Review of the New NFMA Planning Regulations

Prepared by WildLaw. www.wildlaw.org.

In response to the release of new NFMA Planning regulations on December 23, 2004, WildLaw attorneys prepared this white paper on the changes and requirements of the new rules and on possible legal strategies for protecting public lands under these new rules.[1] Although this paper cannot substitute for legal advice provided by counsel familiar with a specific set of facts dealing with a particular project or plan revision under the new regulations, this white paper can give the user ideas on what things to look for and what to do in response to a plan revision or project under these new rules. Hopefully, the Forest Service will use this paper as a guide on how to implement these new rules effectively and properly so as to avoid any legal problems.

An electronic copy of this white paper is available on our web site in both Word and HTML formats.

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[1] With the release of this white paper coming almost a month after the new regulations were issued, we owe a debt of gratitude to all the other great forest advocates who prepared and circulated reviews of the new rules prior to this one. We plagiarized liberally from the fine work of many of these other folks. In particular, we want to thank Mike Anderson of The Wilderness Society and Rocky Smith of Colorado Wild.

Background and a Lost Opportunity

Rocky Smith of Colorado Wild gives a good background of NFMA and the regulations under that law:

> Prior to passage of the National Forest Management Act (NFMA) in 1976, planning for national forests was a rather scattershot effort. There was no consistency to the process, and forests did various levels of planning as they saw fit. NFMA finally brought order to this previously chaotic process. It required, for the first time, that a comprehensive land a resource management plan be prepared and implemented for each administrative unit (i.e., National Forest or group of them) of the National Forest system. It had other requirements, but most of the details were left to regulations, which the Forest Service was required to prepare with the advice of a committee of scientists.
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> The first set of regulations was issued in 1979, and amended slightly in 1982. They were encoded at 36 C.F.R. § 219. These regulations were used to prepare the first generation of forest plans for each unit in the country. In the early 1990s, the first Bush Administration tried to greatly weaken the regulations, but that effort was never completed, probably at least in part because of public opposition. In the late 1990s, President Clinton appointed a new committee of scientists, which produced a draft set of new regulations in 1999, and a final set in late 2000, shortly before Clinton left office. These regulations would have emphasized protection of ecological values, but enforcement provisions, such as the requirement in the 1982 regulations for monitoring actual populations of management indicator species of wildlife, were removed or gutted.
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> The current President Bush never let these regulations take effect. Instead, the Forest Service issued a greatly weakened set of new regulations in December, 2002.

The new regulations, described in detail below, took effect on January 5, 2005, the date they were published in the Federal Register.

While the old 1982 regulations had some difficulties that could have used updating or tweaking, most of the "problem" the agency had with them was not that they were hard to implement but that they were hard for the agency to avoid complying with. Despite the agency's claims of burdensome litigation and paper work, there is NOT ONE SINGLE CASE where a court overturned the Forest Service for complying with the 1982 regulations. NOT ONE! As one high level Forest Service official put it (we will protect his identity), "We never got sued for complying with the 1982 regulations. We lost

lawsuits because we did not comply with the regulations. We cut corners and got caught." Hard to imagine making a good case with the public why totally new regulations are needed if the reason for getting rid of the 1982 regulations is that you got caught violating them too many times. We also find it hard to imagine that this Administration has so little regard for the 1982 regulations issued under President Reagan. The 1982 regulations were not "liberal" rules.

The real tragedy here is that, when the Forest Service DID try to comply with and properly implement the 1982 regulations, they were hugely successful at it. In 1992, the National Forests in Alabama were the WORST of the forests in the whole Forest Service system; they violated every federal law as often as they could in order to "get the cut out." A series of lawsuits, appeals and other legal actions shut down all logging in the National Forests in Alabama in 1999. Since then, the leadership of the Forests and much of the staff changed. Now, the National Forests in Alabama are implementing scientifically-valid restoration programs, all of which were prepared under (and in full compliance with) the 1982 NFMA regulations. If the 1982 regulations can be followed in Alabama, this could be done anywhere. Being the first to do this new type of restoration work under the 1982 regulations, the Conecuh National Forest prepared a full Environmental Impact Statement (EIS) on what restoration is needed for that forest's unique Longleaf Pine/Wiregrass ecosystem (the rarest forest type in North America) and on what work could be done in five years to correct past mismanagement and restore the natural and healthy forest native there. That restoration plan was not challenged legally in any way and succeeded.

Now, National Forests in Louisiana, Florida and parts of Mississippi are also doing great work at Longleaf Pine restoration, all in compliance with the 1982 regulations. Actual population trend data on management indicator species is being collected and analyzed. Survey data on threatened, endangered and sensitive species is being collected and analyzed. Public participation is open and good. NEPA analysis for most of these projects is exemplary and does not slow down the agency at all. Indeed, these forests have found that doing NEPA analysis right, instead of trying to shortcut NEPA, makes their final decisions better and more successful. Other examples of good people in the agency doing good work under the old regulations exist in many other areas as well.

So, if there are real, ongoing and tangible examples of the Forest Service successfully implementing the 1982 regulations, why would the agency abandon those rules and replace them with something totally different and untried? It seems that the agency simply does not value or even believe in its personnel who actually do their jobs correctly and successfully. The agency appears to put its faith in those bad apples who have been caught shortcutting legal requirements; it seems to want to make the worst the example it wants all the agency to follow. These new regulations seem to be an attempt to immunize, indeed elevate, mendacity, mediocrity and failure in the agency. We hope that is not the case.

The Forest Service was offered the opportunity to figure out how to fix real problems and then encourage the real innovations and successes the agency does have. An effort like that would have been an exciting thing that would truly have produced a better agency, better public relations and much less litigation. Sadly, the agency chose not to take that opportunity. Indeed, this entire scheme of having an EMS for each Forest was NEVER submitted to the public for review and comment.

As one of the top litigators against the Forest Service, WildLaw knows where the agency cuts corners and where the agency shines. We know many good people in this agency, good people who are true public servants. We also know the bad people in the Forest Service, bad people who will do anything they can to make money for their buddies in industry at the expense of the public at large. We have never sued the Forest Service because we do not like the agency; indeed, we have sued the Forest Service so much because we like this agency. We DO believe in its true potential to be the greatest land management and protection agency in the world. We DO have faith in the many good people in the Forest Service; we KNOW that if the good people are given the chance to do their jobs, they will produce great results with which no one can argue.

The Forest Service could have met us half way and made a real attempt to solve the real problem areas in NFMA planning and thus come up with a system and set of regulations that brought out the best in the agency. Such an open and cooperative effort would have truly solved the "process predicament" and "analysis paralysis" the agency has moaned about for the last four years. Many of us in the conservation community **repeatedly** offered to make such a process work with the agency; we were turned down.

Another major problem with these new regulations is that, instead of fixing the problems with the old regulations and updating them, the Forest Service decided to throw them out completely and come up with an entirely new and unknown system for National Forest planning. Many have said that the Forest Service "threw the baby out with the bath water." True, these new rules do that, but they also "bring in a new puppy." As this EMS/adaptive management puppy grows into a big dog, it will be interesting to see if it is as easy to train and control as the Forest Service wishes. It may well turn out that this new dog will eventually turn on its master and bite it in the rear. Eliminating planning as it has existed for 22+ years and putting in a new system of environmental management systems and "ongoing planning," the agency is dumping a set of problems it knows and could deal with successfully for a whole bunch of new problems that are a total mystery at this point. We have talked with a number of forest rangers about the new regulations, and every one of them finds the new rules to be unintelligible. "Greek to me," as one ranger put it.

Apparently thinking that a new system, especially a system that has served industry so well in "green washing" itself, would "solve" its problems, the Forest Service hopes these new regulations will insulate the agency from review and interference. Why a public agency would want to separate itself from the public it is supposed to serve is strange but obvious in the current day. But what is really shocking is that the Forest Service thinks this will really make things easier for them. Such an attitude is appallingly

naïve. The new regulations will require a total overhaul of how the entire agency and its thousands of employees do things. To think that will go smoother than the work of the past is almost laughable. Instead of resolving the alleged "process predicament," it seems that the agency issued these new rules in order to increase its problems with paperwork and costs.

Further, ditching a "known problem" for an entirely new system is a recipe for disaster, or at least great difficulty, in any context. The rule of **unintended consequences** will play a large role for the Forest Service in the coming years as its struggles to implement these new regulations. Even on the face of the new rules, it is clear that the Forest Service is doing a number of things the agency clearly did not think through very well. Some examples:

- In the past, the Directives (the Forest Service Manual and Forest Service Handbook) were mostly unenforceable in court. The new regulations make the Directives mandatory and enforceable.
- If the agency then tries to make the Directives too loose and thus unenforceable, they will be in violation of NFMA, because NFMA makes certain unavoidable requirements on the Forest Service and the new regulations put implementation of those requirements in the Directives. If the agency does not meet NFMA's requirements in the regulations, they HAVE to meet them in the Directives, but if they do not meet NFMA's requirements in the Directives, then they HAVE to meet them in the regulations. It is a nice "Catch-22" the Forest Service has invented for itself. Unless some mandatory and enforceable requirements to meet NFMA's dictates are SOMEWHERE, the Forest Service will be in such violation of the law that a lawsuit could shut down an entire Forest, or maybe even the entire National Forest System. Maybe the agency wants such a manufactured "catastrophe" to occur so it can run to Congress and demand that NFMA be gutted, but such a scenario would be a cynical sham. The Forest Service fully has the power and the opportunity to solve most of its problems right now, but the agency seems to want to complicate its problems, not solve them. While these new regulations make it appear that the Forest Service wants to increase its problems, we cannot believe, yet, that the leaders of the agency are so craven as to actually want to create a crisis for political purposes. If they do, it will backfire on them, as all dishonest schemes eventually do.
- Failing to do NEPA alternatives analysis at the planning stage will mean projects will have to consider forest-wide alternatives and identify and consider cumulative impacts forest-wide, a prospect so daunting that we do not envy the poor staffers we know who will have to do this task. But it sure gives us a great legal hook to stop bad projects. We know of a way for the Forest Service to solve this dilemma and have offered that solution to the agency many times, but we will see if the Forest Service continues to refuse our assistance now.
- While an EMS under ISO 14001 was voluntary for industry and not enforceable, as a company could opt out of its EMS any time it wanted and suffer nothing more than only a loss of "certification," incorporating the ISO 14001 into these regulations makes the ISO's requirements mandatory for the Forest Service. By melding the ISO's requirements into the regulations, the Forest Service has given those previously

voluntary requirements the force of law against the agency. As litigators, we welcome the opportunity to ask courts to enforce the better parts of the ISO against bad plans and projects. But as owners of these Forests (which is more important), we hope that the Forest Service will do the right thing and really comply with the spirit and letter of the ISO so as to engage in good management, thus avoiding legal unnecessary problems.

The Forest Service could have used the review of its NFMA planning regulations as an opportunity to engage the public, bridge divides and solve real problems. It could have built on the working examples of the best of the agency and made a real difference and a real improvement. Along with others in the conservation community, WildLaw explicitly met with and directly asked the top leaders of the Forest Service to do just that; we offered repeatedly to work with the agency, instead of being forced to be its adversary. Instead, the Forest Service chose to barge ahead blindly, to seek new and untested ways to allow the worst of the agency to operate freely, to widen divisions both inside and outside the agency, and to create a host of consequences and potential NEW problems for itself.

Things could have been different, but the Forest Service has decided so far to waste a rare and unique opportunity to improve the agency to really do a better job of protecting the land and serving the public. While there is still an opportunity to do things better, we continue to offer an olive branch to the Forest Service and hope the agency will truly work with the public to find real solutions. But our willingness to work with the Forest Service should never be construed as a willingness to allow degradation of our public lands or diminishment of our rights as Americans. The Forest Service talks about valuing open and constructive public participation; this may be the last chance for the agency to walk its talk.

General Problems with the New Regulations

Everyone agrees that the current system is not perfect. Increased efficiency of the whole system is a good goal and, of course, cutting the Forest Service=s costs may free them up to more thoroughly do their job. The question is, what is their job? The new regulations treat the National Forests like a corporation. Will the management style will be like Ford, which, despite fluctuations, has been making cars since they were first introduced or more like the dot.com industry with its spectacular boom and bust? The problem is that the regulations pave the way for our National Forests to be operated like a dot.com.

These new regulations give economic considerations weight equal to that of ecosystem health. This is circular reasoning because in order for this equation to result in sustained productivity, obviously, the ecosystem must be functional. Like any system, the relationship between the natural resources and the harvesters must be subject to quality control.

In theory, the Forest Service exists as the quality control assurance. If every person in the agency had the best interests of sustainability in mind when they made decisions, the discretion in the new regulations would not be a detriment to the ecosystems. The Forest Service was created to make sure that the interests of the few did not ruin the forests for the general population and future generations. Unfortunately, not all forest managers have not shown this inclination, so their discretion is not a standard for good decisions.

When individual discretion won=t suffice, the most important tool in quality control are standards. Although these regulations still require public participation, monitoring, and some consideration of scientific implications in the planning process, no standards are established. Such general requirements border on being useless. In fact, in some cases, the Administration has specifically removed the standards that served as the basis for past lawsuits that resulted in forest protection. So it seems that these new regulations are less about good management and more about getting around the law.

With no requirement for specific public notice to interested people and in light of the fact that the plans are only aspirational, public participation is truly hollow under these new regulations. Section 219.9(a) provides that the Responsible Official must provide opportunities for the public to collaborate and participate in the planning process. The public will be informed of the general and overall goals for each forest, and the Forest Service will know what the public wants on this broad scale. But when the rubber hits the road at the project level, they are free to proceed in obscurity.

In the section on sustainability, § 219.10, there is no assurance that the interests of endangered species, species of concern and species of special interest will be taken into account. Section 219.10(b)(2) requires the Responsible Official to make provisions for them, but only if he or she determines that necessary; nothing requires consideration of these vulnerable species.

Without the requirement to maintain viable populations of individual species, unless the Responsible Official uses his or her discretion and decides to make specific provision for endangered species, they may not be considered. The new language, "provide a framework to contribute to sustaining native ecological systems by providing ecological conditions to support diversity of native plant and animal species in the plan area," could allow specific species to slip through the cracks. It remains to be seen if consultation under the ESA with the U.S. Fish and Wildlife Service will even take place for each project. If consultation is only done for plans, the ESA will be no help here. This may be an area ripe for litigation to clarify the application of the ESA to projects and not just plans.

In § 219.14(f) the regulations negate the old requirement to have population trend data for MIS even for projects being done under the old regulations. This seems like they are trying to get ahead of themselves, a *post hoc* attempt to get around already existing requirements. If a plan promulgated under the old rules is still in place, the old regulations still apply because the plan was written under the old regulations.

The Administration even weakened the 2002 draft regulations' insistence that forest management decisions must be consistent with the best available science. The final rule demands only that local Forest Service officials "take into account the best available science." § 219.11(a). The regulations spell out what "consider" means here. One hope for giving teeth to this section is litigation over what the subsections in § 219.11(a) mean. A court may well find that the consideration requirements here mean more than simply cursory consideration and summary rejection of the science. § 219.11(a)(1) requires that the proposed plan document how the best available science was taken into account in the planning process within the context of the issues being considered. § 219.11(a)(2) requires that the proposed plan evaluate and disclose substantial uncertainties in that science. § 219.11(a)(3) requires that the proposed plan evaluate and disclose substantial risks associated with plan components based on that science. § 219.11(a)(4) requires that the proposed plan document that the science was appropriately interpreted and applied.

Further, NFMA requires the Forest Service to develop regulations that, among other things, limit the size of clearcuts, protect streams from logging, ensure prompt reforestation, restrict the annual rate of cutting, as well as determining which land is economically unsuitable for timber production. These new regulations defer to the Forest Service Directives System in § 219.12(b) for all those requirements. This is an attempt to slip out from under specific direction from Congress that could be challenged since the Directives did not in the past have the same legal force as regulations. This areas has great potential for abuse without the public oversight that accompanies regulation.

The Administration's attempt to eliminate standards wholesale may be vulnerable. The agency's assertion that because the words guidelines and standards were used "with no apparent distinction" in NFMA, they are equivalents is fallacious. It is well established that the starting point of statutory interpretation is to review the plain language of the statute itself, as well as its overall design. In the Act, since the two words are found together, it must be assumed that Congress meant both words. And the plain meanings of these two words are not interchangeable, as 22+ years of the use of standards and guidelines under the 1982 regulations have proved.

Mike Anderson of The Wilderness Society gives a good review of some of the main problems in the new regulations:

> Wildlife Viability
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> The final regulations eliminate the requirement to maintain "viable populations" of native fish and wildlife species in the national forests. This requirement has been a primary legal basis for some of the Forest Service's most important forest conservation initiatives, including the Northwest Forest Plan and the Sierra Nevada Forest Plan. In place of the viability requirement, the regulations simply provide an "overall goal" to "provide a framework to contribute to sustaining

native ecological systems by providing ecological conditions to support diversity of native plant and animal species in the plan area" [36 CFR 219.10(b)].

Rather than planning to ensure the continued existence of wildlife, forest plans will only "establish a framework to provide the characteristics of ecosystem diversity in the plan area" [219.10(b)(1)]. In fact, forest plans will no longer have to specifically address wildlife needs at all unless the Forest Service determines that the "ecosystem diversity" provisions of the plan need to be supplemented for a particular species [219.10(b)(2)]. The regulations also excuse the Forest Service from any duty to monitor wildlife populations [219.14(f)].

NEPA

The final regulations eliminate the requirement to prepare an environmental impact statement (EIS) pursuant to the National Environmental Policy Act (NEPA) whenever a forest plan is revised or significantly amended. Instead, forest plans "may be categorically excluded from NEPA documentation" [219.4(b)], which means that the Forest Service can entirely bypass the NEPA process whenever it revises or amends a forest plan.

Eliminating NEPA will severely limit public involvement and consideration of environmental values in the forest planning process. For example, people will have less access to information about the environmental impacts of the agency's proposed management plan. The Forest Service will not be required to examine alternatives to its proposed plan or to supply information about the comparative advantages of various alternatives. In addition, the Forest Service will not be required to study or disclose to the public the cumulative environmental effects of management activities across the national forest. Eliminating NEPA from the forest planning process also appears to violate specific direction in the NFMA that the regulations "insure that land management plans are prepared in accordance with [NEPA]" [16 USC 1604(g)(1)].

Furthermore, the planning regulations treatment of NEPA needs to be viewed in the context of other NEPA-related actions by the Bush Administration. For the past four years, the Administration has adopted a series of regulatory changes – mostly under the umbrella of the "Healthy Forests Initiative" -- aimed at reducing the Forest Service's duties to comply with NEPA at the project level, such as for timber sales. These actions undermine the credibility of the Administration's assurances that full NEPA analysis will be accomplished at the project level and therefore is unnecessary at the plan level.

Instead of NEPA, the final regulations require the Forest Service to establish an "environmental management system"(EMS) for each national forest. [219.5]. EMS is a planning and monitoring process that has been adopted by large timber companies like Weyerhaeuser Corporation to deal with environmental regulations while maximizing corporate efficiency and profits. It has never before been

applied to federal forest lands, and it appears to be an entirely inappropriate substitute for NEPA to advance the public's interest in protecting the environmental integrity of the national forests.

Role of Science

Although the Bush Administration claims to be strengthening the role of science in forest planning, in reality the final NFMA regulations give local agency officials broad discretion to reject scientific evidence and recommendations. The final regulations only require agency officials to "take into account" the best available science [219.11(a)]. The preamble to the final regulations [p. 18] makes it clear that science "is only one aspect of decisionmaking" and that "competing use demands" and other factors can override scientific input. In contrast, the draft rule issued in December 2002 gave science a much more prominent role in the planning process by requiring that Forest Service decisions must "be consistent with" the best available science.

Timber Management

Amazingly, the final regulations essentially ignore large parts of the law (NFMA) that they are supposed to be implementing. In an effort to protect the national forests from excessive and destructive logging, Congress specifically instructed the Forest Service through the NFMA to develop regulations that, among other things, limit the size of clearcuts, protect streams from logging, ensure prompt reforestation, and restrict the annual rate of cutting. Prior NFMA regulations complied with the statute by limiting clearcuts to 40 acres, requiring 100-foot stream buffers, and restricting the amount of timber cutting in each national forest.

However, the final regulations do none of these things. Instead, they simply state that procedures for complying with NFMA requirements will be included in the Forest Service's internal directives system (the Forest Service Manual and Handbook) [219.12(b)]. One major problem with this strategy is that federal regulations have the force of law, but management direction in the Forest Service's directives system is generally not legally enforceable. The agency's directives system is also much less visible and accessible to the general public and therefore is a poor forum for engaging people's interest in important forest management issues.

Also, the final regulations completely ignore the NFMA's requirement that forest plans identify lands that are economically unsuitable for timber production [219.12(a)(2)]. Consequently, forest plans will provide little if any information about the extent to which the Forest Service's plans may result in below-cost timber sales and taxpayer subsidies to the timber industry.

Detailed Section by Section Breakdown

§ 219.2(b): Departs from old regulations in approval of forest plans in that now the forest supervisor approves them instead of regional forester. Old § 219.4(b)(3). Regional Forester or Chief may now elect to approve plan or plan amendment. However, under both the old and the new rules, the forest supervisor has the ability to amend the forest plan.

§ 219.2(d)(3): New rules require plan revision at least every 15 years as opposed to a 10 year preference for revision, but at least every 15 years in the old rules. Old § 219.10(g).

§ 219.3(a): Nature of land management planning: No real equivalent to this section was in the old regulations, but where the new regulations talk about land management that is "adaptive" and is based on "useful and current information," the old regulations talked about using a "continuous flow of information". Old § 219.4

- Additionally under the old regulations, there was a detailed provision on monitoring and evaluating how well forest objectives and standards were being met. Old § 219.12(k). Through this process, recommendations could be made which would precipitate a forest plan amendment/revision.

§ 219.3(b): This regulation is an obvious departure from how courts were previously interpreting the force and effect of plans. Under this regulation, plans do not create any legal rights and do not approve or execute projects and activities. The obvious question in light of this regulation is what is the purpose of plans are if they do not carry any legal authority.

- This provision seems to fly in the face of NFMA which states that "resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans." 16 U.S.C §1604(i). Bottom line is that if plans are only goals or objectives and do not create any legal rights then there is no need for projects to be consistent with the plan, and this violates the Act.
- The Forest Service relies on the *Ohio Forestry* case for the proposition that forest plans are merely "tools." The agency quoted directly from *Ohio Forestry*: plans "do not grant, withhold, or modify any contract, permit, or other legal instrument, subject anyone to civil/criminal liability, or create any legal rights." The *Ohio Forestry* court was actually paraphrasing Justice Brandeis in *United States v. Los Angeles & Salt Lake R. Co*., 273 U.S. 299, 309-310, (1927). *Ohio Forestry* is a case about ripeness and when judicial review of forest plans is permitted. Obviously forest plans did not exist in Brandeis' day; there is an argument to be made that the Forest Service took this part of *Ohio Forestry* out of context. The Forest Service also seems to contradict their contention that forest plans do not matter further on down in the regulations.
- The Forest Service also seems to like the SUWA case, *Norton v. Southern Utah Wilderness Alliance*, 124 S. Ct. 2373 (2004). First off this case is on

BLM land and although it involves a land management plan, FLPMA instead of NFMA is the controlling statute. Secondly, SUWA was attempting to enforce mere statements in the BLM's plan to monitor off road vehicles in wilderness study areas. This should be distinguished from forest plan standards, which under the new regulations do not exist since they have only "guidelines." Justice Scalia does concede that under the APA the BLM does need to act in accordance with and conform to LUPs. Additionally the BLM is prohibited from taking actions that are inconsistent with provisions of LUPs.

- § 219.8(e) seems to contrast and be inconsistent with earlier sections of the regulation since it says that approved projects and activities must be consistent with applicable plan components.

§ 219.4: A controversial regulation that eliminates preparation of an EIS for all forest plan revisions based on a categorical exclusion. The justification is that since forest plans are aspirational or tools, there are no significant impacts on the environment based on a forest plan. This initial premise will need to be successfully overcome for a successful NEPA challenge to the categorical exclusions of forest plan revisions from NEPA.

- The Act does not seem to be helpful on this point since NEPA applies in situations where the regulations describe "when and for what plans an EIS" is required. 16 U.S.C. §1604(g)(1). Presumably the agency could say that an EIS is never required for a Forest Plan revision; however, the Act does somewhat imply that in some cases an EIS would be required, otherwise Congress would not have included this provision.
- This regulation is a very wide departure from the old regulations which had detailed provisions for preparation of an EIS for forest plans. An argument could be made that, by removing wildlife protections for MIS and species listed under the ESA, there is a significant impact on the environment, and an EIS would be required for a forest plan revision.

§ 219.5 Environmental Management Systems

- This new section requires each National Forest to develop and maintain an environmental management system (EMS) according to the requirements of ISO 14001.
- A detailed discussion of EMS and ISO 14001 is below.

§ 219.6 Evaluations and monitoring

- This provision is not as new and exciting as the Forest Service would have people believe, since there were similar requirements under the old regulations under § 219.7(f). Additionally, under a monitoring and evaluation program, forest plans could be revised accordingly. Old § 219.10(g), also see old § 219.11(d).
- The plan monitoring program described in § 219.6(b) is not really new at all either, since this was previously required under old § 219.12(k).
- § 219.6 (a)(1)(ii) *Conditions and trends*. The current social, economic, and ecological conditions and trends, and substantial changes from previously

identified conditions and trends must be described based on available information, including monitoring information, surveys, assessments, analyses, and other studies as appropriate. Evaluations may build upon existing studies and evaluations. There really is no process for assuring the Forest Service will collect relevant and necessary information. Permitting merely the use of available information (especially if the available information is nothing) gives the agency an excuse for not collecting the right monitoring information to begin the process.

§ 219.7(a)(2)(ii): "Objectives" are said to be aspirational but previously seemed to be more concrete and were a measurable timed result. Old § 219.3.

- Part (iv) suitability is out of line with the old regulations and the Act, which requires "the secretary to identify lands within the management area which are not suited for timber production…." 16 U.S.C. § 1604(k).
- The old regulations required the Forest Service to avoid logging areas that could not be adequately restocked or where resource damage could not be avoided because of lack of technology. Old § 219.14. The new regulation on suitability does not make any reference to lands that should be treated as unsuitable as directed in the Act. The suitability of an area will apparently be determined at the project level, which conflicts with the Act.

§ 219.7(a)(5)(ii) states, "Unless otherwise provided by law, all National Forest System lands possessing wilderness characteristics must be considered for recommendation as potential wilderness areas during plan development or revision." Arguably, this is the regulations' one improvement over the old rules. The 1982 regulations in § 219.17 had a longer and more detailed section on wilderness recommendations, but § 219.17 boiled down to a constrained and convoluted analysis of only inventoried roadless areas. The new section allows "all" lands having wilderness characteristics, not just those in the official inventory, to be considered for wilderness. Now, the agency may gut this in the Directives, but on its face, this is the one new section that seems to hold some promise.

§ 219.8(e) Ensuring project or activity consistency with plans:

> **"**If an existing (§219.8(a)) or proposed (§219.8(b)) use, project, or activity is not consistent with the applicable plan, the Responsible Official may take one of the following steps, subject to valid existing rights:
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> "(1) Modify the project or activity to make it consistent with the applicable plan components;
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> "(2) Reject the proposal or terminate the project or activity, subject to valid existing rights; or
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> "(3) Amend the plan contemporaneously with the approval of the project or activity so that it will be consistent with the plan as amended. The amendment may be limited to apply only to the project or activity."

- This section seems to undercut any teeth or even the purpose of a plan. Like with zoning that can be swallowed and destroyed by the variances that allow incompatible things to happen anywhere, these new regulations say there will be a plan, but the plan means nothing as it can be amended any time to allow anything.
- With forest planning and projects, NFMA requires the agency to put the chicken before the egg, but § 219.8(e)(3) allows the Forest Service to put the egg first.

§ 219.9: A lot of discussion here about public participation, but obviously, since there will be no forest plan EISs, public participation could be severely reduced and almost entirely at the discretion of the forest supervisor.

§ 219.9(b)(2)(iii): "Public notification of evaluation reports and monitoring program changes may be made in a manner deemed appropriate by the Responsible Official."

- This is going to cause confusion. Some National Forests make better use of the web, etc. than others, but this will give a reluctant Forest Supervisor an easy out for hiding reports. This really doesn't even leave much room for the Forest Service to address this in the Directives.
- These regulations should be changed to require that all public notification info should be required to be put on the web and mailed or e-mailed to all persons who request it.

§ 219.10(b) Sustaining ecological systems: The weak and fuzzy language in this section seeks to "provide a framework to contribute to sustaining native ecological systems by providing ecological conditions to support diversity of native plant and animal species." Unfortunately, NFMA is somewhat unhelpful in that the Forest Service is only required to provide for diversity of plant and animal communities to the extent that doing so meets multiple use objectives. 16 U.S.C. § 1604(g)(3)(B). Steps taken to protect tree species diversity are only necessary "to the degree practicable". *Id*.

§ 219.11 Role of science: This is a major change since the new regulations only require the Forest Service to "take into account" best available science, whereas in the draft 2002 planning regulations the agency was directed to take actions "consistent with" the best available science. This provision apparently directs the Forest Service to look at the best available science, but it seems they can dismiss it if they choose. The Forest Service is not obligated to use peer reviewed science or any other science advisory board. One hope for giving teeth to this section is litigation over what the subsections in § 219.11(a) mean. A court may well find that the consideration requirements here mean more than simply cursory consideration and summary rejection of the science.

- § 219.11(a)(1) requires that the proposed plan document how the best available science was taken into account in the planning process within the context of the issues being considered.
- § 219.11(a)(2) requires that the proposed plan evaluate and disclose substantial uncertainties in that science.
- § 219.11(a)(3) requires that the proposed plan evaluate and disclose substantial risks associated with plan components based on that science.

- § 219.11(a)(4) requires that the proposed plan document that the science was appropriately interpreted and applied.

§ 219.12 Suitable Uses: Seems to relate to § 219.7(a)(2)(iv): This regulation talks vaguely about areas that could conceivably be considered "unsuitable" for logging. Under this regulation, it seems the Forest Service could easily not designate any areas as unsuitable, and furthermore this regulation does not comply with the Act. The old regulation § 219.14 detailed certain environmental conditions that would preclude logging in certain areas. These conditions include logging methods that would not allow the soil resource to recover or if the area in question could not be adequately restocked.

- By contrast, the new regulation only precludes logging if the land is not forest land or if achievement of desired conditions and objectives would not permit logging. However, these conditions and objectives are merely aspirational and would probably do nothing to cause an area to be designated unsuitable.
- The Act requires that timber be harvested only in situations where:
  - Soil, slope, or other watershed conditions will not be irreversibly damaged. 16 U.S.C. § 1604(g)(3)(E)(i).
  - There is assurance that such lands can be restocked within 5 years. Id.
  - Protection is provided for water bodies of all types including protection of water quality, prevention of sediment build up, deterioration of fish habitat. Id.
- The old regulation § 219.14 outlined prevention of resource damage as described in the Act. Additionally prevention of resource damage was outlined under old regulations § 219.23 and § 219.27. This could be an area where the Forest Service is vulnerable, since they did not establish specific conditions where logging would be considered unsuitable in a certain area.

§ 219.13: Objections to plans: This process is to replace the old § 217 appeals process for forest plans. The justification for the change is that the public and the agency spend too many resources to comply with procedural requirements, and they wanted to make the process more in line with the BLM process. It seems that under the old regulations the appeals process was not described in the NFMA regulations, but instead referenced another section of the CFR detailing the appeals process. In this case, the appeals or objection process is described in the NFMA regulations itself. The new 30-day objection period is not an adequate time to review and comment on an entire forest plan. Once again, public participation is reduced.

§ 219.13(c) *Responding to objections.* (1) The Reviewing Officer (§219.16) has the authority to make all procedural determinations related to the objection not specifically explained in this subpart, including those procedures necessary to ensure compatibility, to the extent practicable, with the administrative review processes of other Federal agencies. The Reviewing Officer must promptly render a written response to the objection. The response must be sent to the objecting party by certified mail, return receipt requested

- This is the quintessential double standard—objections come with a time limit, however, the response does not.

§ 219.14(f) MIS: The Forest Service says that the MIS concept is flawed, because they say the science says that population trends of MIS cannot represent trends for other species. They do not cite any studies for this supposition, and more importantly, they do not offer an alternative that would ensure adequate wildlife viability across the board.

- The regulations do say that collection of population trend data for MIS would still be required if the Forest Plan requires this, but otherwise analysis of habitat would suffice. The Forest Service wants to make any requirements that relate to MIS very flexible, and calls for a "range of methods" to be available for evaluating MIS. MIS monitoring is also not required for individual projects and project areas. Most of this stuff conflicts with the MIS case law under the old 1982 regulations and may not survive legal challenge.

Notable Omissions in the New Regulations

There is no mention of clearcutting in the new regulations. Since the Act requires that plans contain guidelines on clearcutting it follows that the regulations should also describe the parameters for clearcutting. NFMA clearly prescribes that there be guidelines in plans which allow clearcutting, but the Act does not necessarily prefer this method. 16 U.S.C. § 1604(g)(3)(F). Clearcutting is, of course, permitted, but only if it is the optimum and meets other requirements. Plans are also to establish maximum size limits for areas to be cut in a certain operation. Cuts are also to be carried out so that natural resources are protected.

The new regulations reference the Renewable Resource Program, 16 U.S.C. § 1601 and § 1602, which requires a report on personnel requirements, multiple use objectives, etc. Most noteworthy in the RRP is the requirement to "account for the effects of global climate change on forest conditions," including the effects of climate change on species. An assessment under this program described in § 1601 requires "an analysis of the potential effects of global climate change on the condition of renewable resources on the forests and rangelands in the US."

- We would be surprised if the Forest Service ever took a close look at this issue. It took a tremendous amount of foresight by Congress to include this language in law back in the mid-70s. Recent studies (*Nature*, 2004) on this subject indicate that climate change has increased the occurrence of wildfires in Idaho.
- Will this play into any plans or the EMS for any forest? It should.

<u>Failure to Make Decisions in the Plan</u>

The main justification in the new regulations for not doing NEPA analysis at the plan revision stage is "Typically, a plan does not include final decisions approving projects or activities." 70 *Fed. Reg.* 1,023, 1,025 (Jan. 5, 2005). The Forest Service even miscites *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 737 (1998) for this proposition that plans "don't actually do anything."

But this excuse is not viable. *Ohio Forestry* did not hold that plans never include final decisions. The basic ruling in *Ohio Forestry*, which is a ruling on ripeness, is that **general** forest plan decisions that do not have on-the-ground effects until a second phase of decision making (at the project level) by the Forest Service cannot be challenged on their face. Rather, in most instances, one has to wait until a project is proposed based on the faulty forest plan decision. However, the Supreme Court indicated two exceptions to that rule. First, challenges to NEPA violations in preparation of the plan could be brought once the NEPA documentation is final. Similarly, procedural violations under NFMA could possibly be brought after the forest plan is finalized. A third exception is that any final decision the plan itself makes (such as the decision on what areas to recommend as wilderness) can be challenged without waiting for projects, because such final decisions in a plan do not need a later, project-level decision to become operative.

Up until now, National Forest plans did indeed make a number of important final decisions. As examples are the new revised plans for six National Forests in Region 8 which were finished in 2004. These plans covered the National Forests in Alabama, the Chattahoochee and Oconee National Forests in Georgia, the Cherokee National Forest in Tennessee, the Sumter National Forest in South Carolina, the Jefferson National Forest in Virginia, and the Daniel Boone National Forest in Kentucky. Total, these new plans cover 3.9 million acres of public land in a region of the country with very little public land. Each and every one of those plans stated that it was indeed making certain final decisions. Here is the list of final decisions made by the new plan for the National Forests in Alabama:

> "The revised Forest Plan will decide and establish the following:
>
> "1. Determining the Forest-wide multiple-use goals, objectives, and standards for the Forest, including estimates of the goods and services expected.
>
> "2. Determining multiple-use management prescriptions and management areas containing desired conditions, objectives and standards.
>
> "3. Identifying land that is suitable for timber production.
>
> "4. Determining the allowable sale quantity (ASQ) for timber and the associated sale schedule.
>
> "5. Recommending wilderness areas.
>
> "6. Recommending wild and scenic river status.
>
> "7. Determining monitoring and evaluation requirements.
>
> "8. Identifying the lands that are administratively available for mineral development (including oil and gas), and consent to lease the available lands."

All the other plans make the same decisions. If the Forest Service is no longer going to make these final decisions during planning, when will they make them? For many of these decisions, the new regulations do not say, which will be a major problem for the agency both in court and in practical application, because many of these decisions are forest-wide decisions which cannot be made in a site-specific project analysis.

The new regulations attempt to shift some of these decisions to the Directives or to individual projects. But decisions about the recommendations for things like wilderness areas and wild and scenic rivers will still come at the planning stage usually. Indeed, even the new regulations anticipate this final decision for wilderness recommendations. Section 219.7(a)(5)(ii) specifically states, "Unless otherwise provided by law, all National Forest System lands possessing wilderness characteristics must be considered for recommendation as potential wilderness areas during plan development or revision." This is a final decision with great "on the ground" implications. If the Forest Service does not do an EIS or similar level of analysis for making the final decisions on what areas do and do not deserve wilderness protection, that lack of information and analysis would have serious *California v. Block* type problems. Any supporting data or studies expressly relied upon in making decisions about wilderness recommendations must be "available and accessible" to the public. *California v. Block*, 690 F.2d 753, 765 (9th Cir. 1982) (quoting *Trout Unlimited, Inc. v. Morton*, 509 F.2d 1276, 1284 (9th Cir. 1974)). A failure to consider a reasonable range of alternatives on wilderness recommendations would be an obvious and easily litigated NEPA violation.

The regulations contain other irreconcilable problems for the agency in this area. In § 219.7(a)(2)(v), the agency deals with "special areas." "Special areas such as botanical areas or significant caves may be designated, by the Responsible Official in approving a plan, plan amendment, or plan revision. Such designations are not final decisions approving projects and activities." One cannot designate an area as "special" without some kind of analysis to support that designation, and the designation is indeed a final decision. Just because it is not a "final decision approving projects and activities" that does not mean it is not a "final decision." A decision to make a "special area' closed to all logging, mining and drilling done without NEPA analysis would surely not be something the Administration and its friends in industry would agree is "not final" and thus beyond their ability to challenge in court. Calling a rock a potato does not make it taste good when fried.

The agency is trying to create a distinction that does not apply here. As stated in their notice adopting these regulations:

> "The Department emphasizes that project or activity decisions are generally not appropriate for inclusion in a plan level document; experience has shown that including project and activity decisionmaking in planning has actually delayed the planning and project and activity processes without improving natural resource management or public participation. Thus, by sharpening the distinction between planning and project and activity decisions, the Department expects both better

> planning decisions and more useful and timely environmental analysis for project and activity decisionmaking." 70 *Fed. Reg*. 1,203, 1,040 (Jan. 5, 2005).

No one disputes that project decisions are different from plan level decisions. The agency thinks that by emphasizing the distinction between a plan and project level decisions, it can evade NEPA analysis for a plan. But the real requirement for NEPA analysis is not the type of decision made (project versus plan) but **whether a final decision is made**, period. If a plan makes a final decision, even if that is not a "project or activity decision," the plan does something that triggers NEPA requirements. Yes, general guidelines and similar things in a plan are not final decisions, even if they would affect project decisions directly, but plans DO make final decisions, such as designation or special areas, opening of lands to mineral exploration and development, and recommendations for wilderness areas. No poorly executed trick of semantics will save the Forest Service from this reality.

NEPA Problems

The new regulations eliminate the need for the Forest Service to prepare a full environmental impact statement (EIS) for new or revised plans, as the old regulations required. Simultaneous with the new regulations, the Forest Service proposed a new categorical exclusion (CE) which would allow new plans to forgo any extensive analysis under NEPA.

Part of the rationale for the dropping of NEPA analysis for new or revised plans was:

> "From more than 25 years of NFMA planning experience, the Department concluded that it can most efficiently and appropriately evaluate and analyze the environmental consequences of an array of potential projects and activities when those matters reach the status of a proposal. Making planning a more continuous process, not dependent on environmental impact statements that only give a prediction at one point in time, will actually make plans more relevant to projects by collecting, evaluating, and monitoring data on an ongoing basis, thereby maintaining a current base of information that Forest Service can use at the project or activity level." 70 *Fed. Red*. 1,023, 1,041-42 (Jan. 5, 2005).

While there is some truth and appeal to this dropping of the long and cumbersome planning EIS process, we fail to see how the Forest Service will do a legally adequate job at only the project level of meeting NEPA's requirements for analysis of alternatives and an analysis of indirect and cumulative impacts. Despite the burdensome nature of doing an EIS when revising a plan, that process did have a real positive feature – it provided a detailed analysis of alternatives and overall indirect and cumulative impacts that projects could tier to. Now, the Forest Service has pushed the very onerous job of analysis of alternatives and indirect and cumulative impacts onto the very first project that occurs after a revised plan is adopted. Surely this is not a consequence that the agency intended

or wants. But this consequence exists, because while the agency may be able to avoid doing this required analysis at the planning stage, it will HAVE to do it sometime. No project will be able to move forward legally until this analysis is done.

Cumulative effects analysis requires "some quantified or detailed information. . ." *Neighbors of Cuddy Mountain v. U.S.F.S.*, 137 F.3d 1372, 1379 (9th Cir. 1998). "General statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided." *Id*. at 1380.

NEPA regulations require that the Forest Service "integrate the NEPA process with other planning at the earliest possible time." 40 C.F.R. § 1501.2. Many courts have recognized this means cumulative impacts analysis cannot be deferred. In *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985), the Forest Service prepared an EA for a logging road, considering only the impacts of the road itself and ignoring the impacts of logging timber the road was designed to access. The Forest Service promised cumulative impacts would be considered in EAs or EISs prepared for individual timber sales. *Id*. at 760. The Ninth Circuit found this impermissible under NEPA. The court concluded that NEPA "cannot be fully served if consideration of the cumulative effects of successive, interdependent steps is delayed until after the first step has already been taken." *Id*. The court stated that "consideration of cumulative impacts will serve little purpose if the road has already been built. Building the road swings the balance decidedly in favor of timber sales. . ." *Id*. The Ninth Circuit went on to state clearly in *Neighbors of Cuddy Mountain v. U.S.F.S.*, 137 F.3d 1372 (9th Cir. 1998), that the Forest Service cannot "defer consideration of cumulative impacts to a future date. 'NEPA requires consideration of the potential impact of an action before the action takes place.'" 137 F.3d at 1380 (quoting *City of Tenakee Springs v. Clough*, 915 F.2d at 1308, 1313 (9th Cir. 1990); see also *Kern v. Oregon Natural Resources Council*, 284 F.3d 1062, 1075 (9th Cir. 2002) (not appropriate to defer consideration of cumulative impacts when meaningful consideration can be given now).

The Forest Service argues that the impacts of the management activities proposed in the plans are too far in the future and are too vague or uncertain to be considered in detail in the plans. The Forest Service made a similar argument without success in *Thomas v. Peterson*, where the court said the Forest Service "may not escape compliance with the regulations by proceeding with one action while characterizing the others as remote or speculative." 753 F.2d at 760; see also *Kern*, 284 F.3d at 1072 ("we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry.'"). In one case where the court allowed the Forest Service to defer detailed cumulative effects analysis to the project level, the court still required the Forest Service to "analyze [cumulative] impacts, including possible synergistic effects from implementation of the Plan as a whole, before specific sales." *Resources Ltd. v. Robertson*, 35 F.3d 1300, 1306 (9th Cir. 1994). The court recognized that "consideration of specific projects in isolation is insufficient to replace analysis of the impact of a program as a whole." *Id*.

The one glimmer of hope in this apparent scheme to avoid complying with NEPA is that on its website on these new regulations, the Forest Service cites a paper prepared by Ted Boling, Deputy General Council of the Council on Environmental Quality, "Environmental Management Systems and NEPA: A Framework for Productive Harmony." Ted's paper talks about how an EMS should complement and improve the NEPA analysis done by an agency, not replace that NEPA analysis.

> "The EMS standard requires that organizations identify applicable legal and other requirements to ensure that the plans, projects, and activities of the organization meet those requirements. The EMS provides the management structure to help the agency, among other things, address its NEPA requirements. In turn, NEPA provides the agency with certain procedures called for by the EMS, such as impact identification. CEQ NEPA regulations require that NEPA be integrated to the fullest extent possible with other environmental planning and review procedures (which includes the EMS), whereas an EMS requires 'uploading' into the system all legal and other requirements that apply to the agency (which would include NEPA compliance). Therefore, an effective EMS should enhance an organization's ability to identify, evaluate and meet all of its environmental requirements in a holistic manner, rather than compartmentalizing its NEPA obligations from those that arise under other environmental statutes. That same process can be used to address a wider range of legal and non-legal obligations to consider broad issues such as the agency's contributions to sustainable development and other stakeholder interests. For example, ISO 14001 also requires organizations to take the same approach to 'other requirements' it may commit to meet. In other words, once an agency commits to do something, even if it was not required by law to do so, ISO 14001 requires that organization to address that commitment though its EMS as if it was required by law."

We hope the Forest Service will require that its personnel follow this example in integrating an EMS with NEPA instead of allowing different Forests to do things any which way they please in order to avoid their NEPA duties.

Standardless Regulations

Unless the Forest Service makes a real attempt to put valid and enforceable standards and requirements in the Directives, these new regulations could well fail. In an attempt to increase their discretion in management, the Forest Service cannot legally go so far as to give itself unbridled discretion.

> "We are well aware of the judicial disdain traditionally accorded standardless regulations. Ofttimes, out of necessity, delegations of regulatory power to agencies offer little in the way of concrete guidance toward accomplishment of stated goals. Such imprecise authorizations nonetheless garner judicial sanction on the assumption that the agency, pursuant to its mandate from the legislature, will fill the gaps through the rulemaking process. When the agency fails to

> supply this necessary precision, the continuing vagueness may be too great to withstand judicial scrutiny. Cases cited by petitioners amply demonstrate the point. In each, the reviewing court was confronted with a regulation summoning covered parties to achieve specified objectives. No guidelines, however, were offered by which regulated parties could measure their performance against the announced end. A blanket requirement compelling compliance in the absence of an indication of the factors considered controlling is impermissibly vague. Even the grant of broad rulemaking authority from Congress cannot excuse such imprecision."

Atlas Copco, Inc. v. Environmental Protection Agency, 642 F.2d 458, 465 (D.C. Cir. 1979), citing *Morton v. Ruiz*, 415 U.S. 199, 94 S. Ct. 1055, 39 L. Ed. 2d 270 (1974); and *South Terminal Corp. v. EPA*, 504 F.2d 646, 670 (1st Cir. 1974).

A regulation "so vague and standardless that it leaves the public uncertain as to" what to do is prohibited. *City of Chicago v. Morales*, 527 U.S. 41, 56, 144 L. Ed. 2d 67, 119 S. Ct. 1849 (1999) (quoting *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-403, 15 L. Ed. 2d 447, 86 S. Ct. 518 (1966)). As such, the enforcement of the regulation would offend due process.

One of the unintended consequences of these new regulations is that the Forest Service itself may not be able to stop a really bad project from happening. Forget for a moment whether citizens could sue and stop a bad project, if the Forest Service succeeds in giving itself unlimited management discretion, what can **the agency itself** do to stop abuses within its own ranks? A thousand good and valid projects can be undone by one bad abuse; just ask the military how its good works look in the light of Abu Ghraib.

Making the Directives Enforceable

Our reading of these new regulations is that they make the portions of the Directives (the Forest Service Handbook and Forest Service Manual) which will flesh out these regulations mandatory and legally enforceable. Normally, the Manual's and Handbook's provisions are not legal enforceable. The Ninth Circuit has developed a two-part test for determining when agency publications, like the Forest Service Manual, are enforceable. Generally speaking, for any policy/pronouncement to be enforceable, it must have the "force and effect of law."

For a policy to have the force and effect of law, it must "(1) prescribe substantive rules - not interpretive rules, general statements of policy or rules of agency organization, procedure or practice - and (2) conform to certain procedural requirements." *United States v. Fifty-three Electus Parrots*, 685 F.2d 1131, 1136 (9th Cir. 1982). To satisfy the first requirement, the rule must be legislative and affect individual rights and obligations. *Id*. A court will look at the language in the policy to determine if it is a substantive, rather than interpretive, rule. See *United States v. Alameda Gateway, Ltd.*, 213 F.3d 1161. (9th Cir. 2000). To satisfy the second requirement, the rules must have gone

through the notice and comment process and either appear in the Federal Register or be codified in the C.F.R.

In *Western Radio Services Co., Inc. v. Espy*, 79 F.3d 896, 901 (9th Cir. 1996), the Ninth Circuit determined that the Forest Service's guidelines in both the Manual and Handbook did not have the force and effect of law. The court looked at the Manual and Handbook as a whole, rather than at specific sections of the documents that that arguably may been legislative in nature. *Id.*

However, as held in *Fifty-Three Electus Parrots*, 685 F.2d at 1135, "an agency can create a duty to the public which no statute has expressly created." In *Rhodes v. Johnson*, 153 F.3d 785, 788 (7th Cir. 1998), the Seventh Circuit held that the Forest Service Environmental Handbook was enforceable because the applicable sections were published in the *Federal Register*. Here, in these new regulations, the Forest Service has both incorporated the Directives into the regulations by direct reference and has required that all sections of the Directives that deal with these new regulations go through public notice and comment via publication in the *Federal Register*. Thus, the sections of the Directives dealing with these new regulations will be legally enforceable.

The cases are legion in which courts determine whether an agency pronouncement is an enforceable "rule," or instead, a "policy" under which the agency retains flexibility of action. "A valid legislative rule is binding on all persons, and on the courts, to the same extent as a congressional statute. When Congress delegates rulemaking authority to an agency, and the agency adopts legislative rules, the agency stands in the place of Congress and makes law." *National Latino Media Coalition*, 816 F.2d at 788 (D.C. Cir. 1987). To have this kind of force and effect of law, an agency pronouncement must:

> "(1) prescribe substantive rules – *not* interpretive rules, general statements of policy, or rules of agency organization, procedure or practice – and, (2) conform to certain procedural requirements. To satisfy the first requirement the rule must be legislative in nature, affecting individual rights and obligations; to satisfy the second, it must have been promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress."

Western Radio Services Co., Inc. v. Espy, 79 F.3d 896, 901 (9th Cir. 1996)(emphasis in original)(citations omitted). "A general statement of policy 'does not establish a binding norm. It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon [such a] policy as law because a general statement of policy only announces what the agency seeks to establish as policy.'" *Chamber of Commerce v. Dep't of Labor*, 174 F.3d 206, 212 (D.C. Cir. 1999)(quoting *Pacific Gas & Electric Co. v. Federal Power Commission*, 506 F.2d 33, 38 (D.C. Cir. 1974)). "A policy statement announces the agency's tentative intentions for the future." *Pacific Gas*, 506

F.2d at 38. In *Syncor Intern'l Corp. v. Shalala*, 127 F.3d 90 (D.C. Cir. 1997), the D.C. Circuit noted:

> "An agency policy statement does not seek to impose or elaborate or interpret a legal norm. It merely represents an agency position with respect to how it will treat – typically enforce – the governing legal norm. By issuing a policy statement, an agency simply lets the public know its current enforcement or adjudicatory approach. The agency retains the discretion and the authority to change its position – even abruptly – in any specific case because a change in its policy does not affect the legal norm. We have thus said that policy statements are binding on neither the public nor the agency. The primary distinction between a substantive rule – really any rule – and a general statement of policy, then, turns on whether the agency intends to bind itself to a particular legal position."

Id. at 96 (internal citations omitted); *see also Vietnam Veterans of America v. Secretary of the Navy*, 843 F.2d 528, 538 (D.C. Cir. 1988).

In *Davis v. Lascar*, 202 F.3d 359, 366 (D.C. Cir. 2000), the D.C. Circuit stated that "the Park Service has further bound its own discretion through the adoption of Management Policies" and then added in a footnote:

> "Whether the Park Service is bound by its Management Policies turns on 'the agency's intent to be bound.' Plaintiffs contend that the Park Service demonstrated the requisite intent in the Forward to policies when it stated that '[a]dherence to policy will be mandatory unless waived or modified by an appropriate authority.' . . . Since defendants did not challenge this assertion, the Court finds that the Park Service intended to be bound and is bound by the policies."

Id. at 366 n.4 (citation omitted; s*ee also Wilkins v. Secretary of Interior*, 995 F.2d 850 (8th Cir. 1993)(adjudicating a suit under the Policies); *Voyager Regal Nat'l Park Ass'n v. Lujan*, 966 F.2d 424, 425 (8th Cir. 1992) (Park Service can be held accountable for violating Policies); *Sierra Club v. Lujan*, 716 F. Supp. 1289 (D. Ariz. 1989)(issuing a preliminary injunction based on failure to abide by Management Policies). S*ee Comty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987)("mandatory, definitive language is a powerful, even potentially dispositive, factor . . . ."); *American Bus. Ass'n v. United States*, 627 F.2d 525, 532 (D.C. Cir. 1980) ("We look first to the statement's language, and find that nothing even hints to those who will apply the statement that they may exercise any discretion in doing so. Instead of 'announc(ing) the agency's tentative intentions,' the statement is unequivocally 'couched in terms of command.'")(quoting *Pacific Gas,* 506 F.2d at 38, 42).

The use of the word "must" certainly appears to convey a command to conduct assessments without discretion. *See South Dakota v. Ubbelohde*, 330 F.3d 1014, 1028 (8th Cir. 2003) (Master Manual promulgated by Army Corps of Engineers "is binding on the Corps because it sets out substantive requirements and its language and context indicate that it was intended to bind the Corps's discretion."); *Syncor Int'l Corp.*, 127 F.3d at 94 (policy statements can become binding on an agency if so intended, which is to be determined by the statement's language and context).

EMS and ISO 14001

The Forest Service seems to be betting the ranch on the use of EMS as set out in the ISO 14001. ISO 14001 was developed for the use of businesses and corporations for polluting facilities. All too often, the ISO has been used to "green wash" a company to make it look like they were concerned for the environment. Other times, it has been effectively used to improve a facility's operations and lessen its environmental impacts. It has been used by some government agencies on limited scales, but it has never been used agency-wide or even proposed for use on the scale the Forest Service now plans. The Forest Service is literally walking into unexplored territory here.

The thrust and purpose of the ISO 14001 is process driven; it is designed to provide the process for meeting an organization's environmental goals and objectives while assessing, and hopefully reducing, its environmental impacts. The ISO will do little to make the Forest Service set good goals and policy, other than the ISO does mandate that an organization's policy must have "a commitment to continual improvement and prevention of pollution." ISO 14001 § 4.2. The Forest Service could choose bad policies and goals, such as maximizing subsidized logging of all remaining old growth, but given the media and public relations implications of opening stating bad intentions, it is doubtful the agency would do that. Goals and policies will come in the plan, but the ISO will provide requirements for meeting those goals. If past plans and these new regulations are any indication, the Forest Service will probably set up broad but good sounding goals and policies in its plans; they will probably not openly advocate goals and policies 75% of the public disapprove of. With such "good" goals and policies in place, it may be possible to use the process requirements of the ISO to mandate projects and actions in line with the "good" intentions of the agency. Litigation over the enforcement of the ISO will be a brand new field of law, created thanks to the Forest Service.

The current cost of the ISO 14001 at the American National Standards Institute (ANSI) website is $81.00. The cost was $78.00 on December 23, 2004, the day the Forest Service announced the new regulations. Apparently, ANSI anticipates more people buying the ISO as a result of the new rules. Or perhaps it was a regular price increase at the start of the year. Regardless, $81.00 is an outrageous sum to ask each and every member of the public to pay just so they can participate in the planning and management of their National Forests. It is unprecedented, and the Forest Service has no legal authority to force the public to make such expenditures in order to participate in the management of their public lands.

The ISO 14001 is a copyrighted product. ANSI will not allow people to have it unless they buy it, and the copyright license is for each copy to be used only by the person who bought it and then on only one computer. Even the person who buys the ISO cannot copy it for their own use. The Forest Service itself will have to work out a large bulk licensing deal with ANSI just in order for its very own employees who must develop the EMS for each Forest to even read the ISO. And the agency complained about the cost of doing planning under the 1982 regulations!

While ANSI has the legal right to enforce their copyright, having a public agency base the management of public land on standards in a document the public cannot see unless they pay for it is very problematic.

When we asked, Forest Service top personnel refused to give the ISO to WildLaw. Granted they were nice and honest about why they could not do so, but the reality remains that they want comments on the new Plan CE and they want people to trust their use of the ISO, all without ever allowing the public to see the standards they are going to use to manage 192,000,000 acres of public land. Almost needless to say, courts will have a real problem with this arrangement; managing public land while keeping the basis for that management secret from the public. As stated by Fred Norbury, Associate Deputy Chief of the Forest Service:

> "As I understand it, we can't distribute copies of the ISO itself because it is copyrighted. This is a question that has been raised by a number of Federal agencies that are following the ISO, and we understand that the Office of the Federal Environmental Executive in the White House and CEQ are working on a solution.
>
> "As you can well imagine, this is a frustrating situation for us, and we're wide open to any suggestions you have as to how we might work around it."

E-mail communication to Ray Vaughan, Jan. 14, 2005. Seems odd and somewhat thoughtless that the Forest Service did not have this problem "worked around" prior to releasing and implementing these regulations. It is one of many signs that, despite the great amount of time the agency took on these regulations, the Forest Service did not really think through many of the implications of what they were doing in adopting an entirely new system of National Forest planning.

Sharon Friedman, Assistant Director, NEPA and Project Planning, U.S. Forest Service, had this to say:

> "Units of federal agencies in the past have become certified under ISO and the lack of public access hasn't been an issue with these units.
>
> "We recognize that land management agencies are subject to an entirely different level of scrutiny and interest. One option would be to redraft the standard and then go by the redrafted version, but then people could say that we weren't using

> the 'real' standard. Plus auditors would have to know the differences from what they usually do. Which is why the public administrator side of me would say 'if we use the same as everybody else, there will be a fairly competitive market for training, auditors, etc. and the taxpayer will benefit.' Another option is to talk to ANSI to see, given what you have pointed out about FOIA, we could arrange some creative form of licensing that would solve the problem. It is good for ANSI and good public administration for the feds to adopt this standard.
>
> "We are also exploring a site license for FS employees which apparently EPA and DOD have, which addresses some of your concerns, but this doesn't help with the public."

E-mail communication to Ray Vaughan, January 14, 2005.

All this puts the agency in a bind. By adopting the ISO into these regulations, the Forest Service has technically made the ISO a public document, and someone could send a Freedom of Information Act (FOIA) request for it and would have the right to get it that way. It is only a matter of time before someone does this, and no exemption in FOIA will shield the agency from having to release the ISO. Then, THAT requesting party would be able to distribute the ISO without paying for the copyright (so long as they distributed it for free for public policy purposes), as legally, the ISO would be a public document secured under FOIA and subject to fair use and other exceptions of the copyright law. And it would be the Forest Service, not the FOIA requester, ANSI would have to go after for putting their copyrighted material into the public domain. And on the flip side, if the Forest Service could somehow keep this ISO out of the public's hands under FOIA, then the entire set of regulations will most likely fall to a legal challenge of basing management on a system hidden from the public. Even before these regulations get implemented, problems are already coming up that make it look like the agency itself is not going to like everything about how this new system works out.

Legal Requirements for an EMS

New 36 C.F.R. § 219.5 requires that each unit of the National Forest system establish an environmental management system (EMS). The EMS must include at least "the land management planning process defined by this subpart." Thus, it would appear that each Forest, even if it does not need to revise or amend its plan (such as the six Forests in Region 8 that adopted new revised plans in 2004), must incorporate the new regulations requirements into their management, via the EMS. Without an EMS, it will not be possible for a Forest to meet the requirements of these new regulations.

Under the new regulations, each and every National Forest must have its EMS in place within three years. New 36 C.F.R. § 219.14(b) provides, "Transition period. For each unit of the National Forest System, the transition period begins on January 5, 2005 and ends on the unit's establishment of an EMS in accordance with § 219.5 or on January 7, 2008 whichever comes first." With all the newness and uncertainty surrounding the new rules and the requirements for an EMS, it seems difficult to imagine all the National

Forests, or even a majority of them, meeting this deadline. It could be argued in court that any Forest that has not met this deadline should not be allowed to implement ANY projects until it does finish its EMS.

The new regulations require that "plan development, plan amendment, or plan revision" be completed in accordance with the Forest's EMS. § 219.5(a).

The EMS "must conform to the consensus standard developed by the International Organization for Standardization (ISO) and adopted by the American National Standards Institute (ANSI) as 'ISO 14001: Environmental Management Systems—Specification With Guidance For Use' (ISO 14001)." § 219.5(b). This subsection effectively makes anything in the ISO 14001 that is required a binding requirement on the agency. Therefore, although the ISO 14001 is loose and broad in many aspects, it does have mandatory requirements and the regulations now make anything mandatory in the ISO mandatory for each Forest. In effect, the new regulations make the requirements of the ISO 14001 legally mandatory requirements on the Forest Service, just as if the regulations spelled those requirements out in the regulations themselves. It will be a good legal argument that any failure to comply with ISO 14001 is a failure to comply with the regulations, thus voiding any action taken by the agency that is based on that failure to meet ISO 14001. In the past, legal cases argued that the Forest Service broke the law by not complying with its own regulations; now we will be able to argue that the Forest Service breaks the law by not complying with the ISO 14001. That makes the details of the ISO 14001 very vital.

ISO 14001 requires that an organization working under the ISO "shall establish, document, implement, maintain and continually improve an environmental management system in accordance with the requirements of this International Standard and determine how it will fulfil these requirements." ISO 14001, § 4.1, at 4. Therefore, the Forest Service can be legally held to these requirements, including the requirement to "continually improve" each Forest's EMS. The ISO states it more explicitly at § 4.3.1, which requires, "The organization shall document this information and keep it up to date." Thus, if a Forest adopts an EMS and it sits on a shelf while they go about doing whatever they want, that would be a failure to comply with the ISO, which would automatically be a failure to comply with the regulations.

Another major indication that the Forest Service has released these regulations prior to thinking them through fully is that the agency does not know if the development of an EMS will be "top down" or" bottom up," meaning directed by the national headquarters or by the people who know a particularly Forest best. In response to a question from Chris Crews of the Buckeye Forest Council, here is what Sharon Friedman, Assistant Director, NEPA and Project Planning, stated on a message board on the Forest Service's web site:

> "[O]ne more question you had was whether the EMS would be 'bottom up' or 'top down.' This is something we have had many internal discussions about.

"My own feeling is that determining the most important environmental issues for a given forest to address should be determined locally. But complying with statutes and regulations is part of an EMS. So I could see that forests would want to address issues like the Endangered Species Act, Clean Water Act and Clean Air Act, if there were compliance issues, litigation or appeals on those.

"In our discussions internally, I've had difficulty imagining an important environmental concern that would be the same for National Forests of Florida, the Custer and the Tongass. Other than something generic like improving conditions for wildlife and clean air and water- but exactly what you need to do to improve the environment for those broad issues would be different on each forest. But that's where we are.. some think that national things to work on would be a good idea.. but which ones and how specific?" http://www.fs.fed.us/forums/eco/get/ew/publiclands21-forum/30/2.html (Dec. 28, 2004).

The response from Chris is noteworthy:

"While I agree that local direction is important, an EMS has to work with the existing legal framework (ESA, APA, NEPA, etc), not create alternative ones. Maybe we are looking at this issue differently, but I can see a whole host of areas that are similar for all of the national forests. Here are a few examples that I think would apply across the board, regardless of the forest:

"1. Restoring damaged watersheds from decades of destructive industrial logging and resource extraction like oil, gas and coal

"2. Restoring native plant communities while simultaneously removing invasive plant communities, with priority to endangered, rare and threatened species

"3. Development of a comprehensive plan for restoring damage caused by illegal ORV/OHV use, including closing illegal trails and actively enforcing closures

"I believe the 2nd and 3rd were identified by the Chief as major priorities for the entire Service, so it seems odd that no one would see these as obvious areas to start? While the exact techniques would obviously differ from region to region, having an overarching national framework to begin the process would help facilitate that work better. None of them is a generic cleaner water goal, but rather specific actions (restoration or enforcement) that the Service already should know how to do, and is doing in some places.

"That topic can then be subdivided into more detailed action items within that action, like identifying abandoned portals that are leeching acid mine water and closing them, or surveying current threatened plant communities and looking for viable areas to further restore them into.

"Obviously there are regional and state specific projects that can best be addressed on a local level, but are not mutually exclusive from national planning. I personally think that local or bottom up planning is essential for ecosystem management and restoration, simply because that is the only way possible to seriously approach it.

"Take ORV use. Here in Ohio on the Wayne ORV use is a major problem, with hundreds, if not thousands, of undocumented and illegal trails. The Service is aware of this problem, and has made some efforts to address it, but at the same time they are talking about expanding ORV access and considering OHV (4 wheel jeep style) access. With limited resources (staff and money) to patrol, very little enforcement actually happens. Even with that reality the forest is still unwilling to acknowledge the magnitude of the problem.

"If there were a national priority, let's say as part of this new EMS, that placed ORV damage, enforcement and land restoration as a major focus or 'significant aspect' of the forest focus, and the FS funded it accordingly in the budget, then we might actually see some real solutions and work accomplished. Without a focus and willingness to address a problem head on, I'm not sure how an EMS will really make any difference, regardless of whether it is developed nationally or locally.

"I guess what I really can't get a grasp on is exactly why the Service thinks an EMS will make anything different. From all the analysis I have seen so far, and from my own research on EMS, it appears to me to be an easy way to make pretty words sound great on paper and give the illusion of great business management, but actually require little changes in the actual operations of a business. I worry that this same thing will happen with the FS. How is the FS addressing this type of concern, knowing that the EMS is still fairly new and there is no accepted scientific standard for forest management using an EMS? What is wrong with NFMA now that requires an EMS?"
http://www.fs.fed.us/forums/eco/get/ew/publiclands21-forum/30/2/1.html (Jan. 11, 2005).

Details of ISO 14001:2004

- The ISO itself is not a very long document, just 23 pages. The requirements section of the ISO takes up only six pages (single-spaced). The rest of the 23 pages is mainly an "Annex A," which is titled "Guidance on the use of this International Standard."
- Since the Forest Service has adopted the ISO 14001 environmental management system (EMS), it is worth noting that the ISO itself states, "The success of the system depends on commitment from all levels and functions of the organization, and especially from top management." ISO 14001, at v (2004). Thus, unless the EMS required of all National Forests in the new regulations is a sham, then the entire agency must demonstrate its commitment to the standards in the ISO 14001.

- There will be an inherent tension between the EMS developed for each Forest and the regulations themselves. Effective monitoring is vital to a real and successful EMS. Indeed, it is one of the four key parts of an EMS methodology. "Check: monitor and measure processes against environmental policy, objectives, targets, legal and other requirements, and report the results." ISO 14001, at vi. The regulations do not require any particular monitoring and allow each forest to change its monitoring any time it sees fit. Such lackadaisical monitoring requirements do not even meet the flexible standards of the ISO. Note that the ISO requires monitoring and measuring of the agency's processes against legal requirements, such as NFMA's legal requirement to maintain diversity of species. Unless the Forest Service actually and consistently monitors SOMETHING that will measure its results in meeting the legal requirement to provide for diversity, it will be hard for the agency to support ANY project in court. The ISO says that it "contains only those requirements that can be objectively audited." ISO 14001, at vi. Thus, unless the new regulations and the directives require somewhat consistent monitoring for the EMS for each Forest, it will not be possible to "objectively audit" shifting and random monitoring. It will be easy for one to argue in court that a failure to provide definitive and consistent monitoring such that a Forests' EMS can be "objectively audited" means that the agency action is arbitrary and capricious. Therefore, the agency may well be unwittingly setting up the various National Forests for failure. The idea behind these new regulations is to give the agency more discretion in planning and implementing projects according to plans. But the regulations attempt to give such unlimited discretion that individual Forests will lack the guidance and internal agency limitations necessary to meet even the loose standards of the ISO. Therefore, an EMS that fails an audit or that can be shown in court not to meet the ISO's requirements would then automatically be in violation of the regulations, regardless of how loose their specific requirements (or lack thereof) are. A demonstrated failure to meet the ISO would automatically be arbitrary and capricious.
    - Another indication that the Forest Service has not thought through these new regulations very well is in the ISO audit area. In a message board on the Forest Service's web site, again in response to Chris Crews of the Buckeye Forest Council, Sharon Friedman, Assistant Director, NEPA and Project Planning, stated:

> "The independent audit process is still being thought through. We want to design a process that is objective. Technically, to conform to the Executive Order (13148) standard we could use auditors from other units of the Forest Service, other federal agencies, or contractors. Ongoing discussions also include developing our own 'third party' organization for ensuring objectivity of the audits- this could possibly involve an NGO with a board composed of people with different interests and with the involvement of people knowledgeable about ISO and the academic community.
>
> "Do you or others on the forum have any ideas and experience to share on this?"

http://www.fs.fed.us/forums/eco/get/ew/publiclands21-forum/30/1/1.html (Dec. 28, 2004).

- The word "shall" has strong legal implications, implications that were not lost on the Forest Service when it proposed and adopted these new regulations. Interestingly, the six-page requirements section of ISO 14001 uses the word "shall" 61 times; the new regulations use it only 12 times.
- Section 4.2 requires an "environmental policy." Top management of the agency must "ensure" that the policy

> "a) is appropriate to the nature, scale and environmental impacts of its activities, products and services,
> "b) includes a commitment to continual improvement and prevention of pollution,
> "c) includes a commitment to comply with applicable legal requirements and with other requirements to which the organization subscribes which relate to its environmental aspects,
> "d) provides the framework for setting and reviewing environmental objectives and targets,
> "e) is documented, implemented and maintained,
> "f) is communicated to all persons working for or on behalf of the organization, and
> "g) is available to the public."

ISO 14001, § 4.2, at 4. Arguably, this section requires a great deal of the Forest Service. The policy must be appropriate on the scale of 192,000,000 acres to the nature of the National Forest System.

- Section 4.3.1 requires, "The organization shall ensure that the significant environmental aspects are taken into account in establishing, implementing and maintaining its environmental management system." "Environmental aspect" is defined as "element of an organization's (3.16) activities or products or services that can interact with the environment (3.5)." ISO 14001, § 3.6. "Significant environmental aspects" are those "that have or can have significant impact(s) on the environment." ISO 14001, § 4.3.1. The ISO does not define "significant." Therefore, since the Forest Service intends for the EMS to mesh with and compliment their NEPA requirements, it is logical to argue that the definition of "significant" in any EMS situation should be the same as in the NEPA context.

> "The Department has chosen to require each administrative unit to carry out an EMS based on standards developed by the International Organization for Standards (ISO). Each administrative unit's EMS will serve as a framework for land management planning, adaptive management and, at the project level, provide information for EISs, EAs, or CEs where required by NEPA." 70 *Fed. Reg.* 1,023, at 1,042 (Jan. 5, 2005).

- The ISO requires the establishment of objectives and targets. ISO 14001, § 4.3.3. The details of this section are worth quoting, as they set up a series of requirements that may cause trouble for the Forest Service.

  "The objectives and targets shall be measurable, where practicable, and consistent with the environmental policy, including the commitments to prevention of pollution, to compliance with applicable legal requirements and with other requirements to which the organization subscribes, and to continual improvement.

  "When establishing and reviewing its objectives and targets, an organization shall take into account the legal requirements and other requirements to which the organization subscribes, and its significant environmental aspects. It shall also consider its technological options, its financial, operational and business requirements, and the views of interested parties.

  "The organization shall establish, implement and maintain a programme(s) for achieving its objectives and targets. Programme(s) shall include

  "a) designation of responsibility for achieving objectives and targets at relevant functions and levels of the organization, and

  "b) the means and time-frame by which they are to be achieved."

- The ISO has good requirements for making sure that the people and resources are available "to establish, implement, maintain and improve the environmental management system." ISO 14001, § 4.4.1. We are all familiar with how the Forest Service in the past often shortchanged the resources needed to do things like monitoring, mitigation and anything other than build roads, cut trees and drill wells. It is strongly arguable that the ISO requires better:

  "Management shall ensure the availability of resources essential to establish, implement, maintain and improve the environmental management system. Resources include human resources and specialized skills, organizational infrastructure, technology and financial resources.

  "Roles, responsibilities and authorities shall be defined, documented and communicated in order to facilitate effective environmental management.

  "The organization's top management shall appoint a specific management representative(s) who, irrespective of other responsibilities, shall have defined roles, responsibilities and authority for

  "a) ensuring that an environmental management system is established, implemented and maintained in accordance with the requirements of this International Standard,

"b) reporting to top management on the performance of the environmental management system for review, including recommendations for improvement."

- How many times has one seen the Forest Service use the lack of personnel suited to the decisions being made as an excuse for cutting corners? The ISO frowns on such things. "The organization shall ensure that any person(s) performing tasks for it or on its behalf that have the potential to cause a significant environmental impact(s) identified by the organization is (are) competent on the basis of appropriate education, training or experience, and shall retain associated records." ISO 14001, § 4.4.2.
- The ISO also has requirements for a number of other things, including communications inside and outside the agency, documentation, control of documents and many other items. We will not go into all of them here, but once plans are being revised, Forest EMSs are being developed and projects are being implemented, it will be wise to compare carefully what the Forest Service does to the requirements of the ISO. We will mention further only some key things about the ISO.
- Again, monitoring in the ISO is more than just window dressing:

  "The organization shall establish, implement and maintain a procedure(s) to monitor and measure, on a regular basis, the key characteristics of its operations that can have a significant environmental impact. The procedure(s) shall include the documenting of information to monitor performance, applicable operational controls and conformity with the organization's environmental objectives and targets.

  "The organization shall ensure that calibrated or verified monitoring and measurement equipment is used and maintained and shall retain associated records."

  ISO 14001, § 4.5.1. These requirements do not seem to authorize unbridled and ever-changing monitoring. This does not sound like the type of unfettered discretion the agency may have been looking for. Any failure to do actual, real monitoring would be a violation of the ISO, which would be a legal failure to comply with the regulations.
- In the past, when things did not go as the Forest Service planned, there were few requirements that they actually do something about that. Arguably, the ISO makes a major change in this area such that the agency will have to develop new means to deal with failures of their actions. The ISO makes it clear that problems that occur must be addressed adequately:

  "The organization shall establish, implement and maintain a procedure(s) for dealing with actual and potential nonconformity(ies) and for taking corrective action and preventive action. The procedure(s) shall define requirements for

  "a) identifying and correcting nonconformity(ies) and taking action(s) to mitigate their environmental impacts,

"b) investigating nonconformity(ies), determining their cause(s) and taking actions in order to avoid their recurrence,

"c) evaluating the need for action(s) to prevent nonconformity(ies) and implementing appropriate actions designed to avoid their occurrence,

"d) recording the results of corrective action(s) and preventive action(s) taken, and

"e) reviewing the effectiveness of corrective action(s) and preventive action(s) taken.

"Actions taken shall be appropriate to the magnitude of the problems and the environmental impacts encountered.

"The organization shall ensure that any necessary changes are made to environmental management system documentation."

IOS 14001, § 4.5.3. "Nonconformity" is defined as "non-fulfilment of a requirement." § 3.15.

- The ISO provides for an internal audit procedure. These audits must be impartial. "Selection of auditors and conduct of audits shall ensure objectivity and the impartiality of the audit process." ISO 14001, § 4.5.5. Thus, a demonstration that an audit was not objective and impartial would be a legal failure of the agency to comply with the regulations.

Annex A

- The requirements of the ISO take up only six pages (single-spaced). The rest of the 23 pages is mainly an "Annex A," which is titled "Guidance on the use of this International Standard." Annex A contains the ideas and "strictly informative" materials "intended to prevent misinterpretation of the requirements" in the ISO. This is where much of the perceived and actual "softness" of the ISO comes from. We will not be able to make a court require the Forest Service to do anything in Annex A; nonetheless, Annex A is useful in interpreting the requirements in the ISO itself.
- Annex A is clearly written with industrial facilities and similar corporate organizations in mind; most of what it talks about directly applies to such private organizations and how the ISO must be broad enough to cover the myriad possible variation of such facilities. Since the Forest Service is a federal agency, some of the nonbonding guidance in Annex A will apply and much will not. Still, the main thing that separates the use of ISO 14001 by industry and by the Forest Service is that adoption of the ISO into the agency's regulations makes the requirements of the ISO mandatory for the Forest Service. A corporation can choose to abide by ISO 14001 or not, or even choose to abide by it and then change its mind and not abide by it. But

the Forest Service has legally "locked itself in" with ISO 14001 and must abide by it; the agency cannot decide not to comply with requirements in the ISO unless it repeals the regulation § 219.5.

- Annex A has a statement very applicable to the Forest Service under these new regulations"

> "An organization with no existing environmental management system should, initially, establish its current position with regard to the environment by means of a review. The aim of this review should be to consider all environmental aspects of the organization as a basis for establishing the environmental management system.
>
> "The review should cover four key areas:
>
> "— identification of environmental aspects, including those associated with normal operating conditions, abnormal conditions including start-up and shut-down, and emergency situations and accidents;
>
> "— identification of applicable legal requirements and other requirements to which the organization subscribes;
>
> "— examination of existing environmental management practices and procedures, including those associated with procurement and contracting activities;
>
> "— evaluation of previous emergency situations and accidents.
>
> "Tools and methods for undertaking a review might include checklists, conducting interviews, direct inspection."

Every Forest starting its EMS process should be encouraged to begin with this type of review as part of the process.

What To Do From Here

A number of organizations are planning a facial challenge to the new regulations. WildLaw has coordinated our work with many of those groups, and we agreed to serve in more of a backup implementation role. WildLaw will work with forest protection groups and other conservation organizations to watch for the implementation of these new regulations in plans and projects. Failures by the agency to comply with the law will be addressed at each occurrence. We are also preparing a FOIA request to get more information about the preparation of these regulations and the possible variations for their implementation.

WildLaw will work with other groups to develop training for people concerned about protection of their Forests to watchdog the implementation of these new

regulations. Checklists in the Appendix to this white paper are a first step toward such training on this new version of forest watch work.

Lastly, WildLaw and our client organizations offer, one more time, to the Forest Service to meet us half way, to stop making the management of public lands a chess game of divided wills. It is still possible that these new regulations could be good for management of the National Forests. But that will require an openness on the part of the agency that it has not yet fully demonstrated. It will require that the standards and requirements put into the Directives be real, scientifically sound, and mandatory. It will require that each Forest's EMS really is based on positive policies and goals, really complies with the ISO 14001, and really developed through open and cooperative public participation. It will require full compliance with NEPA and NFMA in the process of planning through project implementation. All indications are that these regulations were released more as a "work in progress" than as something the agency has fully figured out on how they will operate for the next 20 years. While one can argue that promulgating regulations that are not fully baked is not good agency policy, it does provide at least one more opportunity for the Forest Service to meet with those in the public who care about our National Forests to work out "the devil in the details" so that good management can occur and conflicts can be reduced.

The Forest Service could implement an independent monitoring system, someone outside the agency who knows the agency and who can be truthful and honest about whether the Forest Service does its job correctly or not. As Sharon Friedman, Assistant Director, NEPA and Project Planning, stated, the agency could develop "our own 'third party' organization for ensuring objectivity of the audits." That is not a bad idea; we would be willing to work with the Forest Service on that. Another idea is to have an independent ombudsman to would monitor all projects and plan revisions under these rules and under the other authorities of the agency (such as the Healthy Forests Initiative (HFI) and the Healthy Forests and Restoration Act of 2003 (HFRA)). This ombudsman could prepare reports and recommendations to the Administration, Congress and the public on further actions to improve the management of our National Forests. The ombudsman would also take complaints about abuses, investigate them, and report to the Administration, Congress and the public the results of those investigations.

While such a mechanism for an ombudsman would have no actual authority to change or stop a project, shining the light of public, congressional and Administration scrutiny on bad projects and those who perpetrate them should do the trick for all but the most recalcitrant of bad actors. Further, such an office would track the good work done and prepare complete reports on what is going well, what is going wrong and what was done to fix the wrongs and prevent more. This tracking by the ombudsman would also meet most of the reporting requirements made on the agency in the HFRA. Such comprehensive reporting would prevent the situation where one really bad project or set of projects bursts onto the national media scene and puts all the good work on the defensive, assuming the good work really does outnumber and outweigh the bad.

The ombudsman would also put together a team of experienced people to go around the National Forest system to educate and train district staff on how to implement these new rules and other authorities correctly. The ombudsman could hold training conferences each year for Forest Service line officers and planners on how to comply with and develop successful plans and projects. The ombudsman could also prepare, produce and distribute training materials such as a DVD with complete training materials and templates for complying with the law that would go to all districts.

The Forest Service wants the public to "trust us." We can and will trust the agency, but only after it shows that it trusts us as much as it wants us to trust it. If the Forest Service really wants to try something new, trusting the public for once would be it. Every time good personnel in the agency opened up and trusted the public instead of trying to get around the public and the law, the Forest Service has succeeded. Why wouldn't the Forest Service want to succeed now?

Thank you.

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APPENDIX: CHECKLISTS

Checklist for a National Forest's EMS Development

1. Does the Forest's EMS comply with and meet all requirements in the Directives?
2. Does the Forest's EMS provide for meeting all policies and goals set by the Forest Service at large and by the Forest itself in its plan?
3. Does the Forest's EMS provide for the means to document, implement, maintain and continually improve the EMS in accordance with the requirements of the ISO?
4. Does the Forest's EMS determine how it will fulfill the ISO's requirements?
5. Does the Forest's EMS define and document the scope of its environmental management system?
6. Is the Forest's EMS appropriate to the nature, scale and environmental impacts of its planned activities and projects?
7. Does the Forest's EMS include a commitment to continual improvement and reducing pollution?
8. Does the Forest's EMS include a commitment to comply with applicable legal requirements?
9. Does the Forest's EMS provide the framework for setting and reviewing environmental objectives and targets?
10. Is the Forest's EMS documented, implemented and maintained?
11. Is the Forest's EMS communicated to all persons working for or on behalf of the Forest Service?
12. Is the Forest's EMS available to the public?
13. Does the Forest's EMS establish, implement and maintain a procedure(s) to identify the environmental aspects of the Forest's activities within the defined scope of the EMS that it can control and those that it can influence taking into account planned or new developments, or new or modified activities?
14. Does the Forest's EMS establish, implement and maintain a procedure(s) to determine those aspects that have or can have significant impact(s) on the environment (i.e. significant environmental aspects)?
15. Does the Forest's EMS document this information and keep it up to date?
16. Does the Forest's EMS ensure that the significant environmental aspects are taken into account in establishing, implementing and maintaining its EMS?
17. Does the Forest's EMS establish, implement and maintain a procedure(s) to identify and have access to the applicable legal requirements related to its environmental aspects?
18. Does the Forest's EMS establish, implement and maintain a procedure(s) to determine how these requirements apply to its environmental aspects?
19. Does the Forest's EMS ensure that these applicable legal requirements and other requirements to which the organization subscribes are taken into account in establishing, implementing and maintaining its EMS?
20. Does the Forest's EMS establish, implement and maintain documented environmental objectives and targets, for relevant functions and levels within the Forest?

21. Are the Forest's EMS' objectives and targets measurable, where practicable, and consistent with the environmental policy to compliance with applicable legal requirements?
22. Are the Forest's EMS' objectives and targets consistent and with continual improvement?
23. When establishing and reviewing its objectives and targets, did the Forest's EMS take into account the legal requirements and its significant environmental aspects?
24. Does the Forest's EMS also consider its technological options, its financial, operational and business requirements, and the views of interested parties?
25. Does the Forest's EMS establish, implement and maintain a program for achieving its objectives and targets?
26. Does the Forest's EMS' achievement program include designation of responsibility for achieving objectives and targets at relevant functions and levels of the Forest?
27. Does the Forest's EMS' achievement program include the means and time-frame by which objectives and targets are to be achieved?
28. Does the Forest or the Region ensure the availability of resources essential to establish, implement, maintain and improve the Forest's EMS? Resources include human resources and specialized skills, organizational infrastructure, technology and financial resources.
29. Does the Forest's EMS define, document and communicate roles, responsibilities and authorities in order to facilitate effective environmental management?
30. Did the Forest Service appoint a specific management representative(s) who, irrespective of other responsibilities, has the defined roles, responsibilities and authority for ensuring that an EMS is established, implemented and maintained in accordance with the requirements of the ISO and reporting to top management on the performance of the EMS for review, including recommendations for improvement?
31. Did the Forest Service ensure that any person(s) performing tasks for it or on its behalf that have the potential to cause a significant environmental impact(s) identified by the organization is (are) competent on the basis of appropriate education, training or experience and that those persons retain associated records?
32. Did the Forest Service identify training needs associated with its environmental aspects and its EMS?
33. Did the Forest Service provide training or take other action to meet these needs and retain associated records related to that training?
34. Did the Forest Service establish, implement and maintain a procedure to make persons working for it or on its behalf aware of the importance of conformity with the environmental policy and procedures and with the requirements of the EMS?
35. Did the Forest Service establish, implement and maintain a procedure to make persons working for it or on its behalf aware of the significant environmental aspects and related actual or potential impacts associated with their work and the environmental benefits of improved personal performance?
36. Did the Forest Service establish, implement and maintain a procedure to make persons working for it or on its behalf aware of their roles and responsibilities in achieving conformity with the requirements of the EMS?

37. Did the Forest Service establish, implement and maintain a procedure to make persons working for it or on its behalf aware of the potential consequences of departure from specified procedures in the EMS?
38. With regard to its environmental aspects and the EMS, did the Forest Service establish, implement and maintain a procedure for internal communication among the various levels and functions of the organization?
39. With regard to its environmental aspects and the EMS, did the Forest Service establish, implement and maintain a procedure for receiving, documenting and responding to relevant communication from external interested parties?
40. Did the Forest Service establish and implement a method(s) for this external communication?
41. Does the Forest's EMS include the environmental policy, objectives and targets?
42. Does the Forest's EMS include the description of the scope of the EMS?
43. Does the Forest's EMS include a description of the main elements of the EMS and their interaction and reference to related documents?
44. Does the Forest's EMS include documents, including records, required by the ISO?
45. Does the Forest's EMS include documents, including records, determined by the Forest Service to be necessary to ensure the effective planning, operation and control of processes that relate to its significant environmental aspects?
46. Did the Forest Service establish, implement and maintain a procedure to approve documents for adequacy prior to issue?
47. Did the Forest Service establish, implement and maintain a procedure to review and update as necessary and re-approve documents?
48. Did the Forest Service establish, implement and maintain a procedure to ensure that changes and the current revision status of documents are identified?
49. Did the Forest Service establish, implement and maintain a procedure to ensure that relevant versions of applicable documents are available at points of use?
50. Did the Forest Service establish, implement and maintain a procedure to ensure that documents remain legible and readily identifiable?
51. Did the Forest Service establish, implement and maintain a procedure to ensure that documents of external origin determined by the Forest Service to be necessary for the planning and operation of the EMS are identified and their distribution controlled?
52. Did the Forest Service establish, implement and maintain a procedure to prevent the unintended use of obsolete documents and apply suitable identification to them if they are retained for any purpose?
53. Did the Forest Service establish, implement and maintain a documented procedure to control situations where the absence of procedures could lead to deviation from the environmental policy, objectives and targets?
54. Did the Forest Service establish, implement and maintain procedures related to the identified significant environmental aspects of goods and services used by the Forest Service and communicating applicable procedures and requirements to suppliers, including contractors, loggers, and others?
55. Did the Forest Service establish, implement and maintain a procedure to identify potential emergency situations and potential accidents that can have an impact(s) on the environment and how it will respond to them?

56. Does the Forest's EMS provide how the Forest Service will respond to actual emergency situations and accidents and prevent or mitigate associated adverse environmental impacts? Does this include fires? Insect outbreaks? Storm damage?
57. Does the Forest's EMS provide that the Forest Service will periodically review and, where necessary, revise its emergency preparedness and response procedures, in particular, after the occurrence of accidents or emergency situations?
58. Does the Forest's EMS provide that the Forest Service will also periodically test such procedures where practicable?
59. Does the Forest's EMS establish, implement and maintain a procedure to monitor and measure, on a regular basis, the key characteristics of its operations that can have a significant environmental impact? Do the procedure include the documenting of information to monitor performance, applicable operational controls and conformity with the Forest Service's environmental objectives and targets?
60. Does the Forest's EMS ensure that calibrated or verified monitoring and measurement equipment is used and maintained and shall retain associated records, where applicable?
61. Consistent with its commitment to compliance, does the Forest's EMS establish, implement and maintain a procedure for periodically evaluating compliance with applicable legal requirements?
62. Does the Forest's EMS provide that it will keep records of the results of the periodic evaluations?
63. Does the Forest's EMS establish, implement and maintain a procedure for dealing with actual and potential nonconformities and for taking corrective action and preventive action? Does that procedure define requirements for
    a. identifying and correcting nonconformities and taking actions to mitigate their environmental impacts,
    b. investigating nonconformities, determining their causes and taking actions in order to avoid their recurrence,
    c. evaluating the need for actions to prevent nonconformities and implementing appropriate actions designed to avoid their occurrence,
    d. recording the results of corrective actions and preventive actions taken, and
    e. reviewing the effectiveness of corrective actions and preventive actions taken?
64. Does the Forest's EMS provide that the actions taken shall be appropriate to the magnitude of the problems and the environmental impacts encountered?
65. Does the Forest's EMS provide that the Forest Service will ensure that any necessary changes are made to EMS documentation?
66. Does the Forest's EMS provide that the Forest Service will establish and maintain records as necessary to demonstrate conformity to the requirements of its EMS and of the ISO, and the results achieved?
67. Does the Forest's EMS establish, implement and maintain a procedure for the identification, storage, protection, retrieval, retention and disposal of records?
68. Does the Forest's EMS provide that records shall be and remain legible, identifiable and traceable?
69. Does the Forest's EMS ensure that internal audits of the EMS are conducted at planned intervals to determine whether the EMS conforms to planned arrangements for environmental management including the requirements of the ISO?

70. Does the Forest's EMS ensure that internal audits of the EMS are conducted at planned intervals to determine whether the EMS has been properly implemented and is maintained?
71. Does the Forest's EMS ensure that internal audits of the EMS are conducted at planned intervals to provide information on the results of audits to management?
72. Does the Forest's EMS provide that audit programs shall be planned, established, implemented and maintained by the Forest Service, taking into consideration the environmental importance of the operations concerned and the results of previous audits?
73. Does the Forest's EMS have audit procedures established, implemented and maintained that address the responsibilities and requirements for planning and conducting audits, reporting results and retaining associated records, and the determination of audit criteria, scope, frequency and methods?
74. Does the selection of auditors and conduct of audits ensure objectivity and the impartiality of the audit process?
75. Does the Forest's EMS provide that top management shall review the EMS, at planned intervals, to ensure its continuing suitability, adequacy and effectiveness?
76. Does the Forest's EMS provide that reviews include assessing opportunities for improvement and the need for changes to the EMS, including the environmental policy and environmental objectives and targets?
77. Does the Forest's EMS provide that records of the management reviews shall be retained?
78. Does the Forest's EMS provide that input to management reviews include
    a. results of internal audits and evaluations of compliance with legal requirements,
    b. communications from external interested parties, including complaints,
    c. the environmental performance of the Forest,
    d. the extent to which objectives and targets have been met,
    e. status of corrective and preventive actions,
    f. follow-up actions from previous management reviews,
    g. changing circumstances, including developments in legal and other requirements related to its environmental aspects, and
    h. recommendations for improvement?
79. Does the Forest's EMS provide that the outputs from management reviews shall include any decisions and actions related to possible changes to environmental policy, objectives, targets and other elements of the EMS, consistent with the commitment to continual improvement?

Checklist for a Plan Revision

1. Does the Forest already have its EMS developed and in operation? Does the EMS fully comply with ISO 14001?
2. Does the proposed plan comply with all the requirements in the EMS and ISO 14001? Use EMS checklist here.
3. Does the Forest's plan revision fall within the transition period of § 219.14(b)?
4. If the plan falls within the transition period, is there potential for getting the Forest to do its plan revision under the 1982 regulations instead of these new regulations? Work on ways to encourage the agency to do things under the 1982 regulations, if those would give your Forest a better result.
5. What public participation is planned for the plan revision? Is the Forest actively engaging the public or doing the least amount of public interaction possible? Does the Forest openly and honestly answer all questions and requests for information from the public?
6. How accessible are the Forest's EMS, monitoring documents and all other documents required by these regulations and the ISO 14001? How current and updated are those documents? How accurate and complete are those documents?
7. Does the Forest's plan provide for monitoring and protection of endangered, threatened or candidate species, and does the plan's documentation adequately cover the possible impacts to them?
8. Does the Forest's plan provide for monitoring and protection of sensitive or other rare species, and does the plan's documentation adequately cover the possible impacts to them?
9. Does the proposed plan adequately identify all areas with wilderness characteristics and adequately consider the impacts and alternatives of recommending those areas for wilderness or not?
10. Does the plan allow for conversion of native, natural forest to plantations?
11. Does the proposed plan allow adverse impacts to trails or other recreational areas?
12. Does the proposed plan adequately document and provide protections for old growth or near old growth forest?
13. Does the proposed plan adequately assess and mitigate for potential impacts to streams and water quality?
14. Does the proposed plan include a reasonable range of alternatives and considers indirect and cumulative impacts? If not, then the plan is sloughing off these requirements of NEPA to the individual projects that will come under the plan, and you must watch to make sure each and every project (or at least the first one) then does the required analysis for all reasonable alternative for how the entire Forest could be managed and does the analysis of all reasonably foreseeable indirect and cumulative impacts from management on the entire Forest.
15. Does the proposed plan include consultation with the U.S. Fish and Wildlife Service over Endangered Species Act implications? If not, then the plan is sloughing off the required ESA consultations to each and every project that comes under the plan. You must watch to make sure that each and every project (or at least the first one) then includes the required consultation for the impacts to listed species for all foreseeable management actions for the entire Forest.

16. Does the proposed plan include identification of "lands within the management area which are not suited for timber production" and include assurance "that, except for salvage sales or sales necessitated to protect other multiple-use values, no timber harvesting shall occur on such lands for a period of 10 years," as required by NFMA? If not, the plan is sloughing off these legal requirements to individual projects, which is not legal under NFMA. You must watch to make sure that each and every project (or at least the first one) then includes the required NFMA suitability analysis and identification for the entire Forest.
17. Does the proposed plan limit the size of clearcuts, protect streams from logging, ensure prompt reforestation, and restrict the annual rate of cutting, as NFMA requires? If not, the plan is sloughing off these legal requirements to individual projects, which is not legal under NFMA. You must watch to make sure that each and every project (or at least the first one) then includes these NFMA requirements for the entire Forest.
18. Does the proposed plan include identification of possible impacts to historic and archeological resources and the means to mitigate those impacts?
19. Does the proposed plan "provide a framework to contribute to sustaining native ecological systems by providing ecological conditions to support diversity of native plant and animal species in the plan area"? If they cannot show that this framework is real, instead of just words, they will be in violation of even these limited regulations. You will need to involve top scientists who know the Forest to show that what the agency is doing either does or does not provide this framework.
20. Does the proposed plan consider the best available science? The regulations spell out what "consider" means here. One hope for giving teeth to this section is litigation over what the subsections in § 219.11(a) mean. A court may well find that the consideration requirements here mean more than simply cursory consideration and summary rejection of the science.
    a. Does the proposed plan document how the best available science was taken into account in the planning process within the context of the issues being considered, as required by § 219.11(a)(1)?
    b. Does the proposed plan evaluate and disclose substantial uncertainties in that science, as required by § 219.11(a)(2)?
    c. Does the proposed plan evaluate and disclose substantial risks associated with plan components based on that science, as required by § 219.11(a)(3)?
    d. Does the proposed plan document that the science was appropriately interpreted and applied, as required by § 219.11(a)(4)?