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WILL PARADISE BECOME A PARKING LOT?:
THE DEBATE OVER THE BUSH ADMINISTRATION'S
OVERHAUL OF FOREST MANAGEMENT REGULATIONS

I. INTRODUCTION

The National Forest System (the System) is a vast organization comprised of 155 national forests and 22 national grasslands in 42 states, territories and commonwealths. Extending over 192 million acres of land and 4418 miles of rivers, the System is our nation's ecological nerve center. Its lands contain vital renewable resources such as water, forage, wildlife and timber. It provides a home for more than 3000 species of mammals, birds, reptiles, amphibians and fish, and over 10,000 plant species.

The National Forest Service (the Service) manages the System with guidance from and in compliance with regulations, including the National Forest Management Act (NFMA) and the National Environmental Policy Act (NEPA). NFMA ensures proper management by requiring the Secretary of Agriculture to create land and resource management plans for each national forest. These plans are then implemented by the Service through individual projects. NEPA's role in management is to ensure that the Service adequately considers the consequences of proposed actions and generates informed decisions.

2. See id. (describing expansive area of System).
3. See id. (describing resources in System).
7. See 16 U.S.C. § 1604(a) (providing that "the Secretary of Agriculture shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning processes of State and local governments and other Federal agencies").
8. See Dombeck, 185 F.3d at 1168 (describing Service's role in forest management under NFMA).
Recently, the Bush Administration instituted changes to the forest management regulations, which has caused a stir in the environmental community. Proponents of the new regulations believe the changes will provide the Service with the flexibility it needs to effectively manage the System without getting caught in judicial red tape, which was a common problem under the old regulations. Opponents of the changes, however, believe the new regulations confer virtually unrestricted power upon the Service, allowing it to ignore ecological interests, such as species viability, arbitrarily in favor of more economically-friendly actions, such as logging.

This Comment focuses on the potential environmental consequences following the Bush Administration's changes to the forest management regulations. Section II of this Comment describes NFMA, the 1982 regulations and the Clinton Administration’s changes to the regulations. Section III explains the Bush Administration’s new regulations. Section IV sets forth potential impacts the new regulations will have on the System. Section V discusses a recent lawsuit filed by several environmental groups challenging the new regulations.


11. See Dan Berman, Forests: Lawsuits Are Hurting National Forest Management, Veneman Says, GREENWIRE (Jan. 5, 2005) (LEXIS, News and Business) (quoting former forest chief Dale Robertson as saying judges interpret environmental law strictly, causing important actions to be held up in court cases).

12. See Barringer, supra note 10 (describing Service’s increased power and environmentalists’ belief that it will lead to dire effects for System).

13. For a discussion of the background of the regulations, see infra notes 17-54 and accompanying text.

14. For a discussion of the Bush Administration’s regulations, see infra notes 55-77 and accompanying text.

15. For a discussion of potential environmental impact of the Bush Administration’s regulations, see infra notes 78-134 and accompanying text.

16. For a discussion of the lawsuit, see infra notes 135-41 and accompanying text.
II. BACKGROUND

A. National Environmental Policy Act and National Forest Management Act

Congress enacted NEPA in 1970 in order to create a mutually beneficial relationship between civilization and the environment. NEPA's primary purpose is to compel agencies to examine the consequences of their proposed actions. One way NEPA accomplishes this is by requiring Environmental Impact Statements (EIS) for all "major Federal actions significantly affecting the quality of the human environment." An EIS is a time-consuming endeavor that looks at the potential consequences of, and alternatives to, proposed actions.

In 1976, Congress adopted NFMA, which changed traditional forest policy in three main ways. First, NFMA gave jurisdiction over forest policy to national environmental constituencies rather than regional appropriations committees, which formerly had jurisdiction. Second, it extended the forest planning process, allowing for extensive public participation and a more active role for the courts. Third, NFMA required the Service to move its focus from timber extraction to the protection of resources, such as water, soils and, especially, wildlife. In 1979, the Secretary of Agriculture adopted the first set of regulations under the recently-established NEPA and NFMA. The Service amended the regulations in 1982.

17. See 42 U.S.C. § 4321 (2000) (quoting NEPA was enacted to "encourage productive and enjoyable harmony between man and his environment").  
18. See Deacon, supra note 9 (stating purpose of NEPA is for agencies to take "hard look" at environmental consequences of proposals).  
19. See id. at 148 (explaining EIS is device used to enforce NEPA principles).  
20. See id. (explaining EIS is analysis of alternatives and consequences that often require years to complete). An EIS has several requirements, "including: (1) environmental impacts of the proffered action; (2) unavoidable adverse environmental effects; (3) alternatives to the proposed action; (4) the relationship between short-term uses and maintenance of long-term productivity; and (5) any irreversible commitment of resources." Id. at 149.  
22. See id. (noting shift in forest policy jurisdiction from industry-dominated, regionally-interested appropriations committees to national environmental constituencies). Regional interests were still effectively represented by appropriations committees. See id.  
23. See id. (describing NFMA's elaboration of planning process).  
24. See id. at 4-5 (citing to NFMA requirement that forest planning "provide for diversity of plant and animal communities in order to meet overall multiple-use objectives").  
25. See id. at 6 (describing adoption of regulations).
beginning a forest management era that endured almost two decades, until the Clinton Administration enacted changes in 2000.26

B. 1982 Regulations

An essential element of the 1982 regulations was their reliance on public participation.27 The regulations stipulated that the Service must get public participation "early and often" in the planning process.28 The Service, however, had discretion to determine how to fulfill its public participation obligations.29 The purpose of public participation was twofold: (1) to keep the public informed; and (2) to obtain information from the public.30 The 1982 regulations required the Service to coordinate forest planning with the similar efforts of federal, state, local and tribal governments.31

Additionally, these regulations required the Service to prepare an EIS in compliance with NEPA in order to disclose the impact that proposed forest plans would have on the ecosystem.32 Once a statement was prepared identifying a preferred planning alternative, the regulations required the Service to make the EIS and proposed plan available for public comment.33

Another important aspect of the 1982 regulations was the significance they placed on maintaining viable populations of existing species in planning areas and providing adequate habitats for those species.34 Along with this requirement came the introduction of

26. See Hoberg, supra note 21, at 6, 18 (noting regulations were amended in 1982 and replaced by Clinton Administration in 2000).


29. See id. (stipulating that Service officials will shape appropriate public participation activities).

30. See id. pt. 219.6(a) (stating intent of public participation as broadening information sources for management decisions, helping Service understand public’s needs, informing public of planning activities and ensuring public understands Service programs).

31. See id. pt. 219.7(d) (requiring Service to coordinate with governments in planning process).

32. See id. pt. 219.10(b) (requiring preparation of EIS to comply with NEPA).

33. See 16 U.S.C. § 1604(2) (requiring Service to make EIS available to public for comment for at least three months).

34. See 36 C.F.R. pt. 219.19 (1999). "Fish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area. For planning purposes, a viable population shall be regarded as one which has the estimated numbers and distribution of reproductive individuals and that habitat must be well distributed so that those
management indicator species (MIS), which were species used as a proxy for determining the effects of management projects on other species. MIS included: threatened or endangered plants and animals; species with special habitat requirements that may be affected significantly by management planning activities; species that are commonly hunted, trapped or fished; special interest species; and plant or animal species whose population changes are believed to indicate the effects of management activities on other species. The 1982 regulations required the Service to monitor MIS population trends and determine the relationship to habitat changes. Over the years, however, there was much debate about what type of monitoring was required to fulfill the Service’s obligation, resulting in a circuit split among the courts. This issue became moot under the Clinton Administration’s changes, and the debate was settled under the Bush Administration’s regulations.

C. 2000 Regulations: Clinton Administration Changes

In 1999, the Clinton Administration proposed new forest management regulations, relying on the findings of a Committee of individuals can interact with others in the planning area.” Id. See also id. pt. 219.27(6) (requiring service to “[p]rovide for adequate fish and wildlife habitat to maintain viable populations of existing native vertebrate species”). A viable population is defined as “one which has the estimated numbers and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area.” Id. pt. 219.19.

35. See id. pt. 219.19(a)(1) (explaining that MIS are selected as proxies because their population changes are believed to indicate effects of management activities on other species).

36. See id. (defining MIS).

37. See id. pt. 219.19(a)(6) (providing that “population trends of the management indicator species will be monitored and relationships to habitat changes determined”). This monitoring is to be done in cooperation with State fish and wildlife agencies. See id.

38. See, e.g., Sierra Club v. Martin, 168 F.3d 1, 7 (11th Cir. 1999) (holding that pt. 219.26 and 219.19, when read together, required Service to gather quantitative data and use it to measure impact of habitat changes on forest’s diversity); see Inland Empire Pub. Lands Council v. United States Forest Serv., 88 F.3d 754, 761 (9th Cir. 1996) (upholding Forest Service’s use of less rigorous habitat viability analysis because habitats have direct impact on population).

39. See 36 C.F.R. pt. 219.14(f) (2004). “For units with plans developed, amended, or revised using the provisions of the planning rule in effect prior to November 9, 2000, the Responsible Official may comply with any obligations relating to management indicator species by considering data and analysis relating to habitat unless the plan specifically requires population monitoring or population surveys for the species.” Id. “Site-specific monitoring or surveying of a proposed project or activity area is not required, but may be conducted at the discretion of the Responsible Official.” Id.
Scientists to produce the changes. These regulations made ecological sustainability of forests the key objective for forest management plans. The Clinton Administration also replaced MIS with focal species. Focal species are similar to MIS, but are chosen for the slightly broader purpose of indicating effects of management activities not just on other species, but on the planning area ecosystems in general. The Clinton Administration regulations also included more details concerning monitoring methods for focal species than the 1982 regulations set out for MIS.

Like the 1982 regulations, the Clinton Administration's regulations required "early and often" public participation and adopted the requirement to collaborate with federal, state and local governments. These regulations put special emphasis on collaboration between the Service and Indian tribes. Additionally, the Clinton Administration's regulations also required the Service to collaborate with private landowners located within or adjacent to the forest or grassland boundary, a requirement not mandated under the 1982 regulations.

40. See Hoberg, supra note 21 (noting Clinton Administration's use of Committee of Scientists to develop changes to regulations).

41. See 36 C.F.R. pt. 219.2 (2000). "The first priority for planning to guide the management of the National Forest System is to maintain or restore ecological sustainability of national forests and grasslands to provide for a wide variety of uses, values, products, and services." Id.


43. See Orlemann, supra note 42, at 378. "Focal species may be chosen because they provide information about habitat conditions which are necessary for the viability of other species or because they are sensitive to environmental changes. Focal species serve as surrogates so that not every species in the planning area need be monitored." Id.

44. See id. at 379-80 (explaining four provisions for conducting focal species monitoring, and making it clear that Service's habitat viability analysis would be sufficient to satisfy these requirements).

45. See 36 C.F.R. pt. 219.16 (2000) (requiring planning information to be public, along with early and frequent participation opportunities); id. pt. 219.13 (requiring coordination among federal agencies); id. pt. 219.14 (requiring involvement of state and local governments).

46. See id. pt. 219.15 (requiring interaction with American Indian tribes and Alaska Natives, and seeking their assistance with: identifying treaty rights, treaty-protected resources, and American Indian tribe trust resources; understanding tribal data and resource knowledge from tribal representatives; and accounting for tribal concerns and suggestions).

47. See id. pt. 219.17 (requiring interaction with private landowners who have "control or authority over lands adjacent to or within the external boundaries of national forests or grasslands"). The Service must ask these landowners to disclose information about local knowledge, potential actions and partnership activities,
Both the Clinton regulations and the original regulations required an EIS. The Clinton requirement was less strict, however, awarding the forest supervisor or other "responsible official" the discretion to determine whether an EIS would be necessary for a particular plan amendment. Finally, the Clinton Administration's changes provided for a transition from the 1982 regulations to its regulations, setting out a schedule and deadlines to ease into the changes, and providing that the 1982 regulations would be in force until each deadline arrived.

The Clinton Administration's regulations were finally adopted in November 2000. Due to a change in administration, however, they were not in force for long. In 2001, after reviewing the regulations, the Bush Administration suspended them indefinitely and, in 2002, proposed its own regulations. During the interim between the Bush Administration's 2002 proposal and the 2004 adoption of the Bush Administration's regulations, the Service was working under an "interim final rule," which allowed the Service officials to work under the 1982 regulations rather than the 2000 regulations if they so chose.

III. CURRENT REGULATIONS: BUSH ADMINISTRATION CHANGES

In December 2004, the Bush Administration implemented its proposed rules with some revisions from the original draft. These conditions or activities that could affect the System, and issues (as defined by pt. 219.4). See id.


50. See 36 C.F.R. pt. 219.35(d) (2000) (providing "[s]ite-specific decisions made by the responsible official 3 years from November 9, 2000 and afterward must be in conformance with the provisions of this subpart"); see also Nat'l Forest Sys. Land and Res. Mgmt. Planning, 65 Fed. Reg. 67,514, 67,563 (Nov. 9, 2000) (stating transition provision was intended to "outline the process by which the Forest Service will transition from the 1982 planning regulations").

51. See Hoberg, supra note 21 (stating enactment date of Clinton changes).

52. See id. (noting change in administration and approach to environmental issues).

53. See id. at 19 (discussing Bush Administration's suspension of Clinton regulations and 2002 proposal of new regulations).


55. See Barringer, supra note 10 (announcing adoption of Bush Administration's final regulations).
new regulations diverged in many ways from both the original regu-
lations and the Clinton Administration’s changes.\textsuperscript{56} First, the new
regulations diminish the Clinton regulations’ primary focus on eco-
logical sustainability, choosing instead to put ecological concerns
on equal ground with social and economic concerns.\textsuperscript{57} Rather than
making ecology first priority, the new regulations focus on the in-
terconnection between all three factors, using a traditional balanc-
ing approach.\textsuperscript{58}

Next, the new regulations remove mandatory protection of spe-
cies viability from the management agenda.\textsuperscript{59} While both of the
prior regulations contained mandatory language to provide for spe-
cies viability, the new regulations do not directly mention viability.\textsuperscript{60}
The new regulations do, however, contain broad, goal-oriented lan-
guage stating that the Service should provide ecological conditions
that support diversity of native plant and animal species in order to
contribute to the sustainability of native ecological systems.\textsuperscript{61} Addi-
tionally, there seems to be a mandatory requirement to provide
ecological conditions for threatened species, endangered species,

\textsuperscript{56.} See Hoberg, \textit{supra} note 21 (explaining numerous differences between
Clinton Administration regulations and Bush Administration regulations).

\textsuperscript{57.} See \textit{id.} at 19-20 (explaining Clinton Administration’s focus on ecological
sustainability as priority over social and economic sustainability and Bush Adminis-
tration’s change to put all three factors on equal ground).

\textsuperscript{58.} See \textit{id.} (explaining Bush Administration’s emphasis on interconnection of
ecological, social and economic sustainability).

\textsuperscript{59.} See 36 C.F.R. pt. 219.19 (1999), which made the species viability provision
mandatory by stating:

\begin{quote}
Fish and wildlife habitat \textit{shall} be managed to maintain viable populations
of existing native and desired non-native vertebrate species in the plan-
ing area. For planning purposes, a viable population shall be regarded
as one which has the estimated numbers and distribution of reproductive
individuals to insure its continued existence is well distributed in the
planning area.
\end{quote}

\textit{Id.} (emphasis added); \textit{see also} 36 C.F.R. 219.20(b)(2) (2000), which made the spe-
cies viability provision mandatory by stating:

\begin{quote}
Plan decisions affecting species diversity \textit{must} provide for ecological con-
ditions that the responsible official determines provide a high likelihood
that those conditions are capable of supporting over time the viability of
native and desired non-native species well distributed throughout their
ranges within the plan area, except as provided in paragraphs (b)(2)(ii-
iv) of this section.
\end{quote}

\textit{Id.} (emphasis added).

\textsuperscript{60.} See Hoberg, \textit{supra} note 21 (noting Bush Administration’s lack of man-
datory viability language).

\textsuperscript{61.} 36 C.F.R. pt. 219.10(b) (2004) (stating overarching goal of ecological sus-
tainability factor is to support diversity of native plant and animal species by pro-
viding ecological conditions).
species-of-concern and species-of-interest, though it does not appear to rise to the level of providing for viability. 62

In a related matter, the new regulations leave out both MIS and focal species. 63 The Bush Administration reasoned that scientific research showed that the MIS concept was flawed because it did not actually represent population trends for other species. 64 Additionally, the Bush Administration believed it would be imprudent to use focal species, as that was untested and potentially as flawed as the MIS concept. 65 The new regulations do, however, provide for forest plans that have not yet phased out MIS, requiring a habitat analysis to satisfy the MIS monitoring requirement from the 1982 regulations. 66

Ultimately, the Service has more power under the new regulations. 67 For example, it has more discretion in deciding whether to allow logging, drilling or off-road vehicles. 68 Further, the new regulations have removed certain specific provisions in favor of more “results-based” objectives. 69

Like the 1982 and 2000 regulations, the new regulations contain a provision regarding public involvement. 70 Part 219.9 of the regulations instructs the Service to provide opportunities for public participation and collaboration in the planning development and amendment processes. 71 Specifically, the Service must encourage

62. See id. pt. 219.10(b)(2) (stating if Service officials determine that special plan components are needed for certain vulnerable species, plan must contain such components consistent with agency limits, plan area capability and multiple use objectives).


64. See id. (asserting MIS was omitted from new regulations because recent scientific evidence showed flaws in MIS proxy system).

65. See id. (asserting focal species were omitted from new regulations because they are untested, would be costly to test and may have same problems as MIS).


67. See Barringer, supra note 10 (noting relaxation of provisions under new regulations giving Service more power).

68. See id. (noting it is now easier under new regulations for Service to allow logging, drilling or off-road vehicles).

69. See Editorial, Trouble in the Forests, N.Y. Times, Jan. 1, 2005, at A12 [hereinafter Trouble in the Forests] (noting change from specific regulations, such as those limiting clearcuts and protecting streams, to “vague ‘results-based’ goals”).


71. See id. pt. 219.9(a) (stating that Service must “provide opportunities for the public to collaborate and participate openly and meaningfully in the planning process, taking into account the discrete and diverse roles, jurisdictions, and responsibilities of interested and affected parties”).
participation from and collaboration by private landowners, state and local governments, federal agencies, scientific and academic institutions and tribal governments. Part 219.9 also provides requirements for public notification, including when public notification must be provided, how it is to be provided and the content of the public notice.

Finally, a proposal accompanied the regulations, which, if enacted, would give forest managers new discretion on what kind of environmental review constitutes compliance with NEPA. This proposal would allow the forest supervisor to determine what type of review a particular plan must undergo: a full EIS, a more marginal review or no review at all. This proposal was open to public comment for sixty days, ending on March 7, 2005. As of the time of this Comment, it is under review by the Council on Environmental Quality (CEQ) to determine whether or not it complies with NEPA.

IV. Impact

Proponents and opponents of the new regulations both agree that the Bush Administration’s changes to the regulations will effectuate at least some significant modifications in the way the Service manages the System. They disagree, however, on whether those changes will benefit or damage our national forests.

72. See id. pt. 219.9(a)(1) (requiring Service to encourage participation by interested individuals and organizations, including private landowners); id. pt. 219.9(a)(2) (requiring Service to seek assistance from federal agencies and state and local governments); id. pt. 219.9(a)(3) (requiring Service to consult with federally recognized Indian tribes).

73. See id. pt. 219.9(b)(1) (providing that public notification must be provided at five stages: initiation of plan, amendment, or revision; beginning of ninety-day comment period; beginning of thirty-day objection period before plan approval; at plan approval; and adjustment to conform to this subpart for plan initiated under previous regulations); id. pt. 219.9(b)(2) (requiring public notice to be published in Federal Register and newspaper(s) of record); id. pt. 219.9(b)(3) (stipulating information that various public notices must contain).

74. See Barringer, supra note 10 (stating proposal accompanied regulations).

75. See id. (detailing proposal’s discretion to Service on necessary type of review).

76. See id. (noting proposal was open to public comment).


78. See Barringer, supra note 10 (giving overview of Service’s and environmentalists’ points of view that new regulations will create changes in System).

79. See id. (giving overview of Service’s view that new regulations will allow more flexibility for better System, and environmentalists’ view that new regulations will deteriorate System).
A. Species Viability vs. Supporting Diversity

One major dispute concerns the amount of protection the regulations authorize for endangered or threatened species.80 While the 1982 and 2000 regulations contained mandatory language to maintain species viability, the new regulations suggest, but do not mandate, that the Service protect species viability.81 Rather, the new regulations require the Service to “support diversity of native plant and animal species.”82

In the preamble to the new regulations, the Department of Agriculture (the Department) under the Bush Administration laid out its reasons for opting for species diversity over species viability.83 First, the Service is not always able to achieve species viability due to circumstances beyond its control, such as a change in a land’s capacity to support the species (for example, a drought causing decline in fish viability).84 Next, the massive amount of species present in the System makes it “impractical” to analyze all species even in groups or through surrogates, such as MIS and focal species.85

The final reason that the Department asserted for not adopting the viability approach was that the time and effort necessary to obtain and evaluate viability data diverts attention from an ecosystem approach, which the Department believes to be the “most efficient and effective” method for managing species with limited resources.86 Conversely, opponents of the new regulations believe this “ambiguous standard” could be the death knell for critical spe-

80. See id. (noting environmentalists’ concern over species survival due to new regulations use of species diversity approach instead of viability); see also Nat’l Forest Sys. Land Mgmnt. Planning, 70 Fed. Reg. 1023, 1028 (Jan. 5, 2005) (noting Bush Administration’s belief that species diversity approach is more practical for System than species viability approach).

81. For a discussion of mandatory viability language in 1982 and 2000 regulations, and the lack of mandatory language in 2004 regulations, see supra note 59 and accompanying text.

82. See id.


84. See id. (explaining first reason that viability was not adopted was because viability may not be achievable for various reasons, including “species-specific distribution patterns (such as a species on the extreme and fluctuating edge of its natural range), or when the reasons for species decline are due to factors outside the control of the agency (such as habitat alteration in South America causing decline of some Neotropical birds), or when the land lacks the capability to support species (such as a drought affecting fish habitat)”).

85. See id. (stating second reason for not adopting viability is that analyzing all species is cumbersome and Service has had “mixed success in practice”).

86. See id. (stating third reason for not adopting viability is that viability takes focus off of ecosystem approach).
cies because the Service would not be held accountable for loss of viability so long as it attempted to "support diversity," presumably by showing evidence of general protection and preservation of the species' surrounding ecosystem.87

Similarly, there is controversy over the removal of MIS and focal species from the regulations.88 Environmental groups labeled the wildlife viability and MIS rules as "second only to the Endangered Species Act [ESA] in their importance as a federal protection for species conservation," asserting that these rules complement ESA by identifying and remedying species declines before emergency ESA measures are necessary.89 By removing these protective procedures, environmental groups assert that the Bush Administration is eliminating an important check on the Service’s actions.90 The Bush Administration, however, disputes the effectiveness of MIS in practice, maintaining that MIS did not accurately represent actual population trends.91 Although the Bush Administration does have some evidence to reinforce its MIS argument, it may have been somewhat hasty to assume that focal species would be inaccurate without a trial period, especially because the reason for having proxy species is to remove some of the difficulties of obtaining specific population data, while maintaining some emphasis on the actual needs of species.92

B. Increase in Forest Service Power

A more general, overarching debate about the new regulations is the increase in the Service’s authority, which allows the Service more discretion to decide whether to allow logging, drilling or off-road vehicles.93 This broadened authority is evident in the lan-

87. See The Forest for the Greed, supra note 10 (discussing new "ambiguous" standard, "changing a few words can mean the difference between survival and decline for critical species. . .").

88. See First Supplemental Complaint, supra note 4 (arguing for importance of MIS); see also Nat’l Forest Sys. Land Mgmt. Planning, 70 Fed. Reg. 1023, 1048 (Jan. 5, 2005) (asserting MIS proxy system is flawed and not useful).


90. See id. (asserting EIS’s are important check on Service because EIS makes Service explicitly set out consequences of actions).

91. For a discussion of the Bush Administration’s argument in opposition of MIS, see supra note 64 and accompanying text.

92. See First Supplemental Complaint, supra note 4 (describing usefulness of proxy species).

93. See Barringer, supra note 10 (noting broad new regulations allow regional forest managers to allow logging, drilling, or off-road vehicles, and setting out Service’s argument that local foresters need more flexibility to do their job, and environmentalists’ argument that new regulations allow Service to abuse its power).
guage of the regulations, which replaced the mandatory term “standards” for the discretionary term “guidelines,” explaining that the Service will have “discretion to act within the range of guidelines, as well as the latitude to depart from guidelines when circumstances warrant it.”

Proponents argue that this new power is necessary because it bypasses some of the judicial red tape the Service has been exposed to over the years, which has seriously impeded the Service’s ability to implement new projects. Allowing the Service more deference with less interference from the courts means that the Service can progress with time-sensitive actions to help our forests flourish ecologically, economically and socially. Additionally, it offers flexibility to “respond to scientific advances and threats like intensifying wildfires and invasive species.”

Conversely, opponents believe that this new power removes many judicial and political checks that kept the Service in line. They argue that the main reason Congress enacted NFMA was because the public had lost confidence in the Forest Service’s ability to make these decisions, chiefly because of the Service’s interest in harvesting timber, which still exists today.

Two specific ways that the Service has arguably received more power are: (1) the ability, in many situations, to bypass certain NEPA reviews, such as an EIS; and (2) the restriction of public input.

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95. See Berman, supra note 11 (quoting former Secretary of Agriculture, Ann Veneman). “[Lawsuits have] almost brought to a standstill many of the things [the Forest Service has] proposed to do, they’ve needed to do. We have well-trained professional people who run the Forest Service, and when the courts try to second-guess everything that’s done, I think it imperils good management in the forests.” Id.
96. See Barringer, supra note 10 (explaining that courts have interpreted environmental laws strictly in past, making it difficult for Service to do its job, and setting out Service’s argument that new time-sensitive issues can be dealt with faster, which will be good for forests).
97. See id. (stating Service assertion that flexible rules will speed up decisions and help advance System).
98. See Trouble in the Forests, supra note 69 (setting forth argument that new regulations give Service too much discretion and not enough checks).
99. See id. (asserting Congress enacted NFMA because public had lost confidence in entire Service, including both local foresters and superiors in Washington due to interest in harvesting timber without regards to ecological health of forests).
100. See First Supplemental Complaint, supra note 4 (asserting public input restrictions and EIS bypasses have given Service too much power).
1. EIS

The Service has arguably received more power because the new regulations allow for the exclusion of an EIS when a forest plan is amended or revised. Opponents argue that allowing the Service to periodically bypass the EIS step blatantly disregards the requirement to comply with NEPA. The Bush Administration contends, however, that full NEPA analysis is unnecessary at the planning level because it would be achieved at the project level, which is a more detailed, specific stage than planning. Environmentalists counter, however, that the Bush Administration has loosened the reins on EIS requirements at the project level as well, including projects for timber sales. Further, the EIS dispute is closely linked to the public involvement issue because the public relies on the EIS for information about effects of proposed plans, which will no longer be available under the new regulations.

2. Public Involvement

Along with the lack of public involvement as a result of loosened requirements for preparing an EIS, opponents argue that the Bush Administration's regulations rely less on public involvement than former regulations, and that the public involvement section was written essentially to placate people, but does not actually do anything. Further, opponents argue that the public did not have a fair opportunity to comment on the Bush Administration's final

101. See 36 C.F.R. pt. 219.4(b) (2004). “Approval of a plan, plan amendment or plan revision, under the authority of this subpart, will be done in accordance with the Forest Service NEPA procedures and may be categorically excluded from NEPA documentation under an appropriate category provided in such procedures.” Id.


103. See Colorado Envtl. Coal. v. Dombeck, 185 F.3d 1162, 1168 (10th Cir. 1999) (explaining projects are narrower than plans because Service implements plans by approving or disapproving individual, site-specific projects); Nat'l Forest Sys. Land Mgmt. Planning, 70 Fed. Reg. 1023, 1040 (Jan. 5, 2005) (asserting NEPA is more useful at project level).

104. See Anderson, supra note 102. “For the past four years, the Administration has adopted a series of regulatory changes—mostly under the umbrella of the ‘Healthy Forest Initiative’—aimed at reducing the Forest Service’s duties to comply with NEPA at the project level, such as for timber sales.” Id.

105. See id. (noting public involvement will be limited because public will not have easy access to environmental impacts on plans).

106. See id. (asserting public provisions lack importance).
regulations.\textsuperscript{107} Although public comment was open on the Bush Administration's proposed regulations from December 2002 to April 2003, the Administration made several changes that were published in the final rule, but were not submitted for public comment.\textsuperscript{108} Opponents view the lack of public comment as significant because the Bush Administration's proposed regulations were labeled as an "adjustment" to the Clinton Administration's regulations for the reason that they allegedly retained many attributes of those regulations.\textsuperscript{109} The regulations that were actually adopted, however, are regarded as a "paradigm shift" in forest planning.\textsuperscript{110} Opponents argue, therefore, that because the regulations that were adopted strayed so far from the proposal that the public was given a chance to comment on, the public deserved another chance for comments to ensure it understood the extent of the changes and had an adequate chance to express its viewpoints.\textsuperscript{111}

Proponents of the regulations respond to these criticisms by arguing that the public comments on the proposed regulations were considered and helped to shape the final regulations.\textsuperscript{112} Yet, even if this is true, there were some provisions in the final regulations that the public could not have anticipated based on the information in the proposed regulations.\textsuperscript{113} For example, the final regulations require each Forest in the System to adopt an "environmental management system."\textsuperscript{114} This term, however, was not in-

\textsuperscript{107} See First Supplemental Complaint, \textit{supra} note 4 (arguing public did not have chance to comment on all provisions of regulations).

\textsuperscript{108} See \textit{id.} (noting that public could not comment on certain provisions because they were in final regulations but not proposed regulations). For example, the final rule contained a requirement that every National Forest must adopt an "environmental management system" (EMS). See 36 C.F.R. pt. 219.5 (2004). Further, the plaintiffs in \textit{Defenders of Wildlife v. Johanns} revealed that if a member of the public wanted information on EMS, he/she would have to visit http://www.webstore.ansi.org/ansidocstore/default.asp and purchase the information for eighty-one dollars. See First Supplemental Complaint, \textit{supra} note 4.


\textsuperscript{110} See Nat'l Forest Sys. Land Mgmt. Planning, 70 Fed. Reg. 1023, 1024 (Jan. 5, 2005) (noting these new regulations are "paradigm shift" in forest management and planning).

\textsuperscript{111} See First Supplemental Complaint, \textit{supra} note 4 (arguing public deserved chance to comment on all provisions of regulations).

\textsuperscript{112} See Barringer, \textit{supra} note 10 (mentioning proponent argument that comments were considered).

\textsuperscript{113} See First Supplemental Complaint, \textit{supra} note 4 (asserting public did not have chance to directly comment on every provision in final regulations because provisions were added that were not in proposed regulations).

cluded in the proposed rule, let alone the requirement that every Forest adopt one, and therefore, because the public had never heard of an environmental management system until it was published in the final rule, the public had no opportunity to comment on it.\textsuperscript{115} Consequently, it is inaccurate to believe that the Bush Administration considered the public’s views on every provision, whether directly or through inferences, because there are some provisions that are too far removed from the proposal for the public to have anticipated them.\textsuperscript{116}

C. Results-based Goals

Another debated alteration is that the new regulations replaced many detailed regulations with broader, more general standards.\textsuperscript{117} For example, limits on clearcuts and protection of streams were replaced with a vague, results-based standard.\textsuperscript{118} The Bush Administration asserts that a results-based standard is important because it allows the Service flexibility to manage the System using various methods, rather than requiring rigid standards that may impede progress.\textsuperscript{119} Environmental groups are worried that the results-based goals coupled with the new economic/social/ecological standard will often result in environmental protections outweighing competing interests.\textsuperscript{120} In the timber industry, for example, the social benefits of cutting down trees to fulfill lumber and paper needs, coupled with the economic benefits of producing these goods, would often outweigh the ecological benefits of keeping the trees in the forest, especially because the Service can claim that any ecological drawbacks can be mitigated somewhat by planting more trees.\textsuperscript{121}

\textsuperscript{115} See First Supplemental Complaint, supra note 4 (explaining that environmental management system was not included in proposed rule).

\textsuperscript{116} See id. (concluding public did not have opportunity to comment on every provision in final rules and asserting that public deserved that chance).

\textsuperscript{117} See id. (stating that regulations replaced detailed regulations with broader standards).

\textsuperscript{118} See Trouble in the Forests, supra note 69 (setting forth results-based goal issues).


\textsuperscript{120} See id. (explaining environmentalists’ concerns over “vague” goals).

\textsuperscript{121} See Hoberg, supra note 21 (noting Bush Administration’s balancing system of ecological, economic and social sustainability).
D. Lack of Scientific Evidence

Finally, science plays a large role in the debate over the regulations. Environmentalists have heavily criticized the Bush Administration for not basing its changes on the findings of a Committee of Scientists, as the Clinton and Reagan Administrations did, and as NFMA requires. In response to public comments about consultation with a Committee of Scientists, the Department asserted that it based the 2002 proposed rule on information from the 1999 Committee of Scientists. As mentioned above, however, many changes were made between the proposed rule and the final rule, and there is no evidence of scientific findings for the final rule, which strayed from both the 2000 regulations and the proposed rule. Opponents of the new regulations assert this lack of data is a serious error because the Bush Administration overrode regulations based on twenty years of scientific studies and findings, replacing them with regulations for which there is no evidence of projected future impact. The species viability approach, for example, was based on the advice of a NFMA-authorized Committee of Scientists in both the 1982 and 2000 regulations. This approach was removed, however, without any scientific data to support the Bush Administration's rationale for deeming it unnecessary.

Additionally, environmentalists argue that the regulations themselves now allow the Service to disregard scientific evidence in planning. While the Bush Administration's draft proposal had ini-

122. See id. at 21 (noting debate over science).
123. See id. (noting environmentalists' criticism of Bush Administration's rejection of previous Administrations' precedent for using committee of scientists).
125. See Hoberg, supra note 21, at 21 (noting lack of scientific findings for provisions that strayed from Clinton regulations).
126. See First Supplemental Complaint, supra note 4 (asserting it was mistake to replace twenty years of regulations based on science with regulations that have no scientific data to back them up).
127. See Hoberg, supra note 21, at 21 (noting mandatory viability language was based on scientific findings and changed by Bush Administration).
128. See First Supplemental Complaint, supra note 4 (explaining that neither preamble to new regulations nor language of regulations contain any "scientific studies, data, or other scientific basis to justify this abandonment of the biological-science-based viability approach that was based on extensive input from independent Committees of Scientists and that has been in place for over twenty years to implement the NFMA's diversity requirements").
129. See id. (arguing that regulations allow Service to ignore scientific evidence).
tially required the Service to make decisions that are "consistent with" the best available science, the new regulations only require the Service to "take into account" the best available science.\textsuperscript{130} Science is explicitly described in the preamble to the new regulations as "only one aspect of decisionmaking," suggesting that other aspects could override scientific evidence in planning.\textsuperscript{131} Specifically, the preamble lists "public input, competing use demands, budget projections, and many other factors as well as science" as aspects for the Service to consider during planning.\textsuperscript{132} While the Bush Administration stresses that science still plays an important role, environmentalists fear that the one-of-many-aspects approach is another easy way to let businesses, such as the timber industry, override ecological concerns.\textsuperscript{133} For example, when deciding whether to implement a logging project or to keep a grove of trees intact, the Service could potentially determine that the logging project is an important "competing use" (based on social benefits mentioned above) with profitable "budget projections," and that these attributes supercede scientific evidence showing that the trees are important to habitat viability.\textsuperscript{134}

V. RECENT LITIGATION

The actual impact of the new regulations remains to be seen, and environmentalists are fighting to ensure that we \textit{never} have to see the implications, as evidenced by a recent lawsuit in California.

\footnotesize{\textsuperscript{130} See Nat’l Forest Sys. Land and Res. Mgmt. Planning 67 Fed. Reg. 72,795, 72,796 (Dec. 6, 2002) (requiring decisions to be “consistent with best available science”).

The responsible official must take into account the best available science. For purposes of this subpart, taking into account the best available science means the Responsible Official must: (1) Document how the best available science was taken into account in the planning process within the context of the issues being considered; (2) Evaluate and disclose substantial uncertainties in that science; (3) Evaluate and disclose substantial risks associated with plan components based on that science; and (4) Document that the science was appropriately interpreted and applied.


\textsuperscript{131} See Nat’l Forest Sys. Land Mgmt. Planning, 70 Fed. Reg. 1023, 1027 (Jan. 5, 2005) (stating science is not only aspect to take into account for planning).

\textsuperscript{132} See id. (specifying other aspects for Service to take into account when planning).

\textsuperscript{133} See Anderson, \textit{supra} note 102 (noting that scientific data can be overridden by other factors).

\textsuperscript{134} See Nat’l Forest Sys. Land Mgmt. Planning, 70 Fed. Reg. 1023, 1027 (Jan. 5, 2005) (explaining that along with scientific data, competing use demands and budget projections are aspects for Service to consider in planning).}
Defenders of Wildlife v. Johanns.\textsuperscript{135} Defenders of Wildlife, the Sierra Club, the Wilderness Society and Vermont Natural Resources Council joined as plaintiffs, arguing that the new regulations violate the NFMA requirements that logging must be limited to protect streams, soil and trees, as well as guidelines to protect plant and animal diversity.\textsuperscript{136} Additionally, the plaintiffs allege that the new regulations overturned more than twenty years of protection without any scientific basis and without a sufficient replacement.\textsuperscript{137} Further, the plaintiffs assert that the regulations stemmed from a defective process because the environmental impacts were never analyzed, and many changes in the final rule were not included in the proposed rule, thus barring the public from its opportunity to comment on them.\textsuperscript{138}

This complaint was filed as a supplement to a lawsuit that the same plaintiffs filed in November 2004 in the United States District Court for the Northern District of California.\textsuperscript{139} Most notable in the request for relief are plaintiffs' pleas for the court to "hold unlawful and set aside" the Bush Administration's regulations and for entering a declaratory judgment reinstating the 1982 regulations.\textsuperscript{140} Although the court has not yet heard the case, \textit{Johanns} will be an important victory for whoever prevails because it will be an open acceptance or rejection of the Bush Administration's regulations.\textsuperscript{141}

\textbf{VI. CONCLUSION}

Ultimately, the future of our nation's forests seems to depend on how the Service utilizes its new power and implements the new regulations.

\textsuperscript{135} 2005 U.S. Dist. LEXIS 34,455 (N.D. Cal. 2005); see Egelko, \textit{supra} note 10 (stating environmental groups initiated lawsuit in San Francisco federal court challenging new regulations).

\textsuperscript{136} See \textit{id.} (explaining Plaintiffs' challenges to regulations).


\textsuperscript{138} See \textit{id.} (setting out another ground of claim).

\textsuperscript{139} See \textit{id.} (explaining that complaint was filed as supplement to November lawsuit).

\textsuperscript{140} See First Supplemental Complaint, \textit{supra} note 4 (setting out plaintiffs' requests for relief).

\textsuperscript{141} See generally \textit{id.} (challenging new regulations). As of December 26, 2005, the case is still pending, though on December 1, 2005, the District Court for the Northern District of California granted the State of California's motion to intervene as Plaintiff under \textit{FEDERAL RULE OF CIVIL PROCEDURE} 24. See \textit{Defenders of Wildlife v. Johanns}, 2005 U.S. Dist. LEXIS 34,455 (N.D. Cal. 2005).
regulations. Many commentators have emphasized the fact that the current Undersecretary of Agriculture, Mark Rey, worked at a major forest industry association and was a lobbyist for the timber industry. Opponents of the new regulations view this as clear evidence that the Service will favor economics over ecology. Proponents of the regulations have faith in the Service’s motives and abilities, however, and believe that the new regulations immensely improve the Service’s capacity to manage our national forests.

Many time-consuming aspects of the former regulations, such as years-long EIS studies and projects tied up in the courts, suggest that perhaps a change was necessary in order for the Service to more effectively and actively manage the System. Yet, the “paradigm shift” of the Bush Administration regulations might cut too far in the other direction, even when giving the Service the benefit of the doubt that it will not abuse its power. Instead of being overly cautious about our forests, the Service might take certain actions too quickly with very little analysis based on a belief that the action is dire, thus risking oversight of detrimental consequences on the System. It seems risky to move from one extreme to the other, such as from specific requirements to broad, results-based goals, without exploring a middle-ground solution.

142. For a discussion of the arguments of how the Service will use its power, see supra notes 139-41 and accompanying text.

143. See Hoberg, supra note 21, at 19 (noting Mark Rey’s former job at American Forest and Paper Association, leading forest industry association); The Forest for the Greed, supra note 10 (noting Mark Rey was lobbyist for timber industry and stating that he is clearly on industry’s side over forests).

144. See The Forest For the Greed, supra note 10 (inferring from Mark Rey’s former lobbyist position and his “hostility” towards his professional staff that Service will favor economics).

145. For a discussion of the proponent argument on how the new regulations will allow the Service flexibility, see supra note 98 and accompanying text.

146. For a discussion of the argument that lawsuits harm the Service’s ability to make changes in forest planning and management, see supra note 97 and accompanying text.

147. For a discussion of the need for scientific evidence to back up regulations, and concern over Bush Administration’s lack of scientific evidence in implementing its regulations, see supra note 123 and accompanying text.

148. See First Supplemental Complaint, supra note 4 (asserting that EIS’s are necessary before taking action to properly assess consequences and that lack of EIS assessment can be detrimental to System).

149. See Hoberg, supra note 21, at 21 (noting dangers of changing regulations so dramatically).
Service, but still retained many of the protective hallmarks of the 1982 regulations.150

Adding another facet to this debate is the recent lawsuit challenging the regulations.151 Along with involving the judiciary in this struggle over forest management, environmental groups and other opponents of the new regulations have strived for public involvement by spreading the word about potential negative impacts.152 It remains to be seen as to whether any of these efforts will lead to changes in the new regulations, but, at the very least, these efforts suggest that the Service’s actions will be closely monitored by the watchful eyes of those who are skeptical of its newly acquired power.

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150. For a discussion of the Clinton Administration changes and retentions from 1982 regulations, see supra notes 40-54 and accompanying text.

151. For a discussion of the Johanns lawsuit, see supra notes 135-41 and accompanying text.
