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Public Participation in the Management of Forest Service and Bureau of Land Management Lands: Overview and Recent Changes

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Summary

Historically, opportunities for public participation in the management of the federal lands managed by the Forest Service (FS) and the Bureau of Land Management (BLM) increased over the years as the statutes and regulations governing the lands were modernized, and the remaining federal lands became increasingly important to the public. Public participation in the management of FS and BLM lands derives primarily from four sources: (1) the relevant management laws, regulations, and agency guidance – especially as to planning procedures; (2) the National Environmental Policy Act environmental review processes; (3) the Administrative Procedure Act; and (4) administrative and judicial appeals.

Recently, administrative changes have been made to the planning, environmental review, and administrative appeals procedures to streamline them and make them more efficient. In addition, the Healthy Forests Restoration Act of 2003 (P.L. 108-148) also seeks to promote efficiency in the context of hazardous fuels reduction projects by limiting the scope of environmental reviews and expediting administrative and judicial review. The act also allows other authorities to be used, including new agency-developed "categorical exclusions" (agency procedures that eliminate formal environmental evaluations), and a new approach to considering "extraordinary circumstances" that could reduce the number of environmental analyses and the associated opportunities for public input. The FS may also place more of its management direction below the level of regulations, arguably making it more difficult for the public to obtain information, participate in management decisions, and perform oversight or seek enforcement.

Both the FS and BLM have changed their systems of administrative appeals. The FS has eliminated appeals of plans, revisions, and amendments, unless the amendment is made as part of a project decision. Instead, the FS has instituted a pre-decisional opportunity to object to a proposed plan. BLM has made fire-related project decisions effective immediately. This could result in eliminating administrative appeals in favor of more costly judicial review, and a drop in appeals numbers may result. A similar stance is proposed by BLM for grazing decisions.

Some applaud these changes as producing long-overdue efficiency and economy in agency processes. Others assert that the changes are closing the public out of management decisions for the publicly owned lands, and question whether the breadth and effects of some of the changes comport with the spirit and letter of the governing laws. The extent to which recent changes in agency procedures allow or preclude meaningful public participation in the management of these federal lands may raise questions of compliance with current statutory requirements, and may raise policy issues of either legislative or oversight interest to the Congress. This report discusses these issues and will be updated as circumstances warrant.

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Public Participation in the Management of Forest Service and Bureau of Land Management Lands: Overview and Recent Changes

Introduction

The Bureau of Land Management (BLM) in the Department of the Interior and the Forest Service (FS) in the Department of Agriculture together manage 454 million acres of land, which is approximately two-thirds of the land owned by the federal government and one-fifth of the total land area of the United States.[1] These lands continue to be important in our national life, serving economic, security, social, scenic, habitat, watershed, recreational and other purposes. Historically, opportunities for public participation in the management of these federal lands increased over the years and came to play a greater role as the statutes and regulations governing the lands were modernized, and as other open space lands became scarce and the remaining federal lands became increasingly important to the surrounding communities and to the public at large.

Public participation in the management of FS and BLM lands derives primarily from four sources:

1) the relevant management laws, regulations, and other agency management guidance – especially as to planning procedures;
2) the National Environmental Policy Act (NEPA)[2] environmental review processes;
3) the Administrative Procedure Act (APA)[3]; and
4) administrative and judicial appeals.

Recently, administrative changes have been made to the planning and appeals procedures of the agencies in an effort to streamline them and make them more efficient. The planning and appeal processes of the agencies had been criticized by

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[1] For background on these two agencies and current issues regarding the lands they manage, see CRS Issue Brief IB10076, Bureau of Land Management (BLM) Lands and National Forests, coordinated by (name redacted) and Carol Hardy-Vincent.

[2] Pub. L. No. 91-190, 83 Stat. 852, 42 U.S.C. §§ 4321 et seq.

[3] 5 U.S.C. §§ 551 et seq.

some as cumbersome, expensive, and time-consuming,[4] and the changes were applauded as producing long-overdue efficiency. Others assert that the changes are closing the public out of management decisions for the publicly-owned lands, and question whether the changes comport with the spirit and letter of the governing laws. The extent to which the public is allowed to participate meaningfully in the management of these federal lands may raise questions of compliance with current statutory requirements, and may raise policy issues of either legislative or oversight interest to the Congress.

In addition to these administrative changes, several recent laws have changed or affected public participation through provisions that address the planning, NEPA, and appeals processes. Chief among these is the Healthy Forest Restoration Act of 2003, which modifies NEPA, administrative appeals, and judicial review procedures for hazardous fuel reduction projects on FS or BLM lands. In addition, Congress has at times legislated to address specific NEPA issues and how agencies may approach certain time constraints. See, for example, provisions extending the terms and conditions of expiring grazing permits and leases pending completion of NEPA reviews.[5] Current legislative proposals address only particular aspects of federal land management, such as management of old growth, etc. – there are no current bills that would amend the major federal land laws generally, whether as to public participation or otherwise.

The principal statutes that provide for modern management for the FS and BLM lands are nearly thirty years old. They provide most clearly for public participation at the macro-level of area planning, but lack detailed requirements as to public participation below that level. Whether the statutes should be amended to increase or decrease public participation involves important policy issues, on which viewpoints differ.[6]

This report discusses the management of federal lands by the FS and BLM, and how public participation enters into that management. The report will be updated as circumstances warrant.

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[4] See *The Process Predicament – How Statutory, Regulatory, and Administrative Factors Affect National Forest Management,* USDA Forest Service, June 2002. This report at 12-13 discusses, among other things, how the modern management and environmental laws moved management to a new era marked by ecosystem management across boundaries at the same time that administrative rules made forest management more complex and cumbersome, and a "costly procedural quagmire" where a single project can take years to move forward and planning costs can exceed $1 million. Some have referred to this situation as "Paralysis by Analysis."

[5] See § 325 of Pub. L. No 108-108.

[6] In commenting on the extraordinary million and a half comments received on the rule to manage roadless forest areas, most of which favored the greater restrictions that the rule provided, a FS spokesperson stated that "the final details of the proposed policy won't be decided by a popularity contest." Statement of Cindy Chojnacky quoted in *The Oregonian,* at B01, Tuesday, August 29, 2000. The weight to be given public input as a factor in forest management planning and decisions is an important issue.

Background

The Agencies

The BLM and FS have similar multiple use-sustained yield management responsibilities for their lands, and many key issues affect both agencies. However, historically the two agencies have developed differently, and each agency has particular emphases and functions. For instance, most BLM lands are rangelands, and the BLM also administers mineral development on federal lands throughout the nation. BLM also manages significant timber resources in Oregon and northern California.[7] BLM manages the surface of approximately 261.5 million acres of land, predominantly in the West, principally under the Federal Land Policy and Management Act of 1976 (FLPMA).[8] Title III of FLPMA is sometimes called BLM's Organic Act because it consolidated and modernized the agency's responsibilities. FLPMA establishes the management principles of multiple use and sustained yield; provides that the federal government must receive fair market value for the use of public lands and resources; establishes a general national policy that the public lands be retained in federal ownership; and expressly requires and encourages public participation in the management of the public lands.

Most federal forests are managed by the FS, which administers 192.5 million acres of federal land, with most concentrated in the West. Management direction for the national forests, first enacted in 1897 and expanded in 1960 and 1976, directs "harmonious and coordinated management" to provide multiple uses and sustained yields of resources. Congress enacted the National Forest Management Act (NFMA)[9] in 1976 to revise timber sale authorities and to establish requirements for land and resource management plans and for public involvement in their development. NFMA planning has been criticized by some as expensive, time-consuming, and ineffective for making decisions and informing the public, and there have been various proposals for changes. The first post-NFMA regulations were adopted in 1979 and revised in 1982. The 1982 regulations remained in effect until new regulations were finalized under the Clinton Administration in November of 2000. Because compliance with the 2000 regulations has been postponed, the 1982 regulations continue to govern management of most National Forest System lands. New planning regulations again were proposed in 2002 by the Bush Administration, and final regulations may be issued soon. Each set of regulations addresses and affects public participation in various ways, and is discussed below.

Sources of Public Participation

Despite differences in the lands each agency manages and in agency history and emphases, the principal statutes governing both agencies direct that public participation be a part of planning and management. These requirements of the land

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[7] Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act of August 28, 1937, ch. 876, 50 Stat. 874, codified at 43 U.S.C. §§ 1181 — 1181j.

[8] Pub. L. No. 94-579, 90 Stat. 2744, codified at 43 U.S.C. §§ 1701 et seq.

[9] Pub. L. No. 94-588, 90 Stat. 2949, codified at 16 U.S.C. §§ 1600 et seq.

management statutes and their accompanying regulations are one source of authority and guidance on public participation.

The National Environmental Policy Act (NEPA) provides another important opportunity for public participation through required procedures for environmental reviews. The NEPA processes are separate from, but are integrated into, the land management planning processes, and provide important opportunities for public participation in agency activities. In some instances, agencies may not provide for public participation aside from the NEPA context.

The Administrative Procedure Act requires that the public be given access to certain agency information,[10] and afforded notice and an opportunity to comment on proposed regulatory changes.[11] The APA requirements for public notice and opportunity to comment apply to rulemaking, not to public participation in projects and activities of the FS and BLM. The act also provides for judicial review of agency actions,[12] and this aspect of the act applies to agency actions in carrying out projects and activities too.

Various opportunities to administratively appeal agency decisions provide a fourth avenue for public input into agency decision making by providing opportunities to change agency decisions. Review opportunities include pre-decisional administrative "protests" or "objections," post-decisional administrative appeals, and judicial review.

All of these aspects are intertwined in the management activities of the two agencies and will be discussed in this report under headings for each agency.

NEPA Overview

Because NEPA and its requirements for public involvement as part of environmental reviews play a significant role in agency planning and decision making, more extensive background on NEPA is provided in this section. Unless Congress provides otherwise, NEPA applies to all actions of federal agencies. It establishes national environmental policies and prescribes certain procedural requirements for all federal agency actions, including those that intersect with private activities — for example, through federal permits or funding. NEPA requires the preparation of a full environmental impact statement (EIS) for any major federal action significantly affecting the quality of the human environment. In practice, and as articulated in NEPA regulations promulgated by the Council on Environmental Quality (CEQ), agencies typically prepare an environmental assessment (EA) if an action might have significant effects on the environment. If an EA indicates that a proposed action would not have significant environmental effects, the agency issues a "finding of no significant impact" (FONSI), and formal NEPA procedures are

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[10] 5 U.S.C. § 552.

[11] 5 U.S.C. § 553.

[12] 5 U.S.C. §§ 702, 704.

complete. If the EA indicates a proposed action could have significant effects, a full EIS is then prepared.

Certain categories of activities have been found either separately or cumulatively to have minor or no environmental effects.[13] An agency is excused from preparing any formal NEPA environmental analyses at all with respect these categories of actions, and hence they are known as "categorical exclusions."

In addition to describing types of actions that may be categorical exclusions, agencies are required to "provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect,"[14] and be removed from categorical exclusion status and once again be subject to the requirements for environmental analyses. A recent source of controversy involves what approach should be taken when extraordinary circumstances — such as wetlands or an endangered species — are present in the area of a proposed action that would otherwise be regarded as a categorical exclusion. Recent expansion of the circumstances regarded as categorical exclusions and recent changes in handling extraordinary circumstances have generated controversy, because NEPA analyses are not being prepared for a broader range of activities, and thus NEPA-associated opportunities for public participation have been eliminated.

Agencies have other NEPA duties aside from preparation of environmental documents, and these duties may play a more important role in light of the expanded use of categorical exclusions. An agency must "[s]tudy, develop, and describe alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources,"[15] and must initiate and use ecological information in the planning and development of resource-oriented projects.[16]

The CEQ/NEPA regulations emphasize public involvement, beginning early in the planning process. An agency is to provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents. Notice of an action of "national concern" is to be published in the Federal Register, and other notice provisions are specified in the regulations.[17] Public hearings or meetings are to be held if there is substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing, and agencies are to solicit appropriate information from the public.[18] How some of these requirements may be applied to FS and BLM actions is unclear.

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[13] 40 C.F.R. § 1508.4.

[14] Id.

[15] 40 C.F.R. § 1507.2(d).

[16] 40 C.F.R. § 1507.2(e).

[17] 40 C.F.R. § 1506.6.

[18] 40 C.F.R. § 1506(c) and (d).

The NEPA processes are to begin with "an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action."[19] This "scoping" process affords the public an opportunity for pre-decisional input. An extensive NEPA regulation requires public involvement and requires agencies to make "diligent efforts to involve the public in preparing and implementing their NEPA procedures" and to provide notice of all NEPA-related hearings, meetings, and documents.[20] Public hearings or public meetings are to be held whenever appropriate, or in accordance with statutory requirements applicable to the agency, considering such things as whether there is substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing.[21]

In addition, the public is to be given an opportunity to comment on draft EISs.[22] There is no express requirement for a comment period on EAs in the NEPA regulations. The most detailed and express NEPA requirements regarding opportunities for public participation occur in the context of EIS preparation, and the agencies' planning processes also afford the greatest opportunities for public involvement in connection with actions involving preparation of an EIS. NEPA procedures are to be integrated into the other studies and processes an agency would otherwise be following.[23] Each department and each agency within a department may elaborate on the CEQ/NEPA processes with their own requirements and guidance.[24] Each agency also may be subject to requirements for public participation that derive from other statutes, and each may voluntarily require or allow additional public participation aside from the NEPA context.

One result of the integration of NEPA processes with the planning process has been that agency regulations may not expressly provide specific opportunities for public participation aside from the NEPA context. For example, if a proposed activity is categorically excluded from NEPA documentation and reviews, there may be an absence of other administrative requirements for public involvement in the project decision making process. This issue has been highlighted by the recent expansion of categorical exclusions by the FS and BLM. It is possible that the public participation in categorically excluded projects may consist only of the general scoping process,[25] but it is possible that some additional public involvement may be required for controversial projects or those with unresolved alternatives for resource management required under NEPA regulations.

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[19] 40 C.F.R. § 1501.7.

[20] 40 C.F.R. § 1506.6(a) and (b).

[21] 40 C.F.R. § 1506.6(c).

[22] 40 C.F.R. § 1503.1.

[23] 40 C.F.R. § 1500.2(c).

[24] 40 C.F.R. § 1507.3.

[25] Even the scoping process may not be required. Department of the Interior guidance in the Departmental Manual at 516 DM 3.3B states that scoping "may" be done in connection with preparation of an EA. If scoping is discretionary at the level of an EA, it is likely to be discretionary or eliminated with respect to categorical exclusions.

The particular statutes and regulations governing each agency are discussed in the following sections of this report.

Forest Service

FS Planning

The original 1897 statute governing the management of the national forests did not address public participation.[26] The Multiple-Use Sustained-Yield Act of 1960 authorizes the Secretary of Agriculture to cooperate with interested state and local governmental agencies "and others" in the development and management of the national forests.[27] In 1976, Congress enacted laws to modernize the management of both the public lands and the National Forest System. The National Forest Management Act of 1976 (NFMA)[28] was enacted as a major amendment to the Forest and Rangeland Renewable Resources Planning Act of 1974.[29] In the findings section of NFMA, Congress found that the national interest in a renewable resource program must be based on "... [certain elements] and public participation in the development of the program."[30] Land and resource management plans are to be developed for units of the National Forest System, and these plans are to be "coordinated with the land and resource management planning processes of State and local governments and other Federal agencies."[31] The public is to be involved in the development, review, and revision of these plans:

> The Secretary shall provide for public participation in the development, review, and revision of land management plans including, but not limited to, making the plans or revisions available to the public at convenient locations in the vicinity of the affected unit for a period of at least three months before final adoption, during which period the Secretary shall publicize and hold public meetings or comparable processes at locations that foster public participation in the review of such plans or revisions.[32]

The land and resource management plans are to form one integrated plan for each unit of the National Forest System, incorporating in one document or one set of documents, available to the public at convenient locations, all of the features required by the NFMA planning section.[33] Plans may be amended "in any manner whatsoever" after public notice, but if an amendment would result in a significant change in a plan, it must be amended in accordance with the substantive and form

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[26] Act of June 4, 1897, ch.2, 30 Stat. 35.

[27] Pub. L. No. 86-517, 74 Stat. 215, 16 U.S.C. § 531.

[28] Pub. L. No 94-588, 90 Stat. 2949, codified 16 U.S.C. §§ 1600 et seq.

[29] Pub. L. No. 93-378, 88 Stat. 476.

[30] 16 U.S.C. § 1600(3).

[31] 16 U.S.C. § 1604(a).

[32] 16 U.S.C. § 1604(d).

[33] 16 U.S.C. § 1604(f)(1).

requirements for plans.[34] Plans may be revised from time to time, and must be revised at least every 15 years in accordance with the substantive, form, and public participation requirements of the planning section.[35] NFMA also states that implementing regulations shall include procedures to insure that land management plans are prepared in accordance with NEPA, including direction on when and for which plans an environmental impact statement shall be prepared.[36] Therefore, it is clear that Congress envisioned public participation in the development and revision of plans; it is less clear how extensive public participation must be with respect to amendments of plans or management, projects and activities implementing plans, or decision making in general.[37] Department of Agriculture NEPA regulations do not elaborate on when an EIS or EA is required and do not address public participation in either context. They do require agencies to determine continued eligibility of actions for categorical exclusion status.[38]

FS Administrative Appeals

Another significant aspect of public involvement in FS planning and activities has been administrative appeals of agency decisions. Although until recently there was no express statutory requirement to do so, the FS has provided for some version of administrative appeals since 1906.[39] Basically, appeals of decisions of one forest officer were taken to a superior officer. Before the enactment of NEPA, appeals were the primary mechanism for challenging management decisions of the FS.[40] As public involvement in federal land management increased over time, and especially after the first round of plans required by NFMA were completed, the number of appeals grew. Some asserted that appeals were crippling management; others disputed that the problems were as bad as was sometimes asserted.[41]

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[34] 16 U.S.C. § 1604(f)(4).

[35] 16 U.S.C. § 1604(f)(5).

[36] 16 U.S.C. § 1604(g)(1).

[37] The committee report indicates that Congress believed that early public participation in the development of regulations, plans, criteria, and standards for FS programs was most important. S. Rep. No. 94-893 at 1, 5, 34, 40 (1976); S. Rep. No. 94-905 at 2 (1976); H.R. Rep. No. 941478, Pt. 1 at 7 and 19 (1976), emphasizing making proposed plans available for public comment; and S. Rep. No. 94-1335 at 23 (1976).

[38] 7 C.F.R. § 1b.3.

[39] See 53 Fed. Reg. 17,310 -17,311 (1988).

[40] Bradley C. Bobertz and Robert L. Fischman, *Administrative Appeal Reform: the Case of the Forest Service*, 64 U. Colo. L. Rev. 372, 375-376 (1993).

[41] Several studies provided factual background: Office of Technology Assessment, U.S. Congress, Pub. No. OTA-F-505, *Forest Service Planning: Accommodating Uses, Producing Outputs, and Sustaining Ecosystems* (February, 1992); (name redacted), Congressional Research Service, Pub. No. 92-349A: *Administrative Appeals of Forest Service Timber Sales* (April 8, 1992); and, more recently, (name redacted), Congressional Research Service, Pub. No. 97-274A: *Federal Land Management: Appeals and Litigation – Overview Prepared for a Workshop Held by the Senate Committee on Energy and Natural Resources*

(continued...)

In May 1988, the FS proposed changes to its appeals system that were premised in part on the view that if the public was involved earlier in the decision making process — through NEPA and some of the provisions of NFMA on planning — administrative appeals were redundant.[42] According to the FS, the public participation aspects of NEPA had legislated administrative appeals into obsolescence.[43] The FS finalized new appeal regulations in 1989,[44] streamlining appeals of actions documented under NEPA and NFMA, including plans and project decisions, reiterating that appeals were simply another type of public participation and were less important than pre-decisional public participation. "We believe that public participation and involvement in planning and decisionmaking is more effective prior to making the actual decision than afterwards."[45] On March 19, 1992, Secretary of Agriculture Edward Madigan announced that the appeals regulations would again be revised to eliminate appeals of timber sales and other project-level decisions.[46] Instead, notice of projects for which an EA had been prepared would be published and comments taken before a final decision would be made. This pre-decisional process combined with the elimination of a right to appeal again reflects the agency thinking that administrative appeals have become a redundant form of public participation.

Pre-decisional public input can be beneficial in that a proposed agency action can more readily be modified before a decision is finalized, to take into account matters and preferences presented by the public. On the other hand, absent any form of administrative post-decisional appeal, and with only the more expensive option of judicial review of agency decisions, there could be a tendency on the part of agency decision-makers to disregard the pre-decisional public input. Arguably, administrative appeals can complement pre-decisional input by providing a check on actual agency action.

The 1992 FS proposal to eliminate appeals elicited controversy and debate, and resulted in Congress enacting the Appeals Reform Act (ARA), § 322 of the FY1993 Department of the Interior and Related Agencies Appropriations Act.[47] ARA

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[41] (...continued)
(February 26, 1997).

[42] 53 Fed. Reg. 17,312-17,313 (1988).

[43] Id.

[44] 54 Fed. Reg. 3,342 (1989).

[45] 54 Fed. Reg. 3,342, 3,344 (1989).

[46] 57 Fed. Reg. 10,444 (1992).

[47] Pub. L. No. 102-381, 106 Stat. 1419. Some Senators had reacted vigorously to the proposal to eliminate appeals: Sen. Wyche Fowler asserted forest management problems would be worsened not solved by saying "Well, we'll listen to these people, but if we disagree with them, tough. That's it. Book closed. You have no appeal. We are the government, not you ... I am the god of the forest." Speaker Thomas Foley asserted that eliminating appeals would violate the legal guarantees of full and open public participation and weaken public confidence. However, other senators supported the proposed changes.
(continued...)

requires the Secretary of Agriculture, acting through the Chief of the FS, to establish processes *both* for notice and comment regarding proposed projects and activities implementing plans, and for administrative appeals of such projects and activities.

ARA added to the NFMA language regarding public participation in planning processes by specifically requiring notice and an opportunity for comment with respect to projects and activities implementing plans. Before proposing an action concerning projects and activities implementing plans, the Secretary is required to mail notice about the proposed action to any person who has requested it in writing, and to persons who are known to have participated in the decision making process. Newspaper publication is also generally required, and a Federal Register notice is required for actions taken by the Chief. A 30 day comment period then must follow. Therefor, although an opportunity for public comment is not expressly required by the CEQ regulations with respect to project EAs, a comment period is required by ARA.

Under ARA, persons who are involved in the public comment process through written or oral comments or by otherwise notifying the FS of their interest in the proposed action have a right to appeal within 45 days from the time of a decision. The statute provides for informal or formal disposition of administrative appeals, and establishes time periods. Unless the Chief of the FS determines that an emergency exists, a decision normally is to be stayed during the appeal filing period, or until 15 days after the date of the disposition of an appeal.

ARA effectively rejected the FS position that post-decisional administrative appeals are redundant if an opportunity for pre-decisional public input is provided. However, as will be seen in the discussion of recent regulatory changes and proposals, that FS approach is still evident as to FS actions not covered by ARA — notably the amendment or revision of plans, where the FS has eliminated appeals for some actions if an opportunity for pre-decisional public involvement is provided.

Until the recent changes to the appeal regulations, there were three types of appeals set out in 36 C.F.R., Part 217 for appeals of plans and significant plan amendments, Part 215 for appeals of projects and activities implementing plans, and Part 251 for appeals by permittees. There was no pre-decisional process for objecting to or protesting a proposed FS decision. Provisions relating to notice of actions and opportunities for public comment appeared in the planning and appeals regulations, and varied depending of the level of the action. Despite the breadth of the ARA language, notice and an opportunity to comment were not provided for all proposed actions implementing forest plans. New FS post-ARA appeal regulations will be discussed in connection with the 2002 proposed planning regulations below. The ARA notice, comment, and appeal requirements have been dealt with in varying ways in the FS regulations.

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[47] (...continued)
See *Administrative Appeal Reform: the Case of the Forest Service*, *supra*, at 398-399.

FS Planning Regulations

The general FS planning regulations have had a history of changes. Basic planning regulations were adopted in 1979 and revised in 1982. The 1982 regulations basically remained in place with few changes until new planning regulations were finalized November 9, 2000 under the Clinton Administration.[48] The 2000 regulations were to have been phased in over time, but the current Administration has extended the time for compliance with the new regulations, thereby leaving the 1982 regulations in place. A new set of planning regulations was proposed in 2002, but these have not yet been finalized.[49] Both the 2000 regulations and the 2002 proposed regulations would make significant changes in the application of NEPA to forest planning, and would affect public participation as well.

The statutory requirements for public participation are most detailed and express with respect to plans. While plans are vitally important in establishing the overall guidance for forest management, a great deal of actual on-the-ground forest management takes place in the selection, configuration, and execution of projects and activities that implement the plans.[50] In the absence of specific statutory direction in NFMA in this regard, ARA, agency regulations, and other agency directives currently play a major role in determining the extent of public involvement below the level of plans.

Regulations of the Department of Agriculture and of the FS also contain the framework for NEPA compliance. Departmental regulations set out the NEPA policies for the Department as a whole, require compliance with that act, and charge the Under Secretary, Natural Resources and Environment with ensuring that the implementing procedures of agencies within the department are consistent with CEQ regulations.[51] Some departmental categorical exclusions are set out, and agencies are charged with identifying additional ones and establishing exceptions when an EA or EIS must be prepared.[52]

Some of the aspects of the three sets of FS planning regulations that are most relevant to public participation are discussed in this section. References in this section to the year 2000 Code of Federal Regulations (C.F.R.) refer to the 1982 regulations; references to the 2003 C.F.R. set out the November 9, 2000 Clinton Administration changes; references to the Federal Register refer to the new planning regulations that were proposed in 2002.

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[48] 65 Fed Reg. 67,514 (November 9, 2000).

[49] 67 Fed. Reg. 72,700 (December 6, 2002).

[50] Michael J. Gippert and Vincent L. DeWitte, *The Nature of Land and Resource Management Planning Under the National Forest Management Act*, 3 ENVTL. LAW 149, (September, 1996).

[51] 7 C.F.R. § 1b2.

[52] 7 C.F.R. § 1b.3(c).

1982 Regulations. The 1982 regulations set out the general principle of public participation, and are more clear and specific with respect to public participation in the development and revision of plans and regional guidance than they are with respect to projects and activities that implement plans. However, the regulations do refer to public participation in connection with activities below the planning level:

> (a) Because the land and resource management planning process determines how the lands of the National Forest System are to be managed, the public is encouraged to participate throughout the planning process. The intent of public participation is to –
> (1) Broaden the information base upon which land and resource management planning decisions are made;
> (2) Ensure that the Forest Service understands the needs, concerns, and values of the public;
> (3) Inform the public of Forest Service land and resource planning activities; and
> (4) Provide the public with an understanding of Forest Service programs *and proposed actions*.
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> . . .
>
> (c) Public participation activities, as deemed appropriate by the responsible line officer, shall be used early and often throughout the development of plans. At least 30 days' public notice shall be given for public participation activities associated with the development of regional guides and forest plans. Any notice requesting written comments on regional planning shall allow at least 60 calendar days for response. A similar request on forest planning shall allow at least 30 calendar days for response. Draft regional guides and forest plans and environmental impact statements shall be available for public comment for at least three months.[53]

Section 219.6 details the type of notice and duration of comment periods required in connection with regional guides and forest plans. Requirements for notice and preparation of an EIS for such documents also are set out:

> The responsible line officer shall give notice of the preparation of a land and resource management plan, along with a general schedule of anticipated planning actions, to the official or agency so designated by the affected State. These notices shall be issued simultaneously with the publication of the notice of intent to prepare an environmental impact statement required by NEPA procedures.[54]

A draft and final EIS must be prepared for plans, regional guides, plan revisions, or significant amendments to plans, and for proposed standards and guidelines in

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[53] 36 C.F.R. § 219.6 (2000) (emphasis added).

[54] 36 C.F.R. § 219.7 (2000).

regional guides,[55] with at least a three-month comment period on a draft EIS.[56] Before the most recent appeal regulation changes, former § 215.4 stated that actions described in a draft EIS were subject to the NEPA notice and comment requirements of 40 C.F.R. §§ 1500-1508, but not to FS notice and comment requirements. Although the NFMA requires revision of forest plans at least every 15 years, the 1982 regulations require the revision cycle ordinarily to be every 10 years.[57] Significant amendments to a plan are to be completed through the same procedures as those required for development and approval of a plan.[58] NFMA and the regulations require all activities to be consistent with the relevant plan.[59] For plan amendments, the responsible official must complete "satisfactory" environmental analyses and conduct "appropriate" public involvement.[60] Additional guidance with respect to when environmental assessments, rather than EISs, are to be prepared, and on those activities that are categorically excluded from NEPA document preparation are found in the FS Handbook 1909.15, chapter 30.

Although there are no provisions in the 1982 planning regulations that require specific types of public participation with respect to projects and activities implementing forest plans, after the enactment of ARA in 1992, there is general direction that "appropriate" public notification be provided, and there is guidance that appears to allow for public participation for activities below the level of plans:

> Public participation activities should be appropriate to the area and people involved. Means of notification should be appropriate to the level of planning. Public participation activities may include, but are not limited to, requests for written comments, meetings, conferences, seminars, workshops, tours, and similar events designed to foster public review and comment ....[61]

After 1992, the 1982 planning regulations were implemented in the context of the notice and comment and appeal provisions of ARA and the new appeals regulations that followed its enactment. Despite the breadth of the language in ARA that required notice and comment for all projects and activities implementing plans, under the regulations implementing ARA (i.e. before the 2000 Clinton Administration changes or proposals), notice and opportunity to comment was only provided for projects for which at least an environmental assessment was prepared, and for most timber harvests that were listed as categorical exceptions to the preparation of NEPA documents. Notice and comment was not provided for other

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[55] 36 C.F.R. §§ 219.8(c) and 219.10(b)(2000). The NEPA documents were required to be a single process that complied both with planning requirements and NEPA/CEQ requirements.

[56] 36 C.F.R. § 219.8(b) (2000).

[57] 36 C.F.R. § 219.10(g) (2000).

[58] 36 C.F.R. § 219.10(f) (2000).

[59] 36 C.F.R. § 219.10(e) (2000).

[60] 36 C.F.R. § 219.10(f) (2000).

[61] 36 C.F.R. § 219.6(d) (2000).

categorically excluded activities,[62] nor for non-significant amendments to plans that were separate from project decisions, or were a part of a project for which no EA or EIS was prepared.[63]

2000 Regulations. The 2000 (Clinton Administration) planning rule stressed expansion of collaboration and pre-decisional public participation requirements.[64] The regulations again specified more details with respect to revisions of plans, and one regulation required public participation in planning in general:

> The responsible official must:
> (a) Make planning information available to the extent allowed by law;
> (b) Conduct planning processes that are fair, meaningful, and open to persons of diverse opinions;
> (c) Provide early and frequent opportunities for participation in the identification of issues;
> (d) Encourage interested individuals and organizations to work collaboratively with one another to improve understanding and develop cooperative landscape and other goals;
> (e) Consult with individuals and organizations who can provide information about current and historic public uses within an assessment or plan area, about the location of unique and sensitive resources and values and cultural practices related to issues in the plan area; and
> (f) Consult with scientific experts and other knowledgeable persons, as appropriate, during consideration of collaboratively developed landscape goals and other activities.[65]

> The responsible official must seek to collaborate with those who have control or authority over lands adjacent to or within the external boundaries of national forests or grasslands ....[66]

Plan revisions began with advance notice and a comment period, and a draft and final EIS were to be completed with an associated comment period.[67] The 2000 regulations eliminated the requirement that plans be revised every 10 years and instead simply referred to the relevant NFMA provision — which requires revision every 15 years.[68] This change also is expressed in the 2002 proposed rules.

Unless otherwise provided by law, under the 2000 regulations the responsible official could propose to amend or revise a plan, propose a site-specific action, or both, and was required to analyze the effects of any proposal and alternative(s) in

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[62] 36 C.F.R. § 215.4(e)(2000)

[63] 36 C.F.R. 215.4(b), 215.3(a),(c) (2000).

[64] See 36 C.F.R. §§ 219.2(c)(2) and (d); 219.12; – 219.18 (2003). The explanatory materials indicate that not all commenters agreed that public participation had been expanded. 65 Fed. Reg. 67,537.

[65] 36 C.F.R. § 219.16 (2003).

[66] 36 C.F.R. § 219.17 (2003).

[67] 36 C.F.R. § 219.09 (2003).

[68] 36 C.F.R. § 219.9(a) (2003).

conformance with Forest Service NEPA procedures.[69] This language did not require any particular level of NEPA analysis and no particular type of public participation was specified.

Reflecting statutory language, all site-specific decisions, including authorized uses of land, were required to be consistent with the applicable plan. If a proposed site-specific decision was not consistent with the applicable plan, the responsible official might modify the proposed decision to make it consistent with the plan, reject the proposal; or amend the plan to authorize the action.[70] Similar language is contained in the 2002 proposed regulations.

As discussed in connection with the 1982 regulations above, notice and comment provisions appeared as part of the appeals regulations after the enactment of ARA in 1993 (See 36 C.F.R. Part 215.) Despite the broad language of the ARA, notice and opportunity to comment was only required for proposed actions implementing forest plans for which an environmental assessment was prepared, for categorical exclusions involving timber harvests, but not for other projects, nor for non-significant amendments to plans that were included as part of a decision on a proposed action for which an EA was prepared.[71] Exceptions to the notice and comment requirements of ARA were retained under the 2000 regulations and would be expanded under the 2002 proposed regulations.

The Clinton rules included a new pre-decisional "objection" process for plans and eliminated administrative appeals of plan revisions and amendments. Any person could object to a proposed plan amendment or revision, except for those proposed by the Chief.[72] If an objection was received, the proposed amendment or revisions could not be approved until the reviewing officer had responded to all objections, and the final decision had to be consistent with the reviewing officer's response to objections.[73] The Part 217 appeals of plans, revisions, and amendments would be phased out.[74] Appeals of site-specific decisions would still be available under Part 215. These approaches are also taken in the 2002 proposed rules.

The explanatory material accompanying the Clinton regulations indicates that many comments urged retaining appeals to ensure cumulative analysis of actions and to allow public oversight of FS policy, and asserted that appeals are a citizen's right, and provide a means to resolve conflicts other than through litigation. The FS responded that Part 217 appeals forced the expenditure of significant human and financial resources "in fulfillment of procedural requirements,"[75] and that appeals may result in a polarized relationship in contrast to the pre-decisional objection

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[69] 36 C.F.R. § 219.6 (2003).

[70] 36 C.F.R. § 219.10 (2003).

[71] 36 C.F.R. 215.3(a) – (c) (2000).

[72] 36 C.F.R. § 219.32 (2003).

[73] 36 C.F.R. § 219.32 (2003).

[74] 36 C.F.R. § 215.12 (2003).

[75] 65 Fed. Reg. 67,562.

process that could provide the "opportunity to seek reasonable solutions to conflicting views before a plan amendment or revision is adopted."[76] These arguments reflect points made before ARA was enacted, and seem premised on the belief that appeals serve no purpose if pre-decisional public participation is provided. Whether Congress will once again legislate to address public participation and appeals of planning decisions is unclear.

2002 Proposed Regulations. The new proposed planning rule[77] contains general requirements for public participation, but also could make public participation more difficult. On the one hand, the 2002 proposed rules include general language that would require meaningful public participation in the planning process, but would leave the specifics of how that participation will occur to the responsible official:

> The Responsible Official must provide early and frequent opportunities for individuals and entities to participate openly and meaningfully in the planning process. The Responsible Official shall determine the methods and timing of opportunities to participate in the planning process. The Responsible Official must provide for and encourage participation by interested individuals and organizations, including private landowners whose lands are within, adjacent to, or otherwise affected by management actions on National Forest System lands.[78]

Several other changes, however, appear likely to make public participation more difficult. Of particular relevance is proposed § 219.2(c)(2), which indicates that more management direction is to be moved to the directives level (i.e. it will not be in the more binding and readily available regulations, but rather in the FS Manual or handbooks, or even below that level in agency 'white papers' that are referred to several times in the explanatory material accompanying the proposed regulations).[79] It is not clear where or how these agency white papers, that will evidently contain management guidance, may be made available to the public. Although the FS Manual and handbooks are on-line, they do not have changes integrated into a comprehensive text promptly.[80] In addition to the Manual, handbooks, and white paper guidance, regional and forest-by-forest guidance also affect plans and activities. Arguably it could be difficult for a member of the public to retrieve all the relevant pieces of information and meld them into coherent information on how forests are to be managed. This piecemeal approach, by which planning requirements and guidance are not compiled and integrated, could make it more difficult for the public to ascertain what the planning requirements are, and hence whether there has

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[76] Id.

[77] 67 Fed. Reg. 72,770 (December 6, 2002). For a general discussion of the proposed rule, see the CRS Congressional Distribution Memorandum, *Analysis and Critique of the Forest Service Planning Regulations Proposed on December 6, 2002,* by (name redacted), January 3, 2003.

[78] Proposed 36 C.F.R. § 219.12; 67 Fed. Reg. 72,799.

[79] See e.g. 67 Fed. Reg. 72,784 and 72,786, both of which refer to expected guidance on conservation of species being set out in agency white papers.

[80] For example, as of May 26, 2004, the on-line FS Handbook materials on categorical exclusions at 1909.30 still do not reflect the 2002 changes.

been compliance with them in any particular instance, or how the public might be able to have input into the process or obtain judicial review.[81]

There are currently regulations at 36 C.F.R. Part 216 that were adopted in 1984 and provide for public input into and comment on FS *Manual* directives. If a Manual directive is determined by the responsible official to be one that is of "substantial public interest or controversy,"[82] the regulations provide for a gradation of public notice and comment procedures depending on the scope of the directive involved. National proposals normally require notice published in the Federal Register, followed by a minimum of 60 days for public review and comment. At the forest or district level, the responsible official determines the appropriate means of notifying the public of Manual changes, which may include a notice published in a newspaper of general circulation or a press release, and a minimum of 30 calendar days for review and comment.[83] However, these procedures may be waived "for good cause that an exigency exists," in which case an interim Manual directive may be put in place before any opportunity is afforded for public comment.[84]

However, the requirements of Part 216 do not apply to material in Handbooks or to certain types of Manual directives,[85] and it appears likely that "white papers" are not covered either. If not, public input is not required with respect to those forms of directives and any management direction they contain could be accomplished without public notice or involvement.

In addition, there is some question whether and when manual and handbook materials are even binding on the agencies. A court may conclude in some cases that manual and handbook provisions are binding on an agency, depending on whether the manual or handbook provisions were adopted with publication and other formalities associated with full rulemaking. But, in contrast to agency regulations, provisions contained in agency manuals and handbooks have generally been held to lack the force and effect of law, to be non-binding on agencies, to be subject to informal change, and *not to give rise to private rights of enforcement*.[86] To the extent a court so characterized the FS Manual handbook, white papers, or other directives, moving forest management guidance to this level may preclude citizen enforcement actions or judicial review both of agency planning standards and requirements, and of compliance with them.

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[81] One has only to look at the series of directives issued in the context of the management of the roadless areas to see the problems that can ensue. Those national directives have been seen as confusing at best, sometimes were published only well after they were effective, and are difficult to find on-line in an integrated form.

[82] 36 C.F.R. § 216.4 (2003).

[83] 36 C.F.R. § 216.6 (2003).

[84] 36 C.F.R. § 216.7 (2003).

[85] 36 C.F.R. § 216.3(a)(2) and (3)(2003).

[86] KENNETH CULP DAVIS AND RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.5 (3d ed. 1994); CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE §§ 3.73 - 3.75 (1985).

All of the sets of regulations have urged coordination of federal planning with other federal agencies and with non-federal planning entities in the area, such as state, local, and tribal governments, but some of the details of the 2002 proposed regulations may connote a shift in emphasis as to the type of participation in some circumstances. Section 219.12 refers to "engaging the skills" of interested people and entities. Under proposed § 219.12, the regulations state that individuals (subsection (a)(1)) and Indian Tribes (subsection (a)(3)) must be given opportunities to "participate." When referring to state and local governments and other federal agencies in (a)(2), the opportunity that must be provided is to "be involved." This may mean that non-federal state and local government staff may directly engage in the planning process, as was done in the preparation by BLM of the Grand Staircase-Escalante Management Plan.[87] In such circumstances, issues may arise involving the difference between coordinating a federally-devised management plan for the federal lands with those of surrounding jurisdictions – even following collaborative and cooperative public input – and improperly permitting federal planning to be conducted by non-federal personnel.

The 2002 proposed regulations expressly state that plans are usually to be revised every 15 years — a provision that reflects the express language of the NFMA. In a significant change, an EIS would not necessarily be prepared for plans, revisions, and amendments, and some plans could even be prepared as categorical exclusions — without completion of any NEPA analysis at all:

> (a) The Responsible Official must comply with NEPA procedures and incorporate them as necessary and appropriate throughout the planning process. The Responsible Official must determine how NEPA applies in the development of a new plan, plan amendment, or plan revision. The Responsible Official shall ensure that the level of NEPA analysis for planning is proportional to the decisions being made.
> (b) If the Responsible Official determines that a new plan, plan amendment, plan revision, or a component thereof, would be an action significantly affecting the quality of the human environment, or authorizes an action that commits funding or resources that could have a significant effect on the quality of the human environment, then an environmental impact statement would be required. A new plan, plan amendment, or plan revision *may be categorically excluded* from documentation in an Environmental Assessment or Environmental Impact Statement as provided in agency NEPA procedures.[88] (Emphasis added.)

As discussed above, despite the broad language of ARA, under current regulations decisions related to projects that are categorically excluded from NEPA analyses need not include public notice and comment. What public participation would be provided for plans prepared as categorical exclusions is not clear.

The explanatory materials to the 2002 proposed regulations assert that the reason plans can be categorically excluded is that plans are permissive — they allow,

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[87] Jarry Spangler, *'Enlibra' – balance & stewardship*, DESERET NEWS, November 29, 1998, at B01, described the state and local officials as working "hand-in-glove" with federal personnel.

[88] 67 Fed. Reg. 72,797 re 36 C.F.R. § 219.6.

but do not direct, that things may happen in specified areas. However, the plans are the "programmatic management direction,"[89] set the objectives of all forest management that will guide particular decisions,[90] set standards that state the permissions or limitations for uses and actions,[91] zone the forests, and eliminate some uses and activities from particular areas — all decisions that could be made under the proposed regulations without consideration of the environmental effects of these choices or consideration of other alternatives, and without public participation.

Under the 2002 proposed rule, plans could be amended instantly in several ways — with some associated limitations on public participation. Under proposed §§ 219.7 and 219.18, administrative corrections and additions are expressly stated as not being amendments. Proposed § 219.7(f) would provide for "interim amendments" which could be for a term of up to four years that is renewable.[92] The regulation is silent as to notice to the public and public participation in the promulgation of such interim amendments, except with respect to notice of renewals of interim amendments. The planning regulation is also silent as to whether these amendments may be appealed, but under § 219.7(f)(4), interim amendments would not be subject to the objection process.

Proposed § 219.10(d)(3) would allow a plan to be amended in and by a project decision — anytime a project would be inconsistent with a plan, the plan could be instantly amended to produce consistency. This is similar to § 215.3 of the Clinton regulations. Under the 2002 proposed regulations, an amendment made as part of a decision is not subject to the objection process,[93] but is appealable.[94] It appears that even an amendment made as part of a project decision for which an EA is prepared is not eligible for the objection process. Legal notice must be published in designated local newspapers for amendments that are subject to the objection process[95] — which amendments made as part of a project decision are not.

For an amendment that is subject to objection under § 219.19, proposed § 219.7(e) would require prior notice to the public of the opportunity to object to the proposed amendment and any associated NEPA documents. Under § 219.19(a), there will usually be a 30 calendar day period for pre-decisional review of a proposed

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[89] Id., re 36 C.F.R. § 219.4(a).

[90] Id., re 36 C.F.R. § § 219.4(a)(2).

[91] Id., re 36 C.F.R. § 219.4(a)(3).

[92] 67 Fed. Reg. 72,803.

[93] 67 Fed. Reg. 72,803, re 36 C.F.R. § 219.19(a)(1).

[94] 67 Fed. Reg. 72,804, re 36 C.F.R. § 219.20 (2003) states that a plan amendment made as part of a site-specific decision may only be appealed as described in 36 C.F.R. § 215.7(a). This latter section at that time (before the new appeal regulations) provided that project and activity decisions that were documented in a Record of Decision or Decision Notice, including those which contained a non-significant amendment as part of a project approval decision, were subject to appeal. New § 215.11(a) allows an appeal of a non-significant plan amendment made as part of a project decision.

[95] 67 Fed. Reg. 72,803 re 36 C.F.R. § 219.19(b)(2).

plan amendment, or revision through the "objection" process. Objections may only be original submissions (as opposed to pre-printed postcards, etc.), and objections may only raise the issue of whether the decision is consistent with the plan and law – not whether it needs to be adjusted in some way to avoid some harm or to better accomplish some goal.

Post-approval notice of some plan revisions and amendments is required to be published in the Federal Register if the decision is made by the Chief of the Forest Service or the Secretary of Agriculture, and "by other appropriate means, as needed."[96] There is no administrative appeal of these decisions and recourse is to the courts.[97]

Proposed § 219.7(d) provides that a plan amendment for which an EIS is prepared is a significant amendment, and § 219.6(b) requires preparation of an EIS for actions that could have a significant effect on the quality of the human environment (the requirement in NEPA). In light of the fact that under the 2002 proposed regulations, an EIS might not be prepared even for plan revisions, there may not be many plan amendments for which an EIS would be prepared and hence few that would be deemed "significant," and have clear requirements for full public participation.

There are no specific requirements for public participation set out in the proposed planning rule for non-significant plan amendments; rather it appears that only the general provision of proposed § 219.12(a) that calls for "early and frequent" opportunities for individuals and entities to participate openly and meaningfully in the planning process pertains. If so, it is for the Responsible Official to determine the "methods and timing" of opportunities to participate.

However, the new notice and appeal regulations also enter into the public participation picture. The requirements of ARA are reflected in the notice and comment and appeals provisions, but exceptions to the ARA requirements are continued. Under new §215.3, notice and comment is required for projects and activities for which an EA is prepared, and non-significant amendments made as part of a project decision for which at least an EA is prepared. However, because ARA only applied to projects and activities implementing plans, under new § 215.4 notice and comment are not required for amendments, revisions, or adoptions of plans that are made separately from any proposed actions and which therefore are subject either to the objection process under §219.32,[98] or administrative appeal under part 217 in effect prior to November 9, 2000. Also under § 215.4, legal notice and opportunity to comment is not available for actions taken as categorical exclusions. As will be discussed in the next section of this report, categorical exclusions have recently been expanded significantly.

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[96] 36 C.F.R. § 219.21, 67 Fed. Reg. 72,804.

[97] 36 C.F.R. § 215.20.

[98] This reference to § 219.32 is to a section in the 2000 [Clinton Administration] regulations related to the objection process. The section apparently would be replaced under the 2002 proposed regulations by § 219.19.

Projects and activities implementing plans that are documented in a Record of Decision or Decision Notice are subject to appeal under § 215.11(a), including those which contain a non-significant plan amendment. Decisions for actions that are categorical exclusions are not subject to appeal. Under § 215.12, amendments, revisions, or adoption of a plan are not subject to appeals under part 215, but rather are subject to either the objection process of § 219.32 or the appeal procedure under § 217 in effect prior to November 9, 2000. An amendment, revision or adoption of a plan that includes a project decision also is not subject to appeal under part 215, except that the project portion of the decision is.

Under § 215.9, decisions that are not subject to appeal may be implemented immediately after publication of a decision documented in a Decision Notice or Record of Decision that complies with those relevant time-frames. When a determination has been made under § 215.10 that an emergency exists, a decision documented in a Decision Notice or Record of Decision may also be implemented immediately. Part 215 does not contain any provisions to stay a decision and therefore, judicial review appears to be available for decisions that are immediately effective.

To obtain a more complete picture of the extent to which the public may participate in the management of the FS lands, planning rules must be read in conjunction with the new appeal regulations described above, the new counterpart regulations and implementing documents, various new categorical exclusions, and Pub. L. No. 108-148.

Expansion of and Changes to "Categorical Exclusions"

Changes to agency NEPA documentation requirements also could significantly affect public participation. As discussed above, some agency actions have been shown to have so little effect on the environment that no NEPA documents are necessary. An agency may indicate what these clearly non-harmful actions are through its articulation of "categorical exclusions" — actions that are excluded from preparation of NEPA documents because they have been found, individually or cumulatively, not to have a significant effect on the human environment.[99] Under CEQ regulations, categorical exclusions may be adopted only after an opportunity for public review and review by CEQ.[100] Once adopted, however, activities within a categorical exclusion may be conducted without formal environmental analyses, and, despite the breadth of language in the ARA requiring notice and an opportunity to comment for projects and activities implementing plans, no notice or comment is required by the FS for activities within a categorical exclusion.

New categorical exclusions were developed jointly with the Department of the Interior to allow "hazardous fuels reduction" activities and rehabilitation projects for lands and infrastructure impacted by fires or fire suppression to be conducted without

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[99] 40 C.F.R. 1508.4.

[100] 40 C.F.R. 1507.3.

environmental analyses.[101] The hazardous fuels referred to consist of dense forest growth of trees and underbrush that provide fire ladders and result in fires that burn very hot and destroy whole trees as opposed to fires that sweep through a forest and do not burn the crowns of trees. Projects could include mechanical fuels reduction activities (e.g. cutting) on up to 1,000 acres, and fuels reduction activities using fire on up to 4,500 acres. Rehabilitation projects may not exceed 4,200 acres. Projects are to be developed through a collaborative process and limited to certain land types. They may not be conducted in wilderness areas, but may be conducted in wilderness study areas if they will not impair the suitability of wilderness study areas, and may be conducted in FS roadless areas. They may not include the use of herbicides or pesticides or the construction of new permanent roads.

New categorical exclusions regarding certain timber sales were finalized on July 29, 2003.[102] The new exclusions allow live harvests of up to 70 acres; harvests of up to 250 acres of dead and dying trees; and, if necessary to control insects and disease, commercial or non-commercial timber harvests of up to 250 acres — with no requirement that trees be dead or dying.

In addition, Title IV of the Healthy Forests Restoration Act of 2003 on insect infestations and related diseases authorizes "applied silvicultural assessments," which are defined as treatments carried out for information gathering and research purposes, and include timber harvesting, thinning, prescribed burning, pruning, and any combination of those activities.[103] Under § 404, these treatments may be conducted on federal land that the Secretary determines is at risk of infestation by, or is infested with forest-damaging insects, but not in components of the National Wilderness Preservation System, a congressionally-designated wilderness study area, any federal land on which, by Act of Congress or Presidential proclamation, the removal of vegetation is restricted or prohibited, or in an area where the activities would be inconsistent with the applicable land and resource management plan.

"Secretary" is defined in § 402(4) as the Secretary of Agriculture, acting through the Forest Service, with respect to National Forest System land, and the Secretary of the Interior, acting through appropriate offices of the United States Geological Survey, with respect to federally owned land administered by the Secretary of the Interior. Therefore, apparently projects could be conducted on all lands managed by the Secretary of the Interior, including national parks and national wildlife refuges, and not just on BLM lands.

Title IV projects are to be peer reviewed by scientific experts selected by the Secretary and the public is to receive notice of each and be given an opportunity to comment on it. Projects on not more than 1,000 acres may be categorically excluded from NEPA documentation, but may not be carried out adjacent to another area that is categorically excluded and being treated with similar methods. The Secretary is not required to make any findings as to whether an applied silvicultural assessment

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[101] 68 Fed. Reg. 33,814 (June 5, 2003).

[102] 68 Fed. Reg. 44,598.

[103] Section 402(1).

project, either individually or cumulatively, has a significant effect on the environment. Projects are subject to the extraordinary circumstances procedures established by the Secretary. Not more than 250,000 acres may be treated as categorical exclusions.[104]

Some have reacted favorably to the expanded use of categorical exclusions as a way to accomplish necessary projects promptly. Others have pointed out that environmental effects are not being analyzed despite the cumulative size of excluded project areas, and have claimed that usually the public is denied an opportunity to comment on or modify the project. In addition, some assert that the desire to reduce fire risk is being used to accomplish the cutting of large green timber.

The categorical exclusions portion of the FS Handbook sets out types of activities that normally would be excluded from preparation of NEPA documents — unless extraordinary circumstances are present. Extraordinary circumstances include the presence of inventoried roadless areas or species listed under the Endangered Species Act. Until recent FS changes, extraordinary circumstances were defined as "conditions associated with a normally excluded action that are identified during scoping as *potentially* having effects which *may* significantly affect the environment." (Emphasis added.) The presence of an extraordinary circumstance arguably removed the proposed action from qualifying as a categorical exclusion and required the preparation of an EA in order to evaluate the possible environmental effects and determine whether an action might have significant effects requiring an EIS. This is the interpretation of the Handbook section and its legislative history in a Seventh Circuit case.[105]

New interim guidance has been finalized[106] so that now the presence of extraordinary circumstances does not necessarily preclude an action from being a categorical exclusion if the responsible official determines — without preparing an EA — that no significant environmental effects will result from going forward with the proposed agency action. Indeed, under the new directive, a circumstance *is* "extraordinary" only if the responsible official determines it is such because the proposed action would have significant effects and preparation of an EIS is warranted. If the responsible official is uncertain whether the proposed action may have a significant effect on the environment, an EA is to be prepared. However, the official is free to conclude an action will have no significant effect, despite the presence of circumstances such as listed species or inventoried roadless areas. Such circumstances were previously considered (under one interpretation of the regulations) to be extraordinary circumstances *per se*, but now are merely "resource conditions" that must be considered in determining whether an action may have a significant effect. "It is the degree of the potential effect of a proposed action on these resource conditions that determines whether extraordinary circumstances

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[104] Section 404.

[105] Rhodes v. Johnson, 153 F. 3d 785 (7th Cir. 1998).

[106] 67 Fed. Reg. 54,622 (August 23, 2002).

exist."[107] Arguably, this is a significant change from the previous guidance, in that the judgment of the responsible official can replace an EA in determining whether a proposed action in an area with sensitive conditions may have a significant effect on the environment.

In support of the proposed changes on extraordinary circumstances, the explanatory material asserts that there is a split in the decisions of the circuits on the effects of the presence of extraordinary circumstances. The Ninth Circuit has held that an agency may issue a categorical exclusion even where a certain resource condition, such as the presence of threatened or endangered species, is found.[108] However, the case cited for this proposition involved a salvage sale under § 2001 of the Emergency Supplemental Appropriations and Rescission Act,[109] a statute that addressed a particular situation, provided the Secretary with very broad discretion to determine the adequacy of any environmental reviews, and set out a very narrow scope of judicial review of environmental decisions. In contrast, the Seventh Circuit concluded that conducting an internal agency review to determine whether an agency action proposed in an area with one or more extraordinary circumstances could have a significant impact on the environment was not permitted under the then-current FS categorical exclusion provisions, and that preparation of an EA was the proper means to make that determination.[110] The court also noted that the EA process allows for public review; the internal agency determination would not.[111] The recent FS changes now permit the internal review (rather than preparation of an EA) the court referred to. Whether a court would find the new FS position valid under NEPA has not been determined. Under the final FS directive on extraordinary circumstances, some timber sales could be conducted in roadless areas (and possibly in roadless areas with endangered or threatened species) without environmental analyses if the official determines, without the necessity of written documentation of any underlying analysis, that there would be no significant environmental effects.

The Healthy Forests Restoration Act of 2003

Title I of Pub. L. No. 108-148, the "Healthy Forests Restoration Act of 2003" (HRFA), addresses hazardous fuel reduction projects. Section 104 allows hazardous fuel reduction projects in certain areas to be conducted if an EA or EIS is prepared under modified procedures that limit the alternatives that need be considered. Section 104 of the bill requires either an EA or an EIS for each authorized hazardous fuel reduction project, but the environmental evaluations usually need study only the proposed agency action, the "no action" alternative, and possibly one other alternative. If the project is within a specified distance of an "at-risk community," only the proposed agency action need be studied in the EA or EIS. However, § 107

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[107] FSH 1909.15 – Environmental Policy and Procedures Handbook, § 30.3b.2.

[108] Southwest Center for Biological Diversity v. U.S. Forest Service, 100 F. 3d 1443, 1450 (9th Cir. 1996).

[109] Pub. L. No. 104-19, 109 Stat. 194, 240-247.

[110] Rhodes v. Johnson, 153 F. 3d 785, 790 (7th Cir. 1998).

[111] Id., at 787.

of the new law expressly preserves the authority of the Secretary to use other authority, including categorical exclusions, to conduct hazardous fuel reduction projects on federal lands, and the funds appropriated to implement the new statute are not limited to projects conducted in accordance with it. Therefore, the new statute could fund projects conducted under the new categorical exclusions put in place administratively by the FS.

The act includes several provisions that address public notice and participation. Public notice of each authorized hazardous fuel reduction project must be provided — "in accordance with applicable regulations and administrative guidelines," which vary and may excuse notice in some circumstances, as discussed above. The act does not specifically exempt fire projects from ARA. Section 104(e)(2) requires a public meeting to be conducted during the preparation of each hazardous fuel reduction project; subsection (f) requires the Secretary to facilitate collaboration among all interested persons and groups; subsection (g) requires the Secretary to provide an opportunity for public comment during the preparation of any EA or EIS for a project in accordance with applicable agency regulations and guidance [which, as discussed, may vary]; and subsection (h) requires the Secretary to sign a decision document and give notice of the final agency action. The new law also includes special administrative and judicial review provisions for these projects, as discussed below.

Collaboration is directed at several points in the law; § 104(f) reads:

> In order to encourage meaningful public participation during preparation of authorized hazardous fuel reduction projects, the Secretary shall facilitate collaboration among State and local governments and Indian tribes, and participation of interested persons, during the preparation of each authorized fuel reduction project in a manner consistent with the Implementation Plan.[112]

Instead of requiring an opportunity for public comment on the NEPA documents prepared in accordance with that section, § 104(g) ties that opportunity for public comment to the applicable regulations and administrative guidance, which, as discussed above, may or may not require public comment for an EA.

Under § 103, the Secretary is to prioritize projects for both federal and non-federal lands, after considering recommendations made by at-risk communities that have developed community wildfire protection plans.

Section 105 requires the Secretary of Agriculture to issue an interim final rule within 30 days of enactment to establish a pre-decisional administrative review process for hazardous fuel reduction projects authorized by HFRA. A reasonable time for public comment is required, leading to a permanent final rule.

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[112] The Plan referred to is the "Implementation Plan for the Comprehensive Strategy for a Collaborative Approach for Reducing Wildland Fire Risks to Communities and the Environment," dated May, 2002. The Plan address collaboration, but does not contain many specifics as to how collaboration will be carried out.

On January 9, 2004, an interim final rule was issued, along with a request for comments.[113] The interim rule takes hazardous fuel reduction projects out of those projects that are subject to the notice, comment and appeal procedures of Part 215, and establishes a separate pre-decisional objection procedure as new Part 218 of 36 C.F.R., specifically for hazardous fuel reduction projects. A modified EIS or EA must be prepared for fuels projects under the HFRA, and new 36 C.F.R. § 218.4 requires that a final EIS or EA be mailed to those who previously requested to be on the project mailing list or are known to have submitted specific written comments related to the proposed project during the opportunity for public comment provided. Section 218.6(a) clarifies that for projects described in an EA, "such opportunity for public comment will be fulfilled during scoping or other public involvement opportunities as environmental assessments are not circulated for public comment in draft form." Thereafter, notice of an opportunity to object is to be published, and procedures are set out that govern how objections are to be submitted and considered. The reviewing officer is to provide a written response, but objections may be consolidated for this purpose. This response is the only administrative review of HFRA projects.

36 C.F.R. § 218.12 preserves any other authority of the Secretary of Agriculture to protect, manage, or administer National Forest System lands, and provides that authorized hazardous fuel reduction projects proposed by the Secretary of Agriculture or the Under Secretary, Natural Resources and Environment, are not subject to the procedures set out in Part 218, but rather is the final decision of the Department and may be reviewed by the courts. Section 218.13 asserts that any filing for judicial review is premature and inappropriate unless the plaintiff has submitted specific written comments relating to the proposed action and the plaintiff has challenged the project under the Part 218 review process. Judicial review of projects subject to Part 218 "is strictly limited to those issues raised by the plaintiff's submission during the objection process, except in exceptional circumstances such as where significant new information bearing on a specific claim only becomes available after conclusion of the administrative review."

Section 105 requires, with some exceptions, exhaustion of administrative review before filing a civil action in a federal district court. Section 106 urges the federal district courts to expedite, to the maximum extent practicable, challenges to hazardous fuel reduction projects. That section also limits judicial review by limiting injunctive relief and stays pending appeal to 60 days, but these may be renewed. The act also directs the courts when considering any request for an injunction of an authorized hazardous fuel reduction project, to balance likely short- and long-term impacts to the ecosystem from undertaking an agency action against the short- and long-term effects of not undertaking the action.

Title IV of the HFRA addresses silvicultural assessments to respond to insect infestations and includes new categorical exclusions which could permit timber harvests and other measures on not more than 250,000 acres, as discussed under that heading above.

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[113] 69 Fed. Reg. 1,529.

Counterpart Regulations

Pursuant to 50 C.F.R. §402.04, joint "counterpart" regulations were finalized by FS, BLM, the National Park Service, Bureau of Indian Affairs, FWS and NOAA Fisheries on December 8, 2003[114] to streamline the consultations required under § 7 of the Endangered Species Act. Normally, a federal agency prepares a biological assessment and then must consult with either the Fish and Wildlife Service (FWS) or NOAA Fisheries, as appropriate, regarding proposed agency actions that might affect a species listed as endangered or threatened under the ESA, or its critical habitat. The new regulations would allow the FS, BLM and the other participating land management agencies themselves to determine that a proposed federal action implementing the National Fire Plan[115] is not likely to adversely affect species listed under that act. Prescribed fire, mechanical fuels treatments, emergency stabilization, burned area rehabilitation, road maintenance and operation activities, and ecosystem restoration are among the activities or projects that would be covered by the new procedure.

There is no indication in the materials published with the final regulations, or in the "Alternative Consultation Agreement" of whether an agency's "not likely to adversely affect" determination may be appealed administratively or be judicially reviewed, but arguably it would not be. Section 215.12 of the new FS appeal regulations states that preliminary findings made during planning and/or analysis processes on a project or activity are not appealable unless they result in a decision document. As will be discussed in the BLM section, in the grazing regulations proposed by BLM, new 43 C.F.R. §4160.1(d) would state that a biological assessment or biological evaluation prepared for purposes of an Endangered Species Act consultation or conference is not a decision for purposes of protest or appeal. Arguably, if this provision is finalized, it could apply to biological evaluations done pursuant to the counterpart regulations as well. If agency "not likely to affect" determinations are not appealable, only judicial review would be available for review of these agency decisions. Arguably, this could result in a lessening of the public's current opportunity to seek review of similar determinations when they are made by the FWS or NOAA Fisheries.

Counterpart regulations have not been promulgated in the past and their validity has not yet been tested in the courts. A recent FS memorandum indicates that the agency may expand use of the counterpart concept to "all land management activities." In response to the four threats of fire, invasive species, un-managed recreation and loss of open space, the FS is considering expanding use of the self-certification concept of the counterpart regulations, categorical exclusions, and other processes to expedite many management processes.[116] Depending on how and to

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[114] 68 Fed. Reg. 68,254.

[115] The National Fire Plan is defined in 50 C.F.R. § 402.30 as the September 8, 2000 report to the President from DOI and DOA entitled "Managing the Impact of Wildfire on Communities and the Environment" outlining a new approach to managing fires.

[116] *Balancing Our Approach – Process Improvements Related to the Four Threats,* (continued...)

what extent this goal is accomplished and whether the decisions are appealable, public participation could also be curtailed.

Bureau of Land Management

The relevant statutes and recent administrative actions affecting public participation also are discussed in this section of the report. Instances where BLM actions are the same as those discussed above with respect to the FS are noted.

Federal Land Policy and Management Act

In 1976, the Federal Land Policy and Management Act (FLPMA) consolidated and modernized the statutory authority for the management of BLM lands, and established policies to guide that management. Express FLPMA policies require public involvement in the development of land management regulations, and also require the establishment of administrative adjudicatory processes and judicial review:

> The Congress declares that it is the policy of the United States that –
>
> (5) in administering public land statutes and exercising discretionary authority granted by them, the Secretary be required to establish comprehensive rules and regulations after considering the views of the general public; and to structure adjudication procedures to assure adequate third party participation, objective administrative review of initial decisions, and expeditious decisionmaking;
>
> (6) judicial review of public land adjudication decisions be provided by law; ....[117]

These policies are implemented through several FLPMA provisions that direct that the general public be involved in the development of rules and regulations, land use plans and land programs; be allowed to comment on the formulation of standards and criteria; and be given an opportunity to participate in both the preparation *and execution* of plans and programs for the management of the public lands, and in land management activities and decisions. FLPMA both establishes the policy of public involvement and repeatedly states how extensive that involvement must be.

FLPMA required land inventory and planning processes and required public involvement in planning and in decision making in general. "Public involvement" is defined in FLPMA as:

> the opportunity for participation by affected citizens in rulemaking, decisionmaking, and planning with respect to the public lands, including public

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[116] (...continued)
Intermountain Region Director's Round Table Discussion with Chief Bosworth — January 14, 2004, updated January 21, 2004.

[117] 43 U.S.C. § 1701(a).

> meetings or hearings held at locations near the affected lands, or advisory mechanisms, or such other procedures as may be necessary to provide public comment in a particular instance.[118]

Public involvement is repeatedly required in the development, maintenance, and revision of land use plans for the BLM lands,[119] and the statutory language also requires public involvement in management decision making and activities as well as in planning.

BLM plans are to be coordinated with plans for lands in the National Forest System and with the planning and management programs of Indian tribes.[120] To the extent consistent with the laws governing the administration of the public lands, the Secretary of the Interior also is to coordinate the land use inventory, planning, and management activities of the public lands with the land use planning and management programs of other federal departments, and with agencies of the states and local governments within which the lands are located. To the extent the Secretary finds practical, the Secretary is to coordinate with and consider other planning efforts and "provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands." These officials may advise the Secretary on land use matters and the land use plans of the Secretary are to be "consistent with State and local plans to the maximum extent [the Secretary] finds consistent with Federal law and the purposes of this Act."[121]

Other activities, such as sales of lands, also must involve public participation because they are keyed to the land use planning process,[122] and general direction to provide public involvement in planning and management programs is reiterated in 43 U.S.C. § 1712(f) and 1739(e) respectively:

> The Secretary shall allow an opportunity for public involvement and by regulations shall establish procedures, including public hearings where appropriate, to give Federal, State, and local governments and the public, adequate notice and opportunity to comment upon and participate in the formulation of plans and programs relating to the management of the public lands.
>
> In exercising his authorities under this Act, the Secretary, by regulation, shall establish procedures, including public hearings where appropriate, to give the federal, State, and local governments and the public adequate notice and an

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[118] 43 U.S.C. § 1702(e).

[119] 43 U.S.C. § 1712(a).

[120] 43 U.S.C. § 1712(b).

[121] 43 U.S.C. § 1712(c)(9).

[122] 43 U.S.C. § 1713(a). See also 43 U.S.C. § 1720 for additional state notice and coordination requirements when lands might be sold or otherwise conveyed and § 1721 regarding special conveyances to states.

> opportunity to comment upon the formulation of standards and criteria for, and to participate in, the preparation and execution of plans and programs for, and the management of, the public lands.

FLPMA also authorizes advisory councils, whose members are to be representative of the various major citizens' interests concerning issues relating to land use planning or the management of the public lands in the area for which an advisory council is established.[123]

BLM Regulations

The FLPMA requirements are integrated with NEPA processes through regulations that provide for public participation in the environmental reviews that may accompany plans and management decisions. As was true with respect to the FS, and despite the fact that FLPMA has more requirements for public involvement in decision making than does the NFMA, there are more specific agency requirements for public involvement related to plans, and plan revisions and amendments than for project decisions. 43 C.F.R. § 1610.2 requires that the public be provided opportunities to "meaningfully participate in and comment on the preparation of plans, amendments and related guidance and be given early notice of planning activities." Advance notice of preparation of amendments or revisions of plans must be published in the Federal Register and in appropriate media. At least 15 days of public notice must be given for activities the public is invited to attend. Any notice requesting written comments shall provide for at least 30 calendar days for response. Other time periods are specified for review of draft plans and environmental impact statements. Additional requirements are stated very generally, with discretion allowed as to the details. For example, public notice and opportunity for participation in resource management plan preparation "shall be appropriate to the areas and people involved," and shall be provided at points in the planning process that are set out in the regulation. Federal planning efforts are to be coordinated with other federal agencies, state and local governments and Indian tribes, who are to be given opportunities for review, advice, and suggestions.[124]

Resource management guidance is to be consistent with plans and with the policies and programs of other federal agencies, state and local governments and Indian tribes so long as consistency with federal laws and regulation is maintained.[125] There is considerable detail provided as to notice and coordination with state and local governments.

Plans may be revised and revisions shall comply with all the requirements of the regulations for approving an original plan.[126] Plan amendments may be accompanied by an EIS or EA, public involvement as prescribed in 43 C.F.R. § 1610.2, and with

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[123] 43 U.S.C. § 1739(a).

[124] 43 C.F.R. § 1610.3-1.

[125] 43 C.F.R. § 1610.3-2.

[126] 43 C.F.R. § 1610.5-6.

interagency coordination and consistency determinations.[127] If an EA shows there is no significant impact likely to result from the amendment, the District Manager can recommend the amendment to the State Director for approval, and upon approval, the District Manager issues a public notice of the action taken on the amendment. If the amendment is approved, it may be implemented 30 days after that notice. If the EA indicates that an EIS is necessary, then the amendment process follows the same route as preparation and approval of the plan, but consideration is limited to only the portion of the plan being considered for amendment.

Plans, revisions, and amendments may be "protested" before they are finalized, and issues raised in a protest must be addressed before a plan (or relevant part of a plan) may be approved.[128] Further recourse is then to the courts; there is no administrative appeal of plans.

BLM – NEPA and Counterpart Procedures

Many of the issues discussed above in connection with the NEPA processes of the FS also apply to BLM.

There is NEPA guidance at both the Department of the Interior level and at the BLM agency level. The departmental NEPA guidance at Part 516 of the Departmental Manual (DM) was recently modified in several respects, and in the future the revised NEPA guidance of particular agencies will be published as chapters in the Departmental Manual.[129] According to the departmental NEPA materials, an update of the BLM chapter is currently being prepared.[130] 516 DM 4 identifies circumstances in which an EIS will normally be prepared; individual agency chapters are supposed to begin with provisions on when an EA or EIS is required, and also set out the categorical exclusions of each agency. Bureaus and Offices are to develop and implement procedures to ensure the fullest practicable provision of timely public information and understanding of their programs. These procedures are to include public involvement in the development of NEPA analyses and documents, and include, wherever appropriate, provision for public meetings in order to obtain the views of interested parties, newsletters, and status reports of NEPA compliance activities, and the coordination and collaboration with state and local agencies and tribal governments in developing and using similar procedures for informing the public.[131] The public is to be involved as early as possible, and NEPA procedures are intended to achieve early consensus on the scope of NEPA compliance. "Consensus-based management, as described in 516 DM 1.5(A)(1),

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[127] 43 C.F.R. § 1610.5-5.

[128] 43 C.F.R. § 1610.5-1.

[129] 69 Fed. Reg. 10,866 (March 8, 2004) The Departmental Manual is available at [http://elips.doi.gov/]. (Visited 5/28/04.) The materials state that a website compares the new NEPA guidance to previous guidance and sets out supplemental directives at [http://www.doi.gov/oepc]. (CRS's search of the website on 6/16/04 for "NEPA guidance" did not, however, locate such a comparison.)

[130] Id., at 10,867.

[131] Id., at 10,875.

should be used, as appropriate to facilitate this process, and should include the consideration of any publicly developed alternatives. However, the use of consensus-based management may be restricted or ended based on applicable statutory, regulatory, or policy requirements."[132]

The NEPA provisions in the Departmental Manual are relevant to public participation in that there are fewest opportunities for public participation with respect to actions taken as categorical exclusions. 516 DM 3 identifies circumstances in which an EA will normally be required; 516 DM 3.3 states that the public must be provided notice of the availability of EAs. Public comment is not required, but "where appropriate" the public is to be involved and public comments considered. This position is repeated in the BLM/NEPA handbook at 1790.1-4 B4.[133] 516 DM 2.6 states that the scoping process "should" be used to integrate planning activities for separate projects that may have similar or cumulative impacts.[134] This appears to make scoping discretionary in the context of an EA.

BLM also is a party to the joint FS/BLM categorical exclusions for fuels reduction and rehabilitation projects and activities. These exclusions are especially relevant to the management of the significant timber resources by BLM in Oregon and northern California, but also apply to projects on the rangelands. In addition, there are DOI departmental categorical exclusions and BLM-wide categorical exclusions. As discussed in connection with the FS, to the extent activities are conducted as categorical exclusions, there are no formal environmental documents for the public to review, and notice and comment are not required.

Appendix 1 of the Interior Departmental Manual lists departmental categorical exclusions, many of which relate to administrative and personnel matters. Exclusion 1.9 is for policies, directives, regulations and guidelines that are of an administrative nature and whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case. Section 1.11 excludes the joint hazardous fuels reduction activities agreed to with the FS, and § 1.12 excludes the post-fire rehabilitation activities. These categorical exclusions are recent changes.

Whether an EA must be prepared when evaluating the presence of extraordinary circumstances in a situation that otherwise would be a categorical exclusion is another important factor that bears directly on the extent of public participation available. The position of BLM on extraordinary circumstances appears to parallel the new position of the FS in that agency personnel will make crucial determinations on environmental effects without preparation of an EA. The explanatory materials accompanying the departmental changes refer to the CEQ regulations on extraordinary circumstances as those in which a normally excluded action *may have* a significant environmental effect – thus requiring additional analysis and action – and then state: "[a]ny action that is normally categorically excluded must be

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[132] Id., at 10,876.

[133] See [http://www.ca.blm.gov/caso/h1790-1.html], (visited 6/3/2004).

[134] Id., at 10,877.

subjected to *sufficient environmental review* to determine whether it meets any of the extraordinary circumstances, in which case, further analysis and environmental documents must be prepared for the action. Bureaus are reminded and encouraged to work within existing administrative frameworks, including any existing programmatic agreements, when deciding how to apply any of the appendix 2 extraordinary circumstances."[135]

Appendix 2 of the Interior Departmental Manual addresses extraordinary circumstances and states that they are circumstances which may have significant impacts on natural resources, ESA-listed species, etc. As was true of the FS, the DOI approach does not list circumstances that trigger a need to prepare an EA, but rather appears to call for the action officers to decide whether the proposed action in particular circumstances may have a significant effect — a function intended to be fulfilled by the preparation of an EA. Many of the paragraphs in Appendix 2 take a similar stance — an extraordinary circumstance only exists if the acting official concludes, without preparation of an EA, that the action may have a significant effect. Yet 516 DM 3.2A states that the purpose of an EA is to allow the responsible official *to determine whether* to prepare an EIS (i.e. the EA indicates whether a proposed action may have a significant effect), or to otherwise assist in planning and decision making. (Emphasis added.) Similarly, 516 DM 7.4B states that EAs "are prepared either *to provide information in order to make a finding* that there are no significant impacts or that an EIS should be prepared." (Emphasis added.) This is the function of an EA under the CEQ regulations. Previously, the section on categorical exclusions contained a list of circumstances that required an EA to be prepared to determine the likelihood of significant effects.

The new final DOI appeals regulations include a brief description of the environmental review that is completed for a categorical exclusion:

> A categorical exclusion does not exempt an agency action from environmental review. Rather, it requires the agency to scrutinize the proposed action to see whether it meets the criteria for categorical exclusion, that is, whether it is the type of action that the agency has decided, through its procedures adopted under 40 CFR 1507.3 of the regulations of the Council on Environmental Quality, does not individually or cumulatively have a significant effect on the human environment. In practice, this will normally be done through a documented checklist of criteria.[136]

BLM is a party to the counterpart regulations discussed above, and the same points on possible limitations of public participation in connection with those determinations pertain. In the grazing regulations proposed by BLM, new 43 C.F.R. §4160.1(d) would state that a biological assessment or biological evaluation prepared for purposes of an Endangered Species Act consultation or conference is not a decision for purposes of protest or appeal. Arguably, if this provision is finalized, it would probably apply to biological evaluations done pursuant to the counterpart regulations as well. If so, it appears that the only public recourse would be judicial

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[135] Id. (emphasis added).

[136] 68 Fed. Reg. 33,799-33,800 (June 5, 2003).

review. We have no information as to whether BLM will seek to expand the self certification process of the counterpart regulations to other planning and management activities in the same way as the FS is considering.

Proposed Grazing Regulations

Other recent BLM actions also could affect public participation. On December 8, 2003, BLM proposed amendments to the grazing regulations.[137] One proposal is to reduce the instances in which BLM is required to solicit public comment on pending grazing management decisions on the grounds that public participation processes were consuming too much scarce staff time.[138] The explanatory materials state that BLM proposes retaining the requirement that BLM provide the interested public with copies of proposed and final grazing decisions and allowing them respectively to protest and appeal them. BLM also proposes retaining consultation with the interested public for: (1) apportioning additional forage on BLM managed lands; (2) developing or modifying a grazing activity plan and other BLM land use plans; (3) planning a range development or improvement program; and (4) reviewing and commenting on grazing management evaluation reports. BLM proposes eliminating requiring public consultation on: (1) adjusting allotment boundaries; (2) changing grazing preference; (3) issuing emergency closures; (4) renewing or issuing a grazing permit or lease; (5) modifying permits and leases; or (6) issuing temporary and non-renewable grazing permits. Arguably, many of these topics for which public consultation would be eliminated could be important to the condition of the rangelands and their ability to serve non-grazing multiple uses. BLM also may consult with permittees and lessees, state and local officials and the interested public on other matters if the authorized officer finds consultation would facilitate management of grazing on the public lands.

At several points, the proposed grazing regulations appear to give permittees and grazing operators a greater role in management decisions than other segments of the public. As discussed above, consultations are conducted with the permittees and operators and with the state and local officials, but the public will be consulted only with respect to certain topics.[139] The materials explain that the public will be consulted

> where such input would be of the greatest value, such as when deciding vegetation management objectives in an allotment management plan, or preparing reports evaluating range conditions. BLM in cooperation with the grazing operator, would retain the discretion to determine and implement the most appropriate on-the-ground management actions. BLM values productive consultation with the interested public. However, BLM needs some flexibility

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[137] 68 Fed. Reg. 68,454. See Carol Hardy-Vincent, CRS Report No. CRS Report RL32244, *Grazing Regulations and Policies: Changes by the Bureau of Land Management.*

[138] Id., at 68,454.

[139] Id.

> in order to take responsive, timely, and efficient management action without being required to first undertake mandatory consultation.[140]

In addition, the proposed regulations would add to 43 C.F.R. § 4120.5-2 (on cooperation) to provide that BLM "shall cooperate" with state, local, or county-established grazing boards in reviewing range improvements and allotment management plans on public lands. Federal grazing advisory boards authorized by FLPMA expired under that act on December 31, 1985, and have not been reinstated. The consultations with the non-federal grazing-focused boards mentioned in the proposed regulations would be in addition to interactions with the federally constituted Resource Advisory Councils, which are required to have balanced membership.[141]

Proposed Grazing Appeals

The proposed grazing regulations would clarify how appeals of BLM grazing decisions and petitions for stays of decisions pending appeal would affect the timing of implementation of a grazing-related decision and the continuity of ongoing grazing operations. As discussed in the explanatory materials, basically if an agency decision can be and is stayed, an appellant must exhaust administrative remedies before going to court; if a decision or action is effective immediately and not stayed, a claimant may proceed to court. In developing the proposed regulations, BLM asserts that it balanced its duties under various statutes by allowing grazing to continue under existing permit terms and conditions if a decision changing those terms and conditions is stayed. The agency asserts that this outcome is valid under the APA (5 U.S.C. § 558), which requires that "a license with reference to an activity of a continuing nature" does not expire until an agency makes a new determination.[142] In instances where there is not an existing permit, BLM would allow grazing in accordance with a decision, even in the case of a stay, if the decision favored grazing in several enumerated circumstances, and affected parties could proceed to court without exhausting administrative remedies. Under current and proposed regulations, the authorized officer may provide that a grazing decision is effective upon issuance unless a stay is granted by the Office of Hearing and Appeals. In sum, it appears that under the current and proposed rules, existing grazing usually would be allowed to continue and anyone challenging a change decision could be required to pursue more expensive judicial appeals, which could reduce the number of appeals.

General DOI Appeals

On June 5, 2003, the Office of Hearings and Appeals of the Department of the Interior finalized changes to its appeals rules in several respects that affect public

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[140] Id.

[141] 43 C.F.R. § 1784.

[142] Id.

participation issues.[143] Under the new regulations, restrictive decisions of the Interior Board of Land Appeals (IBLA) on certain definitions and on standing to appeal were "codified" in the regulations as new 43 C.F.R. § 4.410.

A new provision at 43 C.F.R. § 4190.l and a change at § 5003.1 would make BLM wildfire management decisions affecting rangelands and forests effective immediately when issued, a position that complicates administrative appeals. The appeals changes received many comments when proposed. Those in favor of the proposed rules emphasized the protective nature of the actions and that "the faster BLM is able to take action to reduce future threats of wildland fires, the more likely BLM can safeguard public and firefighter health and safety, protect property, and improve environmental baseline conditions in the wildland-urban interface and other priority areas."[144] Other comments objected to the regulation, asserting that the rule change would undermine the value of public comment by allowing citizen concerns to be effectively ignored, further eroding the trust citizens have in public land management agency decisions. Comments further asserted that (1) the proposed rule would allow a project to begin before a decision is made on the appeal, effectively discounting public opinion; (2) a decision on appeal to reject a proposed project has less effect if the project has already commenced and any negative effects of the action have already occurred; (3) the public is less likely to participate in the decision making process when it can have no real or immediate effect on a proposed project; and (4) such a policy "contradicts the spirit of FLPMA which encourages public comment on proposed actions and participation in the appeal process for a management decision."[145]

In response, DOI stated that "[t]he appeal process is not part of the public participation required by Section 309(e) of FLPMA." This approach contrasts to the position taken by the Forest Service that appeals *are* a part of public participation, but are redundant if pre-decisional input is available. DOI also asserted that making fire management decisions effective immediately actually "encourages public participation by making it more essential at the project design/environmental review state. It is at this stage that BLM gathers evidence and public input upon which to base its fire management plans/projects and decisions."[146] Some comments pointed out that there was existing authority to make decisions effective immediately on a case-by-case basis, but BLM responded that it "views its ability to carry out fire management practices as a matter of great urgency" and that "these fire management decisions need to be effective immediately."[147] Wildfire management decisions are also expedited before the IBLA under new § 4.416, such that a decision is to be rendered by that Board within 60 days after all pleadings have been filed, and within 180 days after the appeal was filed.

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[143] 68 Fed. Reg. 33,794.

[144] Id., at 33,795.

[145] Id., at 33,796.

[146] Id.

[147] Id.

There is precedent for these changes in the DOI regulation at 43 C.F.R. § 4160.3(f), which allows BLM to place certain protective grazing decisions into effect immediately or on a date certain. A decision that is put into effect immediately could still be appealed to the IBLA and a petition for a stay filed under 43 C.F.R. § 4.21(b). (The action being appealed could be 'stayed' from going into effect for the time the stay is in place.)

Several aspects of stays and effectiveness of decisions can present issues as to when judicial review is available. The Supreme Court in *Darby v. Cisneros*[148] held that when judicial review is sought under the APA (and most cases would be brought under the APA), a plaintiff can file in court once an agency decision is final, unless further administrative review is required by the agency's regulations *and* those regulations also provide that the decision for which review is sought is made inoperative during the time of review. If a hazardous fuels management project decision is made effective immediately and the decision is not automatically made inoperative during the time appeals, if any, are taken,[149] it appears that judicial review of such a decision would be available. Similarly, if a stay is sought before the IBLA and denied, an injunction could be sought at the judicial level, although part of the project in question could be underway. 43 C.F.R. § 4.21(c) states:

> No decision which at the time of its rendition is subject to appeal to the Director or an Appeals Board shall be considered final so as to be agency action subject to judicial review under 5 U.S.C. 704, unless a petition for a stay of decision has been timely filed and the decision being appealed has been made effective in the manner provided in paragraphs (a)(3) or (b)(4) of this section [which provide that the Director or an appeals board may deny or partially deny a petition for a stay within a specified time] or a decision has been made effective pending appeal pursuant to paragraph (a)(1) of this section [which provides that a decision not normally effective immediately can be made so by the Director or an appeals board] or pursuant to other pertinent regulation.

Conclusion

The principal statutes governing the federal lands administered by the FS and BLM establish a policy of public participation in land and resource management planning and decision making. Public participation requirements at both the statutory and regulatory levels are most clear with respect to larger-scale decisions, such as the development and revision of plans themselves, rather than with respect to projects and activities implementing plans. However, FLPMA contains several requirements for public participation in decision making and management activities. In addition,

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[148] 509 U.S. 137 (1993).

[149] On this point, see Natural Desert Association v. Green, 953 F. Supp. 1133, 1141-1142 (D. Or. 1997), which found the agency stay provisions did not render agency decisions inoperative because they vested discretion in the agency to stay the decision pending appeal. Idaho Watersheds Project v. Bureau of Land Management, 307 F. 3d 815 (9th Cir. 2002) examined exhaustion of administrative appeal issues in the context of BLM grazing permits and declined to rule on whether the regulations on stays *per se* failed to render agency decisions inoperative because the court found that in the grazing context decisions were not rendered inoperative as a factual matter.

the Appeals Reform Act, related to the FS, requires that the public receive notice and have an opportunity to comment on projects and activities implementing FS plans. Despite the broad language of ARA, FS implementing regulations exempt many projects and activities, such as those conducted as categorical exclusions, from the notice and comment provisions. This has been true since ARA was enacted, but recent expansion of the number and scope of categorical exclusions makes the elimination of public participation in connection with them more significant.

Both the FS and BLM have recently made or proposed administrative changes to their planning, NEPA, and appeal processes that also affect public participation. The FS has seen a succession of changes to its planning regulations and has expanded management direction in agency documents below the level of regulations — through agency manual and handbook materials and possibly down to the level of agency "white papers" — a system that makes it difficult for a member of the public to compile and integrate the relevant management information in order to participate effectively.

In the past, both agencies relied heavily on NEPA processes to provide public participation. Requirements for preparation of NEPA documents (especially EISs), with associated requirements for public participation, are most clear in connection with agency plans. Despite statutory direction to incorporate public participation into agency decision making as well as planning (especially with respect to BLM), there are fewer specific requirements in agency regulations to do so, and broader discretion as to how public involvement may be provided.

In addition, there has been a significant expansion in the use of categorical exclusions by both agencies, and a narrowing of the extent to which the presence of extraordinary circumstances may remove a proposed action from being a categorical exclusion. Although some of fire-related categorically excluded projects will be developed collaboratively, and some insect control related categorically excluded projects are required to have public notice and comment, arguably the elimination of many environmental studies together with their associated notice and comment periods, the expansion of projects conducted as categorical exclusions, and the new approach to extraordinary circumstances may significantly reduce opportunities for public input.

Access to administrative appeals has also been reduced. In the past, the FS has viewed appeals as a type of public participation and recently has substituted a pre-decisional objection process for "redundant" public appeals of forest plans. The ARA requires administrative appeals of projects and activities implementing plans, but does not require appeals of plans themselves. In contrast, the BLM asserts that appeals are not a form of public participation, and can be limited without violating the letter or spirit of FLPMA. By making many decisions effective immediately — with recourse likely to be only to the courts — both agencies have effectively skipped administrative appeals in those instances. Because judicial review is more expensive, this may result in fewer appeals, and hence a reduction in public review of agency actions.

The agencies assert the need for expeditious decision making, improved efficiency and cost reduction as reasons for some of the regulatory changes. Some

changes are the product of experience over time with the operation of certain programs and the agencies' judgment that streamlining is necessary for the efficient management of the federal lands.

The extent to which the public is allowed to participate meaningfully in the management of the federal lands managed by the FS and BLM may raise questions of compliance with current statutory requirements. Agency actions and their effects on public participation may raise policy issues of either legislative or oversight interest to the Congress.