranger designing a site-specific sale would feel free to alter or depart from policy decisions made at a forest-wide or regional level.

The Coconino Amendment Three appeal illustrates the risk of deferring cumulative impact analysis. Increased wildlife and habitat disturbance due to the greater number and frequency of sales under the revised schedule, including rapid reentry of numerous sale areas, was a major concern of the Coconino Amendment Three appellants.¹⁷¹ Sale frequency and reentry rates diverged from the LMP, rendering the LMP EIS an inadequate

level may fail to identify adverse additive effects in the early stages of an ongoing implementation process. That is, in a hypothetical series of sales numbered from one to ten, covering several years, site-specific analysis may not identify a cumulative problem until sales one through five or six have been consummated, by which time at least some damage will have been done. See *National Wildlife Fed'n v. United States Forest Serv.*, 592 F. Supp. 931, 939 (D. Or. 1984) (pre-appeal EAs on sales contained in Seven Year Action Plan failed to identify significant impacts leading to sale cancellations). By focusing attention on the relationship among the several sales, programmatic analysis may allow planners to foresee and forestall such impacts in some cases. See 40 C.F.R. § 1508.7 (1990) (requiring cumulative impact analysis of all reasonably foreseeable actions). The point, of course, is not that either programmatic or site-specific analysis is preferable, but rather that both are indispensable, as well as inherent in the concept of integrated planning.

169. Franklin & Forman, *Creating Landscape Patterns by Forest Cutting: Ecological Consequences and Principles*, 1 *LANDSCAPE ECOLOGY* 5 (1987).

170. *Id.*

171. Arizona Game & Fish Department Appeal of Notice of Decision and Amendment Three of the Coconino National Forest Land and Resource Management Plan (June 19, 1989); The Plateau Group of the Sierra Club Notice of Appeal to the Regional Forester, Southwest Region, of Amendment Three of the Coconino National Forest Land and Resource Management Plan (June 21, 1989).

basis for tiering.¹⁷² Because the added sales had not been scheduled in the LMP, the appellants were not asking the Forest Service to revisit a prior decision.¹⁷³ The alleged impacts were not caused by the design of individual sales, but arose directly from the number and frequency of sales scheduled in the proposed decision.¹⁷⁴ In other words, the cumulative, interactive impacts at issue related directly to programmatic decisions as to the timing and frequency of sales; they were not "site-specific." Earlier court decisions required cumulative impact analysis for sale-scheduling decisions that provided "specific information . . . as to where, when . . . , and at what rate logging will occur."¹⁷⁵ The "specific information" relevant to cumulative impact issues such as disturbance and fragmentation is generated not solely at the site-specific level, but also at the programmatic decisional level. Deferring analysis to the site-specific stage enables an agency to avoid discussion of cumulatively significant effects "by terming an action temporary or breaking it down into small component parts."¹⁷⁶ Because Amendment Three was categorically excluded, discussion of cumulative effects was swallowed by formalistic procedural jargon.¹⁷⁷

Such results are inconsistent with NEPA's integrated planning goals.¹⁷⁸ The CEQ regulations appear to require that cumulative effects be addressed in a single cumulative impact analysis.¹⁷⁹ The regulations also require that previously unanalyzed cumulative impacts be analyzed prior to a final decision, regardless of the decisional stage involved—be it programmatic or site-specific.¹⁸⁰ The regulations also mandate integration, in the sense that NEPA compliance and all other procedures must "run concurrently rather than consecutively."¹⁸¹ Forest Service statutes

172. Notices of Appeal, *supra* note 171.

173. *Cf. Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373 (1989).

174. Notices of Appeal, *supra* note 171.

175. *Minnesota Pub. Interest Research Group v. Butz*, 542 F.2d 1292, 1306 (8th Cir. 1976).

176. 40 C.F.R. § 1508.27(b)(7) (1990).

177. *See supra* text accompanying notes 162-163.

178. *See supra* notes 2 & 11.

179. 40 C.F.R. § 1508.25(a)(2).

180. 40 C.F.R. §§ 1508.7, 1508.18(b)(2)-(4); *see also* 40 C.F.R. § 1508.27(b)(6).

181. 40 C.F.R. § 1500.2(c).

and regulations mandate continuing planning as well.¹⁸² Agency regulations require integration of NEPA procedures within this ongoing planning process.¹⁸³ Ideally, ongoing planning enables the agency to fine tune previous plans and policies as additional information develops in the field.¹⁸⁴ Ideally, NEPA compliance should occur every time a decision to fine tune is reached. This insures that environmental values and information are duly considered.¹⁸⁵ In some senses, continuous planning is "incremental"; but NEPA requires that such incremental planning be accompanied by incremental environmental analysis.

NEPA alone probably does not impose a duty to plan on agencies that are not required to do so under other statutory planning mandates.¹⁸⁶ Such agencies possess the discretion to decide whether to plan, with the caveat that proposals which trigger NEPA "may exist in fact as well as by agency declaration."¹⁸⁷ When an agency elects to plan, however, the same analysis should apply. If the full integration of NEPA that Congress mandated twenty years ago is to be achieved, agencies and courts should abandon formalistic analyses such as the dichotomized model of cumulative impact analysis and instead focus on two simple questions. First, the agency should ask if it in fact proposes to make a decision or change a decision previously made.¹⁸⁸ If so, an "action" is being proposed, and NEPA applies.¹⁸⁹ The remainder of the inquiry should focus on foreseeable impacts.¹⁹⁰ If the new decision results in impacts that have not been adequately analyzed previously, NEPA analysis must be performed at that decision point, whether it is the programmatic, intermediate, or project

182. See *supra* note 134 and accompanying text.

183. *Id.*

184. Ackerman, *supra* note 7, at 728-29.

185. Ackerman reaches a somewhat similar conclusion, but anticipates higher transaction costs than this author. Ackerman, *supra* note 7, at 726-27. For Ackerman's intriguing proposed resolution of this dilemma, see *id.* at 727 n.54. Ackerman suggests a form of ongoing NEPA scoping. This author would add that the scoping should be public and should not employ case-by-case exclusion.

186. See *National Wildlife Fed'n. v. Federal Energy Regulatory Comm'n*, 801 F.2d 1505 (9th Cir. 1986).

187. 40 C.F.R. § 1508.23 (1990).

188. *E.g.*, *Bunch v. Hodel*, 793 F.2d 129, 134-35 (6th Cir. 1986) (NEPA applies to new decisions in continuing projects initiated prior to NEPA).

189. 40 C.F.R. § 1508.18(a).

190. 40 C.F.R. § 1508.7.

stage.¹⁹¹ If the foreseeable impact is significant, of course, an EIS is required.¹⁹²

The transactional costs of such an approach should not be overstated. Assuming NEPA analysis is performed at some stage and is thorough enough to adequately address the significant issues, the timing of such analysis should not substantially affect costs. The advantages that integrated, continuing NEPA application could generate in increased notice, public confidence, and agency knowledge and clarity about ends and means should prove highly valuable. In any event, that was the sense of Congress when it mandated integrated environmental analysis.

The Forest Service's contemplated retreat from case-by-case exclusion appears to be a response to that long-standing mandate. Case-by-case exclusion will be abandoned.¹⁹³ A new listed category for LMP amendments will be established, allowing exclusion only of amendments implementing "incidental changes that do not alter decisions made in the LMP."¹⁹⁴ The prohibition on altering LMP decisions without full NEPA compliance should preclude renewed attempts to categorically exclude significant programmatic decisions, such as changes to LMP standards and guidelines¹⁹⁵ or major sale schedule revisions.¹⁹⁶ Assuming the new procedure is adequately explained and enforced throughout the multilayered hierarchy of Forest Service decision makers,¹⁹⁷ the procedural changes should allow the Agency to resume its earlier, laudable efforts to fully integrate NEPA environmental anal-

191. *Supra* note 179 and accompanying text.

192. 40 C.F.R. § 1508.27(b)(7) (1990).

193. Ketcham, *supra* note 12.

194. *Id.* Ketcham reports that LMP amendments were one of the most controversial issues in development of the new procedure, perhaps suggesting their significance in case-by-case exclusion strategy, as well as more legitimate concerns.

195. *Id.* A major test of the new procedure will be whether it provides adequate guidance to agencies to determine when an amendment "alters" an LMP decision. In the case of formal plan standards and guidelines, the determination should not prove difficult.

196. *Id.* In the case of sale schedule revisions, determining when an amendment changes a plan may prove more controversial absent adequate agency guidance. Cf. 16 U.S.C. § 1611 (1988) (NFMA authorization of and constraints on departures from long-term allowable sale quantity).

197. Ketcham, *supra* note 12; OGC Memorandum, *supra* note 34, at 5 (anticipating need for post case-by-case exclusion re-education process).

ysis and natural resource planning.¹⁹⁸

III. CONCLUSION

When Congress enacted NEPA, it intended to require that environmental impacts be analyzed and considered at all stages of federal agency planning and management. Such an integrated approach to environmental analysis and agency decision making required modification of the dominant incremental approach to planning. In addition to NEPA, Forest Service governing statutes impose upon that Agency a duty to plan and to involve the public in the planning process. The Forest Service implemented a "case-by-case" categorical exclusion procedure in an effort to introduce flexibility into the NEPA compliance process. At times, the procedure was used to avoid public participation. Lacking adequate guidance for the exercise of the discretion afforded by case-by-case exclusion, Forest Service officials often failed to follow the Agency's planning process and to integrate NEPA analysis fully at all process stages. Attempts to defend case-by-case exclusion tended to become overly formalistic, at the expense of meaningful analysis of environmental impacts and orderly planning. Instead of such formalistic approaches to NEPA compliance, integration of NEPA and planning requires a commitment to ongoing NEPA implementation and a focus on foreseeable environmental effects. New Forest Service categorical exclusion procedures appear to move in such a direction, and could serve as a model for NEPA integration by other agencies.

198. See Ackerman, *supra* note 7, at 706-08 (favorably assessing agency NEPA integration).