Public Land & Resources Law Review

Volume 27 Article 7

June 2006

The 2005 National Forest System Land and Resource Management Planning Regulations: Comments and Analysis

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Articles

The 2005 National Forest System Land and Resource Management Planning Regulations: Comments and Analysis

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Paper presented at the Bolle Center for People and Forests, The U.S. Forest Service Planning Rules: What They Mean, Why They Matter. March 7, 2005. Missoula, MT

I. INTRODUCTION

My goal this evening is to provide a big picture look at the 2005 planning regulations and place them in the context of political conflict and public lands governance. I trust that fellow panelists will mix it up when it comes to the details, and I hope to join the fray if possible. But I also think it serves us well to evaluate the important assumptions, arguments, and ideas serving as the foundation of these regulations. And that is what I will focus on this evening. Please be warned, however, that I am not a forest planner, nor have I ever appealed or sued the FS (though if properly trained, I think it would be fun to join the hundreds of others that have sued the former Chief, known around here as "versus Thomas"). But as a policy analyst trained in political science, and a citizen who is passionate about our public lands and sustainable rural communities, I feel that I can offer something when it comes to conflict and the political institutions and decision making processes used to govern our National Forests.

II. COMMENTS & ANALYSIS

At this point, many conflicts over forest management are irrepressible. Though the means by which they are governed often exacerbates them, many of these conflicts are based on competing values, visions, and interests. Therefore, changes in political institutions and decision making proc-

esses may simply shift conflicts from one venue to another. I will call it the "whack-a-mole" principle because of its similarity to the game in which one tries to "whack" a gopher, only to find it reappearing in yet another unpredictable hole. Similarly, suppressing conflict in one venue will likely result in its emergence somewhere else. The planning regulations discussed this evening may thus likely redirect, rather than resolve, conflicts about forest management.

The FS has recently adopted a new set of planning regulations that it believes constitutes a "paradigm shift in land management planning."[1] While the NFMA provides an important framework and sets enforceable parameters, the Bush Administration, like its predecessor, tries to stamp its values and philosophy onto NFMA's planning regulations. What we have seen, then, is the venue of conflict shifting from Congress to the planning process. The 2000 planning regulations, promulgated under President Clinton, and drafted by using another Committee of Scientists, emphasized ecological sustainability above all else.[2] The 2005 rule's foundation, on the other hand, is maximum administrative discretion and decision making efficiency. The FS wants to be unshackled from traditional NEPA-based planning procedures so it can utilize its expertise[3] and respond to new problems, science, and information more expeditiously. In a strange twist, the agency that once sold a tiered-type of rational comprehensive forest planning as the answer to our problems is now admitting that it did not work as intended.[4] In hindsight, it seems to believe that previous planning regulations created too many substantive and procedural hooks that could be used against the agency, like the "viable population" requirement that caused controversy in the Pacific Northwest. Instead of legally enforceable standards, then, the 2005 planning regulations largely consist of general recommendations, with the word "should" instead of "shall" in various parts of the rule.[5] The permissive language was chosen to make it harder to administratively challenge and sue the FS.

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1. 70 Fed. Reg. 1023, 1024 (Jan. 5, 2005).

2. 65 Fed. Reg. 67514 (Nov. 9, 2000).

3. 70 Fed. Reg. 1036. The FS contends that the rule "makes improvements based on over 25 years of experience" in forest planning, but the details about how such planning expertise was collected and evaluated is not discussed in the rule. *Id.*

4. *See e.g.* Robert H. Nelson, *Public Lands & Private Rights: The Failure of Scientific Management* ch. 4 (Rowman & Littlefield Publishers, Inc. 1995). The Service's enthusiastic embrace of planning during the 1970s is consistent with its progressive-era faith in a true science of administration. *Id.*

5. "Should" is generally interpreted by the Courts as meaning a recommended course of action and less than a mandatory directive. "Shall," in contrast, means a command or exhortation and is used to express what is mandatory. *See U.S. v. Maria*, 186 F.3d 65, 70 (2d Cir. 1999); Memo. from Pamela Baldwin, Legis. Atty., Am. L. Div., Cong. Research Serv., *Analysis and Critique of the Forest Service Planning Regulations Proposed on December 6, 2002*, http://www.defenders.org/forests/forest/new/crs.pdf (Jan. 3, 2003). (describing House and Senate reports and legislative amendments concerning proposed Forest Service planning regulations).

Relying heavily, but curiously,[6] upon the logic of *Ohio Forestry* and *SUWA*, it views forest plans as strategic and aspirational documents, thus requiring no environmental analysis or consideration of alternatives at this stage.[7] When it comes to the principle components of planning its mantra is the same: they are "aspirational, but are neither commitments nor final decisions approving projects and activities."[8] (The sort of non-committal language that any sane parent quickly learns to memorize). The analysis and hard work, including cumulative effects analysis, will be shifted to the project level and the use of new five year comprehensive evaluations. [9] But even at this level, forest managers will have increased discretion. With this much focus on the project level, many actors will continue to complain of the agency's unwillingness to look at the big picture and the ongoing "tyranny of small decisions."[10] In other words, the FS could implement a forest plan by taking a number of discrete steps that may seem reasonable when viewed in isolation, but problematic when seen in context.[11] Nevertheless, plans will continue to set individual forests in a particular direction. "The purpose of plans," now says the agency, "should be to establish goals for forests" and "set forth the guidance to follow in pursuit of those goals."[12] Such goals, according to the new rules, can be in terms of describing desired conditions, objectives, guidelines, area suitability, and special areas.[13]

From a conflict perspective, the key term is "desired conditions," defined as "the social, economic, and ecological attributes toward which management of the land and resources of the plan area is to be directed."[14] But conflicts often boil down to fundamentally different "desired conditions," with conservationists often wanting less human management and manipulation of roadless forests and the FS and timber industry wanting more. Even the term "desired conditions" is loaded, moreover, as the FS has historically viewed timber sales as "the most economically viable means of achieving desired plant and animal diversity."[15]

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6. *See generally Ohio Forestry Assn. v. Sierra Club*, 523 U.S. 726 (1998); *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004). (Its application of *Ohio Forestry* is interesting because this decision is about ripeness, and there is nothing in NFMA forbidding the FS from treating land management plans as more important documents. However, the rule is written in a way that makes it sound as though the Service has no choice in the matter and that the changes have been forced by the Courts, which is not the case).

7. 70 Fed. Reg. 1024-25.

8. 70 Fed. Reg. 1025-26.

9. 70 Fed. Reg. 1033, 1041, 36 C.F.R. § 219.6(a) (2005).

10. *See e.g.* Alfred E. Kahn, *The Tyranny of Small Decisions: Market Failures, Imperfections, and the Limits of Economics*, 19 Kyklos: Intl. Rev. Soc. Sci. 23, 24 (1966).

11. *See e.g.* Amanda C. Cohen, *Ripeness Revisited: The Implications of* Ohio Forestry Association, Inc. v. Sierra Club for Environmental Litigation, 23 Harv. Envtl. L. Rev. 547, 555 (1999).

12. 70 Fed. Reg. 1024.

13. *Id.*

14. *Id.* at 1025.

15. *Sierra Club v. Robertson*, 845 F. Supp. 485, 498 (S.D. Ohio 1994) (defending its management practices in *Ohio Forestry's* District Court decision).

Understanding that the agency should not act alone, collaboration with the public is put forth as one way that these desired future conditions will be determined.[16] Hopefully so, but just as likely is the continuation of higher-level decision making, for which the rule explicitly allows.[17] After all, the public may simply respond to a vision drawn by the FS, and they will have little incentive to collaborate if they believe key decisions have already been made. In short, the FS will get to define desired conditions, and it will be less unfettered in determining what these conditions look like and how they will be achieved.

Despite their length, the regulations fail to answer several important questions about forest management. Rulemaking is the usual venue where the tough issues get addressed in public lands management.[18] But this time they have been re-routed to the agency's Directives System, consisting of bureaucratic manuals, handbooks, and white papers. It is part of a trend in more "non-rule rulemaking," meaning that several agencies have started to use more internal decision making processes rather than rulemaking governed by administrative law.[19] The FS contends that it provides a more efficient way to make decisions and practice adaptive management.[20] Critics, however, see it as a way to exert more executive control while providing less public participation and transparency and fewer legally enforceable standards.[21]

Not surprisingly, the reforms have not gone over well in the conservation community.[22] Its suspicion and organized opposition demonstrates the type of challenges that will likely face other reform proposals and "adaptive governance" in general. Much of its dismay comes from the source and substance of these "standardless regulations."[23] For some, they are simply

16. 70 Fed. Reg. 1025.

17. "[T]he final rule provides the option for higher-level officials to act as the Responsible Official for a plan, plan amendment, or plan revision across a number of plan areas when consistency is needed. . . . The Department intends the final rule be flexible in addressing different issues that may arise at different levels. Therefore, the Department does not believe that the final rule should provide the specific criteria for when a higher ranking official becomes the Responsible Official." 70 Fed. Reg. 1038-1039. This is similar language and logic used by Chief Michael Dombeck in defending the controversial roadless rule.

18. *See e.g.* Martin Nie, *Administrative Rulemaking and Public Lands Conflict: The Forest Service's Roadless Rule*, 44 Nat. Resources J. 687 (2004).

19. *See e.g.* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?* 41 Duke L.J. 1311 (1992) (answering the question with a general no except in cases of interpretive rules).

20. 70 Fed. Reg. 1036. "Because the [FS] directives are easier to change and more easily adopt the latest technology and science, they are the appropriate place for specific technical guidance." *Id.*

21. *Id.*

22. *See e.g.* The Wilderness Society, *Final National Forest Planning Regulations Take Step Backwards*, http://www.wilderness.org/OurIssues/Forests/nfma.cfm (updated March 4, 2005); Earthjustice, *What's at Stake? Protect Our Forests*, http://ga0.org/campaign/NMFA_comments/explanation (updated March 4, 2005); Defenders of Wildlife, *What The Experts Are Saying*, http://www.defenders.org/forests/forest/new/experts.html (updated March 4, 2005).

23. *See* Wild Law, *Review of the New NFMA Planning Regulations* 21, http://www.wildlaw.org/NFMA-Regs-White-Paper.htm (updated March 2, 2005).

a complicated cover to cut the heart out of NFMA, and the public and environmental analysis out of forest management. Conservationists also want us to see the regulations in context, especially when it comes to NEPA, because the Healthy Forests Restoration Act includes additional exemptions at the project level.[24] So they see NEPA getting axed from both ends, at the planning and project level. Finally, when it comes to political strategy, reform will empower some interests while hindering others, and conservationists understand that this one takes away some of their most potent weapons used to challenge the agency.

III. EVALUATING THE CORE PRINCIPLES OF THE 2005 FS PLANNING REGULATIONS

What should we make of this administrative reform? Let us start by analyzing the four core principles on which it is based: efficiency, administrative discretion, the localization of forest conflict and management, and adaptability. They are central to public lands governance in general.

A. *Decision Making Efficiency*

First, talk about streamlining, paper-pushing and "analysis paralysis" is built upon the notion of decision making efficiency. That is, forest policy and management is inefficient and must therefore be fixed by giving managers more discretion, streamlining environmental review, and other things. There is nothing inherently bad about efficiency of course. Once I make the decision to bike to work, I cut corners. But let me suggest that efficiency is the wrong way to think about forest policy and management right now. The FS, Congress, and the public-at-large are engaged in a fundamental conflict over the future, values and purpose of the forest system. Why emphasize efficiency when we do not agree on what we want to be efficient at? Think about abortion and the death penalty. Would it be of any use to talk about the most efficient way of getting an abortion or killing someone if the person you are trying to convince believes that all life is sacred?

What we presently need most is not more efficiency, but a more effective and constructive dialogue about the future of our forests and environment. Floundering rural communities, trends in motorized recreation, habitat, global markets, trade deals, and a host of other issues should be front-and-center, not efficiency. Many citizens are interested in participating in the decision making process in an authentic way, not in crafting a more efficient method of building more roads. It is only once we agree on the ends of forest policy that efficiency becomes relevant as a means to achieve them. A focus on efficiency can have a debilitating effect on the type of

24. Pub. L. No. 108-148, §104, 117 Stat. 1887, 1897-99 (2003).

democratic debate that is necessary at the moment. If efficiency is the issue before us, that means the most important decisions over regarding forest policy have already been made, so what is the point of public participation and citizen engagement? I have no doubt that the Service is well-equipped to scientifically and efficiently manage our forests once we decide for what purposes they should be managed. But like other bureaucracies, they are not as well-designed to resolve value-based political conflicts. And this is where we are at right now.

On the other hand, there is certainly something wrong with the status quo on some forests. Most people will agree that a planning process should be shorter than a plan's life cycle. Nor does it make sense to spend such time and resources on a plan that is seen by the agency as nothing more than strategic and aspirational. Something has got to give. But there is also the question of whether or not the regulations will even increase efficiency. The general planning process might be fast tracked, but projects might get further bogged down in analytical requirements, including cumulative effects analysis, and other procedural guidelines.

B. *Administrative Discretion*

As for administrative discretion, we must remember that it cuts both ways. The FS is controlled by the executive branch, so while discretion may look appealing now, at least for some interests, it could be viewed differently under new Presidential leadership. Terms like desired conditions,[25] collaboration,[26] best available science,[27] adaptive management,[28] and sustainability[29] are flexible enough to fit the most preservationist or utilitarian of Presidents. A White House bent on preserving National Forests from resource use could do wonders with such malleable language, as could a more industry-friendly one. Be careful what you wish for, in other words.

Notwithstanding top-down political and/or budgetary pressure, this level of discretion will certainly be used in different ways, depending on the background, values, and management style of the "responsible official," like a regional forester, supervisor, or district ranger. If permitted by higher-level decision makers, some officials may use the space afforded by the regulations to harvest as much timber as they can, citing the call for "healthy forests" or "economic sustainability" for justification.[30] Others, however, may use their discretion in innovative ways, be it with public participation, collaboration, advisory councils, monitoring programs, and the

25. 36 C.F.R. § 219.7(a)(2)(i) (2005).
26. *Id.* at § 219.9.
27. *Id.* at § 219.11.
28. *Id.* at § 219.16.
29. *Id.* at § 219.10.
30. "The overall goal of the social and economic elements of sustainability is to contribute to sustaining social and economic systems within the plan area." *Id.* at § 219.10(a).

use of best available science. The discretion may result in a surprising level of problem-solving and "street level" administrative leadership. The FS is not monolithic in its views and values, so in the end, with this much discretion, what happens will depend on the person at the point of power—and politics always flows to this level.

There is also some question as to whether the regulations are contrary to the letter and spirit of NFMA. While its intent is debatable, it is groundless to argue that NFMA passed as a way to lessen the standards in place at the time and give the FS increased discretion. Such unbridled discretion was the problem, not the solution, according to NFMA's primary architects.[31] Though planning took precedence, judicially enforceable standards, albeit of questionable value, were written into NFMA as a way to check the heretofore unquestioned professional judgment of the FS.[32] The Act was supposed to get our forests out of the courts, but only because the new standards would conceivably provide the direction necessary to stay out of them. In any case, the Courts will ultimately decide whether the regulations crossed the line.

C. *Localizing Forest Conflict and Management*

Though higher-level decisions will continue to be made, the 2005 planning regulations attempt to localize forest conflict and management. In theory, it places regional foresters, supervisors, and district rangers in the driver's seat. And this is what scares skeptics, for conservationists have put forth a concerted effort to nationalize forest conflicts. Furthermore, critics worry that decision makers will once again be "captured" by the forest products industry and commercial interests while facing intense local pressure to manage for these "clients."[33] Without as many enforceable standards, budgetary incentives to harvest more timber may play a bigger role in the future as well, as officials will have less leverage to balance Congressional budgetary pressure with their legal obligations. On the other hand, with appropriate bureaucratic leadership, localizing some forest disputes could foster increased trust among adversaries, more productive relationships, and better problem-solving—drainage by drainage. Again, with this much discretion, it will depend on who is in charge.

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31. *See e.g.* Charles F. Wilkinson & H. Michael Anderson, *Land and Resources Planning in the National Forests* (Island Press 1987) (providing comprehensive coverage of the debate and issues preceding passage of NFMA).

32. *Id.* at 75. Summarized in their comprehensive review of forest planning: "But if the NFMA stands for anything it is that the mystique is gone from federal timber law. The courts have been called in to measure agency performance against new statutory provisions of considerable specificity—and that basic fact of principled judicial oversight and enforcement has had, and will continue to have, a pronounced influence on the nature of Forest Service decisionmaking." *Id.*

33. *See e.g.* 70 Fed. Reg. 1038 (comments pertaining to levels of planning and planning authority).

D. *Adaptability*

Finally, on paper at least, the regulations, including the communications preceding them, signify that the FS is rethinking public lands governance and the potential of adaptive management.[34] The 2005 regulations might represent an attempt to implement the widespread demand for increased adaptability and monitoring by various academics and practitioners, who note the problems often resulting from the one-time decision, prediction-based NEPA model.[35] Its call for adaptive management, for example, stems from the COS report[36] and dozens of scholarly books and articles focusing on this "new" approach to resources planning. In fact, the streamlining and discretion included in the regulations—including the expedited use of the Forest Directives system and the monitoring program (if funded)—may prove to be an ingenious way of practicing the theory of adaptive management in the messy administrative state. Of course, it could also prove to be airy rhetoric simply disguising an old wise use management philosophy. And perhaps, its method of implementation—a corporate-like Environmental Management Systems model—will merely result in increased paperwork, confusion, and a new area of environmental litigation.[37] Only time will tell.

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34. U.S. Forest Service, *The Process Predicament: How Statutory, Regulatory, and Administrative Factors Affect National Forest Management* 40, http://www.fs.fed.us/projects/documents/Process-Predicament.pdf (updated June 5, 2004). As *The Process Predicament* concludes, "[o]pportunities abound for reviving the spirit of our environmental laws. Advances in science and technology have paved the way for a new era of public land management through collaboration and flexible decision making. Ecosystem-based approaches grounded in adaptive management promise to reverse decades of land health decline and restore healthy, resilient ecosystems far into the future." *Id.*

35. *See e.g.* Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 Colum. L. Rev. 903, 908 (2002) (proposing a smarter-yet-streamlined NEPA by using more monitoring and adjustments rather than mere ex-ante predictions). Karkkainen argues that NEPA's flaws are structural and conceptual: "NEPA ambitiously, and naively, demands the impossible: comprehensive, synoptic rationality, in the form of an exhaustive, one-shot set of ex-ante predictions of expected environmental impacts." *Id.* at 906. *See also* Dinah Bear, *Some Modest Suggestions for Improving Implementation of the National Environmental Policy Act*, 43 Nat. Resources J. 931 (2003). Though emphasizing the importance of post-decisional monitoring and mitigation, Bear also notes how it "always seems to be first on the budgetary chopping block." *Id.* at 945.

36. Committee of Scientists, *Sustaining the People's Land: Recommendations for Stewardship of the National Forests and Grasslands into the Next* 4, http//www.fs.fed.us/emc/nfma/includes/cosreport/Committee%20of%20Scientists%20Report.htm (Mar. 15, 1999). "Perhaps the most difficult problem is that the current EA/EIS process assumes a one time decision. The very essence of small landscape planning is an adaptive management approach, based upon monitoring and learning." *Id.* at 117.

37. 36 C.F.R. at § 219.5.