

2005 Final Rule and the Process Predicament

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The new final rule for national forest planning, published in the *Federal Register* on 5 January 2005 (pp. 1023-1061) and hereafter called the "2005 Planning Rule," announces its intended effects are, among other things, "to streamline and improve the planning process. . ." This is desirable because national forest planning has been roundly criticized. Roger Sedjo, an economist at Resources for the Future and a member of the Committee of Scientists who participated in the 2000 Planning Rule, recently wrote: "Forest planning, as practiced by the Forest Service, has largely been a failure. . . . (T)he planning process has been much longer, more expensive, and more contentious than anyone foresaw" (Sedjo). Five years earlier, the Society of American Foresters' Task Force on Proposed Public Lands Management Legislation took a similar position, arguing that the planning process had become too complex, too costly, and too inflexible (Task Force on Proposed Public Lands Management Legislation). In 1990, the Forest Service, The Conservation Foundation, and the Department of Forestry and Natural Resources at Purdue University published a critique of national forest planning and concluded it needed to be simplified, clarified, and shortened (*Critique of Land Management Planning*, vol. 1, p. 5). Many other studies and reports from a wide variety of perspectives, both inside and outside of government, have reached comparable conclusions.

Two key internal Forest Service studies included the problems of the national forest planning process among a larger set of agency process problems. They raised serious doubt whether the combined statutory, regulatory, and administrative framework in which the agency operates, permits effective management of the National Forest System (Forest Service Team Report; Thomas Task Force). The title of the Team Report, "The Process Predicament," accurately captured the thrust of both studies, which described the problem, but contained no recommendations. A key summary sentence states: "(Current) statutory, regulatory, and administrative requirements impede the efficient, effective management of the National Forest System" (Team Report, p. 10).

Of course, streamlining and improving the planning process should not and cannot come at the cost of deprecating the overarching goal of managing the National Forest System, which is "to sustain the multiple uses of its renewable resources in perpetuity while maintaining the long-term productivity of the land" (*Federal Register*, Jan. 5, 2005, §219.1(b), p. 1055). Forest planning must accomplish its fundamental purpose, which is social, economic, and ecological sustainability, yet it must also be flexible, transparent, shorter in duration, and less costly.

Earlier Versions of National Forest Planning Rules

The 2005 Planning Rule is not the first such rule. Indeed, national forest planning rules were successfully promulgated in 1979, 1982, and 2000. An unsuccessful attempt by the Forest Service to promulgate a new rule was made in 1995; the secretary of agriculture stopped the effort, likely because the political consequences at the time were too great. Nevertheless, the Forest Service has had abundant experience in administrative rule making as it relates to forest planning

Why all the effort? The reason is simple. As virtually every reader of this brief paper knows, planning regulations for the National Forest System are required by the Forest and Rangeland Renewable Resources Planning Act of 1974 as amended by the National Forest Management Act of 1976 (16 U.S.C. 1600 *et seq.*), hereinafter referred to as NFMA. Similarly, as virtually every reader knows, controversy has attended every rule-making effort, and the 2005 Planning Rule is no exception.

Application of NEPA to NFMA

Much of the controversy attends the application of the National Environmental Policy Act of 1969 (NEPA) (83 Stat. 852) to NFMA. Section 6 is plain: “The regulations shall include, . . . specifying procedures to insure that land management plans are prepared in accordance with the National Environmental Policy Act of 1969, including but not limited to, direction on when and for what plans an environmental impact statement required under section 102(2)(c) of that Act, shall be prepared; . . .” The 1979 and 1982 planning regulations required an environmental impact statement (EIS) for development of plans, significant amendments, and revisions. The idea was a forest plan EIS would be sufficient for all decisions on projects during the 15 years covered by the plan. In other words, another EIS would not be necessary for projects because they would be covered by the EIS for the forest plan.

This proved to be a bad idea, for early on, case law established that projects viewed as “significantly affecting the quality of the human environment” must be accompanied by their own site-specific NEPA analysis. In other words, a single EIS for a forest plan will not work.

Key Changes in the 2005 Planning Rule

The first sentence in the “Overview” section of the 2005 Planning Rule boldly announces in the first sentence: “This final rule embodies *a paradigm shift* in land management planning . . .” (Emphasis added.) This statement is elaborated later in the same paragraph: “(T)he Forest Service created this final rule to enable a better way to protect the environment and to facilitate working with the public.” So what are the changes involved in this big shift or change?

Answering this question is the purpose of this paper as well as determining how the rule is different from its predecessors and identifying potential problems. Further, the discussion will be confined to the respective components of the planning paradigm. Changes in the rule concerning wildlife, for example, will not be addressed.

Categorical Exclusion from NEPA Documentation for Planning

Major themes guiding the 2005 Planning Rule are that forest plans:

- Should be strategic;
- Must be adaptive and based on current information and science;
- Must involve the public;
- Guide sustainable management of National Forest System lands; and,
- Must comply with all applicable laws, regulations, and policies.

The strategic theme is key in the new planning paradigm. Forest plans are to establish the long-term management framework in terms of general goals, more specific objectives, and guidance to follow in pursuing the goals and objectives. Accordingly, forest plans are to have five components:

- (1) *Desired conditions* in terms of the social, economic, and ecological attributes of the land toward which management is to be directed.
- (2) *Objectives*, which are to be concise projections of intended outcomes of projects and activities to contribute to the maintenance or achievement of the desired conditions. (Objectives are measurable and time specific, while still being aspirational in nature. They are neither commitments nor final decisions.)
- (3) *Guidelines*, whose purpose is to provide information and guidance for the design of projects and the conduct of activities. (In the 2000 Planning Rule, the term “standards” was used. This term was removed in the 2005 Planning Rule to indicate more flexibility in application, consistent with the strategic nature of the plans.)

In addition to the preceding components, plans will identify:

- (4) *Suitability of areas*: Areas in the forest for which the desired conditions and objectives are suited; and,
- (5) *Special areas*: Unique areas or areas that have special characteristics are to be identified in the plan. Such areas include wilderness, wild and scenic river corridors, and research natural areas.

The 2005 Planning Rule painstakingly argues in the “Overview” section that, forest plans, “as evidenced by their five components, are *strategic and aspirational* in nature and generally will not include decisions with on-the-ground effects that can be meaningfully evaluated and that may be major” (Emphasis added; *Federal Register*, Jan. 5 2005, p. 1032). Simply stated, since plans, plan amendments, and revisions do not have major environmental effects, they should be excluded from NEPA documentation.

Hence, the Forest Service, simultaneously with the 2005 Planning Rule, is revising its NEPA procedures to provide for a categorical exclusion from NEPA documentation for forest plan development, amendment, and revision. It is being done at the time of writing through the "notice and comment" process described in 16 USC 1612 as well as 36 CFR 216.

Of course, projects and activities implementing forest plans and viewed as "significantly affecting the quality of the human environment" must continue to be accompanied by their own site-specific NEPA analysis.

Adaptive Management and Monitoring

A frequent criticism of forest plans in the past is their lack of responsiveness to current information (data), new scientific knowledge, and unanticipated circumstances. Of course, the main reason for the lack of responsiveness is, up until the 2005 Planning Rule, a plan amendment or revision required NEPA analysis took five to seven years to complete (Zwight). Under the proposed categorical exclusion, it should be possible to react to changes much more swiftly and efficiently because a plan can be amended or revised at any time by the "responsible official," defined as the official with the authority and responsibility to oversee the planning process and to approve plans, plan amendments, and plan revisions" (*Federal Register*, Jan. 5, 2005, §219.16, p. 1061). Like in plan development, the responsible official is required to provide opportunities for the public "to collaborate and participate openly and meaningfully. . ." (*Federal Register*, Jan. 5, 2005, §219.9(a), p. 1058).

"Adaptive management" is the *nom du jour* for "being responsive" in planning. As indicated above, adaptive management is a major theme of the 2005 Planning Rule, which is essential. Effective strategic planning responds to new information as it becomes available, much as a helmsman responds to changing weather, tides, and currents in steering his course. For planners, the variables are new data, new knowledge, and changing circumstances or conditions, and a systematic monitoring program is to be established and maintained with regard to, among other things, "key social, economic, and ecological performance measures relevant to the plan area" (*Federal Register*, Jan. 5, 2005, §219.6(b)(1), p. 1056).

A systematic, comprehensive monitoring program for each planning unit is certainly necessary for adaptive management. It "is a central element of adaptive management planning in (the 2005) final Rule" (*Federal Register*, Jan. 5, 2005, p. 1027). But such a program is costly in terms of both time and resources, which raises the question of whether the requisite appropriations for adequate monitoring will be forthcoming.

Movement of Planning Procedural and Technical Details to the Forest Service Directive System

To make forest planning more “strategic and adaptive,” procedural and technical details are moved in the 2005 Final Rule from the planning documents to the Forest Service Directive System, which essentially are two documents: the Forest Service Manuals (FSM) and the Forest Service Handbooks (FSH). FSM “contains legal authorities, objectives, policies, responsibilities, instructions, and guidance needed on a continuing basis by Forest Service line officers and primary staff to plan and execute programs and activities” (*Federal Register*, Jan. 5, 2005, p. 1027). FSH “is the principal source of specialized guidance and instruction for carrying out the policies, objectives, and responsibilities contained in the FSM” (*Ibid.*). The agency argues that the Forest Service Directive System is “the appropriate place for specific technical guidance” because “the Forest Service directives are easier to change and more easily adopt the latest technology and science, . . .” (*Federal Register*, Jan. 5, 2005, p. 1036).

Importantly, neither FSM nor FSH has been subject of administrative rulemaking, and hence, it is arguable whether they do have the full force and effect of law. The courts are divided. The 7th Circuit Court of Appeals has ruled that they do (*Rhodes et al. v. Johnson*, 153 F.3d 785), while the 9th Circuit Court of Appeals has ruled otherwise (*Southwest Center for Biological Diversity v. U.S. Forest Service*, 100 F.3d 1443, 1470 (9th Cir. 1996); *W. Radio Services Co. v. Espy*, 79 F.3d 896, 901 (9th Cir. 1996); *Forest Guardians v. Animal & Plant Health Inspection Service*, 309 F.3d 1141, 1143 (9th Cir. 2002)). The Forest Service has avoided subjecting either to the administrative rulemaking process for several reasons, including the voluminous size of the documents and the enormous administrative effort that would be involved. The agency holds FSM and the FSH are binding only on Forest Service employees, providing them with administrative direction.

Interim "National Forest System Land Management Planning Directives", twelve in all, were released on 17 March 2005 and published in the *Federal Register* on 23 March 2005, which initiated a 90-day comment period. Since using the usual notice and comment process would involve a minimum of six months, the interim directives were made effective immediately to eliminate "uncertainty and confusion" as well as cause delays from units from "beginning or adjusting plan amendments or revisions" (*Federal Register*, March 23, 2005, p. 14642). In the meantime comments from the public will be taken, compiled, and considered in preparing the final directives. Interim directives expire 18 months after their issuance.

Environmental Management Systems (EMS)

The 2005 Final Rule requires each planning unit to develop and implement an environmental management system (EMS) based on the international consensus standard published by the International Organization for Standardization (ISO) as “ISO 14001: International Management Systems—Specification with Guidance for Use” (hereinafter

referred to as "ISO 14001"). Executive Order 13148, issued in April 2000, requires federal agencies to use an EMS approach for improving environment performance. Earlier, the National Technology and Advancement Act of 1995 (110 Stat. 775) provided that federal agencies adopt, when possible, technical standards developed by consensus organizations such as ISO.

ISO is a network of the national standards institutes of 148 countries, on the basis of one member per country, with a Central Secretariat located in Geneva that coordinates the system. Although it had a predecessor, ISO began its operations in 1947.

ISO 14001 was published in 1996, and grew out of ISO's commitment to support sustainable development as featured in the United Nations Conference on Environment and Development (UNCED) at Rio de Janeiro in 1992. It is part of the ISO 14000 series, which deals with environmental management and specifies the requirements for an EMS. ISO 14001 was amended in 2004.

ISO 14001 is applicable to any organization, public or private, governmental or non-governmental, that wishes to:

- Implement, maintain, and improve an environmental management system;
- Assure itself of its conformance with its own stated environmental policy (those policy commitments of course must be made);
- Demonstrate conformance;
- Ensure compliance with environmental laws and regulations;
- Seek certification of its environmental management system by an external third party organization; (and)
- Make a self-determination of conformance. (<http://www.iso14000-iso14001-environmental-management.com/iso14001.htm>)

The ISO 14001 model is described by Boling (2005) in an article on the complementary relationship between NEPA and EMSs. The model contains six elements paraphrased below.

1. Prepare an environmental policy statement.
2. Identify—
 - Environmental aspects of the organization's operations and activities;
 - Legal and other requirements.
3. Set EMS objectives and targets with regard to significant environmental aspects and related impacts of the organization's operations and activities.
4. Develop and implement the EMS in terms of—
 - Roles, responsibilities, and authorities;
 - Training programs;
 - Operational controls;
 - Internal and external communications.
5. Monitor key parameters of organizational operations and activities that can have impacts on the environment and take preventive and corrective action.
6. Set up and maintain procedures for—

- Internal audits;
- Management reviews (to ensure the EMS is suited and continually adapted to changing conditions and information.)

In implementing the ISO model, the 2005 Final Rule describes the planning unit's EMS as "a systematic approach to identify and manage environmental conditions and obligations to achieve improved performance and environmental protection." As such, an EMS for planning units will:

- Identify and prioritize desired environmental conditions (and impacts);
- Set objectives in light of congressional, agency, and public goals;
- Document procedures and practices to achieve those objectives; (and),
- Monitor and measure environmental conditions to track performance and verify that objectives are being met (*Federal Register*, Jan. 5, 2005, p. 1030).

Management reviews will be conducted by agency personnel who will regularly review performance. In this way, the respective EMSs of each planning unit will provide the basis for effective adaptive management.

On the complementary relationship between NEPA and ISO 14001 EMSs, Boling wrote: "The expanded use of EMS(s) not only promises to improve the environmental performance of federal agencies, but to help federal agencies focus on improvement of their environmental performance, which is—under NEPA—an integral component of every agency's mission" (Boling, p. 35 ELR 10022). NEPA contains a general environmental policy statement for all federal agencies, which is "to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony, . . ." (83 Stat. 852). The purpose of EMS is to improve environmental performance and protection. The NEPA process is designed to apply environmental analysis and documentation in accordance with law to *individual decision points* with respect to a given agency program. An EMS is a set of procedures and policies directed at *continual improvement* of environmental performance and compliance with environmental laws by an agency through measurement, evaluation, feedback and change. With perhaps some over simplification, NEPA is applied to specific points over the duration of an agency action, while application of an EMS is designed to be continuous. Hence, NEPA analysis can become dated as economic, social, and economic data change, while EMS information should be current.

An ISO 14001 EMS and the NEPA process are complementary. For example, commitments and mitigation measures established in NEPA documents can be monitored through an EMS (*Discussion Paper*, p. 2). Further, an EMS can facilitate and simplify the NEPA process through an adaptive management approach for projects facing uncertain conditions during their implementation (*Ibid.*). By taking advantage of their complementary nature, "agency managers and NEPA practitioners have the opportunity to improve the quality of environmental analysis, decision-making, and further the policy goals of §101 of NEPA" (Boling, p. 35 ELR 10031). A CEQ NEPA Task Force reported in 2003 that NEPA and EMS provide "a synergy that can encourage a robust analysis when the EMS information is extensive, current, and available for use in . . . NEPA

analy(sis)” (*NEPA Task Force Report to the Council on Environmental Quality: Modernizing NEPA Implementation*).

Successful implementation of ISO 14001 EMSs is a key requirement for the success of the 2005 Planning Rule. It will be challenging even with the ISO 14001 model ostensibly spelled out because of the “elasticity” of its contents. The obvious example is ISO 14001 calls for identification of the *significant environmental aspects and related impacts* that the planning unit should be addressing through its EMS.

An *aspect* is defined as *how a specific operation or activity of a planning unit affects the environment*. An *impact* is *how an aspect changes the environment*. The intent of an EMS is to assist the planning unit in identifying how it affects the environment, to prioritize the respective aspects and related issues, and to use the EMS to manage, control, and improve upon the respective aspects. It follows that the planning unit must take into account all *significant* aspects for the system to work, to be effective.

Determining what environmental aspects are *significant* will be a challenge for planning units. It entails much knowledge, sensitivity, and discretion; each of which will be made arduous by the general complexity of and differences among forest and range ecosystems. For example, some ecosystems can handle—are more resilient to—certain impacts than other ecosystems. Hence, impacts might *not* be considered significant in resilient ecosystems while they would be considered significant in ecosystems that are less resilient.

Such differences will make consistency among EMSs across the National Forest System difficult. Just as there is a valid expectation that EMSs will be different for different ecosystems, there is also a valid expectation that there be some degree of consistency among EMSs of comparable planning units. In other words, there would *not* be 175 unique EMSs for the respective 155 national forests and the 20 national grasslands. Consistency should exist among comparable planning units; on the other hand, it should not exist among units that are not comparable.

Monitoring and measuring are not without cost, and at some point, the cost of monitoring and measuring can be excessive in terms of benefits. It is not worth it. Successful implementation of ISO 14001 EMSs will require that they be effective, that they accomplish their purpose. It will also require that they be reasonable, prudent, that their costs not exceed their benefits. “Over-reaching”—attempting to do more than what is necessary or than what the agency is capable—has been a continuing problem in implementation of NFMA, and it has contributed in substantial way to the general perception that forest planning takes too long, is too costly, and is too contentious; that forest planning must be simplified, clarified, and shortened. The potential for over-reaching in development of the EMSs is high, even when only *significant aspects and related impacts* are being considered. Serious efforts should be made to ensure it does not occur.

It can be argued that the categorical exclusion of national forest planning from NEPA documentation and the use of EMSs will reduce the number of environmental impact statements required and, hence, result in substantial savings, which can be used to cover the cost of monitoring. Appropriators can argue differently, however, saying that planning and the cost of environmental impact statements are one thing and EMSs and the cost of monitoring are another, and Congress should appropriate funds for them where and when they are appropriate. But they are not substitutes for one another and will have to stand on their own merits, which raises the issue, again, of the historical congressional willingness to fund monitoring and measuring programs. Indeed, Congress has been remarkably chary to grant funds for such purposes.

To summarize, determination of what are *significant* environmental aspects for individual planning units, consistency of EMSs among comparable planning units as well as across the National Forest System, and "over-reaching" have the potential of being serious problems in development and implementation of the EMSs, a central feature of the 2005 Final Rule. They are interrelated obviously, and must be addressed systematically and comprehensively, as opposed to uniquely and individually. Further, the argument that EMSs will result in significant savings in planning costs which can be used to cover the cost of monitoring and measuring is not compelling because they can be viewed as different activities by appropriators, and hence, will have to be justified on their respective merits. Responsible officials should anticipate this need and the likelihood funding for monitoring will be less than what is currently being forecasted.

Descriptive Summary

A schematic diagram of the of the NFMA Planning Process under the 2005 Planning Rule is shown in Figure 1. It underscores the position that a paradigm shift has occurred, likely because of the effort by the agency planners to avoid the so-called "process predicament," even gridlock, that has beset forest planning over the past 25 years.

The planning process in the 2005 Planning Rule as shown in Figure 1 has five components:

1. NFMA planning requirements;
2. Plans;
3. (a) Projects and activities (requiring NEPA documentation) and (b) an EMS;
4. Monitoring and corrective action; and,
5. Plan amendments and revisions.

The schematic makes clear two major changes in the 2005 Rule: The addition of EMSs to forest planning and the elimination of the requirement for NEPA documentation for plans, plan amendments and revisions. Under earlier rules, NEPA documentation was required for plans, plan amendments and revisions—shown by the dotted red arrows—as well as for projects and activities (significantly affecting the quality of the human

environment), shown by the solid red arrow. The latter requirement, of course, continues under the 2005 Rule.

An inevitable question is what changes have occurred with regard to public participation? Where would it appear in the diagram? The answer to the first question is that the 2005 Final Rule provides extensive opportunity for public participation, exceeding that required by NEPA. §219.9 reads: “Specifically, as part of plan development, plan amendment, and plan revision, the Responsible Official shall involve the public in developing and updating the comprehensive evaluation report, establishing the components of the plan, and designing the monitoring program” (*Federal Register*, Jan 5, 2005, §219.9, p. 11058). As for where would public participation appear in the diagram, it would appear as some circular symbol with arrows emanating toward components 2, 3a, 4, and 5.

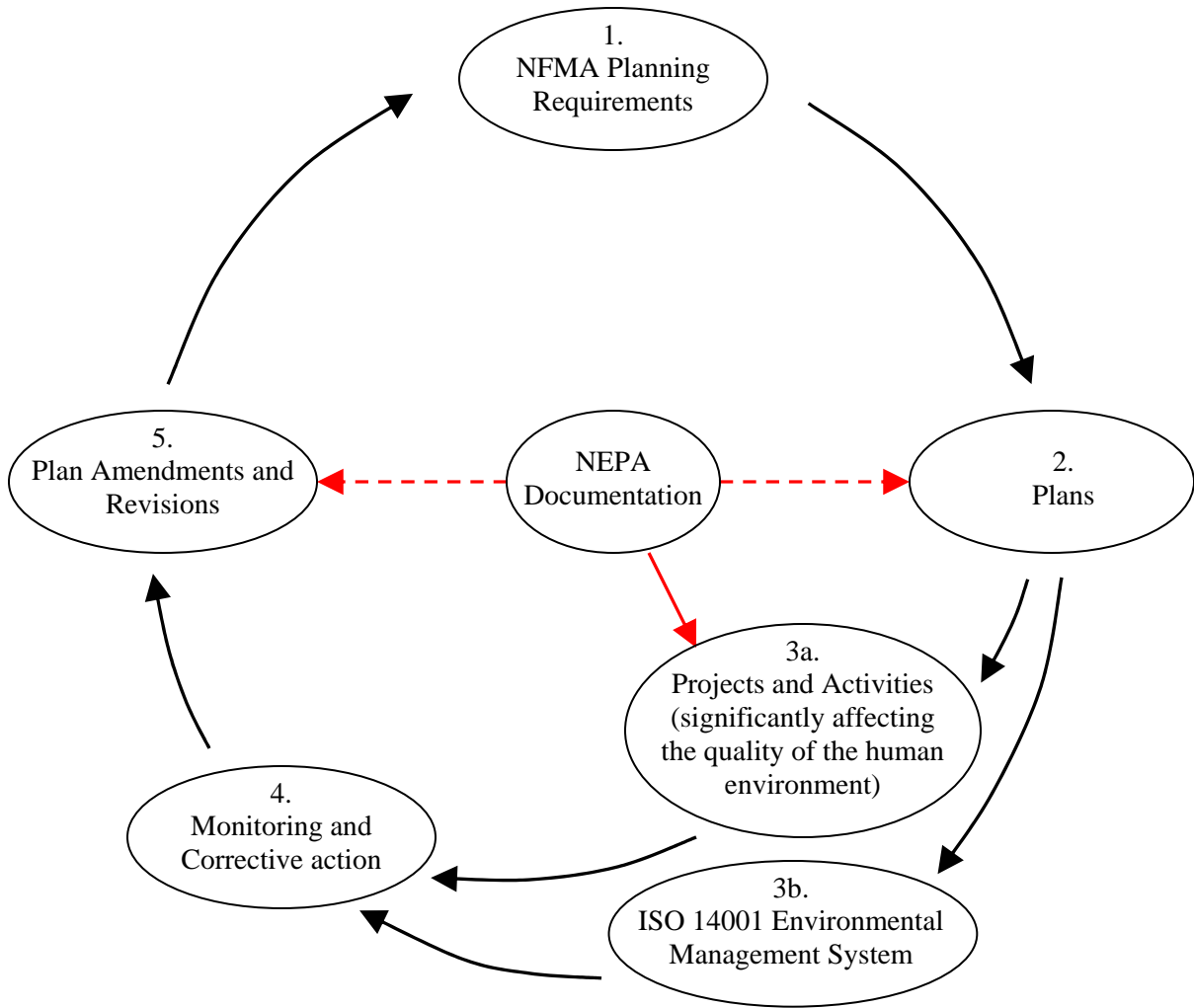
Conclusion

The 2005 Planning Rule is a serious attempt at making a paradigm shift in national forest planning. At least one reason for the change is to escape “the process predicament” that has afflicted forest planning over the past 25 years.

Successful implementation of this “shift” is going to be challenging. First, a categorical exclusion for planning from NEPA documentation must be put into effect. To that end, the notice and comment process is now closed, and the agency is currently evaluating public comments. Second, the procedural and technical details of forest planning have to be moved to the Forest Service Directive System, which is also underway, again using the notice and comment process. Third, an EMS will have to be developed and implemented in each planning unit. It is essential that they achieve their purpose, which is to achieve the environmental policy of the unit, including compliance with all applicable environmental laws and regulations. In so doing, the responsible official for each EMS must ensure it does not overreach. It should also be consistent with EMSs of other comparable planning units. Fourth, Congress must be willing to appropriate sufficient funding for monitoring so adaptive management can be successful.

All and all, the 2005 Final Rule, reflects an thoughtful, imaginative effort by Forest Service planners to escape the "the process predicament" in national forest planning. A paradigm shift was needed, and it has been provided. Now it should be allowed to work.

Figure 1. Schematic Diagram of the NFMA Planning Process under the 2005 Planning Rule



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