

Review of the Forest Service Legal and Regulatory Framework

*Draft Task Force Report
July 19, 1995*

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Executive Summary

Secretary of Agriculture Dan Glickman directed Under Secretary Jim Lyons to form a joint task force, consisting of Forest Service personnel and members of USDA's Office of the General Counsel, to review the key laws and regulations that guide the management of National Forest System lands. The focus of the study was an evaluation of how the laws and regulations relate to one another, and the impacts of those relationships on the management of the National Forests and Grasslands.

The Task Force employed varied methods to evaluate the legislative and regulatory influences over National Forest and Grassland management, and their respective effects. In order to achieve as comprehensive a perspective as possible, the team reviewed the relevant laws and regulations, held discussions with policy officials and Forest Service field personnel, and conducted research into the legal mandates of the Forest Service.

The Task Force did not find strong oppositional conflict between statutory mandates. Rather, it found that over time there had been a trend toward a significant amount of regulation of Forest Service activities by other federal agencies and a shift from historic management priorities emphasizing commodity production toward pollution prevention and species preservation resulting from interpretation of law by the courts, and decreased agency management discretion previously allowed in law. Protection of clean air and water and species preservation must be assured for the Forest Service to implement programs for commodity production and use of other renewable resources. This has resulted in increased protection of the environment, while historic levels of commodity-oriented activity, such as timber sales, have seen reductions.

The Task Force identified some negative effects caused by the legal and regulatory framework. Though largely unintentional, these effects relate to the effectiveness of the Forest Service as a land managing agency. These are:

- The substantive requirements of the Endangered Species Act, the Clean Water Act, and the Clean Air Act, along with economic, social, legal, budgetary, and environmental uncertainties, greatly diminish the predictability of outputs.
- The availability and use of administrative and judicial review reduce the incentives for the public to engage in pre-decisional dialogue with the Forest Service.
- The constraints of the Federal Advisory Committee Act impede the Forest Service's effective consideration of certain professional expertise and consensual group recommendations when making forest plan or project level decisions.

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- The vague or undefined parameters of judicial review in many statutes result in greater levels of uncertainty in Forest Service decision-making.
- The procedural requirements of laws and regulations, particularly the National Forest Management Act, the National Environmental Policy Act, the Endangered Species Act, the Clean Water Act, and the Clean Air Act lead to process duplication, creating management inefficiencies.
- Responding to new information and the interactions among the procedural requirements of the National Environmental Policy Act, the National Forest Management Act, and the Endangered Species Act have led to inefficient cycles of forest plan and project level consultation and documentation.

Introduction

Study Objectives

Shortly after taking office, Secretary of Agriculture Dan Glickman announced the beginning of a review of the laws and regulations that guide the management of National Forest System lands.¹ James R. Lyons, Under Secretary of Agriculture for Natural Resources and Environment, described the project as “an opportunity to take a broader view of what we need to do to function more effectively and efficiently in the Forest Service.”² This review has been conducted by a joint Task Force consisting of Forest Service personnel and members of USDA’s Office of the General Counsel.

The focus of the review was an evaluation of how certain key laws - the National Forest Management Act (NFMA), the Endangered Species Act (ESA), the National Environmental Policy Act (NEPA), the Multiple-Use Sustained-Yield Act (MUSYA), the Clean Water Act (CWA), the Clean Air Act (CAA), and the Federal Advisory Committee Act (FACA) - relate to one another, and the impacts of those relationships on the management of the National Forests and Grasslands. In addition, the Task Force would consider the effects of regulations that implement the requirements of NFMA, ESA, and NEPA.

Study Methods

The Task Force utilized varied methods to evaluate the legislative and regulatory influences over National Forest and Grassland management, and their respective effects. In order to achieve as comprehensive a perspective as possible, the team employed the following methods:

- Review of the language of and legislative history behind laws affecting Forest Service activities, specifically NFMA, ESA, NEPA, MUSYA, CWA, CAA, and FACA.
- Review of the language of regulations promulgated under the NFMA, ESA, and NEPA.
- Discussions with policy officials concerning the effects of, and relationships between, these laws and regulations.

¹ Secretary’s Memorandum to James R. Lyons, Under Secretary for Natural Resources and Environment, April 12, 1995.

² USDA press release No. 0312.95, April 12, 1995.

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- Discussions with Forest Service field personnel concerning the practical effects of these laws and regulations on activities and planning.
- Historical research into the traditional mandates of the Forest Service, and the changing roles of Congress and the Federal judiciary.

This report contains the following information: Section 1 describes changes in the roles of the Congress and the Federal judiciary in relation to National Forest System lands; Section 2 discusses the shift in management priorities for the Forest Service; Section 3 discusses long-range planning of outputs on the National Forests and Grasslands; Section 4 discusses the effectiveness of public involvement in Forest Service decision-making; Section 5 discusses standards for judicial review; and Section 6 discusses the efficiency of certain procedural requirements.

The Task Force found some unintended negative effects within the framework of laws and regulations. These effects related to the viability of long-range planning, the effectiveness of public and interagency involvement, the specification of judicial review standards, and the efficiency of certain procedural requirements. The Task Force did not find strong oppositional conflict between statutory mandates. Rather, it found that overtime there had been a trend toward a significant amount of regulation of Forest Service activities by other federal agencies and a shift from historic management priorities emphasizing commodity production toward pollution prevention and species preservation resulting from interpretation of law by the courts, and decreased agency management discretion previously allowed in law. Protection of clean air and water and species preservation must be assured for the Forest Service to implement programs for commodity production and use of other renewable resources. This has resulted in increased protection of the environment, while historic levels of commodity-oriented activity, such as timber sales, have seen reductions.

Section 1

Background

The mission of the Forest Service historically has been to capture a wide variety of benefits from National Forest System lands, striving to provide “the greatest good for the greatest number in the long run”.³ The agency’s Organic Administration Act establishes that the purposes of the National Forests are to “improve and protect the forest...securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States.”⁴ This charter was broadened in MUSYA, which directs the Secretary of Agriculture to administer the national forests for “outdoor recreation, range, timber, watershed, and wildlife and fish purposes” and to consider the “relative values of the various resources in particular areas.”⁵ These laws, as interpreted by the courts, provided the Forest Service with wide discretion to consider the whole range of National Forest and Grassland benefits and to select the course that “best meets the needs of the American people.”

From the origin of the National Forests and Grasslands until after World War II, the legal framework for National Forest System management was characterized by Congressional delegation of broad management authority to the Secretary to Agriculture. Consistent with its Constitutional authority, Congress provided the principal oversight, albeit somewhat passively. The role of the Federal judiciary was limited to a handful of cases reviewing, and generally affirming, the Secretary’s exercise of his Congressionally delegated authority. Other Federal agencies had very limited roles in affecting the administration of National Forest System lands.

However, after World War II, Congress embarked on a period of gradually increasing legislative activity affecting National Forest System management.⁶ Reflecting an increasing public interest in the recreational, aesthetic, and other non-commodity values of the National Forests and Grasslands, and environmental quality in general, Congress imposed numerous substantive and procedural constraints on the previously broad Forest Service management authority, culminating with the passage of several major pieces of legislation in the 1970’s. The rigorous procedural requirements of many of these statutes generally reflected a growing public interest in the management of natural resources on federal lands for non-commodity purposes.

³ Letter from the Secretary of Agriculture to Gifford Pinchot, February 1905.

⁴ 16 U.S.C. 473-475, 477-482, 551, Act of June 4, 1897.

⁵ 16 U.S.C. 528-531, Act of June 12, 1960. Provided for elsewhere is the use of the National Forests for energy and mineral resource production.

⁶ The Administrative Procedures Act, passed at the end of World War II, exempted public lands from the notice requirements of its rule-making requirements. Secretary of Agriculture Harden waived this exemption in 1971.

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In addition, there has been the substantial growth in administrative appeals of Forest Service decisions. Furthermore, the role of the Federal courts in the management of National Forest System lands began to change dramatically in the early 1970's. Encouraged by Supreme Court decisions on the Constitutional law of standing and citizen suit provisions in federal legislation, litigation challenging the decisions of the Forest Service increased substantially. Inspired by success in at least some Federal courts and by provisions for attorney fee awards, plaintiffs have continued to file dozens of lawsuits against the Forest Service each year under such statutes as NEPA, ESA, and CWA. Today, plaintiffs seek judicial review of decisions for compliance with the accumulated requirements of the multiple statutes enacted over the previous decades.

Section 2

Changing Mandates

The Principal Laws Relating to Forest Service Activities⁷ lists 198 laws that govern agency activities, beginning with the U.S. Mining Laws in 1872, and continuing through the Tourism Policy and Export Promotion Act of 1992. Over 60 percent of these laws were enacted or significantly amended in the last three decades, including six of the seven laws which served as the focus of this study. Appendix A describes some important features of these statutes.

The cumulative effect of these laws has been to limit the management discretion on the National Forests and Grasslands set forth in the Organic Act and MUSYA. Today, the first priority of National Forest System management, as defined in law and interpreted by the courts, has become pollution prevention and species preservation. In response, Jack Ward Thomas has stated that “it appears to me, at least, that we have a de facto policy of biodiversity protection, particularly for National Forest lands. It becomes an overriding objective.”⁸ In a similar response, the Forest Service has declared that its “first priority is ensuring ecosystem health in order to provide the foundation for all life.”⁹

The groundwork for this adjustment was established by language in ESA that “all federal departments and agencies shall seek to conserve endangered and threatened species and shall use their authorities in furtherance of the purposes of this Act.”¹⁰ and was confirmed by a Supreme Court ruling in 1978 that Congress had made “a conscious decision . . . to give endangered species priority over the ‘primary missions’ of federal agencies,”¹¹ This adjustment was furthered by language in NFMA that directs the agency to “provide for diversity of plant and animal communities . . . in order to meet overall multiple-use objectives,”¹² and also by USDA’s regulations implementing NFMA which require that “fish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area.”¹³

In addition, the national requirements of the CAA and the CWA clearly give priority to the prevention of air and water pollution. Under these laws, federal land managers have a responsibility to protect air quality-related values, such as visibility, and water quality. The states establish their own air and water quality standards equal to or more stringent

⁷ USDA Forest Service, 1993.

⁸ Thomas, J.W. 1993 In *The forest conference*. Transcript, 207-211. Portland, OR: Johnson, Beovich, Kirk, May, and Friend, Inc.

⁹ USDA Forest Service, 1994, *The Forest Service Ethics and Course to the Future*, FS 567, 2.

¹⁰ 16 U.S.C. 1531(c)(1).

¹¹ *Tennessee Valley Authority v. Hill*, 437 U.S. 153 185 (1978).

¹² 16 U.S.C. 1604(g)(3)(b).

¹³ 36 CFR 219.19.

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than the federal standards set by the Environmental Protection Agency. The Forest Service must meet all applicable requirements of these plans, including acquiring permits, before its work can proceed.

Only after protection of clean air and water and species preservation has been assured is it possible for the Forest Service to implement programs of use for other renewable resources, rather than utilize the management discretion provided in earlier legislation to pursue multiple-use goals.¹⁴ This has resulted in increased protection of the environment, while historic levels of commodity-oriented activity, such as timber sales, have seen reductions.

¹⁴ One of the basic concepts of multiple use is that all of the named resources in general are of equal priority, but the relative values of the various resources on particular or localized areas, and viewed in the broadest public sense, will be considered in the administrative application of management plans.” U.S.C.C.A.N. 86th Cong. Sess. v.2. Legislative History of H.R. 1551, April 25, 1960, 2380-2383 (Letter from Acting Secretary Peterson to Speaker Johnson, Feb. 5, 1960).

Section 3

Long-Range Planning

In 1960 Congress enacted MUSYA, declaring that the National Forest System lands are to be managed for a high-level annual or regular period output of the various multiple-uses (recreation, range, timber, watershed and wildlife and fish).¹⁵ By 1970 the Public Land Law Review Commission recognized the need for adjusting and streamlining laws regarding the National Forests and Grasslands as well as other federal lands. Due to public interest in environmental protection, Congress enacted laws to enhance the nation's environmental quality. It did so, however, without coordinating and integrating these new legal authorities (e.g. CAA, CWA, and ESA).

NFMA, also passed during this period, began a new era in forest planning. NFMA-style planning represents the most detailed and participatory forest and rangeland planning process ever undertaken.¹⁶ NFMA granted the Forest Service a charter to make land-use decisions under the efficient framework of a staged decision-making system (regional guides, forest plans and project level decisions).

Forest plans are powerful and useful tools. The planning process has allowed Forest Service land managers to identify the renewable resource potential of the National Forests and Grasslands while publicly establishing a protective strategy to sustain these resources. But forest plans are not “silver bullets” that resolve difficult issues or guarantee ecological conditions.

The NFMA planning model was premised on a concept that all resources should be quantitatively accounted for and an optimal solution identified and selected. This system is attractive because it implies a rational, scientifically credible decision-making system that yields certainty. However, forest planning is constrained by the ecological and economic information available and the ability to make accurate predictions from that data. Furthermore, that information is changing and being cycled through the planning process. For example, planning for species diversity, especially endangered or threatened species is ongoing, because the ESA requires the re-evaluation of on-going projects whenever new listings are made, critical habitat is designated, or other new information comes to light.

¹⁵ 16 U.S.C. 531.

¹⁶ The evolution of planning for uses of the National Forest System was summarized in the Environmental Impact Statement for the NFMA Planning Regulation, 36 CFR 219, 44 Fed. Reg. 53934-35 (1979). Wilkinson and Anderson also have an excellent recount of the evolution of land use planning in the Forest Service in “Land and Resource Planning in the National Forests”, 64 Oregon L. Rev., No. 1 & 2, pp. 19-36 (1985). The Public Land Law Review Commission Report, One Third of the Nation's Land, pp. 41-65 (1970), also has a discussion of planning for the National Forests and Grasslands and other land management planning.

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Key components of forest plans, especially the timber allowable sale quantity, timber suitable acres, grazing animal unit months, grazing suitable acres, mineral access, and other projections, were expected to change infrequently. Instead, on some National Forests and Grasslands these projections are often changing as a result of the operation of various laws, like the CWA and ESA, as well as from substantive direction from annual appropriations acts. National Forest System users (recreationists, water developers, miners, hunters and fishermen, loggers, and others) assert that there is no stability of use and access, as they thought forest plans would provide.

The Forest Service has issued a proposed rule to revise the NFMA planning regulation.¹⁷ One of the goals of the proposed regulation is to streamline the forest planning procedures and forest plans. However, it may no longer be reasonable to assume that any planning process, no matter how efficient, can assure a particular outcome, particularly in an open system subject to changing conditions. The combination of changing public expectations, new information, legal interactions, and ecological disturbance, such as fire, windstorm, or flooding, can upset the most carefully crafted forest plan. The Forest Service is seeking to move toward an adaptive planning system that continues public involvement and empowers land managers to accomplish professional, scientifically-based land and resource management in an efficient and affordable manner. But the inherent limitations of long-range land use planning inhibit the flexibility that is needed to manage dynamic natural systems.

¹⁷ National Forest System Land and Resource Management Planning, Proposed Rule, 60 Fed. Reg. 18886 (1995).

Section 4

Public Involvement

Public involvement is a keystone of NFMA and NEPA. The Forest Service makes substantial efforts to learn the underlying values and opinions of the public as a part of its decision-making process. Building and maintaining dialogues with the public, other federal agencies, and with State, local and tribal government is essential to the operation of the Forest Service.

The public's access to post-decisional administrative and judicial review is a positive component of our political system. However, this form of oversight is not intended to overshadow or replace pre-decisional public involvement.

Early involvement by the public gives the agency the opportunity to identify and, when possible, reduce or eliminate conflicts by considering public values and opinions when making decisions. The effectiveness of this approach is constrained, however, by the wide divergence of public opinion on resource issues, incentives for the public to utilize administrative and judicial review to alter decisions, and by limitations imposed by federal law (e.g., FACA).

Divergence of Public Opinion

Public interest in the National Forests and Grasslands has never been higher. Efforts continue in the Forest Service to be more inclusive, proactive, and open in discussions with citizens who are interested in National Forest System management. The Forest Service's decision-making process (regional guides, forest plans, and project level decisions) is subject to repeated public involvement requirements and administrative appeal opportunities.

However, an involved and informed citizenry does not guarantee consensus regarding management of public natural resources. Many opposing viewpoints are advocated by well-funded and sophisticated special interest groups, as well as by individuals. Furthermore, many forums exist for proponents of various viewpoints to advance their cause, leading to an atmosphere where it is difficult to reach a final decision, and agreement on issues is elusive.

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Administrative and Judicial Review

Despite having multiple opportunities for involvement, many citizens and groups have turned away from pre-decisional engagement with the Forest Service, preferring instead to settle their disputes through administrative and judicial appeal. Some groups or individuals raise issues only to establish a record of having done so, without seriously trying to build consensus or resolve disputes. They know that they can easily file an administrative appeal, and later sue in federal court, if the decision does not go their way, with the government often paying their legal costs regardless of who wins.

For example, despite extensive public involvement in preparing its forest plan, the Flathead National Forest received numerous appeals when its Plan decision was announced in 1986. Two environmental groups expressed an intent to file lawsuits, even though the appeal decisions directed the Forest Service to conduct additional analysis in response to some of their concerns. The Forest employed a mediator to facilitate negotiations, but talks broke down before substantive discussions had even begun, and the environmental groups proceeded with their lawsuits. The U.S. District Court ruled in favor of the Forest Service on all thirteen claims. The plaintiffs appealed, and the appellate court upheld the lower court on twelve claims and reversed on one claim. Thus, after six years of administrative appeals and litigation, the Plan was finally approved, with Forest Service paying costs for the one reversed claim in the amount of \$180,000.

The availability of broad injunctive relief and fee-shifting mechanisms has served to promote litigious behavior by those who disagree with a decision of a Forest Service line officer. The Forest Service currently finds itself in a working environment that is characterized by polarization and by a proliferation of litigation. Between 1989 and 1994 the Forest Service successfully defended 39 of 48 cases involving forest plans and 62 of 80 NEPA cases. While the proportion of successfully defended cases is a testament to Forest Service efforts to “obey the law,” each case also represents a tremendous public and private investment. Special interest groups, citizens and Forest Service decision-makers share a concern that litigation is unduly costly in time, money and human resources.

Influence of the Federal Advisory Committee Act

FACA was designed as an “open government” law to regulate committees that provide advice to the federal government. Unfortunately, the language of FACA is so broad that it may throw into question the federal government’s ability to receive advice from members of the public who are not members of a chartered advisory committee. The Forest Service has a legal and regulatory mandate to consult the public on National Forest System management issues. Both NFMA and NEPA have strong public involvement requirements.

FACA constrains the Forest Service in consulting with the public in at least one area.

In cases where the Forest Service does not have the professional expertise or the necessary information, but knows that the expertise or information exists, it can be difficult to get the information and recommendations. Advice must be sought in the same manner as used with any other member of the public and used in the same way in the decision-making process. This is not to say the expert view should not be adjusted in light of public policy making, just that the same procedural rules must be adhered to by those seeking expert advice and those seeking general comments.

In addition, concerns have been expressed that public meetings designed only to help understand the values and opinions of the community concerning management of a National Forest or Grassland could result in violation of the law if those in attendance decide to provide the Forest Service with their unsolicited recommendations. In order for this to be treated as violation of the law, the recommendations must reflect the consensus of the group.

In order to seek consensual advice, the Forest Service is required to charter an advisory committee, following a time consuming process controlled by other federal agencies (General Services Administration and Office of Management and Budget). At present, the Department of Agriculture is operating under an advisory committee ceiling.¹⁸ Thus, FACA continues to force the Forest Service to curtail some of its public involvement activities out of caution of violating its provisions.¹⁹

FACA prohibits federal agencies from obtaining advice or recommendations from advisory committees with non-federal members unless certain requirements are met. FACA was recently modified by Section 204 of the Unfunded Mandates Reform Act of 1995, which exempted advisory committees consisting solely of State, local and tribal elected officials or their designees with authority to act on their behalf, and where such meetings are solely concerned with management of federal programs that share intergovernmental responsibilities or administration.

¹⁸ Letter from OMB Director Alice Rivlin to Secretary of Agriculture Dan Glickman, April 19, 1995.

¹⁹ See Northwest Forest Resource Council v. Espy, 846 F. Supp. 1009 (D.D.C. 1994).

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Section 5

Judicial Review

It is well accepted that Congress does not intend every federal decision to be subject to judicial review. But unless Congress has spoken with specificity, the courts are forced to determine what is judicially reviewable through a trial and error cycle of litigation. Congress did not include a provision in NFMA to guide the courts in determining which Forest Service decisions should be subjected to judicial review. Without specific guidance, the courts have had to start from scratch to develop a set of precedential rulings that apply all other laws in combination with the NFMA. The ad hoc nature of this approach is illustrated by the current conflict between U.S. Circuit Courts of Appeal regarding whether forest plans by themselves are even subject to judicial review.²⁰

In the late 1980's and early 1990's legislation was introduced to establish a judicial review provision for forest plans and project level decisions. Although never enacted, these proposals addressed several key issues, including: (1) who can bring lawsuits; (2) what aspects of forest management are intended to be subject to judicial oversight; (3) where is the appropriate location to file a lawsuit; (4) when is the appropriate time to initiate a lawsuit; (5) which judicial standards of review should be applied; and (6) the relief available.

As legal interpretations evolve, the Forest Service is forced to re-examine past decisions as well as adjust the course of new actions. Congress recognized the social, economic and biological importance of a smooth transition in management direction when it provided that National Forests and Grasslands would be permitted to continue management under existing plans until new NFMA plans were developed.²¹ Some plaintiffs disagree, and continue to seek injunctions on provisions of existing forest plans while the plans are being modified.

The uncertainty this creates for the Forest Service is illustrated by Judge Dwyer's recent decision²² upholding the Northern Spotted Owl Record of Decision (ROD). Judge Dwyer identified several circumstances that may cause a need to reconsider the ROD.

²⁰ Compare *Resources Ltd. v. Robertson*, 35 F. 3d 1300 (9th Cir., 1993) and *Sierra Club v. Robertson*, 28 F. 3d. 753 (8th Cir. 1994). The lack of a judicial review standard is also a significant problem under NEPA.

²¹ 16 U.S.C. 1604(c).

²² *Seattle Audubon Society v. Lyons*, 871 F. Supp. 1291 (W.D. Wash. 1994).

Section 6

Procedural Requirements

For approximately seventy years, the Forest Service operated with considerable discretion in fulfilling its legal mandates. Beginning in the 1970's, the enactment of numerous laws designed to protect natural resources created numerous procedural and substantive requirements for the Forest Service to follow. These statutes, and subsequent regulations, present a significant challenge to timely, cost effective, and efficient management of the National Forests and Grasslands.

Federal laws demand that federal agencies produce a written record demonstrating their compliance with various statutory and regulatory requirements, some of which are administered by other federal and state agencies. While individually, the requirements may be well intentioned, the cumulative effect is a cumbersome and expensive process for managing federal resources.

In order to satisfy the administrative procedures required by statute and judicial precedent, the Forest Service must devote significant resources to analyses of potential environmental impacts of its proposed actions. These analyses must be supported by increasingly detailed documentation demonstrating the agency's "hard look" at the large number of relevant considerations compiled over decades of legislation and judicial opinion.

Process Duplication

Procedural requirements of laws and regulations result in duplication of processes, creating inefficient program operations. While it is nearly impossible to precisely determine the impact of individual statutes enacted over the last three decades on the delivery and cost of Forest Service programs, there is substantial evidence that the cumulative effect of these laws and regulations has increased costs and created redundancies.

NFMA provides the basic framework for Forest Service decisions. The decision-making system includes three levels: regional guides, forest plans, and the project level decisions. The regional guide level establishes coordination requirements within Forest Service regions. At the forest plan level, land is allocated to different uses, and goals, objectives, and standards are set for National Forests and Grasslands, following the regional guide. Forest plans are issued every ten to fifteen years.²³ Project decisions are

²³ The Proposed Rule for National Forest System Management eliminates the regional guide from the Forest Service decision-making structure. National Forest System Land and Resource Management Planning, Proposed Rule, 60 Fed. Reg. 18886 (1995).

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made at the local, site-specific level throughout each year, and comply with the forest plan.

NEPA documents are prepared by the Forest Service at each of these three decision levels. At the project level, an environmental assessment (EA) or an environmental impact statement (EIS) is prepared unless the activity has been categorically excluded. Regional guides and forest plans are accompanied by an EIS, which provides for an analysis of the environmental consequences of various alternatives, and a public notice and comment period. Increasingly, appellants and plaintiffs urge that more EIS's be prepared at the project level. Recently, the Forest Service has been providing a public notice and comment period on all project EA's, blurring the line between the EA and the EIS.²⁴

This decision-making system is overlaid by the requirements of other Federal statutes, such as the ESA, CWA, and CAA. ESA establishes a consultation process between the Forest Service and the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) to ensure that proposed agency actions do not jeopardize the continued existence of any listed species or its designated critical habitat. The Forest Service makes a determination whether a proposed action "may affect" a listed species through completion of a biological evaluation, and then the consultation process is initiated.²⁵ The outcome of the consultation is a biological opinion from FWS or NMFS biologists that may or may not concur with the Forest Service's findings. The consultation process can occur at the forest plan or project level. In addition, FWS and NMFS, supported by relevant case law, are generally unwilling to allow projects that comply with forest plan consultation to proceed without further review at the project level.

The CWA and CAA delegate responsibility to the states to develop plans to assure water quality and air quality. These plans must be approved by the Environmental Protection Agency. The requirements of these laws overlap with the Forest Service's responsibilities to protect "streams, streambanks, shorelines, lakes, wetlands, and other bodies of water from detrimental changes,"²⁶ and to "[maintain] air quality at a level that is adequate for the protection and use of National Forest System resources."²⁷

²⁴ Section 332 of the FY92 Interior Appropriations Act requires notice and comment and administrative appeal of proposed actions concerning most projects and activities implementing forest plans.

²⁵ Consultations may be formal or informal. In a April 24, 1995 brief before the Supreme Court, the Solicitor General described the consultation process as follows: "The regulations provide that an agency shall 'review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat.' 50 C.F.R. 402.14(a). If the agency makes such a "may affect" determination, it is to initiate consultation. *Ibid.* If the agency further determines, however, that the action is "not likely to adversely affect" (NLAA) listed species or critical habitat, it may choose to initiate informal consultation; if it receives the written concurrence of the appropriate consulting agency (either FWS or NMFS), consultation is complete. 50 C.F.R. 402.14(b). If the action agency determines that the proposed action is "likely to adversely affect" the species, the agency must initiate formal consultation." Pacific Rivers Council v. Thomas, 131 L. Ed. 721, 63 U.S.L.W. 3771 (April 24, 1995), Plaintiff's Brief.

²⁶ 16 U.S.C. 1604 (g)(3)(E)(iii).

²⁷ 36 CFR 219.27 (a)(12).

Recycling Decisions Due to New Information

Responding to new information and the interactions among the procedural requirements of NEPA, NFMA, and ESA lead the Forest Service into inefficient, repeated cycles of forest plan and project level consultation and documentation. Currently, forest plan approval, amendment, and revision and project level decisions are all subject to ESA consultation, and to the documentation requirements of NEPA.

Under NEPA, federal agencies have an ongoing duty to gather and evaluate new information relevant to the environmental impact of proposed actions. New information regarding the relationship of actions within any given ecosystem is constantly being developed. The new information often compels rethinking an earlier decision.

Under ESA, any new listing, designation of critical habitat, or discovery of new information requires that on-going projects be reviewed to determine their potential to affect listed species or critical habitat. Consultation under Section 7 of ESA must be re-initiated if necessary. The ESA does not provide specific direction for agencies to deal with forest plans or the effects of new information, new listings, or critical habitat designation on previously approved project level decisions. The Department of Commerce and Interior regulations that establish the mechanisms through which ESA compliance occurs²⁸ also do not provide clear guidance on these matters.

In a recent judicial interpretation, the U.S. Court of Appeals for the Ninth Circuit ruled that the Forest Service violated the ESA by failing to reinitiate ESA consultation on two existing forest plans following the listing of salmon species which had not been listed at the time the plans were issued.²⁹ As a result of the ruling, timber sales and road building were enjoined on the affected National Forests.

Following the Ninth Circuit's opinion, a U.S. District Court prohibited on-going and future activities that "may adversely affect" listed species on National Forests in Idaho pending completion of reinitiated consultation on the plan that would result in no direct impact on listed species.³⁰ The injunctions were issued even though the Forest Service was in the process of developing standards and guidelines to protect that listed species which would be incorporated into the forest plans by amendment. These standards and guidelines were also subject to ESA consultation during the amendment process.

²⁸ 50 CFR 402.

²⁹ Pacific Rivers Council v. Thomas, 30 F. 3d. 1050 (9th Cir. 1994), cert. denied, 131 L. Ed. 721, 63 U.S.L.W. 3771 (April 24, 1995).

³⁰ Pacific Rivers Council v. Thomas, 873 F. Supp. 365 (D. Id. 1995).

Conclusion

The Task Force found some unintended negative effects within the framework of laws and regulations. These effects related to the viability of long-range planning, the effectiveness of public and interagency involvement, the specification of judicial review standards, and the efficiency of certain procedural requirements. The Task Force did not find strong oppositional conflict between statutory mandates. Rather, it found that overtime there had been a trend toward a significant amount of regulation of Forest Service activities by other federal agencies and a shift from historic management priorities emphasizing commodity production toward pollution prevention and species preservation resulting from interpretation of law by the courts, and decreased agency management discretion previously allowed in law. Protection of clean air and water and species preservation must be assured for the Forest Service to implement programs for commodity production and use of other renewable resources. This has resulted in increased protection of the environment, while historic levels of commodity-oriented activity, such as timber sales, have seen reductions.

STATUTE	TIME	AREA	ACTION	SCALE OF ACTION	PURPOSE	CITIZEN SUIT PROVISION
MUSYA	IN PERPETUITY	NATIONAL FOREST SYSTEM	SUPPLEMENT FOREST SERVICE MISSION	NATIONAL FOREST SYSTEM	MULTIPLE-USE; PROTECTION AND SUSTAINED-YIELD	NO
NFMA	10-15 YEARS	PROCLAIMED FOREST BOUNDARY; AND ADMIN. UNIT	PLAN APPROVAL, AMEND, REVISE; AND PROJECT LIMITS	PROGRAMMATIC AND PROJECT LEVEL	MULTIPLE-USE PLANNING	NO
NEPA	UNTIL NEW INFORMATION; CEQ 5 YEAR GUIDE	MULTIPLE: BY ISSUE, SITE-SPECIFIC AND CUMULATIVE IMPACTS	SPECIFIC DECISION AFFECTING THE QUALITY OF THE HUMAN ENVIRONMENT	PROGRAMMATIC; SITE-SPECIFIC; CONTINUING	NOTICE; COMMENT; DISCLOSURE OR ENVIRONMENTAL CONSEQUENCES	NO
ESA	UNTIL NEW INFORMATION	INDIVIDUAL SPECIES; ECOSYSTEM; CRITICAL HABITAT	ACTION AFFECTING LISTED SPECIES OR CRITICAL HABITAT	PROGRAMMATIC; SITE-SPECIFIC; CONTINUING	CONSERVATION AND RECOVERY OF THREATENED AND ENDANGERED SPECIES	YES
CAA	UNTIL NEW INFORMATION	AIRSHED; NON-ATTAINMENT AREA; PRISTINE AREA	ACTION AFFECTING PERMITS, CERTIFICATION; STANDARD & GUIDELINES	STATE, REGIONAL AND SITE-SPECIFIC	CLEAN AIR, PUBLIC HEALTH	YES
CWA	UNTIL NEW INFORMATION	WATERSHED, RIVER BASIN; POINT/NON-POINT SOURCE	ACTION AFFECTING PERMITS, CERTIFICATION; STANDARD & GUIDELINES	PROGRAMMATIC; SITE-SPECIFIC; CONTINUING	CLEAN WATER, PUBLIC HEALTH	YES
FACA	TERMINATES AFTER TWO YEARS UNLESS RENEWED	NOT APPLICABLE	COLLABORATIVE ADVICE AND RECOMMENDATION	NOT APPLICABLE	ENSURES OPEN FEDERAL DECISION-MAKING	NO

Appendix A: Integration of Land Management and Environmental Laws

Forest Service management and planning are influenced by several administrative and environmental statutes. Appendix A contrasts the application of several of these laws in terms of their geographic scope, timing, scale of action, etc. For example, NFMA is premised on a 10-15 year revision cycle, while NEPA and ESA anticipate ongoing review and adjustment based on new circumstances or information. Similarly, NFMA planning is constrained to designated federal administrative boundaries, while NEPA and ESA analyses follow “ecological boundaries.”