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# From Words to Action: The Impact and Legal Status of the 2006 National Wildlife Refuge System Management Policies

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# From Words to Action: The Impact and Legal Status of the 2006 National Wildlife Refuge System Management Policies

Robert L. Fischman<sup>\*</sup>

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I. INTRODUCTION

On June 26, 2006, the United States Fish and Wildlife Service (“FWS” or “Service”) issued three new final policies governing the conservation of the National Wildlife Refuge System.<sup>1</sup> These new agency manual provisions nearly complete an implementation project that began shortly after Congress enacted a new organic statute in 1997, providing a modern charter for management of the refuges.<sup>2</sup> More broadly, they open a window into the current administration’s attitudes toward public land management. They also raise the stakes for the developing case law on whether land management agencies will be bound to follow their own published guidance.

A sprawling, ninety-six million acre network of reserves and easements dedicated to nature protection,<sup>3</sup> the National Wildlife Refuge System is the nation’s most valuable asset for ecological conservation. Though the Interior Department’s other dominant-use public land system, the National Park System, is much better known, the National Wildlife Refuge System is larger and more diverse. Management of the individual units of the Refuge System,

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1. Policy on National Wildlife Refuge System Mission and Goals and Refuge Purposes, 71 Fed. Reg. 36,404 (U.S. Fish & Wildlife Serv. June 26, 2006); Final Appropriate Refuge Uses Policy Pursuant to the National Wildlife Refuge System Improvement Act of 1997, 71 Fed. Reg. 36,408 (U.S. Fish & Wildlife Serv. June 26, 2006); Final Wildlife-Dependent Recreational Uses Policy Pursuant to the National Wildlife Refuge System Improvement Act of 1997, 71 Fed. Reg. 36,418 (U.S. Fish & Wildlife Serv. June 26, 2006).

2. National Wildlife Refuge System Improvement Act of 1997, Pub. L. No. 105-57, 111 Stat. 1252 (codified as amended at 16 U.S.C. §§ 668dd, 668ee (Westlaw 2006)).

3. The ninety-six million acres include ninety-three million acres of named national wildlife refuges and three million additional acres of waterfowl production areas and coordination areas. U.S. FISH & WILDLIFE SERV., ANNUAL REPORT OF LANDS UNDER CONTROL OF THE U.S. FISH AND WILDLIFE SERVICE 9 (rev. Mar. 2006), available at [http://www.fws.gov/realty/pdf\\_files/2005%20Lands%20Report.pdf](http://www.fws.gov/realty/pdf_files/2005%20Lands%20Report.pdf).

especially the 545 named national wildlife refuges,<sup>4</sup> will determine how well the United States conserves its biological heritage and contributes to international efforts promoting sustainable development.<sup>5</sup>

While the national parks, national forests, and Bureau of Land Management (“BLM”) lands received concentrated attention from Congress in the 1970s, the refuges did not acquire updated organic legislation for coordinated management until 1997. Organic legislation seeks to organize management among diverse public land units so that, together, they can achieve more than just the sum of their parts. In other words, it aims to transform *collections* of resources into organic *systems*. The hallmarks of organic legislation—purpose statements, designated uses, comprehensive planning, substantive management criteria, and public participation<sup>6</sup>—have changed little since the 1970s. The 1997 Refuge Improvement Act is the most recent application of these elements and indicates the current approaches Congress favors in public land administration.<sup>7</sup> It sets out a systemic conservation mission, defines dominant uses, requires comprehensive planning for each refuge, establishes substantive management criteria, and specifies avenues for public participation. One of the most noteworthy aspects of the 1997 law is the relatively rich detail of the substantive management criteria, compared to previous federal organic statutes. Nonetheless, Congress left plenty of room for the FWS to flesh out the management details.

The policies that govern implementation of the 1997 Act translate words into conservation actions. Therefore, this article examines the latest effort to put the operating principles of a federal land-management agency into practice. The 2006 policies are a mixed bag, reflecting both the peculiar themes of the George W. Bush Administration’s Interior Department and the conservation tradition of the career refuge managers. When it

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4. *Id.* at 1.

5. More than any other United States public land system, the refuges share sustainable development’s focus on the principle of compatibility through application of best science. Robert L. Fischman, *The Significance of National Wildlife Refuges in the Development of U.S. Conservation Policy*, 21 J. LAND USE & ENVTL. L. 1, 21-22 (2005).

6. Robert L. Fischman, *The National Wildlife Refuge System and the Hallmarks of Modern Organic Legislation*, 29 ECOLOGY L.Q. 457, 510-13 (2002).

7. National Wildlife Refuge System Improvement Act of 1997, Pub. L. No. 105-57, 111 Stat. 1252 (codified as amended at 16 U.S.C. §§ 668dd, 668ee (Westlaw 2006)).

comes to defining substantive criteria, the FWS deserves high marks for creativity, fidelity to the 1997 Refuge Improvement Act, and promoting ecological integrity. The priority goals fleshing out the system mission and the criteria for making appropriate use determinations best illustrate this strength of the 2006 policies.

However, the policies stumble badly in their emphasis on the individual refuge purposes, which tend to focus more on traditional fish and game concerns than on the newer 1997 systemic mission. All three of the policies reflect an affinity for state fish and game management at the expense of national system planning. The FWS wrote the final policies with state fish and game officials assigned to the federal government through interagency personnel agreements. The content of the policies displays the influence of state interests in several ways. First, the Goals and Refuge Purposes Policy demotes systemic purposes to a secondary (“to the extent practicable”) position relative to “paramount” individual purposes. Second, the Appropriate Uses Policy allows state fish and game activities on refuges to escape evaluation through memoranda of understanding. Third, the Wildlife-Dependent Recreation Policy emphasizes the amount of hunting and fishing opportunities on each refuge over their distinctive attributes. These examples illustrate the unrealized potential of the 2006 policies to secure a conservation order in the refuge system that highlights the connections among refuges more than their differences. Such an alternative policy would distinguish national wildlife refuges through visitor experiences that reflect a greater concern with education through contact with the very best practices of modern ecosystem management.

Courts also have a role to play in evaluating federal public land policies. When agency manuals purport to bind personnel and when the agency promulgates manual provisions using notice-and-comment rulemaking procedures, the public has a reasonable expectation that courts will bind the agency to its final determinations. This is implicit in the invitation for the public to spend its time commenting on the agency proposals. However, the 2006 policies raise difficult questions about whether courts would enforce these new policies if the FWS does not act in accordance with its words. In particular, disclaimers of judicial reviewability (which are not part of the policies, but were published with them) may provoke courts to clarify the factors that resolve when manuals or policies bind an agency.

This Article traces the efforts of FWS to translate the words of the organic act into on-the-ground action by way of the new management policies. It begins with a brief review in Part II of the significance of the 1997 refuge organic legislation, placing the 2006 policies in the context of the statutory framework. Part III proceeds to discuss the most important aspects of the 2006 policies in terms of both practical refuge management and broader trends in natural resources law. Part IV evaluates the legal status of the 2006 policies with a special focus on whether the judiciary would bind the FWS to follow them. The Article concludes in Part V with suggestions for the next round of FWS policymaking for refuge conservation.

The 2006 policies largely complete the administrative project of updating the *Fish and Wildlife Service Manual* (hereinafter "Manual")<sup>8</sup> for comprehensive planning and for deciding which uses should occur on refuges. However, the updated manual still falls short of providing guidance on many other important mandates from the 1997 law, such as acquisition of water rights and biological monitoring. More work is needed to fulfill the promise of the visionary organic statute.

## II. THE REFUGE IMPROVEMENT ACT AND THE NEED FOR POLICY

The success or failure of refuge management turns on how well the framework of the 1997 Act operates in theory and practice. That law, the only organic act of its generation,<sup>9</sup> has generated little controversy to date. However, recent administrative developments will begin to challenge the framework and the Service's chosen implementation approach in new ways.

In some respects the refuges face challenges similar to other public lands. For instance, increased recreation vexes refuge managers seeking to promote public use but not invite its adverse consequences. National defense and energy policy establish priorities that refuges struggle to accommodate within their conservation mission. And, years of under-funding have created terrible maintenance backlogs and unfulfilled promises of

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8. U.S. FISH & WILDLIFE SERV., THE FISH AND WILDLIFE SERVICE MANUAL (updated continually), <http://www.fws.gov/policy/manuals/> [hereinafter FISH & WILDLIFE MANUAL].

9. As previously discussed, organic legislation organizes management of diverse collections of public resources (such as public lands) in order to orchestrate administration of individual units to synergistic effect.

improvement.

In other respects, though, the refuges face more difficult problems. For instance, more than other public lands, the refuges in the contiguous states seek to protect and enhance ecosystems degraded almost beyond recognition by human activities including farming and dam building. The intensive management that results from this legacy means that disking, mowing, burning, and flooding remain common practices on refuges. Though many desirable species thrive on these management activities, the level of environmental disturbance can be great. Refuges contain relatively lower elevation areas, higher soil productivity, and more wetlands than the other federal lands.<sup>10</sup> These attributes, along with its broad geographic distribution, account for the high biodiversity of the refuge system. But refuges also are in greater proximity to anthropogenic lands (urban, built-up, and agricultural) than other federal lands.<sup>11</sup> All this makes refuges particularly susceptible to downstream pollutants and other external threats. Further, the system's relatively low national profile makes it less able to compete for monies in this period of austere federal natural resources budgets. The refuges receive fewer budget dollars for resource management and operations than the other federal public land systems, and nearly 200 refuges are completely unstaffed. With a statutory deadline of 2012 to complete comprehensive conservation plans for each refuge,<sup>12</sup> the system is ill-equipped to take on additional ambitious administrative tasks.

Yet, converting the words in the United States Code to actions on the ground (and in the water) requires the Service to create procedures and more precise standards. From May 2000 to January 2001, the Clinton Administration issued the first three policies implementing the 1997 statute, which are all collected in a comprehensive FWS manual.<sup>13</sup> While these policies are not the focus of this article, they provide the context in which the three Bush Administration policies operate.

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10. J. Michael Scott et al., *National Wildlife Refuge System: Ecological Context and Integrity*, 44 NAT. RESOURCES J. 1041, 1041 (2004).

11. *Id.* at 1050.

12. 16 U.S.C. § 668dd(e) (Westlaw 2006).

13. FISH & WILDLIFE MANUAL, *supra* note 8. "The manual contains the standing and continuing directives of the Service with which Service employees must comply." *Id.*, pt. 010, § 1.4(B) (defining the role of the manual in the governance of the FWS).

The first of the Clinton policies, the Refuge Planning Policy, addressed the top agency priority: to begin meeting the deadline Congress established for the preparation of individual refuge plans (called “comprehensive conservation plans,” or “CCPs”) by 2012.<sup>14</sup> As the application of national standards to specific refuge circumstances, CCP development was an appropriate first operational step.<sup>15</sup> Comprehensive public land unit planning was by then routine and had long been required of other agencies (and even of the FWS for Alaska refuges).<sup>16</sup> Applying this tool to the refuges, therefore, did not require especially path-breaking work.

The second policy out of the administrative gate, the Compatibility Policy, dealt with the statutory compatibility criterion.<sup>17</sup> The compatibility criterion requires the FWS to examine all refuge uses to ensure that they are not materially interfering with or detracting from the fulfillment of the mission of the refuge system or the purposes of the individual refuges affected.<sup>18</sup> More than any other issue, the long controversy over refuge uses incompatible with wildlife conservation spurred Congress to act in 1997.<sup>19</sup> Therefore, the Service correctly viewed compatibility determinations as a priority and sensibly sought to fold compatibility analysis into comprehensive planning. Congress emphasized the importance of the compatibility criterion by requiring that the Interior Department promulgate regulations within twenty-four months of the enactment of the Refuge Improvement Act.<sup>20</sup> This was the only mandate for rulemaking in the 1997 Act. Only one year late (which is pretty good by federal

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14. 16 U.S.C. § 668dd(e) (Westlaw 2006).

15. Refuge Planning Policy, 65 Fed. Reg. 33,892 (U.S. Fish & Wildlife Serv. May 25, 2000) (codified in FISH & WILDLIFE MANUAL, *supra* note 8, pt. 602 § 1.4). See generally ROBERT L. FISCHMAN, THE NATIONAL WILDLIFE REFUGES: COORDINATING A CONSERVATION SYSTEM THROUGH LAW 102-08 (2003), for further analysis of this policy.

16. Alaska National Interest Lands Conservation Act of 1980, Pub. L. No. 96-487, 94 Stat. 2371 § 304(g). For a discussion of the special rules that apply to Alaska refuges, see FISCHMAN, *supra* note 15, at 183-192.

17. Final Compatibility Regulations Pursuant to the National Wildlife Refuge System Improvement Act of 1997, 65 Fed. Reg. 62,458 (U.S. Fish & Wildlife Serv. Oct. 18, 2000) [hereinafter “Final Compatibility Regulations”] (codified at 50 C.F.R. pts. 25, 26, 29 and in FISH & WILDLIFE MANUAL, *supra* note 8, pt. 603 § 2). See generally Fischman, *supra* note 6, at 547-562, for analysis of this policy.

18. 16 U.S.C. §§ 668dd(d)(3)(a)(i), 668ee(1) (Westlaw 2006).

19. Fischman, *supra* note 6 at 493-499 (describing the history of the enactment of the 1997 law).

20. 16 U.S.C. § 668dd(d)(3)(B) (Westlaw 2006).



environmental law standards), the FWS promulgated the regulations.<sup>21</sup> On the same day, the Service also published the Compatibility Policy, which mirrors the regulations, in its Manual.<sup>22</sup>

Among the substantive considerations of the Compatibility Policy, the most innovative prohibits uses that reasonably may be anticipated to fragment habitats,<sup>23</sup> a form of ecological degradation conservation biologists agree is a leading threat to biological integrity.<sup>24</sup> This substantive policy against fragmentation is unprecedented in United States public land law, and thus raised expectations for the content of the next policy.

The final Clinton-era policy, the Integrity-Diversity-Health Policy, interpreted the second most important substantive management criterion in the Act, after compatibility. This criterion requires the Service to ensure the maintenance of “the biological integrity, diversity, and environmental health” of the refuge system.<sup>25</sup> Breathing life into these three terms was important because they represent the furthest Congress had ever pushed land agencies toward mandated ecosystem management.<sup>26</sup> They also constitute the statutory mandate that most directly supports the refuge system’s mission to create and maintain a network of lands and waters for conservation of plants and animals.<sup>27</sup> Defining the three terms describes what ecological conditions the Service must

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21. Final Compatibility Regulations, *supra* note 17.

22. Final Compatibility Policy Pursuant to the National Wildlife Refuge System Improvement Act of 1997, 65 Fed. Reg. 62,484 (U.S. Fish & Wildlife Serv. Oct. 18, 2000) (codified in FISH & WILDLIFE MANUAL, *supra* note 8, pt. 603 § 2).

23. FISH & WILDLIFE MANUAL, *supra* note 8, pt. 603 § 2.5).

24. Habitat fragmentation occurs when a formerly continuous area is divided by roads, trails, or other development, breaking it into two. Although the actual area of the development may be quite small (e.g. a road cutting across a refuge), the division significantly impairs the functioning of the ecosystem, as many species will not cross barriers, or will be disturbed by invasive species or other nuisances migrating in along the new corridor. See generally NAT’L RESEARCH COUNCIL, SCIENCE AND THE ENDANGERED SPECIES ACT (1995); Ellen I. Damschen et al., *Corridors Increase Plant Species Richness at Large Scales*, 313 SCIENCE 1284 (2006); David S. Wilcove et al., *Quantifying Threats to Imperiled Species in the United States*, 48 BIOSCIENCE 607 (1998).

25. 16 U.S.C. § 668dd(a)(4)(B) (Westlaw 2006); Policy on Maintaining the Biological Integrity, Diversity, and Environmental Health of the National Wildlife Refuge System, 66 Fed. Reg. 3810 (U.S. Fish & Wildlife Serv. Jan. 16, 2001) (codified in FISH & WILDLIFE MANUAL, *supra* note 8, pt. 601 § 3). I analyze the content of this policy in Fischman, *supra* note 6, at 563-71, and Robert L. Fischman, *The Meanings of Biological Integrity, Diversity and Environmental Health*, 44 NAT. RESOURCES J. 989 (2004).

26. Fischman, *The Meanings of Biological Integrity, Diversity and Environmental Health*, *supra* note 25, at 990-91.

27. 16 U.S.C. § 663dd(a)(2) (Westlaw 2006).

maintain on the refuges. These conditions, in turn, become important limitations on refuge uses that must operate within the constraint of ecological sustainability.

In addition to driving large-scale goals within the refuges, the Integrity-Diversity-Health Policy also instructs managers to address risks to ecological resources that originate outside of refuge boundaries.<sup>28</sup> That provision is the most direct and detailed federal public land law on the grave problem of external threats. The Integrity-Diversity-Health Policy pushes individual refuge management decisions toward the central conservation mission of the system and helps the FWS promote continent-wide connections for wildlife over the long term. This is a centripetal force counteracting the tendency for diverse, multiple-unit systems to spin away from core, organizing principles.<sup>29</sup>

When the Service finalized its Integrity-Diversity-Health Policy on January 16, 2001, time had run out on the Clinton Administration, which had proposed three more key draft policies that were left to the new Bush Administration to revise.<sup>30</sup> That it took so long for the Bush Administration to finalize those policies is a reflection of the Interior Department's commitment to extensive consultation with state fish and wildlife agencies, but it is hard to justify a five-year wait based upon consultation alone. Rather, the delay reflects the relatively low priority of the refuge system in natural resources policy. Neither congressional oversight nor Interior Department leadership bothered to facilitate these guidelines or to assert greater FWS control over refuge conservation, which are crucial for the Service to fulfill its mission under its organic legislation. It is only against these diminished expectations from the excitement generated by the 1997 Act and its initial implementation conference in 1998<sup>31</sup> that the 2006

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28. FISH & WILDLIFE MANUAL, *supra* note 8, pt. 601 § 3.20.

29. Fischman, *supra* note 6, at 461, 499-501, 583, 586.

30. Draft Policy on National Wildlife Refuge System: Mission, Goals, and Purposes, 66 Fed. Reg. 3668 (U.S. Fish & Wildlife Serv. Jan. 16, 2001); Draft Appropriate Refuge Uses Policy, 66 Fed. Reg. 3673 (U.S. Fish & Wildlife Serv. Jan. 16, 2001); Draft Wildlife-Dependent Recreational Uses Policy, 66 Fed. Reg. 3681 (U.S. Fish & Wildlife Serv. Jan. 16, 2001). The Clinton administration issued one other draft refuge policy, on wilderness stewardship, on that same day. See Fish and Wildlife Service, Draft Wilderness Stewardship Policy, 66 Fed. Reg. 3708 (U.S. Fish & Wildlife Serv. Jan. 16, 2001). However, unlike the other policies, the wilderness stewardship policy applies only to those portions of refuges that are or could be designated by Congress as wilderness areas. *Id.* Also, unlike the other policies, the wilderness stewardship guidance has not yet been promulgated in final form.

31. In October 1998, the FWS held its first-ever National Wildlife Refuge System

policies can be judged to advance refuge management.

### III. THE SUBSTANCE OF THE 2006 POLICIES

The three 2006 policies accept the administrative foundation established by the Clinton Administration. This came as a bit of a surprise. Both the five-year gestation period and the Bush Administration rejection of most other Clinton-era public land management policy premises suggested that the final policies might make an abrupt departure from the 2001 proposals.<sup>32</sup> But, the new policies are rather conventional in their approach to decision-making.

The 2006 policies fill important gaps in the 1997 Act and facilitate the management tasks laid out in the previous guidance: comprehensive unit-level planning and evaluation of proposed and existing uses. They fit within the framework established by the Clinton Administration, which had issued drafts of each of the three 2006 policies. But while they do not depart from established thinking about what guidance the refuges need over the next decade, the 2006 policies bear the prints of an administration less oriented toward ecosystem protection and more concerned with both sustaining existing refuge activities and deferring to state wildlife management preferences. They continue to address the directives of the organic act; but they do not sufficiently resist the centrifugal tendency of refuges to hew to local custom and individual purposes at the expense of promoting distinctive system goals.

This section describes the most important features of each of the three 2006 policies. The Goals and Refuge Purposes Policy provides important details about the content of the systemic mission created by the Refuge Improvement Act and the interpretation of individual refuge purposes. Both are important in setting benchmarks for planning, determining compatibility of uses, and reconciling differences among applicable goals. The Appropriate Uses Policy delineates the types of activities subject to

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Conference in Keystone, Colorado to consider the steps necessary for advancing the newly legislated system mission. The conference led to an ambitious strategic plan. See U.S. FISH & WILDLIFE SERV., *FULFILLING THE PROMISE: THE NATIONAL WILDLIFE REFUGE SYSTEM* (1999), available at <http://training.fws.gov/library/Pubs/Fulfillprom.pdf>.

32. For instance, the Bush Administration's revision of National Forest planning represented a fundamental rejection of the Clinton approach. National Forest System Land Management Planning, 70 Fed. Reg. 1023 (U.S. Forest Serv. Jan. 5, 2005).

the appropriate use test, and the criteria for applying the test. The Wildlife-Dependent Recreation Policy describes how the Service promotes each of the six kinds of recreational uses that receive priority under the 1997 Act. After critically analyzing the three policies, this section concludes with a synthesis of their common strengths and weaknesses. Notwithstanding judgments about the substantive merit of the policies, agency accountability through judicial review is a key issue in resolving whether the policies will be effective.

#### A. *Goals and Refuge Purposes Policy*

Two of the key elements of refuge administration, for which earlier policies provided detailed instructions, are comprehensive planning and compatibility determinations. They each require the Service to analyze the consequences of activities for fulfillment of both the mission of the refuge system and the purposes of the individual units affected. The Goals and Refuge Purposes Policy helps define these two critical benchmarks for planning and compatibility. It fleshes out the meaning of the refuge system mission by establishing five goals for the Service and provides guidance on how to determine individual refuge purposes. While the statements of and procedures for determining system and unit purposes are quite good and consistent with past practice, the Policy runs aground in elevating the priority of individual refuge purposes higher than necessary. This result may hamper progress, charted by the 1997 Act, from a collection of disparate reserves to a coordinated system of continental-scale ecological conservation.

##### 1. *Systemic goals.*

The 1997 Refuge Improvement Act lays out a broad mission for the refuge system but fails to articulate clear goals or milestones for achieving the mission. The statutory mission of the refuge system is to “administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of” animals, plants, and habitat.<sup>33</sup> The 1997 Act goes on to define the two most elastic terms of the mission: conservation and management. They are synonymous and mean “to sustain and, where appropriate, restore and enhance, healthy populations” of

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33. 16 U.S.C. § 668dd(a) (2) (Westlaw 2006).

animals and plants utilizing methods associated with “modern scientific resource programs.”<sup>34</sup>

While the Act’s legislative history and prior policies inform the meaning of these terms defining the mission of the refuge system,<sup>35</sup> they do not construct a narrative explanation of the refuge system purpose. The 2006 Goals and Refuge Purposes Policy fills the gap by providing a clear list of five goals that derive from the mission and other objectives stated in statute. These goals are worth quoting verbatim because they present an excellent, progressive statement of what a national network of public property can accomplish beyond fulfilling individual, site-specific purposes.

The five goals of the Refuge System in the 2006 Goals and Refuge Purposes Policy are:

A. Conserve a diversity of fish, wildlife, and plants and their habitats, including species that are endangered or threatened with becoming endangered.

B. Develop and maintain a network of habitats for migratory birds, anadromous and interjurisdictional fish, and marine mammal populations that is strategically distributed and carefully managed to meet important life history needs of these species across their ranges.

C. Conserve those ecosystems, plant communities, wetlands of national or international significance, and landscapes and seascapes that are unique, rare, declining, or underrepresented in existing protection efforts.

D. Provide and enhance opportunities to participate in compatible wildlife-dependent recreation (hunting, fishing, wildlife observation and photography, and environmental education and interpretation).

E. Foster understanding and instill appreciation of the diversity and interconnectedness of fish, wildlife, and plants and their habitats.<sup>36</sup>

The Policy goes on to define each of the five goals,<sup>37</sup> privileging

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34. 16 U.S.C. § 668ee (Westlaw 2006).

35. See, e.g., H.R. REP. NO. 105-106, at 8 (1997) (describing the system mission in the context of ecosystems and life-cycle needs of wildlife); Policy on Maintaining the Biological Integrity, Diversity and Environmental Health of the National Wildlife Refuge System, 66 Fed. Reg. 3810, 3812 (U.S. Fish & Wildlife Serv. Jan. 16, 2001) (characterizing health as a concept containing both qualitative and quantitative components).

36. FISH & WILDLIFE MANUAL, *supra* note 8, pt. 601 § 1.8.

37. *Id.*, pt. 601 §1.9.

the first three—which focus more directly on ecological protection—over the lower priority goals of (D) and (E).<sup>38</sup> The system goals elucidated in the Policy strengthen the refuge system's claim to be the United States' premier nature protection resource. They also provide greater traction for the compatibility criterion's task of controlling and eliminating uses that interfere with the system mission.

## 2. *Individual refuge purposes.*

The FWS confronts the special challenge of serving individual unit purposes as well as the overarching system mission. The measure of the new Goals and Refuge Purposes Policy will be its ability to guide managers in meeting that challenge. Much more than any other public land system, the refuges have been established with a hodgepodge of legislative and executive authorities for a wide range of reasons.<sup>39</sup> Like the national parks, virtually every refuge has a particular, individual purpose separate from the organic mission of the system, which was not adopted until 1997. The individual unit purposes, however, are established by a more diverse array of instruments for the refuges than for the parks, which are each established by statute. Moreover, Congress created the systemic mission for the national parks in a 1916 organic law, which has focused subsequent national park establishment on a narrower, somewhat more coherent, range of purposes.<sup>40</sup> Because most individual refuge purposes focus on wildlife protection, direct conflict between the 1997 mission and individual purposes is rare.<sup>41</sup> Still, in an austere fiscal atmosphere, competition between organic goals and the fulfillment of specific establishment aims is a constant tension that the Policy addresses.

Determining the particular purpose of each refuge is important not only for understanding the resources and political realities at stake for planning; it is also important because the central management criterion of compatibility uses material interference with the individual refuge purposes as one of the two standards for determining what uses should be prohibited on

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38. *Id.*, pt. 601 § 1.10.

39. Fischman, *supra* note 6, at 592-612.

40. Act to Establish a National Park Service, ch. 408, 39 Stat. 535 (1916) (codified at 16 U.S.C. § 1 (Westlaw 2006)).

41. FISCHMAN, *supra* note 15, at 163-164; Vicky Meretsky et al., *New Directions in Conservation for the National Wildlife Refuge System*, 56 BIOSCIENCE 135, 138 (2006).

refuges (the other is with the system mission). For a refuge established by an obscure secretarial order, a bequest, or a Migratory Bird Conservation Committee action, purposes may not be immediately clear. The 2006 Goals and Refuge Purposes Policy guides FWS managers through an analysis that leads to an articulation of purposes for each refuge.<sup>42</sup>

The 1997 Act locates the purposes of refuges in “the law, proclamation, executive order, agreement, public land order, donation document, or administrative memorandum establishing, authorizing, or expanding a refuge.”<sup>43</sup> This statutory provision is ambiguous in its breadth, particularly because many inferences may be derived from administrative memoranda and law. The most important decision on this problem that the Service makes in the Goals and Refuge Purposes Policy is to continue the longstanding practice of reading establishment documents to mandate the broadest possible purposes. This approach, embodied in the Service’s existing database of refuge purposes<sup>44</sup> and in the 2001 FWS Director’s Order,<sup>45</sup> facilitates quick and accurate determinations, and also minimizes conflicts between individual refuge purposes and the systemic goals.

Instead of searching the legislative history behind general authorities, such as The Fish and Wildlife Coordination Act<sup>46</sup> or the Migratory Bird Conservation Act,<sup>47</sup> the Goals and Refuge Purposes Policy instructs managers to adopt the general goals stated in the texts of these laws.<sup>48</sup> Similarly, the Policy does not encourage research into the particular circumstances of individual refuge designation under these general authorities. Such an approach might examine the minutes of the Migratory Bird Conservation Committee meeting that approved the creation of a particular refuge or the pre-decisional memoranda supporting a secretarial order. It would also present greater potential conflicts with the systemic goals by identifying multiple time- and place-

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42. FISH & WILDLIFE MANUAL, *supra* note 8, pt. 601 exhibit 1.

43. 16 U.S.C. § 668ee (Westlaw 2006).

44. U.S. Fish and Wildlife Service Refuge Purpose Database, <http://refugedata.fws.gov/databases/purposes.taf?function=form> (last visited Oct. 1, 2006).

45. U.S. FISH & WILDLIFE SERV., DIRECTOR’S ORDER NO. 132, NATIONAL WILDLIFE REFUGE SYSTEM MISSION, GOALS, AND PURPOSES (2001).

46. 16 U.S.C. §§ 661-667e (Westlaw 2006).

47. 16 U.S.C. §§ 715a-715r (Westlaw 2006).

48. FISH & WILDLIFE MANUAL, *supra* note 8, pt. 601 §§ 1.13-1.14.

specific intentions. Such a centrifugal interpretation of individual purposes would undermine one of the chief rationales for the 1997 organic law.

Because many refuges have grown through incremental additions to an initial core, the Goals and Refuge Purposes Policy also addresses the relationship between purposes in an original refuge designation and the purposes in documents expanding the refuge. The Policy endorses existing guidelines in extending the original refuge establishment purposes to all additions.<sup>49</sup> However, the original refuge area does not take on the purposes of the addition. Of course, specific congressional instructions would override the Policy in any particular case, but that is a rare to nonexistent circumstance.

Blackwater National Wildlife Refuge presents a good example of the typical case. In 1931, the Migratory Bird Conservation Commission authorized land purchases to provide habitat for waterfowl on the Delmarva peninsula in Maryland. Between 1933 (when the first purchases actually created the refuge) and 1972, a series of acquisitions under the aegis of Migratory Bird Conservation Act purposes composed an 11,600-acre refuge. Beginning in 1975, however, the refuge expanded its forest habitat with purchases under the Endangered Species Act to protect the Delmarva fox squirrel. Blackwater National Wildlife Refuge today covers over 23,000 acres, harbors the largest remaining population of the endangered squirrel, and includes extensive wetlands and croplands. The additions authorized under the Endangered Species Act also carry the original migratory bird purpose. But, the older 11,600-acre refuge area does not absorb the endangered squirrel purpose.<sup>50</sup>

Because individual refuges often have multiple purposes, the Goals and Refuge Purposes Policy seeks to sort out priorities in cases where Congress or the executive branch did not. The first rule is that individual purposes dealing with the plant and animal conservation take precedence over other purposes.<sup>51</sup> The 1997 Act justifies this rule because of the goal it establishes for the refuge

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49. *Id.*, pt. 601 § 1.16; U.S. FISH & WILDLIFE SERV., *supra* note 45.

50. U.S. FISH & WILDLIFE SERV., CHESAPEAKE MARSHLANDS NATIONAL WILDLIFE REFUGE COMPLEX DRAFT ENVIRONMENTAL ASSESSMENT AND COMPREHENSIVE CONSERVATION PLAN (2005), <http://www.fws.gov/northeast/planning/Chesapeake%20Marshlands%20NWR%20Complex/ccphome.html>.

51. FISH & WILDLIFE MANUAL, *supra* note 8, pt. 601 § 1.15.



system as a whole. Within conservation goals in individual purposes, more specific goals will trump general conservation objectives where they conflict.<sup>52</sup> Conflict will be rare, but competition for resources is common. In cases of competition, the Policy does not provide a rule for ranking conservation tasks within individual establishment purposes. That may be left to refuge planning or the exigencies of funding availability. Generally, the individual refuge manager makes the triage decision when not every refuge purpose may be advanced.

One of the notable characteristics of the Goals and Refuge Purposes Policy is that it is the only one of the three 2006 policies to include a documented example to illustrate how the policy should work. The Goals and Refuge Purposes Policy describes how Minnesota's Sherburne National Wildlife Refuge established objectives for its CCP as a model for translating the broad approach described above into the specific management objectives necessary for a successful plan.<sup>53</sup>

The choice of Sherburne is important for two reasons. First, because it was created under the Migratory Bird Conservation Act, Sherburne is in the largest category of non-legislatively established refuges with general purposes. The Migratory Bird Conservation Act's instructions for units designated under its authority are typically vague: lands are to be used "for migratory birds." Therefore, translating the Sherburne "for migratory birds" purpose into a site-specific vision and plan is a common problem of one extreme type.

Second, in the scant literature on refuge management and the law, the Sherburne CCP has been promoted as a particularly effective approach to using old, individual purposes in a way that promotes the systemic, landscape-level, ecological mission.<sup>54</sup> Through its CCP, Sherburne dedicates its management to restoring rare oak savanna "ecosystem stability and health."<sup>55</sup> For a policy that distances itself from the terms "preserve" and "ecosystem,"<sup>56</sup> the choice of Sherburne is surprising because it so

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52. *Id.*

53. *Id.*, pt. 601 § 1.19.

54. Meretsky et al., *supra* note 41, at 142; Richard L. Schroeder et al., *Managing National Wildlife Refuges for Historic or Non-Historic Conditions: Determining the Role of the Refuge in the Ecosystem*, 44 NAT. RESOURCES J. 1185, 1195-1201 (2004).

55. FISH & WILDLIFE MANUAL, *supra* note 8, pt. 601 § 1.19.

56. Policy on National Wildlife Refuge System Mission and Goals and Refuge Purposes, 71 Fed. Reg. 36,404, 36,405 (U.S. Fish & Wildlife Serv. June 26, 2006).

strongly supports the biological integrity, diversity and environmental health mandate of the ecologically oriented 1997 law. On the other hand, Sherburne's elaborate CCP is a gold-standard effort that the vast majority of the refuges do not have the time or funding to emulate.

3. *The relationship between systemic goals and individual purposes.*

Notwithstanding the Sherburne example, the Goals and Refuge Purposes Policy clearly prefers individual refuge purposes over systemic goals. The organic act compels treatment of individual purposes as "paramount"<sup>57</sup> only in rare cases of conflict, not in the routine situation of competition. Sherburne illustrates well that individual purposes seldom conflict with, and often bolster, systemic goals. But many refuges will find that somewhat different management actions and uses will be associated with each. The questions will then become, which of the actions will receive funding priority and which uses will be preferred.

The 2006 Goals and Refuge Purposes Policy repeats the instruction of the 1997 statute that "if a conflict exists between the purposes of a refuge and the [system] mission," then the Service should protect the individual purposes first, and carry out the mission only to the extent practicable.<sup>58</sup> This statutory directive addresses only situations of conflict. However, the Policy takes an additional step beyond the mandate in stating that "[t]herefore, our first obligation is to fulfill and carry out the purpose(s) of each refuge."<sup>59</sup> The Policy states that efforts to go beyond individual purposes to advance the system mission will be additional, additive, and complementary to fulfilling the refuge purpose.<sup>60</sup> This makes serving the system more of an unaffordable luxury than a core necessity. Given how few refuge priorities get actual funding, the Goals and Refuge Purposes Policy's preference for individual purposes is a significant move away from coordinated management. The Service explained that it moved this particular priority rule from its more obscure location in the draft Policy to emphasize the principal allegiance of managers to individual refuge purposes.<sup>61</sup> And, another section of the Goals and Refuge

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57. FISH & WILDLIFE MANUAL, *supra* note 8, pt. 601 § 1.19.

58. 16 U.S.C. § 668dd(a)(4)(D) (Westlaw 2006).

59. FISH & WILDLIFE MANUAL, *supra* note 8, pt. 601 § 1.5.

60. *Id.*

61. Policy on National Wildlife Refuge System Mission and Goals and Refuge

Purposes Policy makes even more clear that the systemic goals are to be achieved “to the extent practicable” after the higher priority individual purposes.<sup>62</sup> This rule in the Policy reflects a surrender to the centrifugal forces of local, particularized priorities and a relegation to secondary status of the organic mission to connect the refuges into a system that is more than the sum of its parts.

Overall, the Goals and Refuge Purposes Policy does an excellent job putting flesh on the statutory language setting the systemic mission, and sorting out the difficulties of determining applicable individual refuge purposes. It is therefore especially disappointing that the Service should privilege (sometimes outdated) individual purposes<sup>63</sup> over the superb (modern) system ones to a greater extent than that required by legislation.<sup>64</sup> One clue to explain why comes from the explanatory material prefacing the Goals and Refuge Purposes Policy and responding to comments. In the explanations, the Service stresses its commitment to work cooperatively with state fish and wildlife

Purposes, 71 Fed. Reg. 36,404, 36,405 (U.S. Fish & Wildlife Serv. June 26, 2006). The Service is correct to state that the final policy’s call to fulfill refuge purposes as a “first obligation” is a change in emphasis, not a substantive departure from the Clinton-era draft. See Draft Policy on National Wildlife Refuge System: Mission, Goals, and Purposes, 66 Fed. Reg. 3668, 3671 (U.S. Fish & Wildlife Serv. Jan. 16, 2001) (proposed addition to FISH & WILDLIFE MANUAL, *supra* note 8, at pt. 601 § 1.7(A)).

62. FISH & WILDLIFE MANUAL, *supra* note 8, pt. 601 § 1.10. The “extent practicable” limitation of the circumstances under which the Service seeks to achieve systemic goals was not a part of the draft policy. See Draft Policy on National Wildlife Refuge System: Mission, Goals, and Purposes, 66 Fed. Reg. 3668 (U.S. Fish & Wildlife Serv. Jan. 16, 2001).

63. Examples of old individual purposes at odds with the 1997 mission include: Act to Provide for the Transfer of Certain Lands to the Sec’y of the Interior and for Other Purposes, Pub. L. No. 80-361, 61 Stat. 770 (1947) (establishing Crab Orchard National Wildlife Refuge “for the conservation of wildlife, and for the development of the agricultural, recreational, industrial, and related purposes”); Exec. Order No. 451 (Sept. 20, 1926) (establishing Blackbeard Island National Wildlife Refuge “for use as a bird refuge and as an experiment station for the acclimatization of certain foreign game birds”); Exec. Order No. 7509, 1 Fed. Reg. 2482 (Dec. 11, 1936) (establishing Charles M. Russell National Wildlife Refuge (formerly the Fort Peck Game Range) “for the conservation and development of natural wildlife resources and for the protection and improvement of public grazing lands,” and providing that “all the forage resources within this range or preserve shall be available, except as herein otherwise provided with respect to wildlife, for domestic livestock . . .”). In *Schwenke v. Secretary of Interior*, 720 F.2d 571, 576-77 (9th Cir. 1983), the court upheld the specific refuge purposes, including numerical limits on game populations, despite subsequent legislation heightening the priority of wildlife. For a comprehensive discussion of establishment legislation and its relationship to system goals, see FISCHMAN, *supra* note 15, at 163-82; Meretsky et al., *supra* note 41, at 138.

64. See *supra* text accompanying notes 33-38.

agencies.<sup>65</sup> This is a theme in the 1997 Act, and a rationalization for the delay in issuing the final policies. However, beneath the surface of this cooperative federalism is a tension between the restoration- and preservation-oriented view of the refuges as ecological networks, and the promotion of hunting and fishing. State wildlife and fish agencies derive much of their funding and most of their political support from the hunting and fishing constituencies. The individual refuge purposes are less beholden to the more modern ecological conceptions of conservation embodied in the integrity-diversity-health mandate of the 1997 Act and more responsive to the priorities of these groups.

Though environmentalists often find common cause with hunting- and fishing-focused “sportsmen’s” groups,<sup>66</sup> there is nonetheless a difference of basic interests between these two families of conservation advocates. The decision to favor individual purposes over the system mission reflects a prioritization of more traditional “hook and bullet” objectives over the ecological principles of systemic organization. This is manifest mostly in rhetorical elements of the Goals and Refuge Purposes Policy. For instance, the final rule changes “preserve” to “conserve” in response to comments that the draft used “preserve” in a way that diluted the mandate to implement individual purposes.<sup>67</sup> Similarly telling was the Service’s elimination of the word “ecosystem[s]” in some places, which the Service justified (despite the term’s strong root in the mission goals of the 1997 Act) on the grounds that the term did not add meaning to the sections from which it was removed.<sup>68</sup> Certainly, the Service was not as editorially severe in excising other words that fail to add meaning to a section.<sup>69</sup> The treatment of individual refuge purposes as paramount in the Goals and Refuge Purposes Policy represents the farthest any of the Policies goes in pushing back against the ecosystem management

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65. Policy on National Wildlife Refuge System Mission and Goals and Refuge Purposes, 71 Fed. Reg. at 36,404-05, 36,406 (Responses to Issues 1 and 11).

66. Juliet Eilperin, *Growing Coalition Opposes Drilling in West: In N.M. Battle, Hunters Team with Environmentalists*, WASH. POST, July 25, 2006, at A1.

67. Policy on National Wildlife Refuge System Mission and Goals and Refuge Purposes, 71 Fed. Reg. at 36,405.

68. *Id.* (explaining the deletion of “ecosystem(s)”). In some sections where it is important, the word “ecosystems” remains. See, e.g., FISH & WILDLIFE MANUAL, *supra* note 8, pt. 601 § 1.8(C).

69. See, e.g., FISH & WILDLIFE MANUAL, *supra* note 8, pt. 601 § 1.20 (“[T]he Director will interact, coordinate, cooperate, and collaborate with the State fish and wildlife agencies . . .”).

goals of the 1997 Act.

### B. *Appropriate Uses Policy*

Federal public lands are often classified as either multiple use or dominant use regimes. The value choices inherent in distinguishing among categories of uses reveal much about the deep structure and cultural assumptions of United States public land law. The 2006 Appropriate Uses Policy is perhaps the most detailed guide for evaluating the characteristics of uses in order to decide who gets to consume scarce public resources.

Since the 1962 Refuge Recreation Act, which imposed the first system-wide substantive limit on the Service's discretion to allow certain uses, the refuges have been required to permit recreational uses only where "appropriate."<sup>70</sup> However, the "appropriate" criterion was never as prominent as the "consistency," or "compatibility," criterion, which began as a system-wide limitation on recreational uses in 1962, became a standard for all uses in 1966 legislation, and finally grew sharp teeth in the 1997 Act and the subsequent Service compatibility policy.<sup>71</sup>

Nonetheless, the Service still regards the "appropriate" standard as a separate requirement for all refuge uses (not solely recreation). It serves as a coarse filter to eliminate certain uses from consideration before the remaining activities go through the finer compatibility analysis outlined in Service regulations and policies. The 2006 Appropriate Uses Policy also gives refuge managers a tool to contextualize and justify denying uses that may have individual impacts too trivial to trigger the "materially detract" standard for compatibility.<sup>72</sup> Under the new Policy, these uses—which do not materially detract from refuge purposes—may nonetheless be barred as inappropriate. Examples include family reunions, weddings, Boy Scout jamborees, antique car shows, flying model airplanes, demonstrations, and parachute landings.

If a refuge manager finds a use inappropriate, she need not take the time to do the more intensive compatibility determination.<sup>73</sup> The appropriateness test is less exacting, in part,

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70. 16 U.S.C. § 460k (Westlaw 2006).

71. Fischman, *supra* note 6, at 547.

72. 16 U.S.C. § 668ee(1) (defining compatible uses as those that do not "materially interfere with or detract from" refuge purposes or the system mission).

73. FISH & WILDLIFE MANUAL, *supra* note 8, pt. 603 § 1.8.

because it does not attempt to resolve (or mediate) conflicts among refuge uses—that is a function of compatibility analysis.<sup>74</sup> The Appropriate Uses Policy is most significant for its great deference to state wildlife managers in certain areas and for its stringent criteria describing what is appropriate on refuges.

1. *The scope of the appropriate uses policy.*

The Appropriate Uses Policy does not apply equally to every refuge activity. Many activities with notoriously negative effects on refuge wildlife are outside of the jurisdiction of the Service. Military operations and navigable river management under the exclusive control of the Department of Defense constitute two of the biggest categories of these activities impacting refuges.<sup>75</sup> Because the Service does not directly control these activities, they do not go through an appropriate uses analysis. However, even where the Service has proprietary discretion to curtail or modify activities, the Service's Appropriate Uses Policy categorically excludes certain broad groups of activities from analysis.

Under two separate provisions of the Appropriate Uses Policy, the Service creates four categories of activities that do not need to pass through the appropriate use analysis before either receiving approval or moving on to compatibility analysis.<sup>76</sup> They are 1) reserved or mandated uses, 2) refuge management activities, 3) wildlife-dependent recreation, and 4) "take" under state law.

a. *Reserved or mandated uses.*

The first category includes uses reserved by property owners or mandated by law.<sup>77</sup> Acquired refuges often operate under the limitations of reserved mineral rights.<sup>78</sup> Many refuges also include land where the United States owns conservation easements, giving the Service only limited control over uses that do not interfere with the terms of the easement.

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74. Final Appropriate Refuge Uses Policy Pursuant to the National Wildlife Refuge System Improvement Act of 1997, 71 Fed. Reg. 36,408, 36,413 (U.S. Fish and Wildlife Serv. June 26, 2006).

75. U.S. GEN. ACCOUNTING OFFICE, NATIONAL WILDLIFE REFUGES: CONTINUING PROBLEMS WITH INCOMPATIBLE USES CALL FOR BOLD ACTION 30-31 (RCED-89-196, 1989).

76. FISH & WILDLIFE MANUAL, *supra* note 8, pt. 603 §§ 1.2, 1.3.

77. *Id.*, pt. 603 § 1.2(A).

78. *See, e.g.*, FISCHMAN, *supra* note 15, at 198-99 (describing the law governing private oil/gas rights on refuges).

b. *Refuge management activities.*

The second category excluded from the appropriate use analysis is refuge management activities.<sup>79</sup> Refuge management activities are designed to fulfill a refuge purpose or the system mission based on "sound professional judgment" of the Service.<sup>80</sup> The exclusion is consistent with the existing management framework of the refuge system because the Service exempts these activities from the compatibility requirement, which is limited to public uses. Refuge management is the only category that also receives a pass under the compatibility criterion, because it is not a "use." Because it advances a refuge purpose, refuge management should be per se appropriate.

However, this second category will still warrant oversight because it is a repository for discretionary decision-making that receives far less scrutiny than uses subject to the appropriate and compatible criteria receive. All other appropriate use exclusions receive eventual close evaluation at the compatibility stage of approval. Moreover, many actions that the Service undertakes as refuge management activities, such as prescribed burns, seasonal flood management, and invasive species control, have controversial environmental impacts.

Adding substantially to the likely controversy over this category, the Service Appropriate Uses Policy extends the umbrella of refuge management activity to include actions by state fish and wildlife agencies when they meet any one of three criteria.<sup>81</sup> This represents a significant movement beyond the normal cooperative relationship where states may have special avenues for inserting their priorities in federal land management, but not actual federal equivalence.<sup>82</sup>

The first criterion is for state activities that directly contribute to the achievement of a refuge purpose or the system mission.<sup>83</sup> But this is the very essence of a refuge management activity. It

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79. FISH & WILDLIFE MANUAL, *supra* note 8, pt. 603 § 1.2(B).

80. *Id.* On the meaning of "sound professional judgment," see Fischman, *supra* note 6, at 552-58.

81. Strangely, tribal fish and wildlife agencies are excluded from this category. See FISH & WILDLIFE MANUAL, *supra* note 8, pt. 603 § 1.2(B). Usually tribes enjoy deference and opportunities to participate comparable to states. See, e.g., *id.*, pt. 603 § 1.11(A)(3)(b).

82. See Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 200-03 (2005) (describing state favoritism in federal process).

83. *Id.*, pt. 603 § 1.2(B)(1).

should be a required determination rather than an alternative for qualification out of three criteria.

The second criterion is for actions approved under national policy.<sup>84</sup> The Service's national headquarters' vetting of national policy helps ensure that such state activities also meet the first criterion for contribution to the refuge or system purposes.

The third criterion under which state wildlife management can qualify for the refuge management activities exemption is for activities "addressed" in a general class of management documents that the Appropriate Uses Policy does not define. Instead, the Policy merely offers examples of the types of documents that qualify.<sup>85</sup> Comprehensive conservation plans and certain memoranda of understanding qualify under the Policy. This criterion raises, but does not answer, the question of how formal the memorandum of understanding must be to qualify for the exemption. A CCP goes through extensive public review and environmental analysis; therefore decisions about what state activities ought to be authorized as appropriate are likely to be good. But it is not clear how much public scrutiny and environmental analysis goes into a memorandum of understanding between a regional office and a state, or even whether an individual refuge can execute a qualifying memorandum with a state. This criterion will likely cause great controversy and create problems for the FWS to maintain consistent, systemic standards for state actions qualifying as refuge management activities. Consider how a controversial state predator control program in Wyoming or Alaska might escape appropriateness and compatibility analysis, as well as public debate, if approved in a regional memorandum of understanding.

The FWS has already lost credibility through excessive deference to state decisions that conflict with precedent, planning, and science. In 2002, the Interior Department accepted the Arkansas Game and Fish Commission's restrictions on white-tailed deer hunting on refuges within the state despite the lack of substantive support in any public record.<sup>86</sup> The Wildlife Management Institute, hardly a hotbed of rhetorical excess,

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84. *Id.*, pt. 603 § 1.2(B)(3).

85. *Id.*, pt. 603 § 1.2(B)(2).

86. U.S. Fish & Wildlife Serv., Cache River National Wildlife Refuge Public Use, Hunting and Fishing Regulations (2002-2003) (applying the state three point rule to deer).



characterized the situation as “reverse carpetbagging” and criticized the FWS for “surrender[ing]” to state politics “without a fight.”<sup>87</sup> Stealth incorporation of state programs through memoranda may insulate the deferential decisions from national constituencies that help promote systemic interests.

The open door for state exemption is a significant manifestation of the current administration’s interest in sharing public land management power with state agencies likely to be sympathetic to its perspective on natural resource management. It was not part of the draft Appropriate Uses Policy and likely emerged from the discussions between state wildlife agencies and the Service between 2001 and 2006. I discuss its place in the broader scope of natural resources federalism in the conclusion to this article.

c. *Wildlife-dependent recreation.*

The third category excluded from the appropriate use analysis contains the six wildlife-dependent recreational uses spelled out in the 1997 Refuge Improvement Act.<sup>88</sup> Unlike the refuge management activities, these uses are exempt from the coarse filter only; they must pass muster under the compatibility analysis before a refuge manager may approve them. This is not a controversial category because the statute repeatedly emphasizes the appropriateness of the uses, frequently termed “the big six”: hunting, fishing, wildlife observation and photography, and environmental education and interpretation.<sup>89</sup> This suite of activities is governed in part by its own special policy, described in the next section of this article.

d. *“Take” under state law.*

The fourth category is for “take” of fish and wildlife under state regulations.<sup>90</sup> Take is a term that encompasses a wide range of activities that go beyond conventional, recreational fishing and

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87. *Arkansas Trumps Science with Defiance in the Name of Quality Deer*, OUTDOOR NEWS BULLETIN (Wildlife Mgmt. Inst., D.C.), July 15, 2002, at 2. The Wildlife Management Institute is a professional organization of wildlife managers. See Wildlife Management Institute Mission, <http://www.wildlifemanagementinstitute.org/pages/mission> (last visited Oct. 1, 2006).

88. FISH & WILDLIFE MANUAL, *supra* note 8, pt. 603 § 1.3(A).

89. 16 U.S.C. § 668ee(2) (Westlaw 2006).

90. FISH & WILDLIFE MANUAL, *supra* note 8, pt. 603 § 1.3(B).

hunting. In some states permitted takes include baiting and trapping. The status of commercial takes in refuges may also change as a result. Takes are regulated but not actually conducted by the state. This is another example of the Bush Administration's efforts to tailor national public land policy to the particular policy preferences of the states in which they are located.<sup>91</sup> But, unlike the state activities in the second category, these takes must meet the compatibility criterion before they may occur on a refuge. Moreover, the compatibility rule subjects commercial uses to a higher standard. In addition to avoiding material detractions from refuge purposes and the system mission, a commercial use must contribute to them.<sup>92</sup> Commercial activities may well find their way blocked by that finer filter.

## 2. *Appropriate use determinations.*

The FWS applies the coarse filter of appropriate use determination to limit the number of uses that then go through the more involved compatibility analysis. The Appropriate Uses Policy reiterates the Compatibility Policy in stating that a determination that a use is both appropriate and compatible does not *compel* a refuge manager to permit the use, but only *allows* the manager to permit it.<sup>93</sup> Like compatibility assessments, the appropriate use determination is site specific: a use appropriate on one refuge may not be on another.<sup>94</sup> Nonetheless, in order to promote consistency, the Service plans to maintain a database of refuge uses.<sup>95</sup> The database would address a persistent problem in refuge coordination that was the source of much of the controversy over incompatible uses that led to the 1997 statute.<sup>96</sup>

The process for determining appropriateness under the Appropriate Uses Policy is less precise and comprehensive in its scope of analysis than that for compatibility. The Policy finds a use to be appropriate if it falls into one of two categories that need no further analysis: a wildlife-dependent recreational use, or a use that

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91. See *infra* notes 214-227 and accompanying text on forms of cooperative federalism.

92. 50 C.F.R. § 29.1 (2006); see Fischman, *supra* note 6, at 538.

93. FISH & WILDLIFE MANUAL, *supra* note 8, pt. 603 § 1.8.

94. *Id.*, pt. 603 § 1.11(E).

95. *Id.*

96. See Fischman, *supra* note 6, at 493-99.

contributes to fulfillment of a refuge purpose or system goal.<sup>97</sup> These two categories that result in an immediate determination of appropriateness duplicate the exclusions to the appropriate use analysis discussed above. If a use does not fall into either of these categories, then the refuge manager must evaluate it employing ten criteria.<sup>98</sup>

It is the set of ten criteria that breaks new ground for refuge management. For all uses not excluded from the appropriate uses determination and that do not fall within the two categories described immediately above, a refuge manager must consider each of the ten criteria and document answers to ten questions based on the criteria.<sup>99</sup> Before a manager's appropriateness finding may be adopted by the Service, a regional official must concur in order to promote consistency. This documentation and review is less formal than the process for compatibility determinations but still impressive for such a preliminary step in permitting a use. It will promote better coordination among refuges to achieve systemic goals.

The ten criteria, as expressed through the ten questions that refuge managers must answer in evaluating a use, fall into two groups. The first set of criteria must be satisfied before further site-specific analysis may proceed.<sup>100</sup> They are absolute requirements. In order to proceed with the appropriate use analysis, the refuge manager must first determine that the Service has jurisdiction over the use.<sup>101</sup> If the Service has jurisdiction, the manager must make the further findings that the use complies with "all applicable laws and regulations;" is consistent with executive orders, and departmental and Service policies; and is consistent with "public safety."<sup>102</sup> The "applicable laws and regulations" include state, tribal, and local rules, so the refuge manager may be in the unusual position of evaluating a use against a standard originating outside of federal law.<sup>103</sup> Zoning, public safety, and commercial activities are all regulated by states, tribes, and localities. The new Appropriate Uses Policy instructs refuge managers to delve more

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97. FISH & WILDLIFE MANUAL, *supra* note 8, pt. 603 § 1.11(A).

98. *Id.*

99. The documentation is a standardized form, included as an exhibit in the policy. *Id.*, pt. 603 § 1.11(A)(3).

100. *Id.*, pt. 603 § 1.11(B).

101. *Id.*, pt. 603 § 1.11(A)(3)(a).

102. *Id.*, pt. 603 § 1.11(A)(3)(b), (c), (d).

103. *Id.*, pt. 603 § 1.11(A)(3)(b).

deeply into these sources than is typical in federal public land management. Also notable is the definition of “public safety.” The Policy instructs refuge managers to find a use inappropriate if it creates “an unreasonable level of risk to visitors or refuge staff, or if [it] requires refuge staff to take unusual safety precautions . . . .”<sup>104</sup>

If the first set of criteria is met, the refuge manager then proceeds to the second set of criteria. In this set, unlike for the first four criteria, a single negative finding does not necessarily prevent the use from passing the appropriateness test.<sup>105</sup> However, if the answer is “no” to any of the questions expressing the second set of criteria, then the FWS “will generally not allow the use.”<sup>106</sup> The only circumstance where the Appropriate Uses Policy suggests further consideration of a use not meeting all of the second set of criteria is “where the refuge has exceptional or unique recreational resources, such as rock climbing, that are not available nearby, off the refuge, and the use requires insignificant management resources.”<sup>107</sup> These specific standards will greatly assist refuge managers in the difficult task of saying “no” to low priority or harmful refuge uses.

The six questions expressing the second set of criteria are:

- 1) Is the use consistent with refuge goals and objectives in an approved management plan or other document?
- 2) Has an earlier documented analysis not denied the use or is this the first time the use has been proposed?
- 3) Is the use manageable within available budget and staff?
- 4) Will the use be manageable in the future within existing resources?
- 5) Does the use contribute to the public’s understanding and appreciation of the refuge’s natural or cultural resources, or is the use beneficial to the refuge’s natural or cultural resources?
- 6) Can the use be accommodated without impairing existing wildlife-dependent recreational uses or reducing the potential to

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104. *Id.*, pt. 603 § 1.11(A)(3)(d).

105. *Id.*, pt. 603 § 1.11(B).

106. *Id.*

107. *Id.* The 2001 draft policy incorporated this consideration as one of the second set of criteria. Draft Appropriate Refuge Uses Policy Pursuant to the National Wildlife Refuge System Improvement Act of 1997, 66 Fed. Reg. 3673, 3681 (U.S. Fish & Wildlife Serv. Jan. 16, 2001) (“Is the refuge the only place this activity can reasonably occur? If there are other nearby public or private lands that can reasonably accommodate the use, then the use should be rejected.”).

provide quality compatible wildlife-dependent recreation in the future?<sup>108</sup>

These six criteria constitute an interesting new analytical framework focused on both the nature of the use and its effects. Most of the issues the criteria raise are considered in greater detail in the compatibility determination. In that respect, the appropriate use analysis detailed in the criteria is "compatibility lite." But, in other respects, the appropriate use analysis stresses different concerns. For instance, the concern about a new use consuming available resources or impinging on other priorities, such as wildlife-dependent recreation, is a good recognition of the narrow fiscal constraints under which the Service administers the refuge system. The last question, especially, seeks to reserve recreational resources for wildlife-dependent uses. It seeks to avoid approving current uses that may consume a resource cushion, thus foreclosing or constraining future wildlife-dependent recreation.

Another significant criterion is the concern about contributing to the public's understanding and appreciation for natural and cultural resources. This criterion does an excellent job integrating environmental education and interpretation, which get shortchanged by the Wildlife-Dependent Recreation Policy, *infra*, into management. More aspects of refuge policy should be similarly imbued with the notion that resource management itself expresses tacit endorsement of the activities it permits. It is especially important that uses equally (or more) at home off refuges contribute to public understanding and support of the conservation mission when allowed on refuges.

Related to this aspect of the criteria is the newly articulated standard that "whether or not the refuge is the only place the use can occur is an important factor" for determining what non-wildlife-dependent recreational uses are appropriate.<sup>109</sup> Though the Appropriate Uses Policy employs a rock-climbing example,<sup>110</sup> this new policy element may strengthen the refuge managers' ability to deny motorized recreationists access to refuges. That will

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108. FISH & WILDLIFE MANUAL, *supra* note 8, pt. 603 § 1.11(A)(3)(e)-(j).

109. Final Appropriate Refuge Uses Policy Pursuant to the National Wildlife Refuge System Improvement Act of 1997, 71 Fed. Reg. 36,408, 36,412 (U.S. Fish & Wildlife Serv. June 26, 2006).

110. FISH & WILDLIFE MANUAL, *supra* note 8, pt. 603 § 1.11(B).

resolve many important conflicts and reduce damage to refuges<sup>111</sup> sooner than the CCP and compatibility determinations might. Like the external threats provision of the Integrity-Diversity-Health Policy, this standard reflects a land management agency on the vanguard of viewing its resources within a patchwork landscape containing many other landowners. Just as the Integrity-Diversity-Health Policy asks managers to look outside the refuge boundaries for threats, the Appropriate Uses Policy asks managers to look outside the boundaries for opportunities, providing alternative places for non-priority uses.

### 3. *An appropriate uses awakening.*

Despite its presence in national wildlife refuge law since 1962, the Service has never made appropriate use a significant determinant in management decisions. That history turns a corner with this new policy. The criteria for appropriateness and the call for managers to look beyond refuge boundaries for alternative use sites constitute the best developments of the 2006 policies.

On the other hand, the Appropriate Uses Policy broadens the category of refuge management activities, which are excluded from both appropriate use and compatibility determinations. The Service has opened a back door for state agencies to conduct activities on the refuges with no more scrutiny than a memorandum of agreement. Though many state programs provide essential support for the objectives of the refuge system, others may not be appropriate for a federal land system far less focused on game management and fish stocking than most state wildlife agencies.

Finally, the Appropriate Uses Policy reframes the hierarchy of refuge uses. It clarifies that all general public uses other than the “big six” wildlife-dependent forms of recreation that do not contribute to the fulfillment of refuge purposes or system goals are the lowest priorities for refuge managers.<sup>112</sup> This categorical statement should help FWS staff on the ground get a better grip on the uses that crowd out refuge conservation. For instance, power boating has long been a controversial yet fairly common

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111. U.S. GEN. ACCOUNTING OFFICE, NATIONAL WILDLIFE REFUGES: CONTINUING PROBLEMS WITH INCOMPATIBLE USES CALL FOR BOLD ACTION 20 (RCED-89-196, 1989).

112. FISH & WILDLIFE MANUAL, *supra* note 8, pt. 603 § 1.10(C).

refuge use that harms fish and wildlife.<sup>113</sup> While boating that facilitates fishing and wildlife observation will continue to receive FWS support,<sup>114</sup> other watercraft activities, such as racing, personal watercraft use (also known as “jet skiing”), and waterskiing will continue to lose ground under this Policy.

### C. *Wildlife-Dependent Recreation Policy*

The 1997 Refuge Improvement Act defines wildlife-dependent recreational uses as “hunting, fishing, wildlife observation and photography, or environmental education and interpretation.”<sup>115</sup> The statute promotes them on virtually every page.<sup>116</sup> These “big six” uses deserve their own policy if for no other reason than Congress clearly instructed the Service to favor them over other uses after conservation objectives are met. Moreover, the FWS needs guidance on what kind of hunting, fishing, and other similar uses to encourage on refuges. Though the Appropriate Uses Policy deals with the contrast between activities that can occur anywhere and those specially suited to a refuge, it categorically exempts most wildlife-dependent recreation from appropriate use analysis.

The Wildlife-Dependent Recreation Policy says little about this category of uses as a whole; instead, it divides the “big six” into individual chapters. Nonetheless, there are some general guidelines applicable to all six uses, particularly in the general chapter introducing the Policy. Not surprisingly, the Policy strikes the themes set by the President and then-Interior Secretary Norton. The guidelines in the first chapter emphasize partnerships, coordination with states, user fees, and cooperative conservation.<sup>117</sup>

Though planning for wildlife-dependent recreational uses and their effects is a routine part of all public land management, the Policy emphasizes the importance of monitoring. An essential element of adaptive management, monitoring generally receives little attention and scant funding. Though the policy does not

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113. U.S. GEN. ACCOUNTING OFFICE, *supra* note 111.

114. FISH & WILDLIFE MANUAL, *supra* note 8, pt. 603 § 1.10(D)(8); Final Appropriate Refuge Uses Policy Pursuant to the National Wildlife Refuge System Improvement Act of 1997, 71 Fed. Reg. 36,408, 36,415 (U.S. Fish & Wildlife Serv. June 26, 2006).

115. 16 U.S.C. § 668ee (Westlaw 2006).

116. Fischman, *supra* note 6, at 530-36 (describing the six ways in which the act expresses the preference for wildlife-dependent recreational uses).

117. See FISH & WILDLIFE MANUAL pt. 605 §§ 1.9E, 1.10A, 1.13C.

guarantee money or follow-up attention, it does consider an essential element of recreation policy to be evaluating how well anticipated uses and effects predict actual outcomes.<sup>118</sup> If the FWS is able to deliver on the recreation monitoring in the Policy, and the biological monitoring mandated in the 1997 Act,<sup>119</sup> it will take a giant step toward the elusive planning goal of adaptive management.

The Wildlife-Dependent Recreation Policy relies heavily on the use of Visitor Services Plans (“VSPs”) to authorize wildlife-dependent recreational uses. Most refuges are closed to all uses unless specifically declared open. Developing the VSP is both the first step in permitting and first standard in developing public uses on the refuges.<sup>120</sup> The VSP is a “step-down management plan,” which builds upon the more general CCP. A step-down management plan provides an integrated analysis of a particular program, and often specific schedules for implementation.<sup>121</sup> Because the CCP is the central vehicle for translating national law and guidance into site-specific programs, it makes good sense to organize recreational use conditions through a step-down management plan. Other common kinds of step-down management plans address fire management, habitat management, and invasive species control.<sup>122</sup> For wildlife-dependent recreation, the VSP contains descriptions of goals for permitted uses, current and targeted audiences, desired future actions, enforcement strategies, concession and fee programs, monitoring tools, and evaluation criteria.<sup>123</sup> To facilitate implementation, the VSP sets forth staffing needs, specific projects and costs, and partnership funding and resources.<sup>124</sup>

Though hardly models of lucid instruction or modern English usage, the Goals and Refuge Purposes and Appropriate Uses Policies are nonetheless paragons of administrative clarity compared to the Wildlife-Dependent Recreation Policy. This final Policy is written as though it were the last to receive attention during an all-night drafting session. It brims with confusing

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118. *Id.*, pt. 605 § 1.8.

119. 16 U.S.C. § 668dd(a)(4)(N).

120. *Id.*, pt. 605 §§ 1.13(D), 1.14(A).

121. *Id.*, pt. 602 § 4.

122. *Id.*

123. *Id.*, pt. 605 exhibit 1.

124. *Id.*



language and strange shifts in perspective,<sup>125</sup> and it trails off toward the end, with very little of substance for the last four of the listed “big six” priority public uses.

The lack of clarity and consistency are not as serious as the problems that flow from the substantive decisions embedded in the Policy. The following two subsections unveil these decisions in the context of two major issues. The first is the excessive weight given to hunting and fishing, often at the expense of considering the attributes of those activities that would encourage greater selectivity in which opportunities to promote on refuges. The second is the segregation and constriction of environmental education and interpretation.

1. *The excesses of hunting and fishing.*

The Wildlife-Dependent Recreation Policy purports not to resolve conflicts or pick favorites among the wildlife-dependent recreational uses.<sup>126</sup> However, the much greater attention directed to hunting and fishing manifests a favored status that reflects the deep history of these activities on refuges. The other reason for the higher level of detail in the hunting and fishing sections is that they deal with state and federal regulation, which is not a significant dimension of wildlife observation, environmental education, and the other uses.<sup>127</sup>

Nonetheless, a more farsighted policy would have seized the occasion to create guidance to help refuge managers better conceive of innovative recreation programs for the other wildlife-dependent recreational activities. Exactly because of their extensive regulation and long history at refuges, hunting and fishing do not need much Service guidance to explain how to

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125. *E.g., id.*, pt. 605 § 1.6 (“The Refuge System provides a unique opportunity to ensure that we approach our compatible wildlife-dependent recreation programs from the perspective of the Refuge System mission and goals.”); *id.*, pt. 605 § 2.7 (briefly switching from third person to second person: “You should periodically evaluate . . . You may use permanent check stations . . .”).

126. *See, e.g.*, Final Wildlife-Dependent Recreational Uses Policy Pursuant to the National Wildlife Refuge System Improvement Act of 1997, 71 Fed. Reg. 36,418, 36,422 (U.S. Fish & Wildlife Serv. June 26, 2006).

127. *Id.* at 36,427, 36,428. In addition to the greater detail, there are also substantive differences in the applicable rules. For example, the policy requires reviews of hunting and fishing programs annually, but only “regularly” for the other categories of wildlife-dependent recreation. FISH & WILDLIFE MANUAL, *supra* note 8, pt. 605 §§ 2.9B, 3.8B, 4.8A, 6.10, 7.12A.

devise new programs and manage them. Hunting and fishing are already widespread and refuge managers typically are familiar with the issues that surround them. The number of refuge managers with educational degrees and experience in the field of sport fish and wildlife management dwarfs the number with similar backgrounds in environmental education or interpretation. It is the non-hunting-and-fishing uses that need more help from the Policy to better define what are now just vague understandings. For instance, the Policy fails to provide managers specific guidelines about how wildlife observation and education can take deeper root on refuges and grow. The Policy does not identify the attributes of the observation and education programs that the refuges should strive to encourage.

Sadly, the Service has missed an opportunity to distinguish clearly the kind of wildlife-dependent recreation that occurs on refuges from that which occurs elsewhere. In its ardor to encourage these uses, the Service has diminished the importance of the quality of the recreational experience. In moving from its draft to the final Wildlife-Dependent Recreation Policy, the Service removed the modifiers “high” and “highest” to describe the quality of the wildlife-dependent recreational programs it promotes.<sup>128</sup> This results in some strange guidance to employ “quality standards” or discourage “opportunities that lack quality” without stating what the particular attribute at issue is.<sup>129</sup>

Similarly, the Policy removed references to ethics and ethical behavior in the kind of hunting the Service seeks to further.<sup>130</sup> Though these are principally semantic quarrels, they do reflect the primary tone of the Policy to “maximize opportunities”<sup>131</sup> for wildlife-dependent recreation.<sup>132</sup> The Policy does contradict the more-is-better attitude with a somewhat perplexing instruction to “concentrate resources on fewer, quality opportunities rather than

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128. Final Wildlife-Dependent Recreational Uses Policy, 71 Fed. Reg. at 36,422.

129. FISH & WILDLIFE MANUAL, *supra* note 8, pt. 605 § 1.10(A). The FWS has a history of using the word “quality” ambiguously. See U.S. FISH & WILDLIFE SERV., FULFILLING THE PROMISE: THE NATIONAL WILDLIFE REFUGE SYSTEM 43 (1999) (identifying the need for “quality wildlife experiences”).

130. Final Wildlife-Dependent Recreational Uses Policy, 71 Fed. Reg. at 36,423.

131. *Id.* at 36,426.

132. The 1997 Act does require the Service to “provide increased opportunities for families to experience compatible wildlife-dependent recreation,” but nowhere does it call for maximizing such opportunities. 16 U.S.C. § 668dd(a)(4)(K) (Westlaw 2006).

offer many opportunities that lack quality."<sup>133</sup> But, this one sentence fails to convey a strong sense that the quality to be promoted is skillfulness, good sportsmanship, solitude, or sustainability, to name four qualities the Policy might have described and advanced. The most the provision on ensuring the quality of wildlife-dependent recreation programs can muster by way of defining the attributes of quality is exhortations to use partnerships, user fee programs, and cooperative efforts such as cost-share agreements to fund and staff recreation programs.<sup>134</sup> While these are useful (and trendy) implementation tools, they are poor indicators of most valuable qualities. If anything, they highlight the short-sightedness of a policy that should articulate an inspiring vision for the transformative character of wildlife-dependent recreation on the very best habitat in the United States. The Wildlife-Dependent Recreation and Appropriate Uses Policies each delineate the same eleven criteria that "determine a quality recreational experience."<sup>135</sup> However, the criteria are so general and pull in so many different directions as to be almost worthless.<sup>136</sup>

A better Wildlife-Dependent Recreation Policy would demand stronger commitments to a qualitatively different and better experience of recreating on refuges compared to other venues for outdoor recreation. It is true that funding a well-supervised and enforced program is critical. But, the Policy should convey a stronger sense of the kind of recreational experiences the Service envisions for refuges. This would help explain what purpose refuge recreation serves within the scope of the system mission. For an agency concerned now with "branding," the Wildlife-Dependent Recreation Policy is strangely quiet on what is distinctive about refuge recreation. A refuge hunting trip ought to feel different from a hunting trip outside of a refuge.<sup>137</sup> The qualitative difference should be partly a result of the high standard of wildlife management on refuges but also a result of a refuge system program that integrates environmental education into all visitor

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133. FISH & WILDLIFE MANUAL, *supra* note 8, pt. 605 § 1.10(A).

134. *Id.*, pt. 605 § 1.10(B).

135. *Id.*, pt. 603 § 1.6(D); *see also id.*, pt. 605 § 1.6.

136. Some of the criteria are duplicative ("promotes accessibility" and "uses facilities that are accessible") and others do not reflect enough ambition for the system (e.g. "provides reliable/reasonable opportunities to experience wildlife"). *Id.*, pt. 605 § 1.6.

137. Of course, states administering their own wildlife management areas and private hunting preserves do not want to be cast as providers of lower quality experiences.

experiences. The Appropriate Uses Policy nods toward such an integrative approach in distinguishing uses that “contribute to the public’s understanding and appreciation” of refuge resources.<sup>138</sup> The failure of the Wildlife-Dependent Recreation Policy to pick up on this thread of administration is a tragic, missed opportunity.

The retreat from the challenge of emphasizing quality is evident in particular provisions, such as in the fishing chapter. The 2001 draft banned exotic live bait and fishing tournaments. The fishing chapter in the final Wildlife-Dependent Recreation Policy eliminated those categorical bans, and also removed the emphasis on biological integrity.

The zeal to promote wildlife-dependent recreation is also evident in the bizarre interpretation of the stewardship responsibilities in the 1997 Improvement Act. The Act sets out an affirmative conservation duty, requires the Service to maintain biological integrity, diversity and environmental health, mandates biological monitoring, and insists that refuges acquire needed water rights.<sup>139</sup> These stewardship responsibilities are the principal *limitations* on wildlife-dependent recreational use. They establish how far the Service should go in its enhancement of recreational opportunities. The Wildlife-Dependent Recreation Policy, however, turns around the purpose of the stewardship responsibilities and redefines them to “direct” the Service to ensure enhanced consideration and priority of wildlife-dependent recreation.<sup>140</sup> Though this interpretation has no direct impact on the process of limiting wildlife-dependent recreation in the Service policies, it is a discouraging indication that the Interior Department has yet to appreciate one of the great innovations of the 1997 statute: its substantive management criteria provide more specific guidance on how far the Service should go in promoting uses than is found in any other federal organic act.

Nonetheless, the text of the Policy does explicitly include two of the substantive management criteria (compatibility; and biological integrity, diversity, and environmental health) as

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138. FISH & WILDLIFE MANUAL, *supra* note 8, pt. 603 § 1.11(A)(3).

139. 16 U.S.C. § 668dd(a)(4) (Westlaw 2006).

140. Final Wildlife-Dependent Recreational Uses Policy Pursuant to the National Wildlife Refuge System Improvement Act of 1997, 71 Fed. Reg. 36,418, 36,419 (U.S. Fish & Wildlife Serv. June 26, 2006). The appropriate uses policy employs the same interpretation of the 1997 stewardship responsibilities. Final Appropriate Refuge Uses Policy Pursuant to the National Wildlife Refuge System Improvement Act of 1997, 71 Fed. Reg. 36,408, 36,409 (U.S. Fish & Wildlife Serv. June 26, 2006).

evaluative criteria for deciding whether to allow wildlife-dependent recreation programs.<sup>141</sup> This is a significant inclusion, made all the more so because the interpretation of stewardship responsibility excludes these (and the other) criteria. It is bolstered by other instructions, such as the use of monitoring tools<sup>142</sup> and protection of sensitive areas through closures,<sup>143</sup> designed to ensure that recreational programs stay within the bounds of the ecological mission of the system. In the end, the Policy manages to make advancing the system mission of conservation, supported by the integrity-diversity-health mandate, among others, a higher priority than promoting wildlife-dependent recreation. Anything short of that would have run afoul of the legislation. But the actual approach used by the Policy sows confusion.

## 2. *Environmental education and interpretation.*

The Service's grammatical inconsistency in construing the statutory definition of "wildlife-dependent recreation" leads to an important substantive policy statement. The policy interprets "wildlife observation and photography"<sup>144</sup> to mean "wildlife observation" and "wildlife photography," but interprets "environmental education and interpretation"<sup>145</sup> to mean "environmental education" and "interpretation" (not, "environmental interpretation").<sup>146</sup> One consequence of this construction of the organic act is to justify greater emphasis on cultural and archeological interpretation. The legislation for the refuge system does not otherwise stress cultural resources, which the Service nonetheless (and appropriately) includes within the purview of its stewardship.<sup>147</sup> Unfortunately, this is the only expansive aspect of the otherwise meager version of environmental education and interpretation in the Policy.

Consider the definition of environmental education. One of the elements of environmental education that distinguishes it from its predecessor, conservation education, is its focus on advocacy.<sup>148</sup>

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141. FISH & WILDLIFE MANUAL, *supra* note 8, pt. 605 § 1.13(B).

142. *Id.*, pt. 605 § 1.8(B).

143. *Id.*, pt. 605 § 1.8(D)(3).

144. 16 U.S.C. § 668ee(2) (Westlaw 2006).

145. *Id.*

146. Compare FISH & WILDLIFE MANUAL, *supra* note 8, pt. 605 § 5 with *id.*, pt. 605 § 7.

147. See, e.g., *id.*, pt. 603 § 1.11(A)(3)(j).

148. W. B. Stapp, et al., *The Concept of Environmental Education*, 1 J. ENVTL. EDUC. 30,

Environmental education promotes participation in activities that lead to the resolution of environmental challenges, though without pushing a particular course of action.<sup>149</sup> In this respect good refuge management, which teaches visitors by example, feeds back into greater public support for refuge conservation. However, the story of conservation advocacy shows how a full spectrum of tools to change environmental behaviors is necessary for effective progress. For instance, without a lawsuit filed by environmental groups in 1992, it is unlikely that Congress would have enacted the 1997 Refuge Improvement Act.<sup>150</sup> Tenacious litigation in the 1970s challenging the Army Corps of Engineers' 231-mile channelization project on the Cache River in Arkansas saved bottomland hardwood habitat that the Service would purchase for the Cache River National Wildlife Refuge in the 1980s.<sup>151</sup> It is there that the ivory-billed woodpecker, once thought extinct, is now believed by many scientists to have endured.<sup>152</sup>

A shortcoming of the Wildlife-Dependent Recreation Policy is that it defines environmental education to include only cooperative approaches to resource protection. Though cooperative approaches have achieved spectacular successes, they are bolstered by other, non-cooperative approaches. Competitive and adversarial approaches (among states, or between NGOs and government) are necessary dimensions to environmental education as well. The 2006 Policy reflects the Bush Administration's focus on cooperative conservation more than it does a fair depiction of the necessary tool box for converting knowledge into action. It also reflects the administration's general lack of enthusiasm for environmental education.<sup>153</sup>

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30-31 (1969).

149. The most commonly cited comprehensive definition of "environmental education" comes from the Tbilisi Declaration of 1977, sponsored by the United Nations Education, Scientific, and Cultural Organization (UNESCO). UNESCO, *Tbilisi Declaration of 1977*, available at <http://www.gdrc.org/uem/ee/tbilisi.html> (last visited Oct. 1, 2006).

150. See Fischman, *supra* note 6, at 498-99; S. REP. NO. 103-324, at 6-7 (1994).

151. *Envtl. Defense Fund v. Froehlke*, 473 F.2d 346 (8th Cir. 1972); *Envtl. Defense, The Return of the Ivory-Billed Woodpecker*, SOLUTIONS, July-Aug. 2005; E-mail from Jim Tripp, General Counsel, *Envtl. Defense*, to Robert L. Fischman (Oct. 19, 2006) (on file with author).

152. David S. Wilcove, *Rediscovery of the Ivory-Billed Woodpecker*, 308 SCIENCE 1422 (2005).

153. Each of President Bush's proposed federal budgets for Fiscal Years 2003 through 2007 eliminated entirely the National Environmental Education Act's funding. See DAVID M. BEARDEN, CONG. RESEARCH SERV., NATIONAL ENVIRONMENTAL EDUCATION ACT OF 1990: OVERVIEW, IMPLEMENTATION, AND REAUTHORIZATION ISSUES (rev. 2006).

The Wildlife-Dependent Recreation Policy segregates environmental education and interpretation into chapters that are too self-contained. It will be a step forward for most refuges to have educational and interpretive programs on deck for implementation in a VSP.<sup>154</sup> But the FWS could have done much better. Integrating environmental education as a component of all recreation programs would reach more people in a more effective and sustainable way. This would be consistent with the last of the five systemic goals promulgated in the Goals and Refuge Purposes Policy.<sup>155</sup> Alas, the current Wildlife-Dependent Recreation Policy does little to make that integration occur.

Though the 1997 Act fails to push for integration, the Service certainly has the discretion to move in this direction in recognition of the important role that education will play in supporting conservation over the long term. Not all hunting and fishing activities are equally educational from the perspective of sustainability. The Service should be supporting those that are and making sure that visitors understand the relationship between conservation management and their own experience. That is the best form of environmental education. It also has a deep taproot in refuge history, which began with efforts by wildlife observers (bird watchers) and sport hunters to discriminate against particular forms of wasteful, commercial, and subsistence hunting.

A better approach would have mirrored the role that environmental education plays in the 2001 strategic plan by the National Park System Advisory Board.<sup>156</sup> That report treats education as the core organizing principle for "America's greatest university without walls."<sup>157</sup> The parks report seeks to move beyond an "enjoyment equals support" visitor model to "encourage public support of resource protection at a higher level of understanding."<sup>158</sup> Refuges can play as important a role as parks in environmental education. While the national parks do preserve some of the best examples of biomes, the refuges preserve a greater area of a wider variety. And, refuges are, on the whole,

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154. *Id.*, pt. 605 § 6.9(B).

155. FISH & WILDLIFE MANUAL, *supra* note 8, pt. 601 § 1.8E.

156. U.S. NAT'L PARK SERV., NAT'L PARK SYSTEM ADVISORY BOARD, RETHINKING THE NATIONAL PARKS FOR THE 21ST CENTURY (2001), available at <http://www.nps.gov/policy/report.htm>.

157. *Id.*

158. *Id.*

nearer to where the public lives. Without an educated public, the constituency to support budgets for, expansion of, and even continued federal ownership of refuges will evaporate. This road not taken could have provided a cross-cutting attribute distinguishing the quality of wildlife-dependent recreation on the refuges.

#### D. *Judging the Policies*

The 2006 policies advance refuge management in many directions that fulfill the promise of the organic act. The Goals and Refuge Purposes Policy provides essential flesh on the bare bones statutory definition of the refuge system's mission. It effectively translates conservation elements into distinct goals and establishes the right ecological priorities among them. This relieves individual CCPs from having to work through the system goals refuge by refuge and establishes a much-needed unity that will better integrate refuges into conservation networks. The Policy also clarifies and codifies existing guidance about the meaning of individual refuge purposes and the relationship among multiple purposes within a single refuge. This will also help relieve the burden on CCP development by clarifying that refuges need not search deeply in the site- and time-specific rationales to interpret individual refuge purposes. The general purposes stated in an authorizing statute, such as the Migratory Bird Conservation Act, are the purposes adopted by all of the refuges established under that authority regardless of the particular circumstances at the time the authority was used. This bolsters the centripetal task of orchestrating individual units to answer large-scale ecological challenges.

Another policy provision that will have wide-ranging salutary effects is the second set of criteria for determining appropriate uses on refuges. Unlike the effects analysis of the compatibility determination, the appropriate use criteria describe the qualitative attributes of activities that make them suitable for a land system. The FWS produced a set of criteria that should serve as a model for other land-use authorities. Asking whether a use contributes to public understanding of refuge resources is a critical new criterion that will make the system more selective and distinctive. Moreover, the instruction for a refuge manager to look at other, non-refuge areas to determine whether they can provide non-wildlife-dependent recreation is the kind of outward orientation that sews



refuges into the fabric of larger regions. It is the affirmative partner to the external threats provision of the Integrity-Diversity-Health Policy.

Almost all of the weaknesses in the 2006 Policies derive from the Service's reluctance to distance itself and its refuges from state game and fish management. Though states now produce and implement comprehensive ecological protection plans through a federal grants program,<sup>159</sup> most still are oriented principally toward promoting game and sport fish. All states now have some kind of "non-game" conservation program, but it is typically a very small effort compared to sport fish and game. The imbalance is changing, but the states still have far to go before achieving anything close to the federal land management agencies' concentration on ecological integrity and biodiversity. The individual refuge purposes, which may be as much as a century old, have a stronger affinity for state priorities than do the goals implementing the 1997 refuge system mission. Therefore, the Goals and Refuge Purposes Policy's limitation on achieving the system mission "to the extent practicable" after fulfilling "paramount" individual purposes is of a piece with other policy provisions more explicitly about shaping refuge management to the preference of state agencies.

A more obvious grant of preferential treatment to state game and fish management is the Appropriate Uses Policy provision allowing state agency activities to avoid both the appropriate use and the compatibility analyses through a memorandum of understanding, which may not be subject to much public scrutiny. Similarly, the removal of draft language on ethical attributes and the biological integrity of refuge hunting and fishing (respectively) indicate a desire to blur the distinction between uses of refuges and state wildlife management areas.

The procedure by which the FWS wrote the final policies helps explain why state fish and game interests so strongly influenced the 2006 policies. After the comment period closed on the draft policies, the FWS employed intergovernmental personnel agreements ("IPAs") to bring state agency employees directly into

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159. A 2001 appropriations rider prompted states to produce "wildlife action plans" which enable them to secure federal grants to fund habitat enhancement activities. Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 107-63, tit. I, 115 Stat. 414, 422 (2001).

the process.<sup>160</sup> Notes of meetings between the FWS and the IPA officials indicate that the state officials sought revisions of the drafts to formalize coordinated management between refuges and state agencies.<sup>161</sup>

The use of IPAs is consistent with both the Refuge Improvement Act and Bush-Norton policies emphasizing the importance of federal-state cooperation. While states are important, legitimate stakeholders in refuge policies, the timing of the IPAs and the post-comment revisions of the draft policies raise troubling questions. If states, which took the opportunity to comment on draft policies along with other interested parties, had a special avenue for advancing their agenda outside of the notice-and-comment process, then it would seem fair to provide other commenters with a similar opportunity or at least another chance to respond to the revised policies before final promulgation.<sup>162</sup>

A policy, however meritorious, can only be judged effective if it is followed. The FWS codified all of the 2006 policies in the agency manual. The use of a manual to integrate various directives to regional and field personnel is a commonplace tradition in federal public land law. The next section discusses what role the judiciary will play in securing the policies' implementation. Though the manual itself states that it binds FWS personnel, the promulgation statement of the policies disclaimed the judicial role in reviewing whether the FWS actually does follow the policies. The administrative law of manuals, however, raises questions about whether such disclaimers would determine the outcome of a

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160. See Intergovernmental Personnel Assignment Agreement for John Frampton, U.S. Fish & Wildlife Serv. – S.C. Dept. of Natural Res., May 1, 2002 (on file with author); Intergovernmental Personnel Assignment Agreement for Artina Cuning, U.S. Fish & Wildlife Serv. – Alaska Dept. of Fish & Game, May 1, 2002 (on file with author); Intergovernmental Personnel Assignment Agreement for John Kennedy, U.S. Fish & Wildlife Serv. – Ariz. Game & Fish Dept., May 1, 2002 (on file with author); Intergovernmental Personnel Assignment Agreement for Christian Smith, U.S. Fish & Wildlife Serv. – Mont. Fish, Wildlife & Parks, May 1, 2002 (on file with author); Intergovernmental Personnel Assignment Agreement for Gordon Batcheller, U.S. Fish & Wildlife Serv. – N.Y. Division of Fish, Wildlife & Marine Res., May 1, 2002 (on file with author).

161. Notes from meetings between U.S. Fish & Wildlife Service and representatives from Alaska, Arizona, Montana, and South Carolina, July 20, 2002, Sept. 19, 2002 and Nov. 20-21, 2002 (on file with author).

162. See *Air Transport Ass'n v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999) (noting that ex parte contacts in notice-and-comment procedures are not strictly forbidden in all circumstances, but critical information must be exposed to public refutation and a final rule may not differ so much from the proposal as to be unanticipated).

judicial challenge to policy noncompliance.

#### IV. THE LEGAL STATUS OF THE POLICIES

All six of the refuge management policies that constitute the first cycle of administrative interpretation of the 1997 Refuge Improvement Act present the same unusual question of legal status. Having gone through the procedures required for Administrative Procedure Act (“APA”) section 553 rulemaking,<sup>163</sup> do they have the same legal status as rules codified in the Code of Federal Regulations (“C.F.R.”)? The refuge policies are not codified in the C.F.R. because they do not directly regulate private behavior—they address solely the management activities of federal officials in charge of refuges.<sup>164</sup> But do they bind the Service in the same way that regulations bind agencies?<sup>165</sup> This question is important because binding policies are likely to be taken more seriously by agency officials faced with mountains of paperwork and procedure. An analysis of the content of written policies only goes so far in evaluating their effectiveness. In the end, only policies that actually shape management practices will impact the system.

This section begins with the basic principles of administrative law that generally support binding an agency to policies promulgated through the notice-and-comment process. It then describes the FWS Manual and compares it to counterparts at other land management agencies. The legal status of a manual depends on several factors that courts employ to evaluate whether land management policy is binding on the government. But the judiciary has not settled on a uniform test and different courts apply factors in disparate ways. The section concludes by distinguishing the Clinton-era policies, which will likely bind the

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163. 5 U.S.C. § 553 (Westlaw 2006).

164. The C.F.R. contains federal regulations of “general applicability and legal effect.” 1 C.F.R. § 8.1(a) (Westlaw 2006). An administrative issuance meets this definition if it prescribes a penalty or course of conduct; confers a right, privilege, authority, or immunity; or imposes an obligation relevant to an open-ended class of the public. *Id.* § 1.1. Basically, the C.F.R. reprints agency documents that are directed toward the public rather than agency management of resources. The important exception is for agency management policies that Congress requires to be promulgated as a rule, such as the FWS compatibility regulations and the Forest Service land and resource management regulations. 16 U.S.C. § 668dd(d)(3)(B) (Westlaw 2006); *id.* § 1604(g).

165. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (the source of the “Accardi Principle” that agencies must comply with their own rules).

Service, from the Bush-era policies, which present a more difficult case because of disclaimers published along with them in the Federal Register.

#### A. *The Administrative Law of Manuals*

Most administrative law questions concerning agency policy ask whether the policy must go through notice-and-comment rulemaking. There is an ever-growing body of case law and literature addressing the circumstances under which agencies must employ the APA section 553 procedure in order to make their statutory interpretations binding. However, the refuge policies present the converse question: having gone through that procedure, are they binding on the Service? Another related question concerns how deferential courts will be to the substantive interpretations of the 1997 Act in the policies.

Courts deciding whether manuals are binding look at both substantive and procedural aspects of the administrative material. The substantive dimension is the content of the manual policy. This dimension is concerned with whether the policy encodes duties an agency must meet through particular standards, methods, and binding language. The procedural dimension is the manner in which the agency promulgates the manual provision.

The circuits are divided on the question of whether public land manuals are binding. However, the case law can be reconciled by focusing on the procedural dimension. Notice-and-comment procedure corresponds with binding status. In general, manual provisions are not promulgated under APA section 553 procedures. Most litigation involves the United States Forest Service manual. The majority of courts that examine the question closely find agency manuals to be non-binding, internal guidance unless some special circumstance raises the legal status of the policy. The few manual provisions promulgated under notice-and-comment procedures, though, are regarded by courts as binding on agencies.<sup>166</sup> I explore the substantive and procedural

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166. Compare *Rhodes v. Johnson*, 153 F.3d 785, 787-88 (7th Cir. 1998) and *Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1023, n.8 (10th Cir. 2002) (notice-and-comment publication in the Federal Register make policies binding) with *W. Radio Serv. Co. v. Espy*, 79 F.3d 896, 901 (9th Cir. 1996) and *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996) (manual does not bind the Forest Service in circumstance where it was not promulgated under notice-and-comment procedures). See also *Wilderness Soc'y v. Norton*, 434 F.3d 584, 596 (D.C. Cir.

considerations in detail in the next subsection.

For notice-and-comment rules, courts regard the APA procedure as a kind of one-way ratchet. Once an agency has engaged the public through the process, it is obliged to follow the result until it reverses itself employing the same process. This is the underlying principle of the landmark 1983 case *Motor Vehicle Manufacturers Association v. State Farm*.<sup>167</sup>

In *State Farm*, the Supreme Court rejected the Reagan administration's argument that an agency could deregulate more easily than it could regulate in the first place. The administration argued, in other words, that it could revoke a rule under the same low standard of review that a court would employ to review refusal to promulgate in the first place.<sup>168</sup> The Court found that revocation of a rule (in this case one governing passive restraints in automobiles) is different from an initial decision to forego promulgating a rule. An agency does not have a very high hurdle to justify failure to promulgate (or, interpret) a rule—in fact, such a decision is close to non-reviewable. But, having established an agency position or interpretation, an agency faces a higher standard to justify reversal. The Court explained its reasoning: "Revocation constitutes a reversal of the agency's former views as to the proper course. A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress."<sup>169</sup>

Under the *State Farm* rationale, the Service faces a higher burden to explain its variance from a notice-and-comment promulgated policy than it would a decision not to make an official interpretation in the first place. Even if courts refuse to enforce the terms of the policies directly on the Service, they may indirectly restrict refuge management through the APA's general standard of judicial review. A court may find an unexplained or insufficiently supported departure from the terms of the policies

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2006) (National Park Service manual of policies, which were not promulgated using notice-and-comment procedures, are not binding on the agency).

167. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

168. See Jerry L. Mashaw, *The Story of Motor Vehicle Manufacturers Association of the U.S. v. State Farm Mutual Automobile Insurance Co.: Law, Science and Politics in the Administrative State*, in ADMINISTRATIVE LAW STORIES 335, 369, 381 (Peter L. Strauss ed., 2006) (describing the deregulation platform of the Reagan election campaign and the administration's legal theory rejected by the Court).

169. *Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 41-42.

arbitrary and capricious. That would be a basis for a remand to the agency under the APA.

In return for its investment in the notice-and-comment procedure, the Service should receive from courts greater deference to its interpretations of the refuge organic law.<sup>170</sup> But, this comes at the price of binding the agency to its published determinations. If courts will not bind agencies to their manual interpretations, then courts should refuse to grant *Chevron* deference to the definitions and interpretations in the policies.<sup>171</sup>

### B. *Promulgation of Public Land Manuals*

Matters of public land administration generally need not go through the APA section 553 notice-and-comment procedure because they fall under the “public property” exception.<sup>172</sup> Nonetheless, some public land legislation, such as the Refuge Improvement Act’s provision on compatibility, waive the exception and affirmatively require rulemaking.<sup>173</sup> For the vast majority of resource management guidance, notice-and-comment is not required for another reason—agency manual provisions typically are interpretive rules, rather than legislative rules. Interpretive rules state what the agency thinks a statute means, in contrast to legislative rules, which create new rights or duties.<sup>174</sup>

Procedurally, the Bush refuge policy-making followed the same notice-and-comment approach employed by the Clinton Administration to promote the new organic legislation and respond to past weaknesses in refuge management. This important continuity in public land administration ensured that the states, public and all interest groups had ample opportunity to evaluate draft policies through widely available notices and text in the

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170. See *United States v. Mead Corp.*, 533 U.S. 218 (2001) (refusing the most deferential standard of review to agency manuals that fall short of notice-and-comment rulemaking procedure).

171. Compare *Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984) (deferring to any permissible agency interpretation where legislation fails to unambiguously address the precise issue) and *United States v. Mead Corp.*, 533 U.S. 218 (2001) (refusing the most deferential standard of review to agency manuals that fall short of notice-and-comment rulemaking procedure).

172. 5 U.S.C. § 553(a) (Westlaw 2006).

173. 16 U.S.C. § 668dd(d)(3)(B) (Westlaw 2006).

174. *Gen. Motors v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (interpreting 5 U.S.C. § 553(b)(A)). See William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321 (2001) (noting that courts have not agreed on the distinction between the two kinds of rules, and reviewing the various approaches used by courts).

Federal Register.<sup>175</sup> It also recognized the heightened importance of legal restrictions on refuge management that originate with the 1997 organic act. And, it reflects a current trend of somewhat increased reliance on notice-and-comment procedures in public land administration generally, even when not required by statute.

The APA section 533 informal rulemaking procedures employed by the FWS distinguish these policies from most of the other materials in the *Fish and Wildlife Service Manual*, which were issued without the same level of public scrutiny. Other public land agencies have manuals as well, which seldom rely on the notice-and-comment process for promulgation of their provisions. The oldest and most famous of the public land manuals, the *Forest Service Manual*, is a good example, where only provisions involving a "substantial public interest or controversy" go through notice-and-comment.<sup>176</sup> Even when triggered, the *Forest Service Manual* notice-and-comment procedures generally fall short of the more elaborate APA section 553 practice employed for the recent FWS policies.<sup>177</sup>

Some of the other agencies' manuals occupy a lower station in the hierarchy of authorities governing resource management. For instance, the National Park Service's manual provisions occupy the bottom rank of a three-tier system of park system guidance, with a set of Management Policies at the top.<sup>178</sup> The 2006 refuge policies, though codified in the *Fish and Wildlife Service Manual*, are more analogous to the overarching National Park Service *Management*

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175. The continuity has even deeper roots. The refuge system has always had a special relationship with the Federal Register due to the relatively greater administrative powers to create refuges, compared to other public land units. The very first entry in the first volume of the Federal Register contains a notice of an acquired enlargement to the Cape Romain Migratory Bird Refuge. 1 Fed. Reg. 1 (Mar. 14, 1936).

176. 36 C.F.R. § 216.6 (Westlaw 2006).

177. *Id.* The text of APA section 553, 5 U.S.C. § 553 (Westlaw 2006), contains a bare-bones mandate to agencies engaged in rulemaking to provide notice of the legal authority and a description of the issues involved, an opportunity to participate through submission of written views, and publication of the final rule with "a concise general statement" of its basis and purpose. The practice of notice-and-comment rulemaking under section 553 has, however, grown considerably more detailed in the past sixty years. Mostly as a result of judicial decisions, agencies provide preambles setting out the objectives of the rule, and substantive responses to all relevant comments received. A final rule, like the final policies of the FWS, lays out a detailed brief for the administration's view and explains the resolution of controversial elements. *See e.g.*, *United States v. Nova Scotia Food Prod. Corp.*, 568 F.2d 240 (2d Cir. 1977) (reviewing the adequacy of the notice-and-comment process for a rulemaking).

178. U.S. NAT'L PARK SERV., NATURE & SCIENCE, POLICIES AND GUIDANCE, <http://www.nature.nps.gov/policiesguidance/index.cfm> (last visited Sept. 29, 2006).

*Policies* document,<sup>179</sup> which recently received a highly publicized reworking, ultimately rejected, by the Bush Administration.<sup>180</sup>

### C. *The Judicial Factors that Determine Whether Policy is Binding*

The only court to have considered whether to require the FWS to follow its manual for refuge management concluded, in *McGrail & Rowley v. Babbitt*, that the manual is nonbinding guidance.<sup>181</sup> However, that 1997 decision predated the policies discussed in this article, which were promulgated with notice-and-comment in the Federal Register. *McGrail & Rowley*, like most judicial decisions in this field, is not directly applicable to the recent FWS policies because it concerns manual provisions that did not follow all of the customs and requirements of notice-and-comment rulemaking. The cases may nonetheless be profitably mined for insights.

In 2006, the D.C. Circuit held that the Park Service's *Management Policies* is not binding on the agency.<sup>182</sup> Recall that this document is the closest Park Service analogy to the new refuge policies. *Management Policies* contains the key interpretations of land management law for national park administration. As the latest word on this issue by the nation's preeminent administrative law court, *Wilderness Society v. Norton* is particularly significant because it contains an extended analysis of whether public land manuals are binding.<sup>183</sup> The case involved policies that the Park Service did not promulgate under the APA section 553 notice-and-comment procedures.

*Wilderness Society v. Norton* dealt with a challenge to the NPS' failure to create wilderness management plans for several parks. No statute compels the creation of these plans. The legal authority that discusses the plans is the NPS *Management Policies*, which states that each relevant park "will develop and maintain" the plans.<sup>184</sup>

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179. U.S. NAT'L PARK SERV., MANAGEMENT POLICIES (2006), <http://www.nps.gov/policy/mp/cover.htm>.

180. See Dan Berman, *National Parks: Recreation Industry Makes Final Push to Change NPS Rules*, 10 LAND LETTER, July 20, 2006; Dan Berman, *NPS Gives Revised Management Policy a 'Prime Time' Launch*, 10 LAND LETTER, Oct. 20, 2005.

181. *McGrail & Rowley v. Babbitt*, 986 F. Supp. 1386, 1394 (S.D. Fla. 1997).

182. *Wilderness Soc'y v. Norton*, 434 F.3d 584, 595-96 (D.C. Cir. 2006).

183. The opinion also reached a conclusion contrary to another decision decided by the same circuit only six years earlier. *Wilderness Soc'y*, 434 F.3d at 595. *Contra Davis v. Latschar*, 202 F.3d 359, 366 (D.C. Cir. 2000) (finding management policies binding on the Park Service because it intended to be bound by them).

184. U.S. NAT'L PARK SERV., MANAGEMENT POLICIES § 6.3.4.2, cited in *Wilderness Soc'y*,



The use of the word "will," rather than more clear terms such as "shall" or "may" to indicate either binding intent or discretion, respectively, is a characteristic shared by the FWS refuge policies.<sup>185</sup> It raises an issue of agency intent to compel rather than to allow certain actions.

In considering whether manual or policy provisions bind resource management agencies, *Wilderness Society v. Norton* stated that courts should examine two issues: the effects of the agency promulgation and the intent of the agency.<sup>186</sup> But a close reading of the opinion reveals that it actually considers four factors, publication and procedure, binding content, intent, and congressional mandate, which all have roots in other public land management policy cases.

### 1. *Publication and procedure.*

The first factor, which tilts toward binding the FWS to the policies, looks at where the material is published and whether it is promulgated in conformance with APA informal rulemaking.<sup>187</sup> The closer the publication and procedure comes to the standards for legislative rules, the more likely a policy will bind an agency. All six refuge policies implementing the 1997 Act went through the Federal Register notice-and-comment procedure, which is historically unusual for public land management manuals. But in recent times agencies have generally promulgated the more central manual provisions through informal rulemaking procedures.

The *Wilderness Society v. Norton* court noted the significance not simply of employing the notice-and-comment process but also of publishing a final version in the Federal Register and codification

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434 F.3d at 594.

185. See MARY BARNARD RAY & JILL J. RAMSFIELD, LEGAL WRITING: GETTING IT RIGHT AND GETTING IT WRITTEN 384 (4th ed. 2005) (discussing clarity of "shall" and "may" in legislative writing); *In re Trusteeship of First Minneapolis Trust Co.*, 277 N.W. 899, 902 (Minn. 1938) ("will" is an elastic term). Most courts directly addressing the meaning of the instruction of the verb "will" conclude that it expresses a mandatory duty. See e.g., *Terra Int'l, Inc. v. Miss. Chem. Corp.*, 922 F. Supp. 1334, 1370-71 (N.D. Iowa 1996), *aff'd*, 119 F.3d 688 (8th Cir. 1997); *Campbell v. Pan Am. World Airways*, 668 F. Supp. 139, 142 (E.D.N.Y. 1987); 45 WORDS AND PHRASES 237-240 (1970).

186. *Wilderness Soc'y*, 434 F.3d at 595.

187. *McGrail*, 986 F. Supp. at 1394 (finding a Fish and Wildlife Service manual provision not binding on the agency); *W. Radio Serv. v. Espy*, 79 F.3d 896, 901 (9th Cir. 1996) (finding Forest Service manual provisions not binding on the agency where procedural requirements of the APA were not followed).

in the C.F.R.<sup>188</sup> The court regarded the failure to codify the policy in the C.F.R. as signifying an intention to make a general policy, not a binding rule. But a general policy can act as a binding interpretation on an agency.

Unfortunately, the D.C. Circuit appears to confuse two different issues here: promulgation procedure and the standard for including a rule in the *Code of Federal Regulations*. The first issue is the effect of a past *procedure* on subsequent agency behavior. The notice-and-comment process engages the public and fully vets the merits of a policy. Employing the APA section 553 procedure limits agency discretion in exchange for the attention of the public. But, this is a separate issue from the standard for including a rule in the C.F.R., which turns on whether an agency statement is binding on *private* parties, not the agency.<sup>189</sup> The primary concern of this discussion is under what circumstances the *agency* should be bound. There is little question that the refuge policies are not regulating the public at large.

In contrast to the NPS *Management Policies*, the refuge policies did fulfill all of the procedural requirements of the APA. The FWS even abided by the custom of responding, issue-by-issue, to all of the substantive comments made. However, only the compatibility rule may be found in the C.F.R. because the 1997 Act singles it out for “final regulations.”<sup>190</sup> The FWS policies, therefore, may be regarded by the D.C. Circuit as having no legal effect under the confused *Wilderness Society* analysis.<sup>191</sup>

## 2. *Binding content.*

The second factor used by courts to determine the binding effect of policies is whether the manual provisions employ “generally advisory and policy-oriented” language.<sup>192</sup> In order to be binding on the agency, the policy should “prescribe substantive rules—not interpretive rules, general statements of policy or rules

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188. *Wilderness Soc’y*, 434 F.3d at 595-96.

189. See Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311 (1992) (exhaustively categorizing agency rulemaking and identifying the limited circumstances where interpretive rules not promulgated under the APA’s notice-and-comment procedure may nonetheless bind private parties).

190. 16 U.S.C. § 668dd(d)(3)(B) (Westlaw 2006).

191. *Id.*

192. *McGrail*, 986 F. Supp. at 1394.

of agency organization, procedure or practice.”<sup>193</sup> A substantive rule is one that would, according to the D.C. Circuit, have a binding effect on private parties or on the agency.<sup>194</sup> Thus, the standard for whether a rule binds an agency returns, via inquiry into whether it is “substantive,” to ask whether the rule binds the agency or a private party. This particular formulation again conflates the question of whether a policy should bind *private parties* with the circumstances under which a policy should constrain the discretion of *agencies*. The first question, as noted above, is not the subject of this particular controversy. The second is, but most definitions of “substantive rules” look to effects only on the private sector. It is circular logic to ask whether a policy encodes a substantive rule as a means of determining whether an agency should be bound by the policy.

This test is also subjective. All of the FWS policies discussed in this article are just that: policies, which establish procedures and standards of behavior for refuge managers and their supervisors. Even the compatibility regulation, codified as a C.F.R. rule, is ultimately a general statement of policy and procedure for the Service, and sets out no rules binding on private parties. All of the policies avoid the word “shall” in favor of more ambiguous terms such as “should” and “will.” Different courts, using different formulations of this factor in the test to determine whether an agency is bound by a manual provision, might fairly arrive at different conclusions.

### 3. *Intent.*

The third factor is agency intent. If an agency states that it means to circumscribe its own discretion through manual guidance, courts are apt to hold the agency to its word. Unfortunately, agencies often send mixed messages in stating their intent. That is the case with the FWS policies which, as manual provisions, are intended to bind refuge managers but were promulgated with disclaimers seeking to prevent judicial enforcement in the face of agency noncompliance.

The FWS manual “contains the standing and continuing directives of the Service with which Service employees *must* comply. It has regulatory force and effect within the Service. . . . It

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193. *W. Radio Serv. v. Espy*, 79 F.3d 896, 901 (9th Cir. 1996).

194. *Wilderness Soc’y v. Norton*, 434 F.3d 584, 595 (D.C. Cir. 2006).

establishes the requirements and procedures for employees to follow in carrying out the Service's authorities, responsibilities, and activities."<sup>195</sup> Therefore, absent any contrary indications in specific provisions, the agency intent factor should lead a court to find the manual policy provisions binding. That is clearly the case for the Clinton-era policies.

However, the FWS promulgated the 2006 policies with prefatory disclaimers in the Federal Register. The boilerplate disclaimer states the policy "is intended to improve the internal management of the Service, and it is not intended to, and does not, create any [judicially enforceable] right or benefit, substantive or procedural."<sup>196</sup> The disclaimer's wording tracks closely the common disclaimer of judicial enforcement in executive orders.<sup>197</sup> The tension between the actual manual provision and the disclaimer published with the 2006 policies leaves some room for debate over their binding status. The disclaimer does not abrogate the mandatory language of the FWS manual that binds agency officials to manual policies. Rather, the disclaimer attempts to deal with outside enforcement of the terms of the manual to the Service. Therefore, if the third factor is intent to be bound, then the disclaimer does not affect the substantive test that courts use in deciding what binds agencies. The disclaimer expresses an intent about the agency's susceptibility to judicial review of its decisions. It does not disclaim the manual's statement that employees are bound by the terms of manual policy. As to the disclaimer of judicial review, it seems unlikely that an agency, through a Federal Register statement, can override the statutory rights accorded in the APA.<sup>198</sup> In this respect, the disclaimer is different from those in

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195. FISH & WILDLIFE MANUAL, *supra* note 8, pt. 010 § 1.4(B) (emphasis added).

196. Policy on National Wildlife Refuge System Improvement Act of 1997 Mission and Goals and Refuge Purposes, 71 Fed. Reg. 36,404 (U.S. Fish & Wildlife Serv. June 26, 2006); Final Appropriate Refuge Uses Policy Pursuant to the National Wildlife Refuge System Improvement Act of 1997, 71 Fed. Reg. 36,408, 36,409 (U.S. Fish & Wildlife Serv. June 26, 2006); Final Wildlife-Dependent Recreational Uses Policy Pursuant to the National Wildlife Refuge System Improvement Act of 1997, 71 Fed. Reg. 36,418, 36,419 (U.S. Fish & Wildlife Serv. June 26, 2006).

197. *See, e.g.*, Exec. Order No. 12,630, 53 Fed. Reg. 8859 (Mar. 15, 1988) ("this order is intended only to improve the internal management of the Executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States"). *See McKinley v. United States*, 828 F. Supp. 888, 893 (D. N.M. 1993) (finding no judicial review available to challenge agency noncompliance with Executive Order 12,630 dealing with takings implication assessment).

198. 5 U.S.C. §§ 702, 706 (Westlaw 2006). In contrast, no statutory APA rights were at issue in *McKinley v. United States*, *supra* note 197.

executive orders creating policies that are not part of legislative frameworks.<sup>199</sup>

Courts are also inconsistent in their interpretation of agency statements about binding intent. The National Park *Management Policies* reflects a level of management detail analogous to the refuge policies considered in this article. Moreover, the *Management Policies* expresses its binding intent in language similar to the FWS manual. *Management Policies* states that “[a]dherence by NPS employees to policy is mandatory unless specifically waived or modified by the Secretary, the Assistant Secretary for Fish and Wildlife and Parks, or the Director.”<sup>200</sup> In 2000, the D.C. Circuit found that statement sufficient to constitute requisite intent to bind the Park Service, but then reached the opposite conclusion in 2006.<sup>201</sup> The 2000 decision focused on the “mandatory” aspect of the provision, while the 2006 decision focused on the reservation of discretion on the part of political appointees to waive the policy.

#### 4. *Congressional mandate.*

The fourth factor is whether the policy “emanate[s] from a congressional mandate.”<sup>202</sup> The two cases discussing this factor as a significant component of their decisions found no basis to force an agency to comply with a policy requirement if the requirement was not mentioned in a statute. No statute mentions the special management plans for wilderness-quality lands discussed in the policy at the center of the *Wilderness Society v. Norton* dispute.<sup>203</sup> Similarly, *McGrail & Rowley v. Babbitt* attached some significance to the absence of any reference to the FWS manual, generally, in legislation or existing rules.<sup>204</sup>

It remains the case that no statutes dealing with refuge management make reference to the FWS manual. But, unlike the wilderness management plans of the Park Service, many of the specific administrative tasks defined and discussed in the key

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199. See Peter Raven-Hansen, *Making Agencies Follow Orders: Judicial Review of Agency Violations of Executive Order 12,291*, 1983 DUKE L.J. 285 (1983).

200. U.S. NAT'L PARK SERV., *Introduction to MANAGEMENT POLICIES* (2006), available at <http://www.nps.gov/policy/mp/cover.htm>.

201. *Wilderness Soc'y v. Norton*, 434 F.3d 584, 595-96 (D.C. Cir. 2006) (finding the language insufficient to bind the Park Service). *Contra* *Davis v. Latschar*, 202 F.3d 359, 366 (D.C. Cir. 2000) (finding the language sufficient to establish a binding intent).

202. *Wilderness Soc'y*, 434 F.3d at 596.

203. *Id.*

204. *McGrail & Rowley v. Babbitt*, 986 F. Supp. 1386, 1394 (S.D. Fla. 1997).

refuge policies are required by the 1997 Refuge Improvement Act. For instance, the Wildlife-Dependent Recreation Policy defines and sets out the terms for allowing six uses that the refuge organic law explicitly promotes.<sup>205</sup> Though the link to legislation is not as direct as that for the compatibility policy, this factor militates in favor of binding the Service to many of the 2006 policies' provisions.

#### D. *Prospects for the FWS Manual Policies*

In the end, the case law grapples inconclusively with the question of when courts should hold agencies to their management policies. The basic notion of rule-of-law indicates that the government should be bound by written rules, especially ones that it writes for itself.<sup>206</sup> In contrast, a formalistic approach looks for categorical distinctions between "internal guidelines" and "binding norms"<sup>207</sup> that have more to do with the circumstances under which administrative law compels informal rulemaking procedures for the protection of private interests than they do with the rationale for judicially enforced limitations on agency behavior.

Courts ought to focus more on the procedure through which the provision was vetted, in this case the informal rulemaking procedure. The presence or absence of a particular procedure has the merit of being easy to determine, where the substantive nature of the promulgated policy is very difficult to pin down precisely. Unfortunately, even when concerning itself with procedure, the *Wilderness Society v. Norton* opinion goes beyond the promulgation to whether the outcome is codified in the C.F.R.<sup>208</sup> Alas, this is a back-door invitation to reconsider the substantive nature of the policy because the test for codification relates to substantive attributes: e.g., whether the policy confers a right, privilege, authority, or immunity; or whether it imposes an obligation on the public.<sup>209</sup> The 2006 manual provisions are appropriately excluded from the C.F.R. because they do not intend to encode a standard of behavior for private parties. That determination should have no bearing on whether the policies were properly promulgated to

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205. 16 U.S.C. §§ 668dd(a)(3)-(4), 668ee(2) (Westlaw 2006).

206. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-67 (1954).

207. *Wilderness Soc'y*, 434 F.3d at 596.

208. *Id.*

209. 1 C.F.R. § 1.1 (Westlaw 2006). *See supra* note 164 and accompanying text.

bind the public agency.

The *Wilderness Society v. Norton* court concluded that binding the Park Service to follow its land management policies would “chill efforts by top agency officials to gain control over their bureaucratic charges through internal directives.”<sup>210</sup> On the facts, the court’s conclusion seems evidently wrong: the NPS *Management Policies* explicitly allowed top agency officials to waive provisions without needing to justify their actions.<sup>211</sup> Contrary to the D.C. Circuit’s reasoning, officials may find it worthwhile to make the drawn-out effort to promulgate policy only if there is some assurance that the payoff will be something that binds successors absent a waiver or formal policy reversal.

Moreover, incentives for agency officials ought to be only part of the calculus in determining what is good administrative law. Another consideration is the incentive for citizen involvement. One would expect people to contribute less time and energy to policymaking when the final result is merely discretionary for the agency. Binding the agency vindicates public investment in the notice-and-comment process.

Finally, binding policies more often assist rather than hamstring resource managers who are located far from headquarters. Resource managers need a firm backstop (commonly called “cover”) in order to resist those powerful local and longstanding economic interests that conflict with conservation objectives. Imagine the benefit of a binding Appropriate Uses Policy to a refuge manager facing a phone call from the local congressional representative angry over termination of a non-wildlife-dependent recreational program, such as horseback riding.

In recent years, judicial oversight of public land management has receded under the procedural limitations of administrative law, such as standing, ripeness, and APA review of only final agency actions.<sup>212</sup> This trend only emphasizes the importance of the refuge policies as substantive handles for holding the Service to its interpretations of the 1997 organic law. Courts have consistently imposed constraints on agency behavior where the agency has violated its own land management policy promulgated under APA

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210. *Wilderness Soc’y*, 434 F.3d at 596.

211. *See supra* note 200 and accompanying text.

212. 5 U.S.C. § 704 (Westlaw 2006). *See, e.g.*, *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004).

section 553 procedures.<sup>213</sup> Administrative law is, of course, preoccupied with procedures, and this difference between the new refuge policies and their counterparts in the park and forest systems may well prove crucial in the judicial enforcement of policies. The Clinton-era policies present a stronger case for binding the Service because their publication did not include disclaimers of judicial enforceability. But, unlike similar disclaimers in executive orders, agency-created shields to statutorily authorized judicial review are unlikely to be accorded great respect by the courts.

## V. CONCLUSION: THEMES AND PATHS AHEAD

The 2006 Policies reflect the priorities and predilections of the Bush Administration and former Secretary Gale Norton, who stepped down from her Interior post shortly before the department published the Policies. The Policies are larded with Norton's favorite words, the four "c's": conservation through cooperation, communication and consultation.<sup>214</sup> President Bush highlighted the terms in his executive order promoting cooperative conservation.<sup>215</sup> All of the collaboration, cooperation and consultation buzz on the pages of the Policies add up to more than mere rhetoric (though there is plenty of that) when it comes to federalism.

Cooperative federalism has long been common on the refuges, where state fish and game regulations generally apply. Some refuges, called coordination areas, are actually run by states through cooperative agreements with the Service.<sup>216</sup> More important to the state-centric characteristics of the Policies, however, is the 1997 Act itself, which the Tenth Circuit has characterized as a basis for "cooperative federalism" in refuge management.<sup>217</sup>

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213. See *supra* note 166.

214. See, e.g., P. Lynn Scarlett, *A New Approach To Conservation: The Case For The Four C's*, 17 NAT. RESOURCES & ENV'T 73, 111 (Fall 2002); Alex Pasquariello, *A Champion of "Cooperative Conservation": A Conversation with Interior Secretary Gale Norton*, HIGH COUNTRY NEWS, May 24, 2004, at 6.

215. Exec. Order No. 13,352, 69 Fed. Reg. 52,989 (Aug. 26, 2004).

216. Fischman, *supra* note 6, at 467.

217. *Wyoming v. United States*, 279 F.3d 1214, 1231 (10th Cir. 2002). See also 16 U.S.C. § 668dd(a)(4)(M) (Westlaw 2006) (in administering the National Wildlife Refuge System, the Secretary shall "ensure timely and effective cooperation and collaboration with Federal agencies and State fish and wildlife agencies").



The 2006 Policies exhibit two of the three distinctive types of natural resources federalism.<sup>218</sup> Most common are examples of state favoritism in federal process. Though no guarantee that the state view will prevail, state favoritism provides a special, direct avenue for states to influence a federal land management decision.<sup>219</sup> The administrative history of the 2006 Policies exhibits the privileged position of states in the rule-making process: after the comment period for the draft rules had closed, the Interior Department convened a group of state officials chosen by the International Association of State Wildlife Agencies to help rewrite the final Policies. Interagency personnel agreements obviated the need for Federal Advisory Committee Act public disclosures.<sup>220</sup> The contents of the Policies are rife with opportunities for routine coordination with state agencies.<sup>221</sup> The most extreme example of state favoritism in the 2006 Policies is the opportunity for states to avoid the appropriate and compatible uses analysis for actions categorized as refuge management activities in memoranda of understanding with the Service.<sup>222</sup>

The strongest (and rarest) type of cooperative federalism in natural resources law is federal deference to state process. Under this form of cooperative conservation, the federal government will employ a state standard absent some disqualifying circumstance.<sup>223</sup> The most important example of federal deference to state process in the 2006 Policies is the inclusion of all state-regulated takes of fish and wildlife as per se appropriate.<sup>224</sup> The historical dominance of states in managing game and nuisance animals explains why this would be an area for a strong form of natural resources federalism. Nonetheless, many tensions currently exist between refuge managers and state wildlife officials over appropriate practices

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218. See Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179 (2005) (describing three broad types of cooperative federalism in natural resources law: place-based collaboration, state favoritism in federal process, and federal deference to state process).

219. *Id.* at 200-03.

220. 5 U.S.C. app. 2 §§ 1-5 (Westlaw 2006).

221. See, e.g., Final Appropriate Refuge Uses Policy Pursuant to the National Wildlife Refuge System Improvement Act of 1997, 71 Fed. Reg. 36,408, 36,410 (U.S. Fish & Wildlife Serv. June 26, 2006) (Issue 1: Coordination With State Fish and Wildlife Agencies and Jurisdictions).

222. See *supra* text accompanying notes 79-87.

223. Fischman, *supra* note 218, at 203-205.

224. FISH & WILDLIFE MANUAL, *supra* note 8, pt. 603 § 1.3(B).

regarding game.<sup>225</sup> The Policies pull the resolution of those disputes more toward the state side than have previous management prescriptions.

Also in line with other Bush Administration initiatives in public land law, the disclaimers published with the Policies seek to exclude courts from their oversight role.<sup>226</sup> This shuts an important door for public redress. In doing so, it diminishes the agency officials' incentives to seriously consider public suggestions and challenges. It also sets the clock back to a time when the courts would hold an agency to its word only to address private property or contract claims.

Another theme from the 2006 Policies, the hierarchical categorization of activities, builds on the 1997 statute and prior guidance. Categorizing activities rather than evaluating their effects has always been an important function of dominant use agencies, which are charged with a mission to promote certain uses over others. The refuge system is the example *par excellence* of this approach. Though impact evaluation is an important determinant of compatibility and other legal requirements, categorization occupies a more central place in the FWS procedures than in the procedures of any other public land management agency. Before the 2006 Policies, the FWS employed a single, four-tier hierarchy of uses to establish priorities.<sup>227</sup> The new Policies establish a five-tier system for determining appropriateness of uses.<sup>228</sup> Combined with the prioritization of individual refuge purposes,<sup>229</sup> the Service has now created a more complex, formulaic system of administration. The Goals and Refuge Purposes Policy's preference for individual refuge purposes will diffuse the focus of the system and frustrate attempts to concentrate scarce administrative resources on key systemic priorities. This thwarts the fundamental purpose of organic legislation and may well skew refuge management

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225. See, e.g., *Wyoming v. United States*, 279 F.3d 1214, 1231 (10th Cir. 2002) (describing the longstanding dispute over elk vaccination and feeding in the National Elk Refuge).

226. For instance, the 2005 Forest Service planning rule similarly disclaims judicial review of land and resource management plans. National Forest System Land Management Planning, 70 Fed. Reg. 1023, 1025 (Jan. 5, 2005) (to be codified at 36 C.F.R. pt. 219) (endorsing the extension of the principles denying judicial oversight in *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 737 (1998) and *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004)).

227. Fischman, *supra* note 6, at 531.

228. FISH & WILDLIFE MANUAL, *supra* note 8, pt. 603 § 1.10

229. *Id.*, pt. 601 § 1.15.

priorities too much toward supporting local, longstanding uses at the expense of ecological enhancement.

The Appropriate Uses Policy introduces a coarse filter to eliminate some refuge uses without having to engage in the more exacting compatibility analysis. This is a significant addition to refuge management that will simplify decisions by stripping away some uses early in the planning or approval process. The strong criteria for determining which uses are appropriate are among the best of the 2006 policies. They are specific and easily applied. Among other things, the guidance directs refuge managers' attention across refuge boundaries to explore whether alternative, non-refuge venues exist for low-priority uses.<sup>230</sup> Along with the defined mission goals and the external threats provision of the Integrity-Diversity-Health Policy, this provision advances refuge administration to the vanguard of experimentation with ecosystem management objectives.<sup>231</sup>

In contrast, the Wildlife-Dependent Recreation Policy fails to contribute much to solving the most difficult questions. In particular, the trade-off between quantity and quality of wildlife-dependent recreation is an unresolved tension that will continue to absorb refuge management. The Service reached for the potential solution of distinguishing refuge recreation through leadership in environmental education and interpretation in the other 2006 policies, but failed to grasp it in the Wildlife-Dependent Recreation Policy.

Lest the Service rest on the completion of this first round of Policies proposed during the Clinton administration, it is important to highlight the unfinished business of implementing the 1997 Refuge Improvement Act. The Compatibility and Integrity-Diversity-Health Policies cover only two of the key substantive management criteria of the statute. The Service now needs to turn to its mandates to attain adequate water quality and quantity on the refuges,<sup>232</sup> and to monitor the status and trends of animals and plants.<sup>233</sup> These are the kind of practical tasks for which manual policy is particularly important. Until the Service defines the steps it will take for measuring its water quantity needs, for instance, it will likely continue to put off cataloging and

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230. See *supra* notes 109-110 and accompanying text.

231. See, e.g., ROBERT B. KEITER, KEEPING FAITH WITH NATURE 72 (2003).

232. 16 U.S.C. § 668dd(a)(4)(F)-(G) (Westlaw 2006).

233. *Id.* § 668dd(a)(4)(N).

acquiring water rights. Likewise, refuges can serve as barometers of watershed health through water quality monitoring, and ultimately help improve aquatic integrity through the stewardship mandates.<sup>234</sup> But this will not happen until the Service promulgates new policies to break down these huge challenges into discrete tasks.

The new policies should continue to promise binding guidance in exchange for serious public participation and judicial deference to agency interpretations of the statute. That means continuing to promulgate new manual provisions through notice-and-comment rulemaking but terminating the 2006 practice of disclaiming rights of harmed parties to seek judicial review.

Also, mere promulgation of policies does not conservation make. The Service must redouble its efforts to carry out actions that realize the promise of the policies. That begins with training for existing policies, especially the Integrity-Diversity-Health Policy, and then moving forward with monitoring outcomes. Following CCP development, step-down management should supplement VSPs with similarly detailed plans for ecological enhancement. That will create a more balanced palette of tasks and funding priorities for each refuge.

The statutory deadline for completing refuge plans looms in just six years. That will place enormous pressure on the Service to complete CCPs at the expense of other conservation activities. With a bare-bones budget slowly starving the agency, only the top one or two priorities for refuges will likely make much progress. This raises the stakes for making good choices in identifying paramount refuge purposes, winnowing appropriate uses, and concentrating on recreational uses that advance more than one goal of the system. The 2006 Policies provide ample room for the Service to exercise its leadership in making these choices. Time will tell whether the Policies created so many options that refuge conservation maundered rather than progressed.

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234. *Id.* § 668dd(a)(4)(A) & (F).

