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### Clear-Cutting Public Participation in Environmental Law: The Emergency Salvage Timber Sale Program

Paul Maynard Kakuske

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# CLEAR-CUTTING PUBLIC PARTICIPATION IN ENVIRONMENTAL LAW: THE EMERGENCY SALVAGE TIMBER SALE PROGRAM

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## I. INTRODUCTION

Since the birth of the modern environmental movement in 1970, federal law has encouraged broad public participation in both the development and enforcement of environmental policy.<sup>1</sup> The development of pollution standards, for example, has been conducted primarily at the agency level with extensive public comment and review.<sup>2</sup> Likewise, private citizens have been encouraged, both by Congress and the courts, to participate in the enforcement of those standards once they have been promulgated.<sup>3</sup> In both contexts, administrative review has been readily available, and access to the courts limited only by such constitutional and prudential considerations as standing and ripeness.<sup>4</sup>

With the establishment of the Emergency Salvage Timber Sale Program<sup>5</sup> (Salvage Timber Rider or Rider) on July 27, 1995, the federal government departed from this long-standing practice. The Rider instituted a program for the expedited sale and removal of trees "imminently susceptible to fire or insect attack,"<sup>6</sup> including healthy trees "associated" with susceptible trees.<sup>7</sup> The Rider does not apply to private land, but does govern millions of acres of national forest,<sup>8</sup>

1. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 716 (1992); *see also* Chisman Hanes, *Citizen Participation and Its Impact Upon Prompt and Responsible Administrative Action*, 24 SW. L.J. 731, 732 (1970) (recognizing, as early as 1970, the growing insistence upon citizen participation concerning controversial issues like environmental regulation).

2. The Clean Water Act, for example, requires the Environmental Protection Agency to develop and promulgate water quality standards. 33 U.S.C. § 1311(b) (1994). Prior to codification in the *Code of Federal Regulations*, the standards are published in the *Federal Register*, allowing for public comment and review. *See, e.g.*, 40 C.F.R. §§ 400-424 (1995) (containing effluent standards promulgated under the Clean Water Act).

3. *See infra* part IV.B.2.a.

4. PERCIVAL ET AL., *supra* note 1, at 716-17.

5. Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-Terrorism Initiatives, for Assistance in the Recovery from the Tragedy That Occurred at Oklahoma City, and Rescissions Act, Pub. L. No. 104-19, § 2001, 1995 U.S.C.C.A.N. (109 Stat.) 194, 240-54 [hereinafter Salvage Timber Rider].

6. *Id.* § 2001(a)(3).

7. *Id.*

8. The Rider applies to lands under the jurisdiction of the National Forest Service and the Bureau of Land Management. *Id.* § 2001(a)(4). The National Forest System alone comprises 191 million acres. ENVIRONMENTAL LAW INST., SUSTAINABLE ENVIRONMENTAL LAW § 9.2(A)(2) (Celia Campbell-Mohn et al. eds., 1993). The Rider exempts lands included in the National Wilderness Preservation System, Salvage Timber Rider, *supra* note 5, § 2001(g)(2)(A), and lands on which timber harvesting for any purpose is prohibited by statute, *id.* § 2001(g)(2)(D).

including old-growth stands in the Pacific Northwest.<sup>9</sup> Although it expires on December 31, 1996,<sup>10</sup> salvaging conducted after this deadline will continue to be governed by the Rider as long as the sales contract was consummated prior to the December deadline.<sup>11</sup> Furthermore, a retroactive provision applies to any past sales that were enjoined for failing to comply with the federal environmental laws applicable at that time.<sup>12</sup> In those cases, as long as the sale conforms to the provisions of the Rider, the Forest Service (Service) may simply ignore the outstanding court orders.<sup>13</sup> Despite the label as an "emergency" or temporary provision, therefore, the Rider may have a tremendous long-term impact on the nation's forests.

The objective of this Comment is not to debate the substantive merits of timber salvage, an issue best left to biologists and forestry personnel. Instead, the goal is to criticize the provisions of the Rider inhibiting public participation in the agency implementation of this vague and highly discretionary statute. In this respect, the Rider represents a marked departure from existing environmental policy.

Part II of this Comment describes, in general terms, how actions by unelected agency officials are legitimized through direct public involvement, and touches on the practical benefits that result from public participation in the administrative process. Part III backgrounds the role of salvage timber operations in American forestry, and describes how Congress reacted to the salvage timber issue by accelerating the Rider through the legislative process with little opportunity for either legislative or public debate. Part IV examines, in detail, those provisions of the Rider which impact public involvement in the salvage timber process, including the provision rendering all existing federal environmental laws inapplicable to salvage timber sales, and the provisions inhibiting citizens from seeking administrative or judicial review. Part V assesses the constitutionality of the Rider in light of the Supreme Court's legislative non-delegation and procedural due process doctrines, both of which directly relate to the democratic themes discussed in Part II. Finally, Part VI contemplates that the procedural restrictions in the Rider may not reflect a trend

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9. James Gerstenzang, *Clinton Backs Repeal of Logging Provision*, L.A. TIMES, Feb. 25, 1996, at A16.

10. Salvage Timber Rider, *supra* note 5, § 2001(j).

11. *Id.*

12. *Id.* § 2001(c)(9).

13. *Id.*

toward restrictions on public participation, but rather are merely an expedient and inappropriate mechanism for Congress to indirectly undermine the substance of existing salvage timber law.

By facilitating and expediting timber sales, the Rider is inherently favorable to timber industry interests. This does not necessitate the conclusion, however, that prohibitions on public participation will always hinder environmental causes. Both industry and environmental groups are shut out of the deliberative process by the Rider's procedural restrictions. The same restrictions, if included in future, protection-oriented legislation, would similarly curb any business or industry efforts to help review or challenge implementation.

The Comment concludes that the Salvage Timber Rider is a dangerous procedural precedent. The extraordinary discretion delegated to the agencies is both unnecessary and nondemocratic. The policies which encourage public participation are as valid today as they were two decades ago, and Congress should not initiate a trend toward reduced public participation in the administrative process. Alternatively, if the Rider was simply intended to effectuate a congressional desire to alter the substantive law of timber salvage, it may represent an even more troubling precedent. Congress should not undermine the will of the people by indirectly attacking the substance of popular environmental laws via manipulations of the procedural provisions for public participation.

In contrast to the Salvage Timber Rider, any future restrictions on public participation in environmental legislation should be thoroughly debated by both Congress and the public, and should minimize impacts on the people's ability to voice their concerns at the administrative and judicial levels.

## II. ENVIRONMENTAL ADMINISTRATION IN A DEMOCRACY

A fundamental tenet of our democratic government is that power ultimately resides with the people.<sup>14</sup> Accordingly, when elected officials fail to represent their constituency, they may be voted out of office. Today, however, most environmental management is at the administrative level, with policy decisions being developed and enforced by unelected agency officials, both via formal regulation and informal decision making. Although Congress defines major policy

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14. Adam Babich, *Citizen Suits: The Teeth in Public Participation*, 25 ENVTL. L. REP. 10141, 10142 (1995).

objectives, the implementation of those policies is delegated to administrative officials who, in contrast to elected representatives, are not directly answerable to the voters.

The necessity of legislative delegation, however, is indisputable. Without it, Congress would be overwhelmed by technical detail. The key to ensuring the democratic legitimacy of unelected officials, therefore, is to provide the people—particularly those directly affected by the agency's exercise of power—a voice in the administrative process.<sup>15</sup> Federal agencies are, after all, "deemed to be arms of Congress to whom petitions may be addressed,"<sup>16</sup> making restrictions on public involvement contrary to the fundamental freedom of the people to petition the government for redress.<sup>17</sup>

Historically, this principle has been embraced by all branches of the federal government. Congress has facilitated challenges to unelected administrative officials by providing citizen-suit provisions in nearly all major environmental legislation.<sup>18</sup> Similarly, the judiciary has stated that "the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives, and upon whom their commands must fall."<sup>19</sup>

At a constitutional level, two doctrines protect against unbridled accumulations of power at the administrative level. The legislative non-delegation doctrine, which flows directly from the concept of separated powers, proscribes congressional delegation of certain law-making functions to the executive branch agencies, thereby ensuring that Congress does not abrogate its legislative duty.

Even when the delegation of power to an agency is assumed to be legitimate, public participation represents a procedural safeguard, ensuring that administrative power to make substantive decisions is

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15. *Id.*; see also KENNETH F. WARREN, ADMINISTRATIVE LAW IN THE POLITICAL SYSTEM 126 (2d ed. 1988) ("[T]he popular government ideal could still remain in salvageable condition as long as the public could exert reasonable influence and retain sufficient control over the policy-making processes of public administrators.").

16. Hanes, *supra* note 1, at 731.

17. U.S. CONST. amend. I.

18. See *infra* note 104 and accompanying text; see also *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560 (1986) ("Congress enacted [the citizen-suit provision of the Clean Air Act] . . . 'to afford . . . citizens . . . very broad opportunities to participate in the effort to prevent and abate air pollution.' ") (citation omitted).

19. *Sierra Club v. Costle*, 657 F.2d 298, 400-01 (D.C. Cir. 1981) (footnote omitted).

not abused. In this respect, public participation is a facet of procedural due process, which ensures the public a meaningful opportunity to be heard.

Constitutional theory aside, the advantages of public participation are clearly manifest at a pragmatic level. Federal agencies have acknowledged that public participation can build credibility for proposals, help identify issues via diversity of opinion and expertise, enhance public understanding, and reduce costs and delays by resolving conflicts without resort to litigation.<sup>20</sup> Together, these factors contribute to better overall policy with less likelihood of mistake. Arguably, these benefits are but manifestations of the broader constitutional goal of ensuring responsive, representative government. Nevertheless, public inclusion in administrative decision making is rarely, if ever, motivated by agency fear of violating constitutional doctrines.

### III. THE SALVAGE TIMBER RIDER: BACKGROUND

At the outset, *salvage* sales must be distinguished from *conventional* timber sales. Both are conducted by a federal agency—usually the United States Forest Service—and both provide private timber companies with opportunities to purchase and harvest trees. In most other respects, however, the two types of sales differ markedly.

Conventional harvesting involves the sale of healthy, “green” trees in accordance with statutorily required land use management plans.<sup>21</sup> The plans must effectuate the “sustainable yield” doctrine, which requires that forests be rejuvenated at a relatively constant rate,<sup>22</sup> and the “multiple use” doctrine, which requires that forest plans accommodate many activities in addition to timber harvest, including recreation and wildlife preservation.<sup>23</sup>

In contrast, salvage harvesting involves the sale of dead or dying trees, although some healthy green trees are inevitably cleared, as

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20. Lucinda Low Swartz, *Public Participation in the NEPA Process: Scoping and Public Involvement*, in NATIONAL ENVIRONMENTAL POLICY ACT [NEPA], ECOSYSTEM ANALYSIS, AND ENVIRONMENTAL IMPACT ASSESSMENT 221, 227-28 (A.L.I.-A.B.A. Course of Study, 1994).

21. *E.g.*, 16 U.S.C. § 1604 (1994) (requiring preparation of land and resource management plans for units of the National Forest System).

22. *E.g.*, *id.* § 1611(a) (requiring that the “sustainable-yield” concept be applied to units of the National Forest System).

23. *E.g.*, *id.* § 1607 (requiring that the “multiple use” concept be applied to units of the National Forest System).

when road construction is required to allow access to the trees.<sup>24</sup> As will be illustrated below, the extent to which healthy trees are cleared under the guise of a salvage sale is very controversial, and has only been exacerbated by the language of the Rider.

Most salvage sales are the result of unanticipated natural disasters like fire, insect attack, or disease, and are not accounted for in the long-term management plans which accompany conventional sales. Although more timber is harvested through the conventional sales process than through salvage sales, the latter are far from insignificant. In fiscal year 1994, for example, the Forest Service harvested a total—green plus salvage—of 4.8 billion board feet (BBF).<sup>25</sup> In fiscal year 1995, the Service harvested over 1.7 BBF as salvage,<sup>26</sup> the equivalent of thirty-five percent of the previous year's total harvest. Moreover, because natural disasters may strike anywhere, salvage sales have the potential to impact the most pristine regions of forest, and are not limited to lands designated for conventional harvesting under the management plans. Within the first eight months since enactment, the Rider has led to wide-scale cutting in many old-growth forests, much of it in the Pacific Northwest.<sup>27</sup>

A primary objective of salvage sales is to allow harvesting of dead or dying wood before it rots on the forest floor, thus increasing the total supply of federal timber to the wood products industry.<sup>28</sup> Because wood rots fairly quickly, sales that get stalled in court may never come to fruition. This was a primary rationale for the Rider, with Congress emphasizing that the provisions would preserve jobs by allowing removal of timber while it still had "maximum economic value,"<sup>29</sup> and that the Rider would eliminate "dilatatory legal challenges" by environmentalists.<sup>30</sup> Because the *total* timber available from the Forest Service has dwindled in recent years—from a peak of twelve BBF in 1988 to less than five BBF in 1994<sup>31</sup>—the pressure to harvest salvage trees—and thereby preserve jobs—has increased

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24. ROSS W. GORTE, CONG. RES. SERV., SALVAGE TIMBER SALES AND FOREST HEALTH 2 (1995).

25. 1994 USDA, REP. OF THE FOREST SERVICE 14.

26. Informational Memorandum from Jack W. Thomas, Chief of the Forest Service, to Greg Frazier, Chief of Staff, United States Department of Agriculture (Oct. 11, 1995) (on file with the *Loyola of Los Angeles Law Review*).

27. Gerstenzang, *supra* note 9, at A16.

28. GORTE, *supra* note 24, at 1.

29. H.R. CONF. REP. NO. 124, 104th Cong., 1st Sess. 134 (1995).

30. *Id.*

31. *Id.* at 3.



dramatically.

The environmental impacts of salvage logging are highly contentious.<sup>32</sup> Proponents claim that the practice is necessary to thin forests and stop the spread of disease or fire.<sup>33</sup> Critics counter that forests have been naturally thinning themselves for centuries, that dead and dying trees are necessary to maintain endemic levels of native pests and pathogens essential to sustain the ecosystem,<sup>34</sup> and that the clear-cutting techniques frequently employed have serious ramifications for water quality, soil erosion, and animal populations.<sup>35</sup>

Critics also claim that the practice may encourage intentional arson by those who stand to profit from the ensuing sale of damaged trees.<sup>36</sup> In California, an estimated seventy-two percent of the economic damage from forest fires is attributed to arson,<sup>37</sup> and in the Southeast, where lightning is less frequent, the Forest Service estimates that ninety percent of forest fires are deliberately set.<sup>38</sup> In one case a man convicted of setting a string of fires in Shasta County, California, was actually leasing his water truck to the Forest Service to help extinguish the fires he had ignited.<sup>39</sup>

In essence, the salvage timber issue is the classic "jobs versus environment" scenario. Immediate harvest of the timber without adequate consideration of environmental consequences may be disastrous. Alternatively, any delay in harvesting due to administrative or legal challenges may result in timber with absolutely no economic value and an associated loss of jobs.

With the passage of the Salvage Timber Rider, Congress added more fuel to the timber salvage debate. Although the substance of the Rider was highly contentious,<sup>40</sup> the House and Senate provided minimal opportunity for debate or review, primarily because the timber provisions were attached as a rider to a large appropriations

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32. Kathie Durbin, *The "timber salvage" scam*, *AMICUS J.*, Fall 1995, at 29, 30.

33. *Id.*

34. GORTE, *supra* note 24, at 3.

35. *Id.* The practice has been blamed for destroying salmon and trout spawning habitat, and threatening drinking water supplies. 141 CONG. REC. H6642 (daily ed. June 29, 1995) (comments of Rep. Bill Richardson (D-N.M.)).

36. Richard Cole, *Arsonists Torching U.S. Forests For Profit*, *ORANGE COUNTY REG.*, Sept. 4, 1995, at News 1.

37. *Id.*

38. *Id.*

39. *Id.* at News 2.

40. Gerstenzang, *supra* note 9, at A16.

and rescissions bill,<sup>41</sup> a practice for which Congress has been sharply criticized in recent years.<sup>42</sup> As one environmental group noted, because appropriations bills typically move quickly through committees with few hearings or opportunities for debate, changes that would normally be addressed by committees with proper jurisdiction and experience writing environmental laws instead get written "behind closed doors, where the public interest is most apt to be compromised by special interest pleading."<sup>43</sup>

The Salvage Timber Rider, for example, was attached to a politically popular bill providing emergency relief aid for the Oklahoma City bombing victims, redevelopment money for the Los Angeles earthquake recovery projects, and cost-saving rescissions to various government programs.<sup>44</sup> Not surprisingly, most of the floor debate centered not on the timber provisions, but on the appropriations and rescissions language.<sup>45</sup> The extent to which the timber provisions were considered secondary to the other language in the Bill is exemplified by Representative Livingston's statement on the House floor. In response to a request for postponement of the vote due to ongoing deliberations with the White House, Livingston noted that the negotiations affected only the "timber issue and have nothing whatsoever to do with the substance of th[e] bill."<sup>46</sup>

The debate which did transpire was generally with minimal time to prepare. Although tentative drafts of the timber provisions had been circulating for months, the final version was not available until days before the vote. House Democrat DeFazio, for example, complained that he had been provided only two days to review the final draft prior to vote,<sup>47</sup> while House Democrat Obey objected that proceeding to vote was "ludicrous" because he was being "asked to vote on th[e] agreement without even having seen it"<sup>48</sup> or having had an opportunity "to talk to people who have actually done the

41. See Salvage Timber Rider, *supra* note 5.

42. See generally NATURAL RESOURCES DEFENSE COUNCIL, STEALTH ATTACK: GUTTING ENVIRONMENTAL PROTECTION THROUGH THE BUDGET PROCESS (1995) (criticizing congressional budget-based attacks on environmental statutes).

43. *Id.* at 2.

44. See Salvage Timber Rider, *supra* note 5.

45. See, e.g., 141 CONG. REC. H6621-22 (daily ed. June 29, 1995) (comments of Rep. Bob Livingston (R-La.)).

46. *Id.* at H6636.

47. *Id.* at H6638.

48. *Id.* at H6637.

negotiating."<sup>49</sup>

And unlike past reformulations of environmental policy, the Salvage Timber Rider deliberations received little media attention, due in part to the blitzkrieg of legislation introduced by the House during the "first hundred days" following the November 1994 election.<sup>50</sup> Although President Clinton openly opposed the timber provisions,<sup>51</sup> he was under pressure from House Republicans to pass the rescissions language, and signed the entire package on July 27, 1995, over the protests of most major environmental organizations and Vice President Gore. The signing triggered a "twenty-one chain saw salute" by protesters outside the White House the following day.<sup>52</sup>

#### IV. EFFECT ON PUBLIC PARTICIPATION

Even more controversial than the lack of congressional debate are the procedural restrictions of the Rider itself. The Rider clears the way for expedited, large-scale salvage timber sales, to be conducted primarily by the United States Forest Service, a subagency of the Department of Agriculture.<sup>53</sup> In striking contrast to past legislation, the Salvage Timber Rider provides minimal opportunity for public participation in the development, management, and enforcement of salvage timber sales.

##### A. *Ramifications of Exempting NEPA*

One of the more controversial provisions of the Rider is subsection 2001(i), which renders "[a]ll . . . federal environmental and natural resource laws" inapplicable to salvage timber sales.<sup>54</sup> In one sentence, decades of environmental law and deliberation were

49. *Id.* at H6640.

50. See Joe Davis, *The Scoop That Never Was*, AMICUS J., Summer 1995, at 18, 19.

51. Memorandum on Timber Salvage Legislation, 31 WEEKLY COMP. PRES. DOC. 1356 (Aug. 1, 1995).

52. Durbin, *supra* note 32, at 29.

53. Salvage Timber Rider, *supra* note 5, § 2001(a)(4)-(b)(1). The Rider requires that sales be conducted by the Secretary of Agriculture or the Secretary of the Interior. *Id.* The former heads the Department of Agriculture, which includes the United States Forest Service. The Secretary of the Interior heads the Department of the Interior and administers lands under the jurisdiction of the Bureau of Land Management. The vast majority of salvage sales, however, fall under the jurisdiction of the Forest Service. Throughout this Comment, the Department of Agriculture, Department of the Interior, and the United States Forest Service are referred to alternatively as the "agency."

54. *Id.* § 2001(i).

discarded, including the Forest and Rangeland Renewable Resources Planning Act of 1974,<sup>55</sup> the Federal Land Policy and Management Act of 1976,<sup>56</sup> the National Environmental Policy Act of 1969 (NEPA)<sup>57</sup>, the Endangered Species Act of 1973,<sup>58</sup> and the National Forest Management Act of 1976 (NFMA)<sup>59</sup>. Together, these Acts represented the fruition of congressional attempts to produce a foundation of sustainable forest management by fostering open decision making in which the public could participate.<sup>60</sup>

The regulations implementing the NFMA, for example, would have provided for extensive public notice and comment for salvage sales, including a thirty-day window for reception of written and oral comments,<sup>61</sup> and a requirement that the Forest Service address the comments received.<sup>62</sup> The Service considered this issue as recently as 1993, when it addressed a proposal to restrict the notice and comment period for some low volume salvaging.<sup>63</sup> Due to substantial criticism, the Service revised the proposed rule "to make [all] emergency [salvage] actions subject to notice and comment procedures," and "to assure that the public receives timely information about such projects and preserves subsequent opportunity to appeal such decisions."<sup>64</sup> "[Salvage] timber sales," the Service noted, are "often controversial and of keen public interest, even where impacts are minimal. If these decisions were exempted from notice and comment, . . . agency credibility could be questioned."<sup>65</sup> Under the Salvage Timber Rider, of course, the NFMA notice and comment regulations are inapplicable.

But by far the most damaging blow to public participation is the bypassing of NEPA. NEPA's role as the procedural backbone to environmental policy has been universally acknowledged, and the Environmental Protection Agency (EPA) has described NEPA's

55. 16 U.S.C. §§ 1600-1687 (1994).

56. 43 U.S.C. §§ 1701-1784 (1988 & Supp. V 1993).

57. 42 U.S.C. §§ 4321-4370d (1988 & Supp. V 1993).

58. 16 U.S.C. §§ 1531-1544 (1994).

59. Pub. L. No. 94-588, 90 Stat. 2949 (1976) (codified as amended in scattered sections of 16 U.S.C.).

60. Duane R. Gibson, *Sustainable Development and the Forestry Law of the Tongass National Forest and Indonesian Forests*, 31 WILLAMETTE L. REV. 403, 425 (1995).

61. 36 C.F.R. § 215.6(a) (1995).

62. *Id.* § 215.6(d).

63. 58 Fed. Reg. 58,904 (1993).

64. *Id.* at 58,905-06.

65. *Id.* at 58,905.

procedural process as "our basic national charter for protection of the environment."<sup>66</sup> In the context of forest management, NEPA would have required preparation of an Environmental Impact Statement (EIS) for salvage timber sales in excess of one million board feet<sup>67</sup> when the sales "significantly affect[] the quality of the human environment."<sup>68</sup> The EIS process involves the collection and review of a variety of information regarding the probable impact of the timber sale on the physical environment. An EIS must contain an assessment of viable alternatives,<sup>69</sup> each evaluated for its impact on social and economic factors such as "wildlife, timber, fish, water quality, subsistence, visual quality, recreation, [and] tourism."<sup>70</sup>

In the context of public participation, NEPA plays two critical roles. First, because an EIS contains a legal sufficiency requirement, it provides the public with an opportunity to challenge either the absence or inadequacy of the EIS in court.<sup>71</sup> The EIS accompanying a salvage timber sale could be challenged, for example, if it did not consider viable alternatives to the sale.

Second, and most importantly, NEPA provides for extensive public involvement in the preparation, scope, and review of the EIS. NEPA's implementing regulations, for example, include explicit public notice requirements,<sup>72</sup> including a duty to invite the public to attend open meetings and comment on the scope and content of an EIS.<sup>73</sup> The agency must assess and consider both oral and written comments received on the draft EIS during the public comment period, and must respond to these comments in the final EIS.<sup>74</sup> The agency must

66. 40 C.F.R. § 1500.1(a) (1995).

67. Salvage sales of less than one million board feet are "categorically excluded" from NEPA because such a low volume is considered to have no significant impact on the environment. *See id.* § 1508.4.

68. 42 U.S.C. § 4332(2)(C) (1988); *see, e.g.,* *Marble Mountain Audubon Soc'y v. Rice*, 914 F.2d 179, 182 (9th Cir. 1990) (requiring an EIS for salvage sales not contemplated in the EIS associated with the existing forest management plan); *Foundation For Global Sustainability Inc.'s Forest Protection and Biodiversity Project v. McConnell*, 829 F. Supp. 147 (W.D.N.C. 1993) (allowing the Forest Service to segment salvage areas such that each was under one million board feet and thereby categorically excluded from EIS requirement).

69. 40 C.F.R. § 1502.14.

70. Gibson, *supra* note 60, at 427.

71. *E.g., Marble Mountain Audubon Soc'y*, 914 F.2d at 182 (inadequate EIS); *Sierra Club v. Block*, 614 F. Supp. 488, 491 (D.C. Cir. 1985) (absence of EIS).

72. 40 C.F.R. § 1506.6(b).

73. *Id.* § 1503.1(a)(4).

74. *Id.* § 1503.4.

either incorporate the suggestion, or explain why the comment does not warrant further response.<sup>75</sup> The final EIS, the comments received, and any underlying documents must be made available to the public pursuant to the Freedom of Information Act.<sup>76</sup> Finally, the results of any relevant environmental monitoring must be made available to the public upon request.<sup>77</sup>

Thus, although NEPA contains no substantive standards, its public involvement and information disclosure requirements provide an opportunity for the public to apply political pressure by calling attention to poorly conceived timber sales. As a practical matter, this type of pressure can be quite effective,<sup>78</sup> and was the motivation behind state public disclosure laws such as California's Proposition 65.<sup>79</sup>

In lieu of the extensive NEPA requirements, the Salvage Timber Rider only requires the preparation of "a document that combines an [E]nvironmental [A]ssessment under . . . [NEPA] and a [B]iological [E]valuation under . . . the Endangered Species Act."<sup>80</sup> An Environmental Assessment, however, is merely a cursory document "for determining whether to prepare an [EIS]."<sup>81</sup> Similarly, a Biological Evaluation only requires consideration of the impact of salvage sales on threatened or endangered species,<sup>82</sup> and does not require consideration of any other environmental concerns. Furthermore, "[t]hese documents need consider the environmental impacts of the salvage sales . . . only to the extent which the [Forest Service], in [its] sole discretion, deems appropriate and feasible,"<sup>83</sup> and neither the Environmental Assessment nor the Biological Evaluation entails any of the public notice and comment provisions which serve as the heart of NEPA.

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75. *Id.*

76. *Id.* § 1506.6(f) (referring to the Freedom of Information Act, 5 U.S.C. § 552 (1994)).

77. *Id.* § 1505.3(d).

78. ENVIRONMENTAL LAW INST., *supra* note 8, § 2.3(C).

79. California Safe Drinking Water and Toxic Enforcement Act of 1986, CAL. HEALTH & SAFETY CODE §§ 25249.5-.13 (West 1992).

80. Salvage Timber Rider, *supra* note 5, § 2001(c)(1).

81. 40 C.F.R. § 1508.9(a)(1).

82. 16 U.S.C. § 1536(c)(1) (1994).

83. *Inland Empire Pub. Lands Council v. Glickman*, 911 F. Supp. 431, 433 (D. Mont. 1995).

*B. Ramifications for Administrative and Judicial Review*

## 1. Administrative challenges

Due to the complex, technical nature of environmental law, courts are reluctant to interfere with agency expertise unless there is a clear abuse of power.<sup>84</sup> As a result of this deference, the best opportunity to participate in or challenge a proposed timber sale typically occurs at the administrative, rather than judicial, level. The Salvage Timber Rider, however, effectively eliminates any meaningful public participation in the administrative process.

*a. rulemaking*

The legislative history of the Administrative Procedure Act (APA)<sup>85</sup> describes agency rulemaking in the following terms: "An administrative agency . . . is rarely complete, and it must always learn the . . . viewpoints of those whom its regulations will affect . . . . [Public] participation . . . in the rule-making process is essential in order to permit administrative agencies to inform themselves and to afford safeguards to private interests."<sup>86</sup> Accordingly, when Congress enacted the APA, it acknowledged the desirability of public participation by providing for extensive "notice and comment" requirements for "informal rulemaking," the process by which the vast majority of regulations are developed.<sup>87</sup> The APA specifies that informal rulemaking, also known as "section 553 rulemaking," provides for (1) publication of the proposed rule,<sup>88</sup> (2) an opportunity for the public to submit comments on the proposal,<sup>89</sup> and (3) preparation of the agency's explanation of why it adopted the final rule and how it responded to major comments received during the public comment period.<sup>90</sup> Most federal environmental legislation

84. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984).

85. 5 U.S.C. §§ 551-706 (1994).

86. ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, 79TH CONGRESS, 1944-46, at 19-20 (1946) (citation omitted).

87. In rare cases, as when required by statute, agencies will engage in *formal* rulemaking, which requires a trial-type hearing on the proposed rule. 5 U.S.C. §§ 554, 556-557.

88. *Id.* § 553(b).

89. *Id.* § 553(c).

90. *Id.*

explicitly requires the relevant agencies to develop and promulgate regulations to implement broad statutory objectives,<sup>91</sup> thus providing opportunities for both the regulated industry and environmental groups to become actively involved in rulemaking.<sup>92</sup>

The Salvage Timber Rider, however, minimizes this avenue of participation by "not requir[ing] [the agency] to issue . . . rules under section 553 [of the APA] . . . to implement [this Rider] . . . or carry out the authorities provided by [the Rider]."<sup>93</sup> By declining to promulgate regulations that interpret the vague terms of the Rider, the public is forced to challenge individual sales on a case-by-case basis, rather than challenging agency policy in one adjudication of the rule. Given the Rider's temporary nature, of course, the de-emphasis on establishing policy through regulation is somewhat excusable. Unfortunately, the relaxation of rulemaking is the mildest of the Rider's provisions impacting public participation.

#### *b. adjudications and hearings*

In contrast to administrative rulemaking, which is legislative in nature, administrative hearings are judicial processes, typically presided over by an administrative law judge.<sup>94</sup> To provide parties with adequate due process of law, administrative hearings have many of the same formalities as conventional trials.<sup>95</sup> Administrative judges may issue subpoenas, rule on offers of evidence, and ultimately make a final finding or conclusion, including the reasons or basis therefor.<sup>96</sup>

In the environmental context, the ability to adjudicate at the administrative level is often crucial, for the federal judiciary is extremely deferential to agency actions, preferring to have complex technical questions resolved by administrative "experts" at the administrative level. The Supreme Court has emphasized that

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91. See, e.g., 16 U.S.C. § 1540(f) (1994) (directing "[t]he Secretary . . . to promulgate such regulations as may be appropriate to enforce [the Endangered Species Act]").

92. In recent years "negotiated rulemaking" has also become an attractive way to maximize the effectiveness of the rulemaking process via increased public participation. Pursuant to the Negotiated Rulemaking Act of 1990, 5 U.S.C. §§ 561-570 (1994), the agency will appoint a negotiating committee comprised of the major private groups interested in a prospective rulemaking action, in an attempt to resolve disputes prior to issuance of a draft or final regulation. See PERCIVAL ET AL., *supra* note 1, at 683-85.

93. Salvage Timber Rider, *supra* note 5, § 2001(h).

94. 5 U.S.C. § 556(b) (1994).

95. *Id.* § 556(c).

96. *Id.*



"[j]udges are not experts in the field [of pollution control]," and should give considerable weight to an agency's construction of a statutory scheme it is entrusted to administer.<sup>97</sup> This concept is codified in the APA, which provides that all nonadjudicatory agency actions be set aside only if the plaintiff can show they were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>98</sup> Furthermore, even when plaintiffs satisfy their burden of proof, a frequent remedy is merely to remand to the agency for development of a more extensive record.<sup>99</sup>

The Salvage Timber Rider, however, completely transforms the procedural structure. The Rider specifies that "[s]alvage timber sales . . . and any decision of the [Forest Service] in connection with such sales, shall not be subject to administrative review,"<sup>100</sup> thus forcing challenges to be initiated at the district court level. This restriction is in direct contradiction with the existing, but now inapplicable, regulations of the NFMA, which provided that salvage sales be subject to administrative appeal.<sup>101</sup> Somewhat ironically, the decision by Congress to preclude administrative review ignores the concerns of the Forest Service "experts" themselves. A primary reason the Service did not restrict notice and comment procedures for salvage sales, when under consideration in 1993, was the concern that "the . . . Service might give the appearance of trying to shelter [salvage] timber sales from appeal."<sup>102</sup>

In summary, the de-emphasis on rulemaking, with its associated notice and comment opportunities, combined with the elimination of administrative review, eliminates any meaningful opportunity for the public to make its voice heard at the agency level.

## 2. Judicial review

### *a. potential standing hurdles*

Historically, Congress has recognized that opportunities for citizen litigation enhance the legitimacy of administrative decision

97. *Chevron*, 467 U.S. at 865-66.

98. 5 U.S.C. § 706(2)(A). Likewise, formal adjudicatory findings will only be overturned on judicial review if they are "unsupported by substantial evidence." *Id.* § 706(2)(E).

99. *E.g.*, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

100. Salvage Timber Rider, *supra* note 5, § 2001(e).

101. 36 C.F.R. § 215.7(b) (1995).

102. 58 Fed. Reg. 58,905 (1993).

making.<sup>103</sup> Accordingly, Congress provided for citizen-suit provisions in nearly all major environmental legislation,<sup>104</sup> recognizing that the resulting litigation could help abate environmental threats by allowing a citizen group to act as an auxiliary attorney-general.<sup>105</sup> Citizen suits are generally filed by environmental groups challenging an agency's failure to act, either in the context of failure to enforce regulations against known violators, or mandamus-like suits alleging failure to discharge nondiscretionary duties such as implementing regulations by statutory deadlines.<sup>106</sup>

Unlike most environmental legislation, the Salvage Timber Rider contains no analogy to the citizen-suit provision. To some extent, the omission is not surprising. Because the Rider expedites the removal and sale of trees, environmental groups—the traditional beneficiaries of citizen-suit provisions—would have little interest in challenging an agency's failure to act.

But environmental groups may still seek to enjoin a proposed sale of trees, alleging that the sale falls beyond the scope of authority of the Forest Service, perhaps because the trees are not "imminently susceptible to fire or insect attack."<sup>107</sup> In this respect, a citizen-suit provision would provide the additional benefit of creating broad standing to sue.

In general, plaintiffs establish standing if: (1) the challenged action will cause the plaintiff some actual or threatened injury-in-fact; (2) the injury is fairly traceable to the challenged action; (3) the injury is redressable by judicial action; (4) the plaintiffs are claiming their own legal rights, not those of third parties; (5) the injury is not an abstract, generalized grievance; and (6) the injury is arguably within

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103. Babich, *supra* note 14, at 10,141.

104. The following federal environmental laws contain citizen-suit provisions: the Toxic Substances Control Act, 15 U.S.C. § 2619 (1994); the Endangered Species Act, 16 U.S.C. § 1540(g) (1994); the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270 (1994); the Federal Water Pollution Control Act, 33 U.S.C. § 1365 (1994); the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. § 1415(g) (1994); the Deepwater Port Act, 33 U.S.C. § 1515 (1994); the Noise Control Act, 42 U.S.C. § 4911 (1988); the Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (1988); the Clean Air Act, 42 U.S.C. § 7604 (1988 & Supp. V 1993); the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9659 (1988); the Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11046(a)(1) (1988); the Outer Continental Shelf Lands Act, 43 U.S.C. § 1349 (1988); and the Hazardous Liquid Pipeline Safety Act, 49 U.S.C. app. § 2014 (1988).

105. Babich, *supra* note 14, at 10,141.

106. *Id.* at 10,145.

107. Salvage Timber Rider, *supra* note 5, § 2001(a)(3).

the "zone-of-interest" to be protected by the statute alleged to have been violated.<sup>108</sup> The first three conditions are constitutional, stemming from Article III case and controversy and separation of power considerations,<sup>109</sup> and are thus mandatory.<sup>110</sup> The latter three requirements—including the zone-of-interest inquiry—are prudential, and may be altered by Congress at its discretion.<sup>111</sup> This is precisely what Congress accomplished by enacting citizen-suit provisions. It granted standing to "any person" that satisfies the first three constitutional requirements.<sup>112</sup>

Without such a provision, plaintiffs seeking to challenge a proposed timber sale must rely for a cause of action upon section 702 of the APA, which provides a claim to those parties "adversely affected or aggrieved" by "agency action within the meaning of [the] relevant statute."<sup>113</sup> The Supreme Court has interpreted the phrase "within the meaning of the statute" to require that the plaintiff's alleged injury fall within the zone-of-interest sought to be protected by the statutory provision whose violation forms the legal basis for the complaint.<sup>114</sup> Because this is identical to the prudential requirement, section 702 does not in any way enhance a plaintiff's ability to establish standing.<sup>115</sup>

108. *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 474-75 (1982); *Warth v. Seldin*, 422 U.S. 490, 498-500 (1975).

109. U.S. CONST. art. III, § 2.

110. *Warth*, 422 U.S. at 498.

111. *Valley Forge Christian College*, 454 U.S. at 474-75; *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972) ("[Statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different matter from abandoning the [constitutional] requirement that the party seeking review must himself have suffered an injury.").

112. *E.g.*, 42 U.S.C. § 6972(a) (1988) (providing that "any person" may bring an action against violators of the Resource Conservation and Recovery Act).

113. 5 U.S.C. § 702 (1994).

114. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 883 (1990).

115. The Rider describes the allowable "[p]lace and time of filing" a complaint. *Salvage Timber Rider*, *supra* note 5, § 2001(f)(1). It is not obvious that the language was intended to *create* a new cause of action, as opposed to modifying the filing conditions for an existing cause of action established under § 702 of the APA. For purposes of the following discussion, however, the source of the cause of action is irrelevant because the zone-of-interest test has universal application, although this contention has been subject to limited debate. The Court in *Valley Forge Christian College* stated that *any* complaint—whether filed under the APA or not—must fall within the zone-of-interest of the statute or constitutional guarantee in question. 454 U.S. at 475 (citing *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)); *see also* *Dan Caputo Co. v. Russian River County Sanitation Dist.*, 749 F.2d 571, 575 (9th Cir. 1984) ("[T]he zone-of-interest requirement . . . for actions under the APA has been adopted as a generally applicable prudential limitation on standing."). In *Clarke v. Securities Indus. Ass'n*, 479

The additional requirement—that of satisfying the zone-of-interest—may prove troublesome to pro-environmental plaintiffs.<sup>116</sup> Although the Supreme Court has allowed the potential for infringement of “recreational use and aesthetic enjoyment” to serve as the basis for standing,<sup>117</sup> it was done when the statute in question specifically proclaimed environmental preservation as its goal. NEPA, for example, states that “it is the continuing responsibility of the [f]ederal [g]overnment . . . to use all practical means . . . to assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings.”<sup>118</sup> Thus, a plaintiff challenging an agency’s action under NEPA needs only to show a particularized injury<sup>119</sup> to their “aesthetic or cultural use of the biophysical environment in order to establish standing.”<sup>120</sup>

In contrast, potential plaintiffs have been denied standing under the zone-of-interest test when no indication was found of a congressional purpose to benefit the plaintiffs, and when the plaintiffs’ alleged interest at stake was inconsistent with the intended effect of the underlying statute.<sup>121</sup>

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U.S. 388 (1987), the Court stated in a footnote that although general inquiries into prudential standing in the non-APA context may “resemble” the zone-of-interest test, the test was not necessarily a requirement of universal application. *Id.* at 400 n.16. Nevertheless, courts after *Clarke* have continued to characterize the zone-of-interest test as one of general applicability. *See, e.g.,* Hazardous Waste Treatment Council v. EPA, 861 F.2d 277, 282 (D.C. Cir. 1988).

116. The problems with satisfying the zone-of-interest requirement would appear to affect only pro-environmental plaintiffs. The legislative history indicates that one goal of the Rider was to provide harvesting opportunities for the timber industry, and the Rider itself explicitly states that the Secretary must conduct salvage sales “to the maximum extent feasible.” Salvage Timber Rider, *supra* note 5, § 2001(b)(2). Therefore, a timber company that sued to compel a salvage sale would presumably satisfy the zone-of-interest requirement. *Cf. Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800, 808 (11th Cir. 1993) (holding that timber companies lacked standing to compel Forest Service to sell trees where the governing language limited the Service to selling trees “‘equal to or less than’” the amount required to produce a sustainable yield in the forest (quoting 16 U.S.C. § 1611(a) (1994))).

117. *National Wildlife Fed’n*, 497 U.S. at 872.

118. 42 U.S.C. § 4321 (1994).

119. To satisfy the constitutional standing requirement of particularized injury, “a plaintiff claiming injury from environmental damage must use the area affected by the challenged activity, and not an area roughly ‘in the vicinity’ of it.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565-66 (1992) (quoting *National Wildlife Fed’n*, 497 U.S. at 887).

120. Dinah Bear, *The National Environmental Policy Act: Its Origins and Evolutions*, 10 NAT’L RESOURCES & ENV’T 3, 70 (1995).

121. *See, e.g., Hazardous Waste Treatment Council*, 861 F.2d at 283 (holding that recycling and disposal firms’ economic interest in retaining hazardous waste regulations not

The Salvage Timber Rider, however, has no explicit preservationist preamble, and was not enacted to protect recreational use or aesthetic enjoyment. The nearest equivalent to a statement of purpose appears in section 2001(b)(1), which mandates the Forest Service "to achieve, to the maximum extent feasible, a salvage timber sale volume level above the [existing] programmed level to reduce the backlogged volume of salvage timber."<sup>122</sup> And the legislative history indicates two goals of the Rider: (1) to provide logging opportunities in the timber industry,<sup>123</sup> and (2) to mitigate forest health hazards.<sup>124</sup> Although these are arguably valid rationales, they are hardly the aesthetic or recreational interests to which environmental groups could attach standing.<sup>125</sup>

*b. limitations on trial preparation*

Even if the zone-of-interest requirement was satisfied, section 702 of the APA only permits suits based on "final" agency action. Because mere studies or recommendations do not constitute final action,<sup>126</sup> the earliest time to file suit would likely be the formal agency announcement of a proposed sale. But the Rider specifies that suits must be filed no later than fifteen days after such an announcement<sup>127</sup> and explicitly prohibits courts from granting extensions.<sup>128</sup> Plaintiffs, therefore, are left with only two weeks to assess the environmental impacts of a proposed sale and prepare a complaint.

For example, the Forest Service decision to sell over 250 acres in the Tuskegee National Forest was published in local newspapers in

sufficiently related to congressional intent to encourage recycling and disposal of waste under the Resource Conservation and Recovery Act).

122. Salvage Timber Rider, *supra* note 5, § 2001(b)(1); Kentucky Heartwood, Inc. v. United States Forest Serv., 906 F. Supp. 410, 412-13 (E.D. Ky. 1995) (stating that "the general purpose of the rider may at least in part be to reduce a backlog of salvage timber").

123. 141 CONG. REC. S10,463 (daily ed. July 21, 1995) (comments of Sen. Gorton (R-Wash.)).

124. *Id.* at H6638 (daily ed. June 29, 1995) (comments of Re. DeFazio (D-Or.)).

125. The standing issue, however, was not raised by the defendants in the early suits challenging sales offered pursuant to the Rider. See *Inland Empire Pub. Lands Council v. Glickman*, 911 F. Supp. 431 (D. Mont. 1995); *Idaho Conservation League v. Thomas*, No. CV 95-0425-S-EJL, 1995 WL 789239 (D. Idaho Dec. 11, 1995); *Kentucky Heartwood, Inc. v. United States Forest Serv.*, 906 F. Supp. 410 (E.D. Ky. 1995).

126. *Save the Dunes Council v. Alexander*, 584 F.2d 158, 164 (7th Cir. 1978).

127. Salvage Timber Rider, *supra* note 5, § 2001(f)(1).

128. *Id.*

Montgomery, Alabama on January 3, 1996.<sup>129</sup> In plaintiffs' complaint challenging the sale, they sharply criticized this provision as being an unreasonable limitation under which they were "not able to get all necessary expert witnesses, documents and other materials prepared."<sup>130</sup>

*c. standard of review*

*i. applying the "arbitrary and capricious" standard*

Assuming that plaintiffs have successfully established standing and filed a complaint within the fifteen-day window, the Rider prohibits the Forest Service from taking further action to award the sale for forty-five days,<sup>131</sup> after which time a court must render a decision.<sup>132</sup> For plaintiffs to prevail, the court will need to determine, upon "review of the record," that "the decision to . . . offer . . . such sale was arbitrary and capricious or otherwise not in accordance with applicable law."<sup>133</sup> For several reasons, plaintiffs may find this an insurmountable burden.

First, the phrase "not in accordance with applicable law" is largely superfluous, for the Rider itself explicitly makes "[a]ll . . . applicable federal environmental and natural resource laws" *inapplicable* to salvage timber sales.<sup>134</sup> The only significant "applicable law," therefore, appears to be the Rider itself.

Second, the "arbitrary and capricious" standard, which the Rider incorporated from the Administrative Procedure Act,<sup>135</sup> is extremely deferential. Under this standard, reviewing courts will uphold an agency decision if it was "based on a consideration of the relevant factors" and was not a "clear error of judgment."<sup>136</sup> If the action was reasonable, the court will not "substitute its judgment for that of the agency."<sup>137</sup>

The Rider, however, uses extremely vague terms, providing

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129. Complaint at 5, *Alabama Wilderness Alliance v. Carter*, Civil Action No. 96-T-101-E (M.D. Ala. filed Jan. 18, 1996) [hereinafter *Complaint*].

130. *Id.* at 12.

131. *Salvage Timber Rider*, *supra* note 5, § 2001(f)(2).

132. *Id.* § 2001(f)(5).

133. *Id.* § 2001(f)(4).

134. *Id.* § 2001(i).

135. See 5 U.S.C. § 706(2)(A) (1994).

136. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

137. *Id.*

enormous discretion to the Forest Service to decide which trees to sell and making it nearly impossible to show that the decision was arbitrary and capricious. Section 2001(a)(3), for example, allows the sale of trees "associated" with dead or damaged trees, as long as the entire sale includes an "identifiable salvage component" of dead or damaged trees.<sup>138</sup> The Rider does not illuminate on the terms "associated" or "identifiable component," thus implicitly providing the Service with the authority to interpret them.

Comparing the language in the Rider with the existing—but now inapplicable—terms of the National Forest Management Act of 1976 (NFMA)<sup>139</sup> is illuminating. The NFMA allowed the Forest Service to sell trees "which are substantially damaged by fire, windthrow, or other catastrophe, or which are in imminent danger from insect or disease attack."<sup>140</sup> Noticeably absent is any reference to "associated" trees or "identifiable . . . components," and the legislative history of the Rider fails to indicate why these additional and extremely broad terms were necessary. The problem of the vague terms was raised on the House floor by Representative McDermott, who complained that "[w]hile proponents of [the] bill claim that loggers only will cut down trees that are diseased, the actual . . . language states that loggers may go in and cut whatever they see fit as long as there are any trees in the forest that are damaged."<sup>141</sup>

The difficulty of proving arbitrary and capricious conduct is exemplified by *Idaho Conservation League v. Thomas*,<sup>142</sup> in which environmental groups sought to enjoin the Forest Service from conducting salvage sales near the Salmon River in Idaho's Boise and Payette National Forests.<sup>143</sup> Because the salvage sale was initiated prior to passage of the Rider, the Service had begun to prepare an Environmental Impact Statement.<sup>144</sup> While preparing the document, the Service consulted with the EPA, the National Marine Fisheries Service (NMFS), and the United States Fish and Wildlife Service (USFWS).<sup>145</sup> In the unanimous opinion of these agencies, the

138. Salvage Timber Rider, *supra* note 5, § 2001(a)(3).

139. Pub. L. No. 94-588, 90 Stat. 2949 (1976) (codified as amended in scattered sections of 16 U.S.C.).

140. 16 U.S.C. § 1611(b) (1994).

141. 141 CONG. REC. H6642 (daily ed. June 29, 1995).

142. No. CV 95-0425-S-EJL, 1995 WL 789239 (D. Idaho Dec. 11, 1995).

143. *Id.* at \*1.

144. *Id.* at \*2.

145. *Id.* at \*2-\*3.

environmental risks posed by the salvage sale were too great to render it acceptable.<sup>146</sup> The EPA concluded that the sale would "further aggravate the already critically degraded habitat for threatened salmon,"<sup>147</sup> and the USFWS opined that the sale would have general "adverse impacts to fish and wildlife."<sup>148</sup> The Forest Service, not content with the agency opinions, convened its own internal panel of experts to determine if there was a "better scientific basis for the decision."<sup>149</sup> Not surprisingly, the Forest Service experts recommended that the sale go forward.<sup>150</sup>

Plaintiffs brought suit, contending that the sale was arbitrary and capricious because it ignored the expert advice of the other federal agencies.<sup>151</sup> The district court disagreed. Noting that the Rider "grants the [Service] sole discretion over the information considered and relied on to reach [its] decision,"<sup>152</sup> the court held that the "substantial interagency" criticism of the sale rendered it neither arbitrary nor capricious.<sup>153</sup>

*Idaho Conservation League* sets an ominous precedent for future challenges to salvage sales. If the unanimous objections of the EPA, NMFS, and USFWS are insufficient to render a sale capricious, it is difficult to imagine a scenario in which such a finding would be made. To date, not a single challenge under the Rider has succeeded in showing that the decision to conduct a salvage sale was either arbitrary or capricious.<sup>154</sup>

## ii. restricting the reviewable record

The requirement that judicial review be based *exclusively* on a "review of the record"<sup>155</sup> makes the "arbitrary and capricious" standard all the more insurmountable. The requirement mandates that reviewing courts assess the capriciousness of decisions based only

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146. *Id.* at \*3.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at \*5.

152. *Id.*

153. *Id.* at \*5-\*6.

154. See *Inland Empire Pub. Lands Council v. Glickman*, 911 F. Supp. 431 (D. Mont. 1995); *Idaho Conservation League v. Thomas*, No. CV 95-0425-S-EJL, 1995 WL 789239 (D. Idaho Dec. 11, 1995); *Kentucky Heartwood, Inc. v. United States Forest Serv.*, 906 F. Supp. 410 (E.D. Ky. 1995).

155. Salvage Timber Rider, *supra* note 5, § 2001(f)(4).



on the information before the Forest Service at the time the decision was made.<sup>156</sup> Although the standard is well established in administrative law,<sup>157</sup> its incorporation by the Rider is inappropriate. In the past, environmental laws mandated that certain information be included in the administrative record. Under NEPA, for example, the Forest Service would have been required to prepare an Environmental Impact Statement, which could serve as a detailed record of the basis for the timber sale.<sup>158</sup> Plaintiffs, therefore, could challenge Forest Service decisions as arbitrary and capricious in light of the information contained in the EIS. Public comments regarding the EIS, and responses thereto, would likewise become incorporated in the administrative record.

The Salvage Timber Rider, however, explicitly renders NEPA inapplicable,<sup>159</sup> thus eliminating the mandatory preparation of an EIS. Although the Rider mentions preparation of an Environmental Assessment—a cursory document intended, under NEPA, as a precursor to the more exhaustive EIS—the preparation is *discretionary*, with the “scope and content of the documentation and information prepared, considered, and relied on . . . [to be] at the sole discretion of the [Forest Service].”<sup>160</sup> This arrangement creates the type of “fox guarding the hen-house” scenario criticized by administrative law experts as nondemocratic.<sup>161</sup> The Chief of the Forest Service, an unelected official who heads the agency that is the economic beneficiary of the timber sale, has the sole discretion to determine what information should be included in the administrative record. This record, in turn, is the exclusive basis for judicial review of the Forest Service decision.

In *Inland Empire Public Lands Council v. Glickman*,<sup>162</sup> for example, the Forest Service moved to strike all extra-record documents offered by the plaintiffs that were not part of the original administrative record, despite the plaintiffs contention that the documents explained technical issues and provided information

156. See *Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 420.

157. See *id.*

158. See *supra* part IV.A.

159. Salvage Timber Rider, *supra* note 5, § 2001(i)(3).

160. *Id.* § 2001(c)(1)(C).

161. See WARREN, *supra* note 15, at 124 (“[O]bservers have discovered that public administrators can jeopardize rule of law precepts by informally promulgating rules and orders in the absence of a clear, written, and reviewable record.”).

162. 911 F. Supp. 431 (D. Mont. 1995).

contrary to that contained in the record.<sup>163</sup> The court accepted the Forest Service contention that “[p]laintiffs submissions [were] inappropriate because review . . . [was] limited to the administrative record,”<sup>164</sup> and ordered the documents to be stricken.<sup>165</sup> With this contrary evidence cast aside, the court proceeded to hold that the sale was neither arbitrary nor capricious.<sup>166</sup>

The restrictions on extra-record introduction of evidence might explain why the Forest Service has not challenged standing in any of the cases brought under the Rider.<sup>167</sup> Such a challenge might allow discovery and new evidence not included in the original administrative record, thus potentially biasing the merits of any contention by the Service that decisions were not arbitrary and capricious.

*d. appellate review*

If a plaintiff loses in district court, the Rider provides for appellate review if filed within thirty days of the district court decision.<sup>168</sup> There is no extension, however, of the forty-five day moratorium on execution of the timber contract, and the Rider explicitly prohibits the district court from ordering temporary restraining orders or preliminary injunctions pending appeal.<sup>169</sup> Thus, a plaintiff could win on appeal yet be too late to save the forest.

The Oregon Natural Resources Council (ONRC) and the Sierra Club faced precisely this dilemma while attempting to prevent the Forest Service from selling stands in Warner Creek, Oregon.<sup>170</sup> The district court had enjoined the sale of the timber until the Forest Service could incorporate findings regarding arson into the EIS required by NEPA.<sup>171</sup> With the passage of the Rider, however, NEPA became inapplicable, and the injunction was dissolved.<sup>172</sup> Both the ONRC and the Sierra Club planned to appeal the ruling, but

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163. *Id.* at 437.

164. *Id.*

165. *Id.*

166. *Id.*; see also *Oregon Natural Resources Council v. Thomas*, No. 95-6272-HO, slip op. at 8-9 (D. Or. Dec. 4, 1995) (noting that defendants’ Motion to Strike Extra-record Documents was moot due to plaintiffs’ failure to state a valid claim under the Rider).

167. See *supra* note 125 and accompanying text.

168. *Salvage Timber Rider*, *supra* note 5, § 2001(f)(7).

169. *Id.* § 2001(f)(3).

170. Dana Tims, *Judge Clears Salvage Logging*, PORTLAND OREGONIAN, Sept. 7, 1995, at B1.

171. *Id.*

172. *Id.*

the prohibition on temporary injunctions pending appeal meant that the logging company could begin removing the trees immediately.<sup>173</sup>

## V. CONSTITUTIONAL CONSIDERATIONS

The previous section attempted to identify the immediate, practical impacts of the Rider on public participation. As discussed in Part II, such participation ensures that the agencies are responsive to the people, and serves as a check on the accumulation of quasi-legislative power by the executive branch. But the necessity of public participation becomes attenuated, at least in the separation of powers context, when constitutional doctrines independently ensure that executive agencies do not accumulate excessive power. The following section, therefore, addresses two constitutional doctrines—legislative non-delegation and procedural due process—both of which effectuate restraints on unbridled administrative power.

### A. Legislative Non-Delegation

Article I, Section 1 of the Constitution provides that “[a]ll legislative Powers . . . shall be vested in a Congress.”<sup>174</sup> The Supreme Court, however, has not seriously entertained a legislative non-delegation doctrine since the New Deal era,<sup>175</sup> acknowledging that Congress can not legislate with precision in all areas of public interest.<sup>176</sup> In 1980, however, Justice—now Chief Justice—Rehnquist suggested a resuscitation of the non-delegation principle in his concurrence in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*.<sup>177</sup> In *American Petroleum*, Rehnquist articulated what he felt were the purposes of the non-delegation doctrine. First, the doctrine forces Congress, the elected representatives of the people, to make the important policy choices, thus maintaining ultimate power with the people.<sup>178</sup> Second, the doctrine guarantees that any delegations to an agency will be accompanied by an “intelligible principle” to guide both the exercise

173. *Id.*

174. U.S. CONST. art. I, § 1.

175. See, e.g., *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77 (1932).

176. WILLIAM F. FOX, JR., *UNDERSTANDING ADMINISTRATIVE LAW* 28 (2d ed. 1992).

177. 448 U.S. 607 (1980).

178. *Id.* at 685 (Rehnquist, J., concurring).

of the delegated discretion and the judicial review thereof,<sup>179</sup> allowing courts "to ascertain whether the will of Congress has been obeyed."<sup>180</sup>

Within a year of *American Petroleum*, Rehnquist, joined by former Chief Justice Burger, applied the non-delegation doctrine in his dissenting opinion in *American Textile Manufacturers Institute v. Donovan*,<sup>181</sup> in which the Court was asked to determine whether the Occupational Safety and Health Act of 1970<sup>182</sup> required the Secretary of Labor to perform a cost-benefit analysis prior to promulgating a cotton dust standard.<sup>183</sup> To render a holding, the Court was forced to interpret vague statutory language which stated that cotton dust standards must be set "to the extent feasible," but with no elaboration on whether "feasibility" referred to technological or economical considerations.<sup>184</sup> Rehnquist emphasized that there had been a fundamental policy disagreement on the issue in Congress, and rather than either mandating or prohibiting cost-benefit analyses, Congress simply abrogated its policymaking duties to the agency through the intentional use of vague and ambiguous language.<sup>185</sup> Rehnquist felt that had Congress been forced to decide the issue, there may not have been any bill for the President to sign.<sup>186</sup> Furthermore, he believed this policy decision had ultimately been thrust on the Court, which had no guidance in ascertaining the will of Congress.<sup>187</sup> In Rehnquist's view, such an abrogation contrasted to a legitimate delegation in which Congress concluded that an agency was factually better positioned to establish policy, or when the policy issue was relatively minor.

Accepting Rehnquist's reasoning, the Salvage Timber Rider may be unconstitutional. The magnitude of logging in the nation's forests is a major policy issue which, at least arguably, dwarfs the cotton dust standard issue of *Donovan*. The subject is highly contentious, especially in areas with old-growth stands or in regions inhabited by

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179. *Id.* at 685-86 (Rehnquist, J., concurring).

180. *Yakus v. United States*, 321 U.S. 414, 426 (1944).

181. 452 U.S. 490 (1981).

182. Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified as amended at 29 U.S.C. §§ 651-678 (1994)).

183. *Donovan*, 452 U.S. at 494.

184. *Id.* at 544 (Rehnquist, J., dissenting).

185. *Id.* at 545-47 (Rehnquist, J., dissenting).

186. *Id.* at 546-47 (Rehnquist, J., dissenting).

187. *Id.* (Rehnquist, J., dissenting).

threatened or endangered species. Yet, the Rider requires the Forest Service to conduct salvage timber sales "to the maximum extent feasible,"<sup>188</sup> and defines "salvage timber sale" to include *any* sale which includes "an identifiable salvage component" of dead or dying trees.<sup>189</sup> This language appears to permit the Service to initiate a sale that consists almost entirely of healthy, old-growth trees, as long as there is an associated "component" of dead or damaged trees. As in *Donovan*, neither the Rider nor its legislative history elaborate on the vague terms "feasible" or "identifiable," providing courts with no guidance to interpret them. Additionally, and also analogous to *Donovan*, no bill would have made it to the President's desk but for a strong desire by Congress to enact attached legislation, in this case the relief aid and rescissions language. The timber provisions alone were not likely to reach President Clinton, who openly opposed them,<sup>190</sup> and House Republicans probably lacked the votes to override a veto.

Other proponents of a rejuvenated non-delegation doctrine have suggested that it be transformed to de-emphasize the requirement of specific and meaningful statutory standards while emphasizing the need for procedural safeguards to protect against unnecessary and uncontrolled discretionary power.<sup>191</sup> Under this theory, the validity of congressional delegations should turn upon the totality of the protections against arbitrariness, not merely the specificity of the substantive standards.<sup>192</sup> The theory suggests that the potential for abuse due to the vague standards in the Salvage Timber Rider could be offset by providing for stricter procedural checks on the agency. As previously illustrated, however, the Rider accomplishes just the opposite, curtailing nearly all conventional procedural safeguards, from notice and comment to administrative and judicial review.

### *B. Procedural Due Process*

The most fundamental tenet of due process is "the opportunity

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188. Salvage Timber Rider, *supra* note 5, § 2001(b)(1).

189. *Id.* § 2001(a)(3).

190. See Gerstenzang, *supra* note 9, at A16.

191. Kenneth C. Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 725 (1969).

192. *Id.* at 726; see *Iske v. United States*, 396 F.2d 28, 31 (10th Cir. 1968) (stating that the "validity of delegation [might better] be tested . . . on the basis of safeguards rather than standards").

to be heard 'at a meaningful time and in a meaningful manner.'"<sup>193</sup> Referring to the provision of the Rider barring temporary restraining orders pending appeal, one plaintiff quipped that "[b]eing heard after the timber . . . is cut is not at a meaningful time."<sup>194</sup>

The Rider undeniably institutes sweeping restrictions on procedural opportunities for citizens to "make their voice heard." The Supreme Court, however, has consistently held that procedural due process is violated only when a constitutionally protected "liberty" or "property" interest is at stake.<sup>195</sup> In the "property" context, plaintiffs must show a legal claim of entitlement to the property, not merely an "abstract need or desire for it," no matter how grievous the loss.<sup>196</sup> In other words, the "property" interest must be affirmatively created by law, typically a government created entitlement like welfare.<sup>197</sup>

In one constitutional attack on the Rider, an environmental group attempted to overcome the "legal entitlement" hurdle by citing to environmental legislation containing policy goals for national forests,<sup>198</sup> claiming it created a legal entitlement to the use and enjoyment of the forest regions at issue. For example, plaintiffs cited the Forest and Rangeland Renewable Resources Planning Act of 1974,<sup>199</sup> which legally requires that national forests facilitate, among other things, outdoor recreation, watershed, wildlife, and wilderness.<sup>200</sup> Even "the inherent right of every citizen . . . to engage in fishing"<sup>201</sup> was cited to support the plaintiffs' penumbral "entitlement."<sup>202</sup>

The argument is not entirely persuasive. In addition to protecting recreational and aesthetic qualities of national forests, federal law also provides for timber sales and harvesting.<sup>203</sup> Plaintiffs did not justify why their "entitlement" to recreational use should trump the

193. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

194. Complaint, *supra* note 129, at 9.

195. *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972).

196. *Id.* at 577.

197. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254 (1970).

198. Complaint, *supra* note 129, at 7-9.

199. 16 U.S.C. §§ 1600-1687 (1994).

200. *Id.* § 1604(e)(1).

201. *Id.* § 742a.

202. Complaint, *supra* note 129, at 7-9.

203. *E.g.*, 16 U.S.C. § 528 (stating that "national forests . . . shall be administered for . . . timber . . . purposes").

timber industry's "entitlement" to harvest. Furthermore, courts have consistently rejected the idea of a constitutionally protected environment<sup>204</sup> and have limited procedural due process to more conventional legal entitlements.

Nevertheless, it is informative to consider the broader implications of the Court's procedural due process doctrine to salvage timber sales. The current "entitlements" approach has been largely derided as a failure,<sup>205</sup> most notably for attaching only to property interests which are affirmatively defined by law, to the exclusion of all other interests.<sup>206</sup> Because legislatures pass the laws which create the property interest, they may simply avoid the constitutional requirement of fair hearings by defining away the triggering interest.<sup>207</sup> Furthermore, the determination that a property interest is a legal entitlement has little or no relation to its actual importance to the individual.<sup>208</sup> The doctrine may attach in a case involving the temporary loss of a driver's license,<sup>209</sup> but does not attach to the potential loss of old-growth trees—arguably our most cherished public resource. The result is incongruous at best.

The reform of procedural due process has been the subject of extensive debate, and is beyond the scope of this Comment. As an example, however, one critic has suggested reshaping due process in light of NEPA.<sup>210</sup> Although both doctrines represent procedural remedies, their approaches contrast considerably. Due process is only triggered by the existence of underlying substantive law creating a legal right. The magnitude of the harm involved is irrelevant. In contrast, NEPA's procedural requirements—most notably the preparation of an Environmental Impact Statement—are only triggered for the most important harms, those "significantly affecting the quality of the human environment,"<sup>211</sup> and are triggered regardless of the existence or satisfaction of substantive environmental laws. Although a radical reshaping of procedural due process is unlikely in the near future, it is worth noting that it could serve as a constitution-

204. See Michael Herz, *Parallel Universes: NEPA Lessons For The New Property*, 93 COLUM. L. REV. 1668, 1685 & n.84 (1993).

205. *Id.* at 1668.

206. *Id.* at 1694.

207. *Id.*

208. *Id.* at 1696.

209. See *Bell v. Burson*, 402 U.S. 535, 539 (1971).

210. See Herz, *supra* note 204, at 1670.

211. 42 U.S.C. § 4332(2)(C) (1988).

al bar to the Rider's procedural restrictions.

At the constitutional level, therefore, the Rider falls into a void. The interests at stake—loss of trees in national forests—are not sufficient to trigger the highly derided “entitlement” approach to procedural due process. The moribund non-delegation doctrine, assuming no adoption of the Rehnquist opinions of the early 1980s, provides no relief in the separation of powers realm.<sup>212</sup> Hypothetically, therefore, the Forest Service could become the “Forest Czar” and initiate massive clear-cutting of all remaining old-growth forests. Although political considerations would certainly preclude such a catastrophe, no constitutional barriers exist. In this respect, the Rider exemplifies the Constitution's failure to protect against ever-increasing accumulations of agency power, a trend which threatens the very structure of our democratic government.

## VI. POLITICAL CONSIDERATIONS

### A. Congressional Agendas

A cynic might suggest that the Salvage Timber Rider is merely a reflection of the House Republicans' broader environmental platform, which, according to Vice President Gore, is “an extreme anti-environmental agenda” intended to “freeze all health and environmental protection.”<sup>213</sup> This Comment was not intended as a generalized critique of the environmental policies of either political party. But in the context of legislation affecting public participation, it is interesting to contrast the Salvage Timber Rider with House Bill 9 (H.R. 9),<sup>214</sup> the Job Creation and Wage Enhancement Bill, passed by the House less than four months prior to the passage of the Salvage Timber Rider. Like the Rider, H.R. 9 received the overwhelming support of House Republicans.<sup>215</sup> In contrast, however, H.R. 9 proposed *expanded*, rather than *contracted*, opportunities for public comment and participation in the regulatory process. Section

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212. See *supra* part V.A.

213. Al Gore, Jr., *Earth Days Have Become Earth Years*, N.Y. TIMES, Apr. 23, 1995, at A17.

214. Job Creation and Wage Enhancement Act of 1995, H.R. 9, 104th Cong., 1st Sess. [hereinafter H.R. 9].

215. The Salvage Timber Rider passed the House on June 29, 1995 by a vote of 276 to 151. 141 CONG. REC. H6644 (daily ed. June 29, 1995). H.R. 9 passed the House on March 3, 1995, by a vote of 277 to 141. *Id.* at H2638-39 (daily ed. March 3, 1995). Both votes were primarily along party lines.



7003(a)(2), for example, proposed to amend the Administrative Procedure Act<sup>216</sup> by requiring public hearings on a proposed regulation if 100 persons, acting individually, submitted comments.<sup>217</sup> The Bill also facilitated extensions of the public comment period,<sup>218</sup> provided for a citizen-suit provision that allows "[a]ny person injured or threatened by a prohibited regulatory practice" to commence a civil suit and seek an injunction,<sup>219</sup> and required an extensive cost-benefit analysis for "major" rules affecting more than 100 persons.<sup>220</sup>

Several federal agencies have concluded that the regulatory changes proposed by H.R. 9 would greatly delay, if not entirely preclude, ongoing agency efforts to promulgate and enforce environmental regulations.<sup>221</sup> The overwhelming majority of environmental regulations are, of course, intended to mitigate pollution or protect natural resources. Thus, both the *expansions* on participation in H.R. 9 and the *restrictions* in the Salvage Timber Rider favor business over environmental interests. The allegation from environmental groups is that House Republicans are hesitant to directly attack the substance of politically popular environmental laws, yet are undermining these laws indirectly by slashing agency budgets,<sup>222</sup> imposing intensive cost-benefit requirements for new regulations, and—relevant to this Comment—selectively expanding or contracting opportunities for public participation and review.

In this respect, consider the following comment by Republican Senator Gorton in support of the Salvage Timber Rider:

For 6 long years, rural timber communities in [the state of Washington] have been under siege from their Federal Government, and the implementation of environmental laws

216. 5 U.S.C. §§ 551-706 (1994).

217. H.R. 9, *supra* note 214, § 7003(a)(2).

218. *Id.* § 7003(b).

219. *Id.* § 8207(a). The Bill limits the scope of the citizen-suit provision, however, by defining "prohibited regulatory practice" to include only agency action motivated by disclosures by those which the action will affect. *Id.* § 8204.

220. *Id.* § 7004.

221. NATURAL RESOURCES DEFENSE COUNCIL, BREACH OF FAITH: HOW THE CONTRACT'S FINE PRINT UNDERMINES AMERICA'S ENVIRONMENTAL SUCCESS 6 (1995). *But see* Victor B. Flatt, *Environmental "Contraction" for America?*, 29 LOY. L.A. L. REV. 585, 613 (1996) (suggesting that the impact of the procedural reforms of H.R. 9, including the cost-benefit requirement, might be mitigated by the agencies themselves).

222. *See generally* NATURAL RESOURCES DEFENSE COUNCIL, STEALTH ATTACK: GUTTING ENVIRONMENTAL PROTECTION THROUGH THE BUDGET PROCESS (1995) (criticizing congressional budget-based attacks on environmental statutes).

that have neglected to consider the impacts of these laws on people. Federal agencies have gone literally unchecked in their imposition of regulations, and restrictions on people and their property, and, the cumulative effects of these actions have resulted in the destruction of rural communities and their way of life.<sup>223</sup>

Although berating "unchecked" federal agencies, this statement was voiced in support of the Salvage Timber Rider, which eliminates many of the conventional checks on agency action, including administrative and judicial review. The implicit message is that agency action must be curtailed, unless that action serves timber industry interests, in which case it should be expanded. Similarly, consider Senator Gorton's assertion that agencies have "neglected to consider the impacts . . . on people,"<sup>224</sup> made in support of a salvage timber program which eliminates NEPA's mandate to consider the effect of agency action on the "quality of the human environment."<sup>225</sup> Again, the implicit message is that agency consideration of salvage logging impacts should be curtailed, unless the impacts adversely affect timber industry interests, in which case they have not been considered enough.

#### *B. Mitigation Efforts By the Executive Branch*

The Salvage Timber Rider represents a tremendous delegation of power to the executive agencies, albeit for a limited time. Hopefully, the Forest Service will use its discretion responsibly, and early indications are mixed. Within a week after signing the bill containing the Rider, President Clinton drafted a letter directing the Service to implement the salvage provisions using any "current environmental laws" not expressly prohibited by the Rider, even if the Rider stated that the laws were not applicable.<sup>226</sup> In response, an interagency Memorandum of Agreement was circulated indicating that the Forest Service would continue to comply with certain environmental laws, despite not being legally compelled to do so.<sup>227</sup> For

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223. 141 CONG. REC. S10,463 (daily ed. July 21, 1995).

224. *Id.*

225. 42 U.S.C. § 4332(2)(C) (1988).

226. Memorandum on Timber Salvage Legislation, 31 WEEKLY COMP. PRES. DOC. 1356, 1356-57 (Aug. 1, 1995).

227. Memorandum of Agreement on Timber Salvage Related Activities Under Public Law 104-19, between United States Department of Agriculture, United States Department of the Interior, United States Department of Commerce, United States Environmental

example, the Memorandum stated that if the Forest Service determines that a particular salvage sale, "in [its] discretion, ordinarily should require an EIS under . . . NEPA," then the documentation should "include analysis consistent with" those required in an EIS, even though the documentation is not legally required to include an EIS.<sup>228</sup> Furthermore, the Service recognized "the importance of public involvement given the prohibition to administrative appeals," and committed to "involv[ing] the public" in the salvage timber process.<sup>229</sup>

Although these mitigating efforts by President Clinton and the Forest Service deserve credit, they only marginally affect the impact of the Rider because they are purely voluntary declarations, and provide no legal mechanisms for enforcement. The preparation of the EIS, for example, cannot be challenged in court because it is no longer legally required under NEPA. Given the extensive case law involving the failure of the Service to adequately prepare the EIS when it was legally required,<sup>230</sup> it is naive to assume that the Service will adequately prepare them when they are voluntary. For example, one challenge to sales under the Rider, involving over 250 acres in Alabama's Tuskegee National Forest, alleged that the Service failed to prepare the cursory Environmental Assessment legally required by the Rider—much less the voluntary EIS.<sup>231</sup>

And the failure of the Forest Service to police its internal conduct is not limited to the preparation of an EIS. Critics of the Service, including some insiders, contend that the Service is too closely aligned with large and politically influential timber companies.<sup>232</sup> Less than eight months after passage of the Rider, for example, the Service was accused of obstructing investigations into illegally harvested timber from national forests in Oregon and Washington.<sup>233</sup> The allegations, many of which were voiced by former Service personnel, included an accusation that the Service was complicit in the illegal harvesting of up to 32,000 healthy green trees

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Protection Agency (Aug. 9, 1995) (on file with the *Loyola of Los Angeles Law Review*).

228. *Id.*

229. *Id.*

230. *See, e.g., supra* note 71.

231. Complaint, *supra* note 129, at 5.

232. Alan C. Miller, *Forest Service Hindered Theft Case, Groups Say*, L.A. TIMES, Mar. 25, 1996, at A1.

233. *Id.*

per month under the guise of salvage sales.<sup>234</sup>

Furthermore, even assuming the best of intentions by the Service, voluntary measures to mitigate the impacts of the Rider simply cannot overcome the mandatory restrictions on administrative and judicial review.<sup>235</sup>

Finally, if Congress senses that the President is intentionally undermining the spirit of the Rider by compelling the agencies to voluntarily comply with existing laws that Congress has rendered "inapplicable," it may simply lead to additional legislation that clarifies congressional intent. Such legislation may not be far off. The very legislators and committees which drafted and reviewed the Rider made clear that they intend to "change the laws that have brought us to this point,"<sup>236</sup> that the Rider is merely "a good starting point,"<sup>237</sup> and that "long-term timber salvage legislation is forthcoming."<sup>238</sup> To the extent the Rider will serve as a precedent, its implications should be more thoroughly considered.

## VII. CONCLUSION

Congress is the steward of our national forests, and must define the substantive line between economic and environmental interests. In the context of salvage timber sales, this is an extraordinarily difficult task. The goal of this Comment, however, is not to second-guess *where* the line should be drawn, but rather to criticize the *nature* of the line itself. Specifically, this Comment suggests that Congress has effectuated a desired substantive change—increased salvage logging—through two inappropriate mechanisms: (1) vague and discretionary language; and (2) procedural restrictions on the public's ability to implement and enforce this vague language.

Through these mechanisms, Congress has effectively delegated a major policy issue to unelected agency officials. By so doing, Congress has undermined a fundamental tenet of democratic government—that power rests with the people—and has done so concerning the administration of a publicly owned resource about which emotions run strong—the very context most in need of direct,

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234. *Id.* at A10.

235. *See supra* part IV.B.

236. 141 CONG. REC. S10,463 (daily ed. July 21, 1995) (comments of Sen. Gorton (R-Wash.)).

237. *Id.* (comments of Sen. Gorton (R-Wash.)).

238. *Id.* at H6638 (daily ed. June 29, 1995) (comments of Rep. Taylor (R-N.C.)).

public involvement.

The practical reasons for encouraging public participation<sup>239</sup> are as valid today as they were two decades ago. The existing environmental framework both recognizes and encourages public interaction. Although environmental law is necessarily a dynamic body, significant procedural modifications should, in contrast to the Salvage Timber Rider, be thoroughly debated by Congress, and should strive to minimize impacts on public participation. The importance of congressional restraint is only magnified by the Constitution's failure to ensure that the fundamental structure of separated powers will remain intact. By preserving public participation, the effectiveness of environmental law improves, while the democratic ideal of government by and for the people remains.

*Paul Maynard Kakuske*

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239. *See supra* part II.