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# PUBLIC PARTICIPATION, THE FOREST SERVICE, AND NFMA: HOLD THE LINE

T. Randall Fortenbery\*

Harley R. Harris\*\*

## I. INTRODUCTION

Currently, the United States Forest Service is engaged in a program of long range planning for the units of the National Forest System. Several congressional enactments of the past decade have directed the Forest Service to conduct the most extensive review and planning in its history, and possibly in the history of any federal land management agency. The holdings of the Forest Service are substantial, approaching 190 million acres in 154 National Forests and 19 National Grasslands.<sup>1</sup> The decisions made as to the use of these lands involve potentially irretrievable commitments of particular resource values. Because of this, and the contemporaneous effect of allocations made, it is imperative that the wisest of possible decisions be made.

The most visible manifestation of this process to the public has been the continual solicitation by the Forest Service of "public comment" on draft and supplemental Forest Plans. The statutory requirement that the agency consult the public during the decisionmaking period<sup>2</sup> is relatively new, resulting primarily from citizen pressures to "open up" the governmental process. Recently, the Forest Service, charged by statute to promulgate regulations guiding the procedure and use of public input during the planning process, revised those regulations.<sup>3</sup> Most significant of the revisions as they pertained to public participation in the planning process was the deletion of a previously included regulatory clause stating that the intent of such activities was, in part, to demonstrate that public issues were considered and evaluated in that process.<sup>4</sup> Additionally, the revised regulations, coupled with the policy of the present Administration, place a greater emphasis on "economic" criteria in the forest planning process.<sup>5</sup>

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\* Master's candidate, Dept. of Agricultural Economics & Economics, Montana State University; B.S., Natural Resource Economics, Montana State University, 1982.

\*\* Second-year law student, University of Montana Law School; B.A., Political Science, Montana State University, 1980.

1. *The United States Government Manual* 119 (1982-83).

2. *See infra* notes 27, 28 and accompanying text.

3. *See infra* notes 15-20 and accompanying text.

4. *See infra* note 36 and accompanying text.

5. *See infra* notes 69, 93 and accompanying text. *See also* 47 Fed. Reg. 43033, 43047 (1982), 36 C.F.R. § 219.14(c)(d) (1982).

The increased emphasis on economics, and the apparent weakening of the regulatory prescription for public participation, provide good reasons for a wide-ranging inquiry into several areas pertinent to public land management policy. In general, statutory directives guiding management activity, implementation of those directives, and the public's role in agency accountability from the social and legal perspectives will be explored. The particular aim is to examine the traditional management policies of the Forest Service, how those practices fit in with the demand for greater accountability, and consequently the affirmative, reactive role that the agency must play in being held accountable. This Article examines in different contexts the "why" of public participation, and in particular the function it plays in the structure of federal land management.

Recognizing the inability of traditional democratic structures to deal adequately with the specifics of the complex land management process and the reality of necessary discretion, and recognizing the bureaucratic context in which such decisions must be made, the authors believe that a strong model of public participation should be fostered and protected.

## II. STATUTORY BACKGROUND

The *Forest and Rangeland Renewable Resources Planning Act of 1974*<sup>6</sup> (RPA) requires the Forest Service to conduct resource assessments and inventories for all units of the National Forest System. The *National Forest Management Act*<sup>7</sup> (NFMA), enacted in 1976, in amending RPA, directs the Forest Service to promulgate plans for the management of each National Forest in accordance with the assessments and inventories of RPA. Together, these two statutes pose a formidable task for the Forest Service. But this task is further complicated by the requirement that the procedures utilized and plans developed comply with the *National Environmental Policy Act of 1969*<sup>8</sup> (NEPA) and the *Multiple Use-Sustained Yield Act of 1960*<sup>9</sup> (MU-SY).

NFMA contains several provisions mandating public participation in the planning process. Section 6 (d) of the Act directs the Forest Service to "provide for public participation in the development, review and revision of all land management plans, and to hold public meetings, or comparable processes, in locations that foster public participation."<sup>10</sup> Additionally, section 6(g)(1) requires that the Forest Service promulgate regulations guiding the planning process, and that such regulations comply with

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6. Pub.L.No. 93-378, 88 Stat. 476 (1974), 16 U.S.C. §§ 1600-1610 (as amended) (1976).

7. Pub.L.No. 94-588, 90 Stat. 2949 (1976), 16 U.S.C. §§ 1601-1614 (1976).

8. Pub.L.No. 91-190, 83 Stat. 852 (1970), 42 U.S.C. §§ 4321, 4331-4335, 4341-4347 (1976).

9. Pub.L.No. 86-517, 74 Stat. 215 (1960), 16 U.S.C. §§ 528-531 (1976).

10. 16 U.S.C. § 1604(d) (1976).

NEPA,<sup>11</sup> which itself provides for public hearings and comments on actions.<sup>12</sup> Those regulations were first established on September 17, 1979,<sup>13</sup> and have governed the process until the recent revisions.<sup>14</sup>

Shortly after taking office, President Ronald Reagan made good on one of his promises to bring about reform in government. By Executive Order 12291<sup>15</sup> the "Presidential Task Force on Regulatory Reform" was established for the purpose of examining new and existing regulations to "reduce the regulatory burden, increase agency accountability. . . minimize duplication, and assure well reasoned regulations."<sup>16</sup> The Task Force acted quickly, notifying the Department of Agriculture (the "parent" department of the Forest Service) on March 9, 1981, that the NFMA regulations were high priority items for review and revision.<sup>17</sup> The Forest Service began such a review, and on February 22, 1981, issued a draft of proposed revisions.<sup>18</sup> These proposals were subject to public comment and review by a panel of consultants.<sup>19</sup> After the review and comment process the final, and now-effective, regulations were issued on September 30, 1982.<sup>20</sup>

In the planning process the Forest Service must identify a range of alternative allocations of use<sup>21</sup> along a spectrum of resource values identified in MU-SY.<sup>22</sup> The previous NFMA regulations required that this

11. 16 U.S.C. § 1604(g)(1) (1976).

12. 42 U.S.C. §§ 4321-4361 (1976).

13. 44 Fed. Reg. 53928, 36 C.F.R. § 219 (1980).

14. The 1979 regulations were superceded by the regulations published in 47 Fed. Reg. 43026 (1982).

15. Exec. Order No. 12291, 46 Fed. Reg. 13193 (1981).

16. *Id.*

17. Letter from James C. Miller III to James Barnes, General Counsel Designate, U.S. Dept. of Agriculture (Mar. 9, 1981).

18. 47 Fed. Reg. 7678 (1982).

19. *Meeting on National Forest Management Act Proposed Regulation*, June 30-July 2, 1982, Westpark Hotel, Rosslyn, Virginia. At this meeting, Assistant Secretary of Agriculture John Crowell reemphasized the intent of the "Task Force" in stating that the revisions were to (in pertinent part) "clarify the language and shorten if possible", and "remove material that seemed inappropriate for regulations, i.e., philosophical rather than regulatory, or more appropriate for other regulations or intra-agency directives." *Opening Remarks of John Crowell, Assistant Secretary of Agriculture, Meeting on the Planning Regulation Revisions*, June 30-July 2, 1982.

20. 47 Fed. Reg. 43026 (1982).

21. The Plans must be prepared in accordance with NEPA, (16 U.S.C. §§ 1604(g) (1976), which provides that "alternatives to the proposed action" be included in every recommendation. (42 U.S.C. §§ 4332(c)(iii) (1976). For the purposes of this discussion the assumption is made that all Forest Plans are "major Federal actions" according to NEPA guidelines (42 U.S.C. §§ 4332(c) (1976).

22. 16 U.S.C. § 1604(e). MU-SY states that "It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, and wildlife and fish purposes." 16 U.S.C. § 528 (1976).

range of alternatives be “reasonable,”<sup>23</sup> and the new ones require a “broad range of reasonable alternatives”.<sup>24</sup> This requirement of reasonableness is a cornerstone of NEPA policy and has a strong footing in case law.<sup>25</sup> It is at this stage of the planning process that the greatest amount of agency discretion is extant. Although constrained by this reasonableness requirement, the Forest Service, in its position of relative informational advantage, has the capacity to “set the stage” and thus exercise a comparatively greater ability to influence the end result.

The public participation-comment process is, from the stand point of individual participants, where the discretion of the agency is subject to the most direct control. Both NEPA (generally)<sup>26</sup> and NFMA (specifically)<sup>27</sup> require the Forest Service to solicit and respond to public opinion in the

23. 36 C.F.R. 219.5(f) (1982).

24. 47 Fed. Reg. 43045, 36 C.F.R. § 219.12(f), (effective November 1, 1982).

25. “[T]he range of alternatives considered by an agency is governed by a ‘rule of reason’ that requires an agency to set forth only those alternatives necessary to permit a ‘reasoned choice.’ *Save Lake Washington v. Frank*, 641 F.2d 1330, 1334 (9th Cir. 1981); *Life of The Land v. Brinager*, 485 F.2d 460, 472 (9th Cir. 1973) *cert. denied*, 416 U.S. 961 (1974). An EIS, however, need not consider an alternative ‘whose effect cannot be reasonably ascertained, and whose implementation is deemed remote and speculative.’ *Id.*” *California v. Block*, 690 F.2d 753 (9th Cir. 1982). The Supreme Court has recently reminded lower courts that they are not free to impose stricter procedures on agencies than those contained in the statutes, and the concept of alternatives must be bounded by “feasibility”, *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council Inc.*, 435 U.S. 519 (1978). *See also Hill & Ortolano, NEPA’s Effect on the Consideration of Alternatives: A Crucial Test*, 18 NAT. RESOURCES J. 285 (1981).

26. The Council on Environmental Quality guidelines, established pursuant to NEPA state at 40 C.F.R. § 1506.6 (1982) that

“Agencies shall: (a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures,. . . (c) Hold or sponsor public hearings or public meetings whenever appropriate or in accordance with the statutory requirements applicable to the agency. Criteria shall include whether there is: (1) Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing; (2) A request for a hearing by another agency with jurisdiction over the action supported by reasons why the hearing will be helpful,. . . (d) Solicit appropriate information from the public.”

The CEQ guidelines are advisory, but the Supreme Court, in *Andrews v. Sierra Club*, 442 U.S. at 358 (1978), declared that they are “entitled to substantial deference” in interpreting and implementing NEPA.

27. 16 U.S.C. 1604(d)(f)(4), (g)(3)(f)(iv), (m)(2). The controlling provision of the Act in regards to participation in the general planning process is: “(d) Public participation in management plans; availability of plans; public meetings.

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

The other provisions require the same participation in: revisions of plans, (f)(d); in instances of departures from the established harvest schedule, (g)(3)(f)(iv), (m)(2), and 16 U.S.C. § 1161 requires public participation for and departure from evenflow—non-declining yield limit on timber sales.

planning proposals. The importance of this process is reflected in the response to the Forest Service's initial proposals. The original regulations contained a comprehensive explanation of the role of participation in the planning process.<sup>28</sup> The Proposed Regulations condensed that into the brief statement that "[p]ublic participation throughout the planning process is encouraged,"<sup>29</sup> while retaining only the statement that "[t]he primary purpose of public participation is to broaden the information base upon which planning decisions are made."<sup>30</sup>

The deletions were defended by the view that the requirements of the original regulations were "more explanatory than directional," that "they [the regulations] were already referenced to NEPA, and that the deleted material would be transferred to the Forest Service Manual."<sup>31</sup> The proposed revisions were poorly received by the public.<sup>32</sup> The Panel of Consultants recommended that either the original regulations, or a different proposed set of regulations (of June 30, 1982),<sup>33</sup> both substantially similar, were preferable to the Forest Service proposals.<sup>34</sup> In the Final Rule, the Forest Service reinstated most of the language of the original regulations. Omitted as redundant was the clause that stated the purpose of public participation was to "broaden the information base on which planning decisions are made."<sup>35</sup> Most significant, however, is that the fifth statement of intent of the original regulations, that public participation "demonstrate that public issues and input are considered and

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28. 36 C.F.R. § 219.7 (1982).

"(a) Because the land and resource management planning process determines how the lands of the National Forests System are to be managed, the public is encouraged to participate throughout the planning process. The intent of public participation is to: (1) Ensure that the Forest Service understands the needs and concerns of the public; (2) Inform the public of Forest Service land and resource planning activities; (3) Provide the public with an understanding of Forest Service programs and proposed actions; (4) Broaden the information base upon which land and resource management planning decisions are made; and (5) Demonstrate that public issues and input are considered and evaluated in reaching planning decisions.", and "(f) The primary purpose of public participation is to broaden the information base upon which planning decisions are made."

29. 47 Fed. Reg. 7684, § 219.6(a) (1982).

30. This was 219.7(f) in the original regulation, renumbered as 219.6(e) in the Forest Service proposals. See *supra* note 18.

31. C. Hartgraves, Summary Report of Forest Service and Panel of Consultants on Proposed Revision of NFMA Regulations. See *supra* note 19. See also Analysis of Public Comment, 47 Fed. Reg. at 43029 (1982).

32. *Id.*

33. Draft Language Prepared by Land Management Planning Staff for Discussion, June 30, 1982; Review of NFMA Land and Resource Management Planning Regulations. (Available from Forest Service.)

34. *Comments of the Committee of Scientists*, letter from Arthur W. Cooper, Head of Department of Forestry, North Carolina State University, to R. Max Peterson, Chief, U.S. Forest Service, USDA, July 26, 1982.

35. See *supra* note 30.

evaluated in reaching planning decisions”<sup>36</sup> was deleted for no articulated reason. This clause was the strongest and most substantive of the five original guidelines. On inquiry, this deletion was defended because the clause “was considered unnecessary, somewhat inaccurate, and non-regulatory in nature”, and that:

[P]ublic participation in itself does not ‘demonstrate that public issues and values are considered and evaluated in reaching planning decisions.’ The results of the planning process, as recorded in the Forest plans, environmental impact statements, and the planning records should reflect and demonstrate the importance of public issues and values. While Forest Service public participation activities do demonstrate a desire to inform or be informed, that is not the intent. The primary intent of these activities is an information exchange which will facilitate planning and management of the National Forests.<sup>37</sup>

Although correct in the strictest semantic sense—that the results of the planning process, and not the process itself, demonstrate the effect of public comment—the general weight of input on the proposed regulations indicated the desirability of including a guideline of this type.<sup>38</sup> Perhaps a response preferable to non-inclusion would have been to relocate the provision in a section where it would have been more technically accurate. It is doubtful, however, that any relocation would lead to greater accuracy because of the fact that 36 C.F.R. § 219.6 is the general regulation promulgated under NFMA<sup>39</sup> dealing with public participation in the planning process, and thus would seem the most logical place for a regulation of this type. The regulations do refer to compliance with NEPA in this respect,<sup>40</sup> but with NFMA’s specific directive to the Secretary of Agriculture to “promulgate regulations,” and “specify procedures to insure that land management plans are prepared in accordance with [NEPA],”<sup>41</sup> it is questionable whether a mere reference to NEPA is sufficient. Additionally, NEPA case law sets forth a minimum requirement that the decisionmaking process demonstrates the consideration and effect of valid public input, and challenges the perception that public input is simply an information exchange.<sup>42</sup>

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36. 36 C.F.R. § 219.7(a)(5) (1982).

37. Letter from C. Hargraves, Director, Land Management Planning, U.S. Forest Service, to Harley Harris (December 28, 1982).

38. See *supra* note 31 and accompanying text.

39. See *supra* notes 10-11 and accompanying text.

40. 36 C.F.R. § 319.10, 47 Fed. Reg. at 43043 (1982), (effective November 1, 1982).

41. 16 U.S.C. §§ 1604(g)(1) (1976).

42. See *infra* notes 166-172, 205, and accompanying text.

## III. PARTICIPATION IN THE FOREST SERVICE CONTEXT

A. *Historical Background*

The Forest Service has a tradition of being one of the most insular and independent of the federal bureaucracies. The most accurate characterization of this traditional role has been that of the manager and steward of the public forest domain. The reforms of NEPA, directives of NFMA, and other legislation of the past several decades have implicitly led to a redefinition of this role—from that of manager to that of administrator.<sup>43</sup>

Government policy for the nation's forests has gone through several eras; running the gamut from disposition to retention to multiple-use management.<sup>44</sup> Goals of government policy for the first century of the Union were that of disposal of those lands to the private sector.<sup>45</sup> Late in the last century, a concern for the abuse of the forests and of the various land disposal laws brought about an affirmative interest in natural resource conservation.<sup>46</sup> Policy at that time shifted away from disposal to retention and reservation,<sup>47</sup> and was heavily influenced by the European model, where the emphasis was on the scientific management of forests for their resource (primarily timber) value.<sup>48</sup> Values of recreation and aesthetics were heavily discounted relative to contemporary perceptions.

The bulk of Forest Service activity during these first few decades was not production. Sufficient timber still existed within private hands to meet current demands; as a result foresters were involved primarily in conserva-

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43. Conversation with Dr. Richard Shannon, Professor of Forestry, University of Montana School of Forestry, Missoula, Montana (Feb. 23, 1983). See also Ostheimer, *The Forest Service Meets the Public: Decisionmaking and Public Involvement on the Coconino National Forest* (March 1977) (Eisenhower Consortium Bulletin 5, Eisenhower Consortium for Western Environmental Forestry Research).

44. It is not the authors' purpose to explore fully the Forest Service's history. Interested readers would do well by referring to any of the following works: G. ROBINSON, *THE FOREST SERVICE: A STUDY IN PUBLIC LAND MANAGEMENT* (1975); D. BARNEY, *THE LAST STAND* (1974); Huffman, *A History of Forest Policy in the United States*, 8 ENVTL. L. 239 (1977).

45. ROBINSON, *supra* note 44, at 3. Efforts to preserve the forests at this time were seen as anti-development, and thus the government only engaged in selective protection of trees vital to trade and defense.

46. *Id.* at 5; Huffman, *supra* note 44, at 256.

47. The Act of March 3, 1981, (commonly known as the Forest Service "Organic Act") Chap. 561 § 24m 26 Stat. 1103 § 24 (1891), as amended 16 U.S.C. §§ 471 (1976), gave the President power to set aside land "covered with timber."

48. The most influential forester of this era was Gifford Pinchot. He viewed forestry as a practical agricultural science, and his philosophies and policies set the tone that the Forest Service has, to a great extent, followed to this day. ROBINSON, *supra* note 44, at 9. Nevertheless, Pinchot is also viewed as a founder and mentor of the modern conservation movement. What is important about his philosophy, according to Huffman, *supra* note 44, at 268, was that its "approach to resource management met current needs without destroying future options." Statutorily, the Forest Management Act of 1897, Chap. 2, 30 Stat. 35, as amended 16 U.S.C. §§ 424, gave direction to manage the reservations to furnish timber, protect watersheds, and otherwise improve or protect them.



tion work.<sup>49</sup> The New Deal and World War II era had several effects on the National Forest System. These years saw the end of the time when public forests were not needed to supply the nation's demand for lumber.<sup>50</sup> Government planners renewed land acquisition activities<sup>51</sup> and developed much of the infrastructure on which further use was predicated.<sup>52</sup> There was a renewed emphasis on the utilization of forest lands for resource values. The perception of the forests' use as being primarily timber oriented, based on "economic" principles, was further entrenched by passage of the *Sustained Yield Act of 1944*.<sup>53</sup>

The increased call to harvest National Forests awakened the conservation movement, and in the 1950's Congress was inundated with proposals advocating a multiple-use concept<sup>54</sup> for those areas. In 1960, the *Multiple Use-Sustained Yield Act*<sup>55</sup> (MU-SY) was passed, which, for the first time, explicitly required the Forest Service to consider recreation and wildlife values (as well as watershed protection) as resources in the management of the National Forests.<sup>56</sup>

Since MU-SY there have been two significant Acts aside from NEPA affecting Forest Service planning: RPA and NFMA. Both evidence the strong trend in the United States during the last two decades towards more centrally controlled, long range planning for public resources.<sup>57</sup> NFMA, in

49. Control of the forest reservations finally, after much political infighting, rested with the Forest Service under Pinchot's management, in 1905. ROBINSON, *supra* note 44, at 14. It was during this time that the Forest Service established its well earned "Tradition of Excellence" in the conservation of the nation's forests. Address by Charles Wilkinson, *The Forest Service: A Call for a Return to First Principles*, Public Land Law Conference, Missoula, Montana (Apr. 22, 1983).

50. This was a function of both the depletion of private lands and the growing appetite of the nation for forest products. ROBINSON, *supra* note 44, at 14.

51. President Roosevelt was encouraged to follow this policy by Pinchot, now serving in an advisory role, who felt "the solution of the private problem lies chiefly in large scale public acquisition of forest lands." Huffman, *supra* note 44, at 273.

52. The Civilian Conservation Corps of the New Deal targeted much of its activities on various construction projects aimed at "improving the public forests." Barlow, *Evolution of the National Forest Management Act of 1976*, 8 ENVTL. L. 539 (1977).

53. The Act of MARCH 29, 1944, Chap. 146, 58 Stat. 132 (1944).

54. ROBINSON, *supra* note 44, at 14; Huffman, *supra* note 44, at 25.

55. See *supra* note 9.

56. In lobbying for the passage of MU-SY, then Forest Service Chief Richard McArdle called on Congress to make it explicit that the (five) resource values (outdoor recreation, range, timber, watershed, and fish and wildlife) were to be given equal consideration. *Hearings before the Subcommittee on Forests of the House Committee on Agriculture, National Forests—Multiple Use and Sustained Yield*, 86th Cong. 2d Sess, 39 (1960). Whatever his intention, it is apparent that Forest Service policy did not undergo a like change. BARNEY, *supra* note 44, at 112. The passage of the Wilderness Act (Act of Sept. 3, 1964, Pub.L.No. 88-577, 78 Stat. 890) four years later evidenced the growing concern for the provision of recreational opportunities. Some viewed the passage of the Act as "expressing a lack of faith in the ability of the Forest Service to implement the multiple use requirement." Huffman, *supra* note 44, at 245.

57. Hannah, Cortner, & Schweitzer, *Institutional Limits to National Public Planning for*

addition to implementing the inventories and assessments of RPA, was passed as a response to the Forest Service practice of clearcutting, which had become increasingly unpopular in many circles,<sup>58</sup> and the decision in *West Virginia Division of Izaak Walton League of America, Inc. v. Butz* (the Monongahela decision), which threatened Forest Service logging activities.<sup>59</sup> In the eyes of many, these Acts were a "firm step in the direction of Congress mandating management procedures, . . . [and] were necessary because professional foresters had not been able to resist industry pressures to cut timber [in any fashion other than clearcutting]." <sup>60</sup>

NFMA was passed as a compromise between industry and the conservation community.<sup>61</sup> It allows regulated clearcutting, and explicitly makes NEPA applicable to Forest Service plans. Besides repealing the Organic Act provision relied upon in the *Monongahela* decision,<sup>62</sup> the Act addresses several policy matters.<sup>63</sup> It reemphasizes the policy of multiple use-sustained yield, provides detailed standards for timber harvesting and planning for individual forests, and also mandates increased public participation.

The Act has a comprehensive scheme for the provision of public participation in the planning process, providing that in certain instances, specific actions cannot be taken without the opportunity for initial public comment.<sup>64</sup> The general congressional intent was that the planning process

*Forest Resources: The Resources Planning Act*, 21 NAT.RES.J. 203 (1981).

58. D. BURK, *THE CLEARCUT CRISIS* (1970).

59. *West Virginia Division of Izaak Walton League of America, Inc. v. Butz*, 552 F.2d 945 (4th Cir. 1975). The court interpreted a provision of the Organic Act limiting timber harvesting on federal lands to those trees which were of "mature or large growth" as precluding clearcutting as a valid management practice. The decision had the effect of threatening virtually all of the Forest Service's clearcutting programs nationwide. Congress acted quickly to pass NFMA, which repealed the part of the Organic Act relied upon in the *Monongahela* decision, and re-established clearcutting as a valid management policy—albeit with restrictions not previously codified.

60. Barlow, *Evolution of the National Forest Management Act*, 8 ENVTL.L. 539, 544 (1977). See generally, BARNEY, *supra* note 44.

61. Note, *The Forest Service, NEPA, and Clearcutting*, 19 NAT.RES.J. 423 (1979).

62. See *supra*, note 59.

63. For a more complete discussion of the full range of issues dealt with in NFMA, see Mulhern, *The National Forest Management Act of 1976: A Critical Examination*, 7 B.C. ENV. AFF. L. REV. 99 (1978); Hall & Wasserstrom, *The National Forest Management Act of 1976: Out of the Courts and Back to the Forests*, 8 ENVTL. L. 523 (1977); Stael, *The National Forest Management Act*, 8 ENVTL. L. 547 (1977).

64. See *supra* note 27; see also Stael, *supra* note 63 at 566. In addition, Sec. 6(f)(1) of the Act, 16 U.S.C. § 1604(f)(1) (1976) requires that plans developed "shall: (1) Form one integrated plan for each unit of the National Forest System, incorporating in one document or one set of documents, available to the public at convenient locations, all of the features required by this section." Sec. 6(g)(1) of the Act, 16 U.S.C. 1604(g)(1) specifies that the regulations promulgated under NFMA "shall include, but not be limited to: (1) Specifying procedures to insure that land management plans are prepared in accordance with the National Environmental Policy Act. . . ."

“be accomplished with improved opportunity for public participation at all levels.”<sup>65</sup> Perhaps most telling is that every proposed provision concerning public participation was adopted in the final version of the Act.<sup>66</sup>

This emphasis on the participatory process represented a fundamental change in Forest Service policy. Previously, all “participation” activities were via carefully selected “key person” contacts, “advisory committees,” “information outreach” such as public seminars, and the like.<sup>67</sup> Never before had the Forest Service been required to open up the decisionmaking process to the general public, and then consider and react to that input.

The controversy leading to NFMA demonstrated a public concern with forest policy,<sup>68</sup> and to a lesser degree, a public statement that the Forest Service has been unable to manage for values other than timber and commercial resources.<sup>69</sup> Historically, the perception was that the Forest Service existed to protect lands from private industry (and that indeed was an accurate perception in the early days). Increasingly, however, the feeling has become that, in addition to industry, the forests must be protected from the Forest Service itself. Thus, the emphasis on public participation as a vehicle for the achievement of this end is understandable and desirable.

### B. *Forest Management, Economics, and the Traditional Conception.*

There has been a considerable amount of attention over the last decade directed at analyzing the criterion for managing public lands. Some of this discussion has indicated that these resources can be managed more effectively by limiting their allocation more directly to mechanisms which distribute private resources among competing ends—specifically market prices. While this may be appropriate for some resources, there are other resources for which no clear market price exists, and thus an attempt will

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65. S. REP. NO. 588, 94TH CONG., 2D SESS. 34 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6693.

66. Mulhern, *supra* note 63, at 122.

67. ROBINSON, *supra* note 44, at 46.

68. Mulhern, *supra* note 63, at 123, *see also* notes 58, 59 and accompanying text.

69. Whatever may have been the trend post-NFMA during the \*Carter Administration, Assistant Secretary of Agriculture John Crowell has reminded us that the same may still be the case today; and indeed, even emphasized by the current administration. He states:

Our emphasis will be on productivity and economic efficiency in all programs. Our approach can be characterized as emphasizing conservation rather than preservation—wise use rather than non-use. There will also be more emphasis on commodity programs that make direct economic contributions and generate receipts. Amenity programs will not get the same emphasis as in the last Administration, but they will not be ignored either.

*See supra* note 19.

have to be made to determine their value to society to insure the incorporation of these resource values in management decisions. An allocation process which is (at least partially) reliant upon economic criterion would also necessitate in some instances a redirection of public policy.

Traditionally, some public resources have been allocated with little regard for their prices in private markets. The reasons for non-price allocation are numerous, and the results can be costly. The importance of a resource's price is that it tends to reflect its relative scarcity. If a resource is offered for consumption at a price below its equilibrium market price, (i.e., the price at which the quantity supplied equals the quantity demanded), then that resource will tend to be overemployed. This can eventually lead to a shortage of the resource.<sup>70</sup> If the resource is available only at the market determined price, less of the resource will be demanded and a shortage avoided.<sup>71</sup>

One reason that public resources may be consumed at other than optimal levels is that consumers do not realize the true opportunity costs<sup>72</sup> associated with the employment of the particular resource. The final consumer does not face the true social cost of using the resource for his/her private gain. This tends to be more prevalent in the allocation of public resources, in contrast to private resources, because government acts as a buffer between the cost to the consumer and the cost to society of resource employment.<sup>73</sup> By using tax revenues to subsidize, at least in part, the cost of resource employment, the consumer is allowed to use a resource at a price which does not accurately reflect its opportunity cost.

An historic example of this sort of resource allocation is evident in the use of water in the west. In the late 1800's, there was no shortage of water in an absolute sense. (There were, of course, regional shortages, but these were in areas which have always been short of water, and were due more to

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70. The problem may be more accurately defined in terms of the supply schedule, rather than market prices. In private markets, the quantity supplied is generally set so as to maximize profit. In public markets, however, the quantity supplied may not be set by a market generated criterion. The result is that the quantity supplied and the resource price do not correspond to the optimal market clearing (or equilibrium) solution.

71. This implicitly assumes that the resource is a good which exhibits some elasticity of demand. An increase in price would then result in a decrease in the quantity demanded.

72. Opportunity Cost—the reflection of all other consumption possibilities which are foregone. One opportunity cost associated with logging operations is the positive value associated with wilderness (or at least undeveloped) lands.

73. Such subsidies may be direct or indirect. With logging, for example, they may include government financed road construction or insulation from competitive bidding processes in acquiring stumpage; or they may be of a more indirect nature, such as the failure to account for the cost of lost aesthetic values, watershed, fish, wildlife, etc. We recognize, however, that these indirect costs may also be ignored on private forest land.

the mechanical problems associated with transporting the water, rather than there being no water to transport.) As the west became more populated, the federal government began subsidizing water projects to facilitate irrigation for farming.<sup>74</sup> As the demand for the essentially free resource has increased, water has become more scarce. The cost to consumers, however, has not reflected the increasing scarcity of the resource. The result, according to Cuzan, is that "demand for water is outstripping its supply at existing prices, particularly in western states."<sup>75</sup> The suggestion is that, had the consumers' cost of water utilization reflected its scarcity, supply and demand might be nearer an equilibrium.

Public forest land is another resource (or conglomerate of several resources) which has historically been managed in an economic void. There has been little economic consideration given to managing these lands for resources other than timber. There has, however, been some recent discussion directed at intensifying economic consideration in national forest management. Although market prices should be a consideration in the allocation of public resources, a comprehensive economic approach would imply more than a consideration of tangible market prices. The ultimate question is whether the price system is capable of facilitating forest resource management in such a way as to realize the "public interest".

As alluded to earlier, the market price of resources will enlighten the consuming public as to the scarcity of a resource, and in this vein should have a strong influence on Forest Service management decisions. There are other resources, however, whose scarcity may not be accurately reflected by market conditions. Generally, no clear market prices exist for these resources; examples might be wildlife habitat, aesthetic values, wilderness, and various existence values. An attempt may be made, however, to value such resources through the use of "shadow pricing". Traditional cost/benefit calculations can then be derived for alternate management schemes.

According to Sassone and Schaffer:

A shadow price may be defined as a value associated with a unit of some good which indicates how much some specified index of performance can be increased (or decreased) by the use (or loss) of the marginal unit of that commodity. . . [S]hadow prices are the social values of goods created, used up, or otherwise affected by a project.<sup>76</sup>

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74. See F. Merk, *HISTORY OF THE WESTWARD MOVEMENT* (1978).

75. Cuzan, *A Critique of Collectivist Water Resources Planning*, in *PROPERTY RIGHTS AND NATURAL RESOURCE MANAGEMENT* 53 (R. Stroup ed. 1979).

76. Sassone and Schffer, *COST BENEFIT ANALYSIS: A HANDBOOK* 50 (1977).

The authors go on to state that "the most dire need for shadow pricing occurs when the goods or services to be valued are not exchanged on a market."<sup>77</sup> While there are several ways in which to apply shadow prices, the authors point out that ". . .there is no comprehensive and foolproof set of procedures for shadow pricing. Unfortunately, subjective judgment often weighs heavily in shadow pricing exercises."<sup>78</sup>

Thus, the allocation of certain resources such as timber may be managed very effectively through the use of market price signals, while other resources (intangibles) will have to be valued outside of the market context.<sup>79</sup> The national forester is faced with the responsibility of managing the forest resources as directed by the various statutes, and further to strike a balance between managing for resources with tangible prices and managing for those resources that do not exhibit clear market prices.

What is implied in the re-kindled emphasis in utilizing economic criteria in timber land management? Is there a tendency to maintain traditional forest management practices which emphasize a dominant resource? Obviously, timber is the forest resource most susceptible to market pricing, and it is conceivable that there may be a propensity to continue management practices dominated by this single resource. Since this seems to be the historical precedent, a stronger emphasis on "economic criteria" (i.e., emphasizing timber and commodity values) will have little substantive role in redirecting Forest Service policy.<sup>80</sup> To apply economic criteria to forest land management in a comprehensive manner would necessitate the valuation of all forest resources, and a comparison of relative benefits to society derived from alternative management practices. This, however, would violate the Forest Service's traditional definition of sustained yield forestry.

To understand this management concept, it is instructive to explore the definition(s) of sustained yield, and the Congressional mandate set

77. *Id.* at 85.

78. *Id.* at 51.

79. Actually, timber may be valued by markets, but its *optional allocation* will be somewhat dependent on the values of other forest land uses not recognized in the market.

80. That this practice still characterizes Forest Service policy, despite statutory and regulatory guidance to the contrary, was made evident in the RARE II program, where the court, in *California v. Bergland*, 483 F. Supp. 465, 484 (E.D.Cal. 1980), found that the Forest Service valued, "[b]y contrast, (to the articulated weighting of wilderness resources/values) a comparative wealth of information is provided concerning development potential and resource output. Each area is given a rating for development potential. . .yield estimates are given for timber, mineral, gas, oil, uranium, coal, geothermal potential, grazing, and recreational use. [The] statement doesn't consider. . .presently existing wilderness characteristics. . .unique characteristics. . .specific values. [I]t never examines the economic and beneficial environmental values of wilderness."

See also, *supra* note 69.

forth in the *Multiple Use-Sustained Yield Act of 1960*.

According to H.H. Chapman, a widely accepted definition of sustained yield in the early 1900's was "the removal from the forest by cuttings, of the volume in each year just equal to the net increment of the forest for that year."<sup>81</sup> This statement implies that the concept of sustained yield deals with the management of only the timber resource. This single resource connotation is echoed by R.W. Behan as he quotes from Bernard Fernow's book: "[T]he ideal of a forester. . .[is a] forest so arranged that annually, forever, the same amount of wood product, namely, that which grows annually. . .may be harvested."<sup>82</sup>

With the maturing of the forest profession the definition of sustained yield has varied, but it has always been an important part of Forest Service timber policy.<sup>83</sup> As previously illustrated, the initial concept was one which attempted to equate (restrict) timber harvest to timber growth (per some time period). This ideal was re-evaluated in the 1920's when it became evident that many forests were comprised of old growth timber, and exhibited little additional growth.<sup>84</sup> The result was a redirection of timber management practices in favor of intense harvest to perpetuate an acceptable forest profile; one in which traditional sustained yield policies could be practiced.

In the 1930's there emerged a concern for stabilizing communities, and policy shifted towards uniform harvest regardless of forest profile.<sup>85</sup> In 1944, the *Sustained Yield Forest Management Act* was adopted.<sup>86</sup> A major impetus of this legislation "was to promote the stability of forest-dependent communities by establishing cooperative sustained yield units in which private and federal land would be managed jointly", but still primarily for timber.<sup>87</sup>

The effect of this legislation was to allow private firms to purchase public timber at a price not less than the appraised value, but insulated from any competitive bidding process. This generated an expanded and guaranteed supply of timber for private firms without the firms facing the carrying costs associated with the supply. The result was the allowance for monopoly power over public stumpage by certain private firms. This was

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81. H. CHAPMAN, *FOREST MANAGEMENT* (1931).

82. B. FERNOW, *ECONOMICS OF FORESTRY* 200 (1902), cited in Behan, *Political Popularity and Conceptual Nonsense: The Strange Case of Sustained Yield Forestry*, 8 *ENVTL. L.* 320 (1977).

83. Parry, Vaux, Dennis, *The Evolution of U.S. Forest Service Sustained Yield Policy* (Research Paper I, Forest Policy Series, 1982).

84. *Id.*

85. *Id.*

86. The Sustained Yield Forest Management Act of 1944, Pub.L.No. 78-273, 585 Stat. 132 (1944).

87. *See supra* note 8.

based on the conclusion that community stability could be assured simply by regulating timber harvests.<sup>88</sup>

In 1960, Congress attempted to redefine Forest Service policy with the passage of the *Multiple Use-Sustained Yield Act*. This Act directed the Forest Service to manage public timber lands on a sustained yield basis, where sustained yield was defined as “the achievement and maintenance in perpetuity of a high level of annual or periodic output of the various renewable resources of the national forests without impairment of the productivity of the land”.<sup>89</sup> Congress further realized that management practices which were predominately single resource intensive did not comprise a healthy national policy for both economic and biological reasons. It attempted to initiate more comprehensive guidelines for management decisions by mandating multiple-use management, where multiple use was defined as:

The management of all of the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.<sup>90</sup>

While this Act encompassed the first legislative definition of sustained yield, as well as the first official recognition of comprehensive forest management encompassing something more than timber management, it did little to alter the course of Forest Service management practices.<sup>91</sup>

What did impress the Forest Service in the 1960's was the recognition that the survivability of the western timber industry (which by then included some older eastern timber interests) was highly dependent upon public timber. The result was that the Forest Service accepted an even larger responsibility for community stability, and formally adopted an even flow timber policy in 1963.<sup>92</sup> In 1973, with Emergency Directive No.

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88. *Id.*

89. 16 U.S.C. § 531(b) (1976), *see supra* note 9.

90. *Id.*

91. *See supra* note 83.

92. *Id.*



16, this was redefined as *non-declining even flow*.<sup>93</sup> This policy became law in 1976 with the passage of the NFMA. This short exploration indicates that economic criteria, in terms of dealing with *all* forest resources, have had a minimal impact on the management policies of the Forest Service.

In 1982, the Forest Service drafted a new "rule book". "Perhaps one of the most significant changes [in the new book] is that the lumber market, not biology, will now determine which lands are to be classified as commercial timberland."<sup>94</sup> The implication is that there will be a heavier reliance placed on economic analysis in the forest planning process. Although this is encouraging at first glance, a historical review of forest land management suggests that what the Forest Service views as economic criteria may not correlate with optimal resource allocation since some resources don't exhibit explicit monetary values.

The *Multiple Use-Sustained Yield Act of 1960* mandated management policies with the intent of sustaining all resources, but Forest Service practices have continued to be dominated by single resource management.<sup>95</sup> And, as indicated by Behan, the traditional concept of sustained yield fails to "accommodate unplanned changes due to unpredicted mortality from fire, insects, or disease; changes in laws or policies; or effects of unpredictable events".<sup>96</sup> This concept also perverts the decision to harvest timber, both biologically and economically.

If there is going to be a reliance on economic criteria in the forest land allocation process the Forest Service must alter its policy of dominant resource management—an event having no historical precedent. And it would have to eliminate subsidies to timber firms (such as road construction and non-competitive timber sales) so that the "true" price of lumber can be exposed. By subsidizing the timber producer, the Forest Service has little notion as to what amount of timber would actually be demanded if

93. *Id.*

94. Woodruff, *Forest Service Comes Up With New Rule Book*, *The Missoulian* (Missoula, Montana) Oct. 2, 1982, at 5, col. 1. The definition of Net Public Benefits in the new regulations, 36 C.F.R. § 219.3, 47 Fed. Reg. 43039 (1982) is:

An expression used to signify the overall long term value to the nation of all outputs and positive effects (benefits) less all associated inputs and negative effects (costs) whether they can be quantitatively valued or not. Net public benefits are measured by both quantitative and qualitative criteria rather than a single measure or index. The maximization of net public benefits to be derived from management of units of the National Forest System is consistent with the principles of multiple use and sustained yield.

Although this definition seemingly opens up the inquiry to many intangible values, the results of past (and many current) forest resource allocations show that the values attached to some intangibles are, in contrast to tangible resource values, *de minimis*. This shadow pricing is of necessity subjective, and in that respect the importance of public input is the effect it should have on the decisionmaker's valuation calculus.

95. *See supra* note 83.

96. Behan, *supra* note 82.

firms and consumers faced the entire social cost of its harvest (i.e., the equilibrium supply).

Furthermore, in the interest of economics, the Forest Service would have to realize that, even in situations where timber production may generate a positive benefit/cost calculation, there may be some other resource which provides an even greater net benefit (such as wilderness), and as such that is the resource for which the forest should be managed. In short, applying economic criteria to resource management is *not* synonymous with intensely managing only those resources with clear market prices or those resources which provide a monetary return.

The history of Forest Service management practices seems to indicate that accountability for allocation decisions is not precipitated by regulation and/or a strict definition of terms, but conversely is afforded through the exposure of the manager to incentives which will tend to influence rational decisions that promote a reflection of market conditions and public utility.

How can this sort of accountability be achieved? One place to start is by increasing the potential for accountability through public participation. This is a meaningful way to establish social values (shadow prices) which may not be represented well in the market, and then to set a precedent for incorporating these values with the market prices of other resources in determining the costs and benefits to society of alternative management schemes.

### C. *Agency Decisionmaking and Public Participation: Policies and Problems.*

Why all this fuss over public involvement? According to Ostheimer:

Administrative agencies have been given responsibilities that make them anachronistic aspects of a democratic society. Congress has empowered administrative agencies to, 1) collect needed data, thus circumventing the input system of elected party leaders and platforms, 2) make decisions, thus circumventing the representative-legislative process, and 3) carry out enforcement. The public agencies have thus been making decisions in a temporary political vacuum. Thus, in a sense, the present day participatory emphasis represents a restoration of the political balance in our democracy—a balance that was temporarily lost because the complexity of problems developed faster than the institutional capacity to deal with them through representative procedure.<sup>97</sup>

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97. Ostheimer, *supra* note 43, at 14.

The challenge, then, of public participation in the land management-planning process is to balance traditional democratic notions of citizen involvement in government with the countervailing need for technical competency and efficiency of the technocratic society.<sup>98</sup>

Participation in the decisionmaking process must be seen in light of the system within which it is to operate; the public bureaucracy. Generally, the bureaucracy is influenced by: 1) formal rules, laws and regulations, and 2) internal goals and informal rules designed toward institutional survival.<sup>99</sup> The first and fundamental source of bureaucratic survival is an agency's ability to attract and maintain a constituency (i.e., outside political support). The main constituency of the Forest Service since the time the National Forests were looked to as primary sources of the timber supply has been, not surprisingly, the timber industry, and construction and road building interests (and also, to a lesser extent, county governments in National Forest areas, who receive 25 percent of the timber sales receipts from sales on land within the county).<sup>100</sup> Traditionally, this constituency has had a greater interest in a dominant resource policy (primarily timber and mining) for the National Forests than any other orientation.

Like most agencies, the Forest Service has long regarded itself as the expert and guardian of the public interest within its realm.<sup>101</sup> Most public foresters share the same formal education, analytical techniques and paradigms, common information, and membership in professional societies. These common perspectives contribute to building a rather insular bureaucracy, limiting the agencies' flexibility to respond and innovate.<sup>102</sup> The Forest Service has traditionally engaged in informal contact with the public through vehicles such as advisory councils, ad hoc committees, community information programs, and the like.<sup>103</sup> Despite this, conservation groups have pressed for, and received more direct and formal avenues of input.<sup>104</sup> The foresters' initial reaction to this participatory emphasis was understandable. The perception that old methods were adequate, combined with the fierce insularity of the agency and the general weight of input as threatening the traditional dominant use policy (and thus posing risky political constituency choices), resulted in a feeling by many in the

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98. Achterman and Fairfax, *The Public Participation Requirements of the Federal Land Policy and Management Act*, 21 ARIZ.L.REV. 501 (1979).

99. Hannah, et al., *supra* note 57, at 210.

100. BARNEY, *supra* note 44, at 137; Conversation with Dr. Richard Shannan, Professor of Forestry, University of Montana School of Forestry, Missoula, Montana (Feb. 27, 1983).

101. ROBINSON, *supra* note 44, at 273.

102. Hannah, et al., *supra* note 57, at 216.

103. ROBINSON, *supra* note 44, at 4G 470.

104. ROBINSON, *supra* note 44, at 273.

agency that public participation was (is) counterproductive,<sup>105</sup> and a reaction that has been labelled "defensive".<sup>106</sup>

The demand for increased public participation in governmental decisionmaking began in the 1960's with those advocating the cause of the blacks, the poor, and others traditionally outside the political mainstream.<sup>107</sup> Similarly, environmentalists saw environmental problems "in terms of values and interests . . . excluded from decisionmaking".<sup>108</sup> Thus the environmental movement has primarily adhered to procedural goals aimed at opening up the process.<sup>109</sup> With the judicial orientation of the early environmental movement, this was generally the most efficacious manner of action.<sup>110</sup> Other goals identified along the way in the push for greater participation have been those of "controlling government, assuring sound and wise decisions, providing for due process, protecting minority views, establishing responsibility and responsiveness, seeking equity, and striving for the public interest."<sup>111</sup>

Thus it is imperative that a clear and cogent theory of the role that participation activities are to play in the decisionmaking process be articulated, so that both the Forest Service and the public are not at constant loggerheads over this issue. The general criticism of the Forest Service's implementation of the participation mandate is that it has concerned itself more with the how (procedure) than to the why (the substance) it involves the public.<sup>112</sup> This is due in large part to vague statutes,<sup>113</sup> but also to professional disagreement on that point. The model offered by proponents of increased participation<sup>114</sup> is premised on the

105. Ostheimer, *supra* note 43, at 14.

106. *Id.* Robinson attributes this fact to: 1) greater public awareness in the environment, and 2) the general trend of increased public participation in administrative processes. The early participation mandate was that of NEPA, but not until NFMA was that approach explicitly, statutorily recognized in the Forest Service's organic legislation.

107. Wengert, *Citizen Participation: Practice in Search of a Theory*, 16 NAT.RES.J. 23 (1976).

108. Achterman, *supra* note 98, at 506. Although the environmental movement, its members being predominantly middle and upper class, may not fit terribly well under the rubric of "outsiders," many of the substantive points they push inarguably have been.

109. *Id.*

110. *Id.* The authors state: "The courts have generally supported environmentalists' efforts by allowing them to use procedural wedges to press their substantive goals." Dean Ely, in *DEMOCRACY AND DISTRUST*, contends that the court's role in these matters is not to find and enforce substantive "rights" of the parties (and it is very doubtful that there are any such clearly articulated rights in the area of environmental and land-use policy), but rather to fulfill a "representation-reinforcing" function to assure that all substantial values worthy of respect have been represented in the particular governmental decision. J. ELY, *DEMOCRACY AND DISTRUST* 77-88 (1980).

111. Wengert, *supra* note 10, at 39.

112. *Id.* See also ROBINSON, *supra* note 44, at 273.

113. The Barney report, *supra* note 44, speaking to this problem, suggested that Congress make the role of participation more explicit in the statutory schemes.

114. This also seems to be in line with the model employed by the courts under NEPA, *see infra*

necessity of providing the agency with an expanded set of ideas, rewards, and incentives. The application of this model has two elements: first, to delimit the information horizon of the agency, and second, to establish accountability through provision of a new, broader, and enforceable set of incentives by requiring an articulated consideration of values identified by the public.

The first can be seen in the requirement that the Forest Service provide a "broad range of reasonable alternatives" in the planning process.<sup>115</sup> From the individual participant's standpoint, this most closely approaches the traditional democratic notion that knowledge is a principle tool in change and effective political action.<sup>116</sup> In addition to providing the citizen with adequate information on which to base comments, it also forces the Forest Service to explore a greater range of possibilities, thus addressing the argument that "government agencies rarely respond to interests not represented in their proceedings."<sup>117</sup>

This limited "information exchange"<sup>118</sup> perception of the participation process is the one generally accepted and considered top priority by the Forest Service. It is also the one most acceptable to a group of professionals such as those comprising the agency. It tells them simply to work a bit harder at uncovering and valuing various potential resource allocations and not instructing them as to what the decision should be. The decisionmaker, exercising his or her professional expertise, would then decide on the "optimal" allocation.<sup>119</sup>

The second element of this model of participation recognizes the need to provide for a system of accountability to the public's desires in the allocation of various resource uses, and is aimed at the validity of the

notes 167, 168, 171, 178 and accompanying text. The authors, not surprisingly, also agree with a strong participatory model.

115. *Supra* notes 23-25 and accompanying text.

116. Frauenglass, *Environmental Policy: Public Participation and the Open Information System*, 11 NAT.RES.J. 489 (1971).

117. Crampton, *The Why, Where, and How of Broadened Public Participation in the Administrative Process*, 60 GEO.L.J. 525 (1972).

118. *Supra* notes 37, 38, and accompanying text.

119. In addressing the professional role in such decisions, former Dean of the University of Montana School of Forestry, Arnold Bolle, challenged the professionals' capacity for making decisions in the "public interest."

In my opinion, the professional in any field—education, health, defense or forestry and natural resources—has an important but specific role to play. He carries out the demands of society in his area of expertise, he lets the public know the opportunities and possibilities available for choice in policies and he can inform and warn the public of the consequences of the choices it may make. But he is no better qualified than the general public in deciding what is good for the public and what it ought to do (within stated limits) with forests and related resources. . . . In making such decisions the public should and needs to be involved.

*Hearings before the Subcommittee on Forests of the House Committee on Agriculture, Establish a Commission to Investigate Clearcutting on Public Lands*, 92d Cong., 2d Sess. 92 (1971).

decision itself.<sup>120</sup> In the Barney Report<sup>121</sup> this accountability function was emphasized. The author asserted that in order to assure that forest management plans adequately reflected public opinion, Congress would have to provide for procedures of substantive public involvement in the planning process.<sup>122</sup> Six of the twenty-eight proposals for reform of the Forest Service specifically dealt with the need to allow access to the decisionmakers, and to insure their accountability.<sup>123</sup>

Perhaps the most important suggestion for establishing this accountability was that citizen proposals were not to be just heard, but actually considered.<sup>124</sup> This "consideration" proposal was not well received by the Forest Service. It was perceived as threatening professional values (by denying their expertise), causing political controversy (by challenging the agency's traditional "apolitical role"), and, most importantly, establishing new criteria and pressures with which the managers were uncomfortable.<sup>125</sup>

A third perception of the participation process was identified by several commentators within the forestry profession itself. They pushed the idea that the process could be used in a functional manner to increase the constituency and credibility of the agency.<sup>126</sup> It was warned that "[f]ailure to solicit public participation aggressively and innovatively—and respond to it—can result in the loss of agency stature."<sup>127</sup> Some even suggested appealing to emerging constituency groups; "environmentalists are in the task environment of a timberland management agency because they can influence laws which define the service of the agency, budgets and appropriation, (and) the amount of land under their jurisdiction."<sup>128</sup> Forest Service professionals, though, have not fully accepted this con-

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120. ROBINSON, *supra* note 44, states that this function "might be called the social or political function, that of permitting the public some measure of influence over decisions affecting their interests (at 273).

121. BARNEY, *supra* note 44.

122. *Id.* at 131.

123. *Id.* at 157.

124. *Id.* at 131. Achterman, *supra* note 97, at 530, also suggests that "[t]he courts should focus on whether the (agency) actually considered all of the viable alternatives presented and whether the views of those affected were presented."

125. Achterman, *supra* note 98, at 506.

126. Hendee, Clark, and Stankey, *A Framework for Agency Use of Public Input in Resource Decisionmaking*, JOURNAL OF SOIL AND WATER CONSERVATION, (Mar.-Apr. 1974); Address by R. Kizer to North Idaho Chamber of Commerce, Bonners Ferry, Idaho, Oct. 22, 1971, *Public Participation in the Management of National Forests*; Address by S. Uurich to Foresters Day Convocation, Colorado State University, Fort Collins, Colorado, Feb. 23, 1973, *Public Involvement Today*.

127. Hendee, Clark & Stankey, *supra* note 126, at 66.

128. Ostheimer, *supra* note 43, at 15, *citing* Gale.

cept,<sup>129</sup> and because of that, some have recommended "attitudinal changes" within the agency.<sup>130</sup>

The participatory decisionmaking process has, in several respects, not lived up to expectations. Some of the assumptions of the efficacy of public input have proven problematic in application. The first assumption was that public participation would reveal a full range of alternatives, and thus lead to better and easier decisions. The second was that decisions made with appropriate public involvement would be accepted by those involved, and thus reduce controversy.<sup>131</sup> Neither of these have proven to be necessarily true. With more options available, choosing only one actually becomes more difficult, and fostering active involvement can actually heighten controversy and create polarization.<sup>132</sup> Even from a pure "information exchange" perspective, the volume of comment received may render the process unproductive, or at least highly time consuming.<sup>133</sup>

Additionally, several factors coincide to restrict severely the agency's ability to be completely responsive to the weight of public sentiment. There may be insufficient physical resources to enact the desired alternative. A lack of comprehensive and adequate knowledge by any party to the process, including the agency (all the more likelihood when it is realized forest planning generally deals with large and diverse ecosystems), and the lack of specific statutory priorities, all work to constrain the agency's flexibility.<sup>134</sup> Many of the issues raised in the comment process are reflections of broader controversies that exist apart from the specific planning setting; it cannot be (and indeed, should not be) expected that public agencies function as dispute resolution mechanisms.<sup>135</sup> And the political reality of the bureaucracy in a democratic system, continually working to limit decision horizons,<sup>136</sup> combined with the other constraints, all confine the

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129. *Id.* at 15.

130. Karr, A Validity Model for Public Involvement (June 17, 1975) (unpublished masters thesis, University of Montana).

131. Achterman, *supra* note 98, at 507, 508; citing Wengert, *Citizen Participation: Practice in Search of a Theory*, 16 NAT.RES.J. 23 (1976).

132. Achterman, *supra* note 98, at 508; see also Twight, *Confidence or More Controversy: Wither Public Involvement?* JOURNAL OF FORESTRY, February 1977, at 93 (attempts to insure representative involvement may and generally do attract alienated persons who participate only to express resentment and generalized distrust of public officials); and Twight and Paterson, *Conflict and Public Involvement: Measuring Consensus*, JOURNAL OF FORESTRY, Dec. 1979, at 771 (in three cases after Forest Service public involvement processes had been completed, many participants still had stereotyped misconceptions of the agency's position on land use areas. Perceived disagreement was twice as great as actual disagreement. Membership in a conservation group was a primary variable associated with a continued perception of polarization.)

133. ROBINSON, *supra* note 44, at 274.

134. Achterman, *supra* note 97, at

135. *Id.* at 532.

136. Hannah, et al., *supra* note 57, at 212, identifies several of the most salient effects of this

potential for truly responsive decisionmaking.

Other problems identified have revolved around the participants themselves. Public interest and environmental groups have been targets of sharp attacks. The question is whether these groups really speak for "the public interest".<sup>137</sup> Tactics utilized by many of these groups have been identified as leading to overlapping representation, questions of legitimacy of representation, proliferation of issues, and polarization of parties.<sup>138</sup> These are all valid questions, but they simply point to the reality of our pluralist democratic society. Because of the increasing complexity of all institutions, not everything works as efficiently as it could. But there has been a deliberate choice to sacrifice some of the expedient values to protect others deemed more fundamental. The impetus for involvement in these technocratic state decisions at least shows a desire to provide a formal sense of justice in according equal respect to all competing values.

It may be impossible to provide substantive equality for all interests competing for the scarce resources of forest land, but, as Karr observed<sup>139</sup> "it [is] apparent that when the public involvement process is validated, the decision process is, to some extent, also being subject to validation". The ultimate inquiry is to the bottom line benefit of providing citizens with the choice to participate, and do so effectively. As Wengert points out:

. . .the important fact [of the concept of the public interest is that it is] the *search* for the public interest, the *requirement to* rationalize decisions as being in the public interest that [is] the significant aspect of the concept. . .it is the *seeking* that makes the difference, even though we often fall short."<sup>140</sup>

This search would be a hollow one if a strong, effective model of participation was not available to make the decisionmakers accountable and responsive to the values expressed. Such a model is evident in the

reality: 1) as a competitor with other agencies for scarce budget dollars, an agency will not want to propose a solution potentially benefiting another agency, thus traditional solutions will remain favored; 2) in particular, a "no action," or status quo alternative could mean foregoing funding, and thus will rarely be fully considered; 3) the political process encourages decisionmakers to focus on short-term problems and solutions. To be politically feasible, future benefits must be heavily discounted compared to current benefits. (This is obviously contrary to the long-term perspective needed to manage national forests, ed.)

137. This is, of course, sidestepping for the moment the question of what actually is "the public interest." See notes 159, 140 and accompanying text for some discussion of this issue.

138. ROBINSON, *supra* note 44, at 275, in an argument analogized environmental groups to private industry (i.e., providing a service-representation-advocating clean air, water, recreational opportunities, etc.) and asked that if those groups are merely selling a product, doesn't the existence of a market for timber to build houses and provide jobs likewise evidence a constituency for that resource use?

139. Karr, *supra* note 130, at 37.

140. Wengert, *Citizen Participation in Search of a Theory*, 16 NAT.RES.J. 23, 39 (1976).



growing body of NEPA case law. Additionally, the acceptance of such was strongly implicit in the NFMA debates with the inclusion of NEPA, the acceptance of all proposed participation mandating clauses, and in express provisions for participation in some of the management acts that were politically the most controversial and environmentally damaging.<sup>141</sup>

### III. THE NEPA MODEL

The background of all federal agency action is the framework provided by administrative law.<sup>142</sup> The general administrative law theories of government action and judicial review are the foundation upon which NFMA-NEPA public participation activities rest. Traditionally, administrative procedure has revolved around the dichotomy of informal rulemaking and adjudication. In adjudicatory actions where an individual (or small, definable group of individuals) asserts his or her substantive rights, formal, adversarial procedures are employed (formal notice, hearing, right to cross-examination, and appeal).<sup>143</sup> Informal rulemaking is conducted when rules of general applicability are involved. The only requirement in informal rulemaking is for general notice to be given, and opportunity to comment.<sup>144</sup> The traditional emphasis has been on "accurate, impartial and rational application of legislative directives."<sup>145</sup>

Land management planning under NFMA is not an activity encompassed within either of the traditional administrative procedure categories.<sup>146</sup> Those categories generally lack the procedural mechanisms to ensure fair and efficient decisionmaking while at the same time broadening public involvement.<sup>147</sup> But, with the recent emphasis on direct public involvement, courts and agencies have had to be flexible in applying traditional paradigms to new realities. Much of the problem stems from a Congressional failure to define the purpose, goals and parameters of these activities, and to distinguish between traditional concepts of administrative procedure.<sup>148</sup> Based on these three values, a continuum of administrative decisionmaking<sup>149</sup> has been developed along which they are implicated

141. *Supra* notes 64-66 and accompanying text.

142. Most administrative procedure is governed by the Administrative Procedures Act, Title V, U.S.C.

143. 5 U.S.C. § 554 (1976).

144. 5 U.S.C. § 553 (1976). The opportunity to comment is generally limited to written submissions, unless specific regulations or the agency provides otherwise.

145. Achterman, *supra* note 98, at 515.

146. *See* Forest Service Manual 1726.7—1, Interim Directive No. 7, August 7, 1980.

147. Achterman, *supra* note 98, at 515.

148. *Id.* at 517.

149. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM.L.REV. 258 (1978). Professor Verkuil's norms of administrative procedure are grounded in traditions of due process and other related concepts of fair procedure, and implicate the following values: 1) fairness: the

to varying degrees, determining the procedures necessitated in each case.<sup>150</sup>

The planning process (along with policymaking) is the most highly discretionary of agency actions, involving the interpretation and implementation of the agency's general statutory mandate. It has traditionally been considered procedureless. Public participation in the planning process is derivative of informal (notice and comment) rulemaking, where the burden was on the public to become involved.<sup>151</sup> Newer statutory authority has shifted that burden to the agency so that it must now take affirmative actions to involve the public.<sup>152</sup> From the individual's standpoint, the values of fairness and satisfaction are of relatively lesser import, although the aggregate public interest in these values argues for a greater weight.<sup>153</sup> The weight of the efficiency value in complex planning activities most strongly suggests a wide range of procedural freedom. The balance generally is toward more flexibility in procedure. This balance, coupled with the disaggregate nature of the issues involved in "comprehensive planning", make for a reality of extreme discretion vested in the decisionmaker. Planning and policymaking have been likened most to legislation, but the problem with that paradigm is one of adequacy of representation.<sup>154</sup>

Facing this balance, the United States Supreme Court has nonetheless articulated a check on this discretion. In *Dunlop v. Bachowski*,<sup>155</sup> a "reasons requirement" was posited.<sup>156</sup> *Dunlop* involved an appeal of the Secretary of Labor's decision not to pursue a union complaint under a statute that empowered him to investigate and act on such allegations. The action of the Secretary under the statute was deemed to be of a discretionary, policymaking nature (thus implicating the same values as planning procedures). Although there is disagreement among commenta-

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fundamental fairness and accuracy of the decision; 2) efficiency: the goal of low-cost resolution of decisions and issues; and 3) satisfaction: the participant satisfaction necessary in a democratic society.

150. *Id.* at 294. Professor Verkuil's "Universe of Administrative Procedure" is broken into functional categories reflecting different decisionmaking roles, their impact on individuals, and the public at large. They are arranged in order of decreasing procedural necessity:

- 1) imposition of sanctions
- 2) ratemaking, licensing, and other regulatory decisions:
- 3) environmental and safety decisions:
- 4) awards of benefits, loans, grants, subsidies:
- 5) inspections, audits, approvals:
- 6) planning and policymaking

151. Achterman, *supra* note 98, at 512.

152. *Supra* notes 26, 27.

153. Verkuil, *supra* note 149, at 302.

154. Achterman, *supra* note 98, at 528.

155. *Dunlop v. Bachowski*, 421 U.S. 560; *see also* Verkuil, *supra* note 148, at 302.

156. Verkuil, *supra* note 149, at 302, n. 229.

tors as to the effectiveness of this requirement,<sup>157</sup> the policies the Court articulated seem strong and flexible enough to apply to many different situations, including planning actions. First, a statement of reasons facilitates judicial review. "[W]hen action is taken by [the Secretary] it must be such as to enable a reviewing court to determine with some measure of confidence whether or not the discretion. . . has been exercised in a manner that is neither arbitrary nor capricious. . . it is necessary for [him] to delineate and make explicit the basis upon which discretionary actions are taken."<sup>158</sup> The Court also felt that Congress must have intended for such "reasons" to be given to implement the Act, and finally, that "a reasons requirement promotes thought by the Secretary and compels him to cover the relevant points and eschew irrelevancies."<sup>159</sup>

The requirements of *Dunlop* as they apply to the planning process provide for the minimum procedure necessary of an agency involved in planning, but the inquiry cannot end there. With the incorporation of NEPA in the NFMA process, Congress identified a set of concerns that accentuate the value of procedure.<sup>160</sup> NEPA puts the emphasis on proper procedure in this area of "environmental decisions".<sup>161</sup> The values identified from an administrative law perspective are difficult to balance because all have substantial claims demanding recognition.<sup>162</sup> The value of fairness of the decision is crucial where the decisions made are often irreversible.<sup>163</sup> This is particularly a problem given the inability of modern science to fully predict future effects, and of modern technology to mediate impacts. In the management of public lands, the value of satisfaction is important because programs can easily be frustrated due to a lack of public acceptance.<sup>164</sup> One need look no further than the flood of lawsuits challenging Forest Service actions to realize this. Finally, efficiency in the decisionmaking process is important because of the burden complicated and extended administrative actions can have on the government and the economy.<sup>165</sup>

Thus we have the "NEPA diagnosis", that the "problem of administrative procedure is to provide representation to all affected interests; the problem of substantive policy is to reach equitable accommodations among

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157. *Id.* at 229, 230.

158. 421 U.S. at 571.

159. *Id.* at 572.

160. For discussions of the background, purpose, and effect of NEPA on federal agencies, see GRAD, TREATISE ON ENVIRONMENTAL LAW ¶9.01 (1980); RODGERS, ENVIRONMENTAL LAW (1977); YANNAKONE & COHEN, ENVIRONMENTAL RIGHTS AND REMEDIES (1971). It is not the purpose of the authors to explore the full range of NEPA's effect on administrative policy.

161. *Supra* note 150.

162. Verkuil, *supra* note 149, at 298.

163. *Id.*

164. *Id.*

165. *Id.*

those interests in varying circumstances; and the problem of judicial review is to ensure that agencies provide fair procedures for representation and reach fair accommodations."<sup>166</sup>

NEPA's effect on administrative procedure, and in particular the public participation requirement has, for the most part, been a product of litigation and case law. The courts have generally taken the commenting process very seriously.<sup>167</sup> Although less explicit language in the Act refers to public participation than to other inter-agency and inter-governmental commenting, courts have nonetheless looked closely at this requirement in assessing allegedly non-compliant agency actions. A relatively heavy burden has been placed on agencies to demonstrate that public input has been sought and considered.<sup>168</sup>

NEPA, like NFMA, also requires that agencies explore a range of alternatives.<sup>169</sup> The question posed in interpreting this requirement has been that of the sufficiency of the alternatives explored.<sup>170</sup> Even the NEPA regulations, in attempting to define this range as "reasonable",<sup>171</sup> or, as in NFMA, a "broad range of reasonable alternatives",<sup>172</sup> have left this question unanswered. The general trend of case law accepted by the Supreme Court states that the agency must provide sufficient information for a "reasoned choice" by the decisionmaker.<sup>173</sup>

At this juncture perhaps it should be asked why the courts should examine, and at times dismiss agency decisions. Certainly it is not because courts have more expertise in the particular area; in fact, the extreme opposite is the case. In the area of administrative procedure, courts function as supplemental decisionmakers, providing a check of generality that is necessary due to the specific role of the agency. This developed role is due to the fact that:

The program-operating specialists become excessively wedded to their programs, lose their sense of proportion, and resist outside efforts to coordinate their activities. The cost of introducing expertise into politics and giving it relatively wide discretion is a parochialism in which the more a political actor knows about a given program the less capable he becomes of subordinating it

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166. Stewart, *The Reformation of American Administrative Law*, 88 HARV.L.REV. 1665, 1759 (1975).

167. GRAD, *supra* note 160, at 9.02(2)(c)(iii).

168. *Id.*

169. 42 U.S.C. § 4332(2)(c)(iii) (1976).

170. GRAD, *supra* note 160, at 9.02(2)(c)(iv).

171. 40 C.F.R. § 1502.14(a) (1982).

172. *Supra* note 24.

173. *Minnesota Public Interest Research Group v. Butz*, 541 F.2d at 1306 (8th Cir. 1976), *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978).

to the general interest.

In this sense, the peculiar virtue of the judge is ignorance. He knows relatively little about any of the public policy areas in which he makes his decisions, and thus maintains a perspective toward all. He is not so passionately involved in chicken raising or locomotive inspection or tax collection that he allows any of these government functions to grow out of proportion in his mind to the other functions of government.<sup>174</sup>

In general, requiring two or more decisions on the same problem is an inefficient way of managing any enterprise, be it public or private; particularly when the judicial decision is typically only a directive to the agency to go back and make another decision, again subject to the same type of review. With this in mind, the presumption generally has been towards the validity of the agency determination.<sup>175</sup> But, given the premise stated above, judicial correction of agency decisions is necessary when the review will yield a better policy result than non-review, and this occurs when it is evident that agency parochialism and over-ambition has so colored the decision as to require correction.<sup>176</sup> NEPA's greatest contribution towards its ostensible purpose of environmental protection thus has been in its provision of a legal framework within which such corrections can be made.

NEPA posits a relatively new model for agency decisionmaking. The old goal of accurate, impartial, and rational application of legislative mandates is no longer sufficient. The pluralist model implicit within NEPA seeks to insure that the decisionmaker affirmatively account for a wide variety of interests affected by policy alternatives.<sup>177</sup> Perhaps most illustrative of this point as it concerns public participation is the recent

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174. SHARPIRO, *THE SUPREME COURT AND ADMINISTRATIVE AGENCIES*, at 52 (1968).

175. *Kleppe v. Sierra Club*, 427 U.S. 390 (1976). This deference to agency expertise has, though, come under attack in NEPA review. See GRAD, *supra* note 159, at ¶ 9.03(1)(b)(ii).

176. SHARPIRO, *supra* note 174, at 96. Again, Professor Ely's concept of the role courts are particularly suited to play, that of insuring the "rules of the game" have been adhered to, and that one actor has not exploited any comparative advantage it may possess vis-a-vis another actor, which a particular law is designed to eliminate, is appropriate. See *supra* note 107. Professor Ronald Dworkin, on the other hand, feels that the courts' proper role in such decisions is to search through the society's institutional materials and background political morality to find a particular value that, if it is sufficiently strong enough, would "trump" the exercise of an act based on contemporary utilitarian justifications. As an example: if a particular resource allocation worked to severely disadvantage, say, future generations, and the particular right of those generations affected is sufficiently strong enough to hold sway against the contemporary benefits, then that act would be prohibited. See DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977). Whether the judge's role is merely to insure a sense of formal procedural justice, or the seeking of substantive rights, is an issue that will not be resolved here. Also, the spectre of judicial reversal of an agency's efforts provides a powerful internal incentive to make those actions "bomb proof."

177. Stewart, *supra* note 166, at 1759. See also *Calvert Cliffs Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971).

Ninth Circuit decision in *California v. Block*.<sup>178</sup>

A. *California v. Block*.

In *Block*, the court examined and invalidated Forest Service plans promulgated under the Wilderness Act in what is commonly known as the RARE II program.<sup>179</sup> In 1977, the Forest Service began to evaluate programatically all of the roadless areas in the National Forest System for potential classification as wilderness.<sup>180</sup> The draft EIS for RARE II was issued June 15, 1978, and, following the commenting period, the final plan came out on January 4, 1979, (the EIS and the plan are, for the purposes of this case and discussion, one and the same). Shortly thereafter, the State of California and several others<sup>181</sup> filed an action in federal district court alleging that the plans violated NEPA, MU-SY, and NFMA. The district court, in *California v. Bergland*,<sup>182</sup> held the RARE II final EIS deficient in three respects: 1) there was insufficient site specific data to support non-wilderness designations; 2) an adequate range of alternatives was not considered, and; 3) the public was not given an adequate opportunity to comment on the plan. It is the appellate court's analysis of the latter two issues that is pertinent to the present inquiry.

The final EIS listed eleven alternatives, of which three ("all wilderness", "no wilderness", and "no action") were included only as reference points. The two faults in that allocation found by the court in *Block* were first that the Forest Service did not include, as an alternative, increasing resource production on forest lands already open to production in lieu of asserting that such production was necessary in roadless areas. Secondly, the alternatives were unreasonably skewed towards development. Of the alternatives, none allocated more than 34 percent to wilderness, and none less than 37 percent to development. (A third category, "Further Planning", which the court found as being tantamount to development,

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178. *California v. Block*, 690 F.2d 753 (9th Cir. 1982).

179. The Wilderness Act of 1964, *supra* note 56, RARE II refers to the "Roadless Area Review and Evaluation." The Forest Service had previously attempted to inventory and plan for all lands potentially with the Act's definition in the RARE I program. The RARE I plan was enjoined until the Forest Service completed an EIS on the plan. *See Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244 (10th Cir. 1973).

180. Although the RARE II process and the *Block* decision involve a "programmatic" (i.e., system wide) plan, the requirements of NEPA apply with equal, if not greater, force to the specific, allocational plans promulgated under NFMA. This is because it is even more evident that the NFMA plans involve a "critical decision" vis-a-vis a particular area than did the RARE II plan. *See infra* notes 196, 197 and accompanying text.

181. The Natural Resources Defense Council, Trinity County (Cal.), and the Clear Creek Legal Defense Fund were allowed to intervene on California's side; and Webco Lumber Company, the National Forest Products Association, and Del Norte, Shasta, and Siskiyou Counties (Cal.) were allowed to intervene on behalf of the Forest Service.

182. *California v. Bergland*, 483 F. Supp. 465 (E.D. Cal. 1980).

received a middle range of allocations.) Most significant was that no more than 34 percent of the areas were deemed suitable for wilderness classification when all of the areas under study fit at least the threshold requirements of the Act. The Forest Service defended this allocation, stating that the mix was a result of analysis under the "decisional criteria",<sup>183</sup> and that it was the criteria, and not the ultimate allocations, that was pertinent under a NEPA review of alternatives. The court disagreed, feeling that the values assigned the criteria were "instrumental in skewing the alternatives", and that no adequate justification was given for the differing valuation of the criteria. The focus necessary in the "alternatives inquiry" was whether an EIS identification and discussion of alternatives fosters informed public participation and decisionmaking.<sup>184</sup> The range presented was too restricted to fully allow such an inquiry. The prescription of NEPA, of fully opening up the decisionmaking process, was not met because the rating system, as applied, "shrouded the issue from public scrutiny behind the claim of administrative expertise."<sup>185</sup>

The import of this decision for planners is that the proper emphasis in formulating a reasonable range of alternatives (and, under current NFMA regulations, a "broad range") is not to be achieved by constructing an input model that may be technically defensible; but that a model yielding a demonstrably broad range of alternatives should be employed, and from that broad range the effects of the differing alternatives explored.<sup>186</sup> The court looked to the results of the process, and not the process itself, in determining this reasonableness.

The current Council on Environmental Quality (CEQ) regulations dealing with the implementation of NEPA<sup>187</sup> reflect the judicial "working-out" of the Act. The provision of alternatives is considered the "heart of the environmental impact statement." Alternatives should be presented in a comparative form so they provide a "clear basis for choice. . . by the decisionmaker and the public."<sup>188</sup> This interpretation is in consonance with the manner in which this requirement was applied by the court in *Block*. The chief complaint was that the alternatives, being skewed heavily toward one of the potential allocations, did not provide an adequate basis on which differing viewpoints and issues could be focused. If comment was limited,

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183. The methodology employed by the Forest Service employed a weighted set of "decisional criteria" for analysis: 1) resource outputs assigned each area by the Forest Service; 2) MU-SY guidelines; 3) visitor accessibility; 4) landform features; 5) wildlife features; 6) ecosystems; 7) Wilderness Attribute Rating System (WARS) rating, 690 F.2d at 765.

184. 690 F.2d at 767.

185. *Id.* at 768.

186. *See supra* note 119.

187. 40 C.F.R. §§ 1500-1517 (1982).

188. 40 C.F.R. § 1502.14 (1982).

insofar as direct allocation to wilderness, to a range of 6 percent to 33 percent, those advocating for a substantially greater percentage were left with little to comment upon apart from presenting general disagreement with the plan. NEPA's goal is to involve the public in a constructive manner, and by so forcing some of the comments into an adversarial, polarized stance, the Forest Service did not provide for this opportunity.

The CEQ regulations further state that all reasonable alternatives should be "rigorously explore[d] and objectively evaluate[d]."<sup>189</sup> Those alternatives identified, but excluded from detailed study should contain at least a brief discussion of the reasons for their non-inclusion. The Forest Service's error in *Block* was in not explaining why no more than 33 percent of the evaluated areas were recommended for wilderness. There may be valid reasons for such an allocation, but the Forest Service, in focusing such explanation on the technical inputs, didn't adequately explain the allocation except by begging the question.

The ramification of this for the forest planning process is unclear, and will most likely have to wait for judicial resolution. Nevertheless, several suggestions can be gleaned from the case. First, there is the previously discussed emphasis on the output of the planning process insofar as the alternatives inquiry is concerned. Second, there is the court's view that any skewed distribution of resource values is suspect, thus emphasizing an equal valuation of resources identified in MU-SY. Finally, in evaluating areas and recommending them for further use, the court intimated that the present uses and values of a particular area should be weighted more than potential uses so long as the general goal of the plan can be met.

To further insure the efficacy of the public participation process, the final allocation in the plan must have some relevance to one of the alternatives proposed.<sup>190</sup> If the decisionmaker were allowed, after receiving comment, to vary the plan substantially, the relevance of the comments on the draft alternatives would be "seriously diluted".<sup>191</sup> The Forest Service argues that it should be allowed some flexibility in shaping final proposals for technical reasons, and also to be responsive to comments received. The court agreed with this proposition to a limited extent, but felt that the central concern of NEPA—that of identifying and internalizing responsible opposing viewpoints, thus ensuring the decisionmakers' awareness of the environmental trade-offs—limited that flexibility.<sup>192</sup> The test applied involved a two-fold determination: 1) whether the selected alternative was within a range the public could have reasonably anticipated as

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189. *Id.*

190. 690 F.2d at 769.

191. *Id.* at 772.

192. *Id.* at 771.



being under consideration, and 2) whether some of the comments apply to the chosen alternative in a manner to fully inform the decisionmaker of the public's sentiment toward that particular allocation.<sup>193</sup> From a practical perspective, this test should be easy to meet if the initial range of alternatives proposed covered an adequate range of reasonable allocations. But if they were limited or skewed from the beginning, the public's reaction will be shaped by the proffered alternatives and any substantial change puts into question where and how the comments were applied.

The current CEQ regulations<sup>194</sup> echo this view, requiring that the "alternatives considered by the decisionmaker are encompassed by the range of alternatives discussed", and that "the decisionmaker consider the alternatives described in the environmental impact statement." Ultimately, should comments or technical data suggest an allocation substantially different than those discussed in initial statements, the agency will be required to file a supplemental plan.<sup>195</sup>

The final challenge to the RARE II plan considered by the court involved California's contention that the Forest Service inadequately responded to the "site specific" comments received. These comments dealt with particular sites within the programmatic plan. The Forest Service contended that since the plan concerned the system as a whole, site specific comments were not within the scope of this plan, but were more appropriately considered on a forest-by-forest basis. This contention was rejected. Since the effect of the plan was to recommend areas for inclusion in the wilderness system, the consequence of non-inclusion was that the areas so tagged were to be managed for values other than that of wilderness, and potentially permanently excluded from further consideration for such. At this stage, a "critical decision" was being made as to individual sites,<sup>196</sup> and thus an individual evaluation was necessary. The argument of the Forest Service amounted to a contention that, by broadening the scope of the plan, requirements pertaining to specific sites could be avoided. With the potential of irreversible commitment of those sites, such a procedure was impermissible.<sup>197</sup> The requirements the court discussed in this respect, and the policies underlying them, apply with equal force to forest planning under NFMA.

The CEQ regulations in force at that time required that a "meaningful reference" to comments be made in the response.<sup>198</sup> though that

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193. *Id.* at 772.

194. 40 C.F.R. § 1505.1(e) (1982).

195. *Id.* See also 690 F.2d at 770, 772; *Natural Resources Defense Council v. Hughes*, 437 F. Supp. 981 (1977).

196. 690 F.2d at 761.

197. *Id.* at 765.

198. 40 C.F.R. § 1500.10(a) (1977) (superceded 1978).

particular requirement has been deleted from the current regulations,<sup>199</sup> case law applying NEPA delineates the scope of this responsibility. Generally, the scope of an agency's response to comments is determined by the degree to which the comments bear "on the environmental effects of the proposed action."<sup>200</sup> Again, this general language as to scope has been deleted in the current regulations in favor of more specific directions.<sup>201</sup> The new regulations are in consonance with the judicial interpretation of this particular responsibility.

In responding to the comment process, the Forest Service is "obliged to identify and discuss responsible opposing viewpoints."<sup>202</sup> Simple tabulation of comments is insufficient; the response must identify the content of these comments and be shaped accordingly.<sup>203</sup> Additionally, to facilitate review and demonstrate that such a process has occurred, the previous and current regulations require that all substantive comments received be appended to the final statement.<sup>204</sup> The exception to this requirement is if the response has been "exceptionally voluminous", then summaries are deemed sufficient. Public response to the RARE II EIS totalled 85,258 letters, 76,831 petitions, and 101,549 response forms. The Forest Service felt that providing "representative sample[s]" of the response satisfied the requirements of the regulation. The court again disagreed. The ostensible reason was that the sample failed to provide a "meaningful reference to all responsible opposing viewpoints."<sup>205</sup> Although the current regulations do not contain this requirement of a "meaningful reference", the policies underlying NEPA are evident in the court's analysis. Fundamental to NEPA is insuring that the decisionmaker[s] are aware of all relevant, substantial points of view. This requires more than collection and empirical

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199. See 40 C.F.R. 1503.4 (1982).

200. 690 F.2d at 773; 40 C.F.R. § 1500.10(a) (1977) (superceded 1978).

201. 40 C.F.R. 1503.4 (1982) states:

"(a) An agency preparing a final environmental impact statement shall assess and consider comments both individually and collectively, and shall respond by one or more of the means listed below, stating its response in the final statement. Possible responses act to: 1) Modify alternatives including the proposed action; 2) Develop and evaluate alternatives not given serious consideration by the agency; 3) Make factual corrections; 4) Explain why the comments do not warrant further response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response."

202. 690 F.2d at 773.

203. *Id.*

204. 40 C.F.R. § 1510.10(a) (1977) and 40 C.F.R. 1503.4(b) state:

All substantive comments received on the draft statement (or summaries thereof where the response has been exceptionally voluminous) should be attached to a final statement whether or not the comment is thought to merit individual discussion by the agency in the text of the statement."

205. 690 F.2d at 773.

categorization of issues commented upon, but that each comment should be considered on its own merits, responded to and summarized in that manner. Implicit within this view is a recognition of the probability that two different comments may reach the same conclusion, but based on different reasons. It is thus the reasoning behind each conclusion that must be articulated to the decisionmaker in order to fully comply with NEPA. This is necessary to realize NEPA's goal that the participation process amounts to more than a mere plebiscite, but a rational discussion between the public and the decisionmaker.

The import of *Block* and other NEPA decisions is that agencies must go further than merely allowing for an opportunity to comment and collecting those comments made. The "information exchange" function of public participation is clearly the baseline reason for such activity, but, for several reasons, agencies are required to go further in the treatment of input. It is clear that even for the validity of that function to be inviolate, it is necessary to insure first that the information was presented to the decisionmaker, and second, that it was considered.<sup>206</sup> Without these two elements even the informational value of input is subject to question. The requirements of documentation and consideration are instrumental in showing the public, and the courts, that the decisionmaker was indeed confronted with the maximum possible relevant information, and that parochial policy choices had been identified.

A second value is implicated in the NEPA process. In this respect, the primary goal of NEPA is to assure better policy choices. The provision of a supplemental decisionmaker (the courts) to pursue this goal, in part based on public input, argues strongly for a broader accountability/socio-political role for participation. The narrow "information" perspective is based on the hope that added input will yield better policy. If that were the only expectation judicial review would be less important. The acceptance of such review recognizes that in spite of all possible information, the decisionmaker can, and will (according to the pluralist diagnosis of bureaucratic action) make a parochial choice, or one contrary to the weight of evidence. The requirement that an agency show and consider all relevant sides of a policy decision, and then make a case for its final choice, lessens the potential for skewed results,<sup>207</sup> and provides evidence for identifying those that are. Additionally, the potential judicial reversal of completed plans provides a powerful incentive to make the plan demonstrably fair and in consonance with the statutory mandates. Again, it must be emphasized that often there is no clear best choice in these matters. Requiring a

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206. See Achterman, *supra* note 98, at 530; 590 F.2d 773.

207. See *supra* note 158, and accompanying text.

demonstration of the effect of input infuses the process with an atmosphere more conducive to recognizing and seeking the public good, and less likely to be subject to particular constraints. This is, in a sense, one of the fundamental "why's" of public participation; the provision of a more comprehensive institutional structure that provides the decisionmaker with a better idea of values outside his/her specific institutional role.

#### B. *Does NFMA Require More?*

At this point it should be apparent that NEPA provides a substantial model of public participation for the planning process. The question remains though whether or not NFMA adds to or requires more than NEPA. As pointed out before, most statutes leave much to be desired when it comes to determining the role of participation in the particular process involved, and NFMA is no exception. At best, several questions can be raised.

First, if it is accepted that NEPA does require a demonstration of the consideration and effect of public input, the question is posed whether the incorporation by reference of NEPA is sufficient to satisfy NFMA. In that respect, NFMA directs the Secretary to "promulgate regulations" that "shall include, but not be limited to: 1) specifying procedures to insure that land management plans are prepared in accordance with [NEPA]."<sup>208</sup> This requirement, read strictly, would suggest that explicit, separate regulations in consonance with NEPA are necessary. From a practical standpoint, to so do would lead to less confusion within the agency on coordinating various regulatory chapters, greater clarity of action, and ultimately, less litigation over alleged non-compliance. One of the goals of the Task Force revisions was to minimize duplication in federal regulations, thereby streamlining and insuring more efficient government action. In this respect, the revision must then provide a margin of benefit from decreased duplication and increased efficiency to offset the potential costs engendered by such a change. It is not entirely clear that the route chosen is the best one. The error made in this instance is in the assumption that shorter regulations necessarily are more accurate and efficient than longer, more comprehensive ones. It is plausible that reference to a single, uniform body of regulations (NEPA) will provide for more consistent action in the long run. The NEPA regulations, although deferred to by the courts, are not the definitive source of NEPA's requirements; often the courts will go further. It would seem desirable then to provide in the regulations the most accurate description of settled case law available; in particular when the regulatory clause in question is a fundamental guideline type such as

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208. *Supra* note 11.

deleted here. This is most important when it is realized that the implementation of the planning regulations is most often left to non-lawyers, and that even for lawyers the complex milieu of NEPA law is often undecipherable.

The intent guidelines thus are important; at the very least they provide a general direction to agency personnel, influencing attitudes and approaches to the process. A well meaning and strict adherence to the revised regulations may engender a participation process and product that does not demonstrate in a legally sufficient manner how such input was considered. This would lead to challenges and litigation, and be contrary to the goal of increased efficiency in the government process.

The question remains of whether NFMA requires more by way of public participation in the planning process than the base line requirement of NEPA. NFMA, again, is vague on this point. Several matters argue for a stronger model. The Forest Service must present plans at places and in a form that "fosters public participation."<sup>209</sup> NFMA was passed as a reaction to traditional Forest Service practice, and intended to correct them. At the time of the NFMA debates NEPA was already a strong body of law applicable to Forest Service planning activities.<sup>210</sup> Acceptance of NEPA was strongly implicit within the NFMA debates.

Additionally, as discussed before, all proposed amendments pertaining to increased participation in the planning process were accepted in the Congressional debates, and the general intent was that "land management planning. . . shall be accomplished with improved opportunity for public participation at all levels."<sup>211</sup> Whether this "improved opportunity" was based on previous Forest Service practices, or the NEPA model, is the unanswered question. Also noteworthy is that Congress saw fit to provide explicitly for public participation in certain management actions under NFMA. Perhaps this was an effort to remove the question of whether these actions, departures and clearcutting,<sup>212</sup> are "major federal actions" under NEPA; but it appears in any respect that Congress saw the need to provide this check at every important stage in the planning-management process. This recognition of the importance of participation, and the values it brings to the decisionmaking process cannot be deemphasized. NFMA should be read as implementing the NEPA model fully, and thus any challenges to that model in the forest planning process should be carefully scrutinized.

#### IV. CONCLUSION

The previous discussions have hopefully articulated the importance of

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209. *Supra* note 27.

210. *Supra* note 179.

211. *Supra* note 65.

212. *Supra* note 27.

fostering and protecting a strong model of public participation. When it is realized that public forests have traditionally been managed for a dominant resource, and that congressional mandates have been, for the most part, ineffective in changing that orientation, it is apparent that some other method of providing for a representative check on Forest Service activities is needed. An open and participatory decisionmaking process is one such method.

While the changes in the NFMA regulations may be defensible from the standpoint of the goal of regulatory reform, the loss of explicit citation to one of the accepted purposes of public participation; moving the resource allocation process one step (albeit, small) from public scrutiny, may actually work contrary to some of the goals for that reform. The regulations should encourage and endorse public participation, and thus be in consonance with NEPA. Regulations which do not include this affirmative mandate will decrease accountability. Furthermore, less comprehensive regulations provide substantial latitude for interpretation, and as a result will invite challenge, and inevitable litigation.

Most importantly, the circumstances under which current resource decisions are made make it imperative that informed, comprehensive consideration be given to the benefits, costs, and consequences of management decisions. The implementation of Forest Plans will often facilitate an irretrievable commitment of some resources. The trust responsibility which we have vested in our present day resource decisionmakers argues strongly for no less than a full effort to reach the wisest of all possible decisions, and to preclude those that are parochial or which will impose unfair costs on future generations.<sup>213</sup>

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213. The Forest Service has reacted to the holding in *California v. Block* by proposing an amendment to 36 C.F.R. 219.17, which concerns the evaluation of roadless areas in the forest planning process. Most pertinent is that; "Under the proposed rule, information analysis and public participation, in addition to that available from RARE II and other sources would be developed for each area that is subject to evaluation to minimize the risk that any future legal challenges based on *California v. Block* will occur." The proposed rule, in pertinent part, reads, "(2) For each area subject to evaluation under paragraph (1)(1) of this section, (which makes wilderness classification evaluation a part of the forest planning process, ed.) the evaluation, and the determination of the appropriate detail and scope of evaluation, shall be developed with public participation." 48 Fed. Reg. 16505 (April 18, 1983). Although the proposed rule shows the Forest Service's concern with complying with *California v. Block* in regards to participation-commenting on the allocation of specific sites, it appears the Forest Service did not feel it necessary to propose regulatory amendments to comply with *Block's* affirmative participation mandate. Whether the Forest Service feels its present policies are in accord with *Block*, or that *Block* doesn't mandate more "meaningful" participation, remains to be seen.

