

# Barking Up the Wrong Tree: Financial Transparency and Accountability in the Forest Service's NEPA Reviews

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*The United States Forest Service (USFS) is the federal agency responsible for overseeing all national forests and grasslands. The agency's forest management duties rest on a careful balancing of interests. On numerous occasions, this balance has tipped in favor of the agency's timber harvesting goals while moving further away from environmental protection. The agency's decision making, under the framework of the National Environmental Policy Act (NEPA), captures this development in several cases. NEPA calls for the agency to conduct objective and detailed environmental reviews of any major actions that it proposes. Fulfilling this responsibility has been compromised by financial incentives that arise from the agency's budget structure.*

*Such incentives prompt an inquiry into whether the agency can approach NEPA reviews on logging projects as a neutral decision maker. This inquiry becomes especially pertinent as environmental concerns increase and forest management grows more contentious. Are financial incentives so entrenched in the agency's timber harvesting and sale activities that it should bear no responsibility at all for conducting environmental reviews of these activities? This Note argues for transferring the duty to conduct such NEPA reviews to another agency entirely, the Environmental Protection Agency. After describing the USFS's relationship to logging and NEPA, this Note provides and evaluates a proposal for reassigning NEPA duties, with the goal of ensuring more objective and transparent environmental reviews.*

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## INTRODUCTION

Managing national forests has long been intensely controversial, as gaps in scientific knowledge and discrepancies in language complicate public discourse on how best to care for our forests.<sup>1</sup> The United States Forest Service (USFS), the federal agency responsible for navigating this difficult task,<sup>2</sup> has earned various titles in the process of doing so. Over the years, its reputation has ranged from that of a bureaucratic superstar to a failing forest guardian that inadequately manages environmental concerns and competing forest uses.<sup>3</sup> From the mid-2010s onwards, the increasing politicization of climate change issues and intensifying wildfires led the national debate around best practices for forest

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1. RICK BROWN, DEFS. OF WILDLIFE, THINNING, FIRE AND FOREST RESTORATION: A SCIENCE-BASED APPROACH FOR NATIONAL FORESTS IN THE INTERIOR NORTHWEST 8–9 (2000), [https://defenders.org/sites/default/files/publications/thinning\\_fire\\_and\\_forest\\_restoration.pdf](https://defenders.org/sites/default/files/publications/thinning_fire_and_forest_restoration.pdf).

2. See generally JOHN FEDKIW, U.S. DEPT’ OF AGRIC, MANAGING MULTIPLE USES ON NATIONAL FORESTS, 1905 TO 1995: A 90-YEAR LEARNING EXPERIENCE AND IT ISN’T FINISHED YET, FS-628, <http://npshistory.com/publications/usfs/fs-628/chap1.htm> (last updated May 20, 2009).

3. Compare JEANNE N. CLARKE AND DANIEL C. MCCOOL, STAKING OUT THE TERRAIN: POWER AND PERFORMANCE AMONG NATURAL RESOURCE AGENCIES 16 (1996) to Jim Fumish, *Forest Service Putting National Forests in Peril*, THE HILL (August 2, 2021, 10:30 AM), <https://thehill.com/opinion/energy-environment/565871-forest-service-putting-national-forests-in-peril?rl=1>.

management to grow more contentious.<sup>4</sup> Following California's record-breaking fires in 2020 and 2021, the USFS faced greater scrutiny at the forefront of this debate.<sup>5</sup>

Key aspects of the USFS's work are essential to protecting our national forests. Yet over the past decade, the agency's practices have received varying degrees of backlash from environmental groups opposed to its projects.<sup>6</sup> Although the USFS and these groups may share some values regarding safeguarding the environment, they have drastically different approaches to exercising these values.<sup>7</sup> This is especially apparent in the way that the USFS reviews timber harvest projects for environmental impacts.

Environmental review processes under the National Environmental Policy Act (NEPA) comprise one key area where the opposing approaches of the USFS and certain environmental groups come into conflict.<sup>8</sup> Although both the USFS and these groups aspire to preserve forest health and biodiversity,<sup>9</sup> they disagree on how to do so under NEPA. NEPA demands that when a federal agency proposes taking a major action, it must consider the environmental consequences of that action before proceeding.<sup>10</sup> NEPA reviews are frequently conducted by agencies that work on or with the natural environment in some capacity.<sup>11</sup> The review process seeks to foster environmental protection by encouraging

4. See Stephan Loiaconi, *Growing Wildfires Spark Debate Over Forest Management, Federal Funding*, ABC 7 NEWS (Sept. 7, 2017), <https://wjla.com/news/nation-world/growing-wildfires-spark-debate-over-forest-management-federal-funding>.

5. Dale Kasler & Sam Stanton, *As California Burns, Anger and Pointed Questions for Caretaker of its Vast Forests*, THE SACRAMENTO BEE (Sept. 21, 2021, 8:40 AM), <http://www.sacbee.com/news/california/fires/article253688628>.

6. See, e.g., *Bark v. U.S. Forest Serv.*, 958 F.3d 865 (9th Cir. 2020) (involving conservation organizations who challenged the USFS's authorization of forest thinning in one specific sector of Mount Hood National Forest); *Forest Guardians v. U.S. Forest Serv.*, 641 F.3d 423 (10th Cir. 2011) (involving environmental groups who challenged the USFS's approval of a timber sale and restoration project); *Env't Prot. Info. Ctr. v. U.S. Forest Serv.*, 234 Fed. Appx. 440 (9th Cir. 2007) (involving environmental protection organizations who sought to enjoin a USFS-sponsored forest-thinning project in Shasta-Trinity National Forest).

7. Kimberly P. Veerruso, *Earth Island Institute v. United States Forest Cutting Down on Logging Proposals – A Successful Challenge*, 17 VILL. ENV'T L.J. 237, 237–38 (2006).

8. "From 1989 to 2008, a total of 1,160 land management lawsuits were initiated against the Forest Service...Of the completed cases, 671 (63.1 percent) involved a NEPA challenge." Amanda M.A. Miner et al., *Twenty Years of Forest Service National Environmental Policy Act Litigation*, 12 ENV'T PRAC. 116, 119 (2010).

9. *Compare About Us*, BARK, <https://bark-out.org/about/> (last visited Feb. 7, 2022) with *Meet the Forest Service*, U.S. FOREST SERV., <https://www.fs.usda.gov/about-agency/meet-forest-service> (last visited Feb. 7, 2022).

10. 42 U.S.C. § 4332(2)(C) (1970); see also John C. Ruple et al., *Does NEPA Help or Harm ESA Critical Habitat Designations? An Assessment of Over 600 Critical Habitat Rules*, 46 ECOLOGY L.Q. 829, 836–38 (2019).

11. For example, in 2018, the USFS accounted for the most draft and final EISs published in Federal Register (a total of seventy-three EISs). The Bureau of Land Management published the second most with forty-eight documents, followed by the U.S. Army Corps of Engineers with thirty-five. CHARLES P. NICHOLSON, 2018 ANNUAL NEPA REPORT OF THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) PRACTICE 35 (2018).

transparent and informed agency decision making.<sup>12</sup> It also provides an avenue for public participation and accountability in major federal actions.<sup>13</sup>

Since many of the USFS's actions contain some degree of environmental impact, NEPA is one of the agency's most utilized decision-making tools.<sup>14</sup> NEPA reviews are often triggered by the USFS's forest management projects, several of which include timber harvesting and sales.<sup>15</sup> When timber harvesting and sales are involved, we should be concerned that the agency's funding structure may compromise the integrity of its NEPA review.<sup>16</sup> Several components of this funding structure have prompted critics to question the USFS and its ability to adequately safeguard the environment when proposing new projects.<sup>17</sup> For example, in 2019, the Center for Sustainable Economy published a report concluding that the USFS has often used the rationale of advancing ecological goals to downplay its economic priorities.<sup>18</sup>

The USFS's problem of potential bias in its NEPA review of timber harvest projects permeates throughout internal structures. As will be explained in this Note, timber harvesting has an outsized influence on the USFS's budget.<sup>19</sup> Timber harvesting also has the potential to produce severe environmental consequences,<sup>20</sup> and its impact on the USFS raises serious questions as to how the agency can appropriately weigh these consequences when assessing project proposals. Given how pervasive this potential conflict of interest is, the USFS should no longer conduct NEPA reviews of projects involving the harvest or sale of timber. Rather, these reviews should be conducted by another agency entirely.

12. See 42 U.S.C. § 4332 (1970); ENV'T LAW INST., NEPA SUCCESS STORIES: CELEBRATING 40 YEARS OF TRANSPARENCY AND OPEN GOVERNMENT 5–7 (2010), [https://ceq.doe.gov/docs/get-involved/NEPA\\_Success\\_Stories.pdf](https://ceq.doe.gov/docs/get-involved/NEPA_Success_Stories.pdf).

13. See 42 U.S.C. § 4332(2)(C) (1970).

14. See Forrest Fleischman et al., *US Forest Service Implementation of the National Environmental Policy Act Fast, Variable, Rarely Litigated, and Declining*, 118 FORESTRY J. 403, 408 (2020).

15. See generally *Timber Sales on the National Forests*, U.S. FOREST SERV., <https://www.fs.usda.gov/managing-land/forest-management/products/timber-sales> (last visited Feb. 5, 2022) (providing an overview of currently advertised timber sales, total sales by product type, and bidding information).

16. See Alex Williamson, *Seeing the Forest and the Trees: The Natural Capital Approach to Forest Service Reform*, 80 TUL. L. REV. 683, 686–89 (2005) (summarizing federal statutes that have created a series of misguided financial incentives for the agency). This Note focuses primarily on the Knutson-Vandenberg Act and the Forest and Rangeland Renewable Resources Planning Act, which will be described in more detail in Part I.A, *infra*.

17. JOHN TALBERTH & ERNEST NIEMI, ENVIRONMENTALLY HARMFUL SUBSIDIES IN THE U.S.: ISSUE #1: THE FEDERAL LOGGING PROGRAM 8–10 (2019) (“Scientific information presented in appeals and litigation regularly challenges the idea that commercial logging is compatible with stated goals for fire risk reduction, post fire rehabilitation, biological diversity, watershed integrity and other ecological objectives.”).

18. *Id.*

19. See Knutson-Vandenberg Act, 16 U.S.C. §§ 576–576(b) (1994) (originally enacted as Act of June 9, 1930, Ch. 416, 26 Stat. 527); National Forest Management Act, Pub. L. No. 94-588, 90 Stat. 2949 (1976) (codified as amended in various sections of 16 U.S.C.).

20. See, e.g., Rodolfo Picchio et al., *How and How Much, Do Harvesting Activities Affect Forest Soil, Regeneration and Stands?*, 6 CURRENT FORESTRY REPS. 115 (2020) (discussing how “[f]elling and extracting of timber from forests has an inevitable impact on the environment.”).

Given the USFS's mission and key functions, this potential conflict of interest is more concerning than conflicts that may affect the work of other NEPA-reviewing agencies. Every agency presumably wants to execute its projects successfully and is therefore inclined to minimize possible project drawbacks. Financial bias toward unsustainable timber yields in the USFS's work, however, undercuts the agency's core mission. This bias compromises the agency's ability to "meet the [public land] needs of present and future generations."<sup>21</sup> We should be able to trust all agencies to make prudent and objective decisions. Yet at this critical point in the fight against climate change, we should hold agencies tasked with safeguarding large bodies of natural resources, as the USFS is, to a higher standard of accountability. An agency's misguided incentives could perpetuate vastly damaging and irreversible consequences.

One area of great importance is in wildfire management. In recent years, the USFS has taken on a greater role in fighting increasingly intense wildfires.<sup>22</sup> As the agency expands this role, it must strike the right balance between acting swiftly to minimize fire danger and carefully safeguarding irreplaceable forest resources. The solution presented in this Note supports this aspiration by addressing misguided incentives that could stand in the way.

In this Note, I propose that the USFS assign its duty to comply with NEPA in projects involving timber harvesting to the U.S. Environmental Protection Agency (EPA). EPA is the ideal agency to take on this responsibility because (1) it does not rely on timber harvesting for any source of funding,<sup>23</sup> (2) it has sufficient expertise in executing NEPA analyses,<sup>24</sup> and (3) at least one model already exists on how EPA can share environmental review responsibilities with another federal agency, the U.S. Army Corps of Engineers.<sup>25</sup> Before the federal agencies can implement this proposal, Congress must grant its approval.<sup>26</sup> Although federal agencies enjoy some discretion in reorganizing their duties and functions, their efforts cannot conflict with any governing statutes.<sup>27</sup> Congress ultimately holds the power to decide how agencies are organized.<sup>28</sup> The

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21. U.S. FOREST SERV., THIS IS WHO WE ARE 2 (2019).

22. Cassandra Moseley, *Spiraling Wildfire Fighting Costs are Largely Beyond the Forest Service's Control*, THE CONVERSATION (Jul. 25, 2018, 6:46 AM), <https://theconversation.com/spiraling-wildfire-fighting-costs-are-largely-beyond-the-forest-services-control-86041>.

23. See generally EPA, FISCAL YEAR 2020 AGENCY FINANCIAL REPORT 38–40 (2020) (explaining EPA's financial and accounting policies).

24. See *National Environmental Policy Act*, EPA, <https://www.epa.gov/nepa> (last updated Oct. 25, 2021).

25. *Federal Enforcement for the Section 404 Program of the Clean Water Act Memorandum between the Department of the Army and the Environmental Protection Agency (January 1989)*, EPA, <https://www.epa.gov/cwa-404/federal-enforcement-section-404-program-clean-water-act> (last updated Dec. 6, 2021).

26. See JARED P. COLE, CONG. RSCH. SERV., LSB10158, ORGANIZING EXECUTIVE BRANCH AGENCIES: WHO MAKES THE CALL? 1 (2018).

27. *Id.* at 2–3.

28. *Id.*

governing statute in this instance is the Clean Air Act because it regulates the scope of EPA's influence over other agencies' NEPA reviews.<sup>29</sup> As explained in more detail below, this proposal will require Congress to amend the Clean Air Act before the agencies can reshuffle their responsibilities.

This Note begins, in Part I, with a discussion of the impact of the USFS's funding structure and its relationship to timber harvesting on NEPA analyses. Part II lays out a proposal to transfer NEPA compliance responsibilities to EPA when projects involve timber harvesting. Part III evaluates the likely effectiveness of this proposal and addresses potential challenges. Part IV concludes by conveying the urgency to implement this proposal in the context of climate change and current political realities.

## I. THE IMPACT OF TIMBER HARVESTING ON THE USFS'S BUDGET AND NEPA REVIEW PROCESS

### A. *An Intertwined History of Timber Yields and Agency Funding*

The USFS has a long history of aligning its logging initiatives with the timber industry's interests.<sup>30</sup> The agency is still trying to break away from this legacy today.<sup>31</sup> In the 1890s, under the inaugural leadership of Gifford Pinchot, the USFS followed a philosophy of "utilitarian conservation."<sup>32</sup> Pinchot directed the agency to focus on strategically managing economic activities, such as timber harvesting, to support both current benefits and long-term supplies.<sup>33</sup> But in practice, this translated into prioritizing resource extraction above all other environmental goals.<sup>34</sup> Throughout Pinchot's tenure, and for the next several decades until the 1940s, the USFS steadily increased its volume of timber harvest.<sup>35</sup> World War II and its aftermath accelerated this increase by stimulating high timber demands that private forests could no longer meet.<sup>36</sup> To fill the supply gap and take the pressure off private forests,<sup>37</sup> the USFS drastically raised

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29. WILLIAM RODGERS & ELIZABETH BURLESON, RODGERS ENV'T LAW § 7.14 (2d, last updated Nov. 2021).

30. TALBERTH & NIEMI, *supra* note 17, at 8; see Andrea L. Smith, *The Forest Service, NEPA, and Clear Cutting*, 19 NAT. RES. J. 423, 423–25 (1979).

31. See TALBERTH & NIEMI, *supra* note 17, at 8.

32. Ashley K. Hoffman & Sean M. Kammer, *Smoking Out Forest Fire Management: Lifting the Haze of an Unaccountable Congress and Lighting up a New Law of Fire*, 60 S.D. L. REV. 41, 59 (2015).

33. *Id.* at 60.

34. *Id.*

35. ANNE A. RIDDLE, CONG. RSCH. SERV., R45688, TIMBER HARVESTING ON FEDERAL LANDS 7 (2019).

36. *Id.*

37. During World War II, many private forests were heavily logged for war-related endeavors. See *Seeing the Forest for the Trees: Placing Washington's Forests in Historical Context*, CTR. FOR THE STUDY OF THE PAC. NW., <https://www.washington.edu/uwired/outreach/cspn/Website/Classroom%20>

its harvest limits, while also utilizing clearcutting more frequently.<sup>38</sup> Most of the revenue from increased timber sales was likely devoted to hiring new personnel, building recreation facilities (to meet a growing need), fire control, and future timber sale management.<sup>39</sup>

Clearcutting, the process of cutting all trees within a certain acreage regardless of maturity,<sup>40</sup> soon became a target of controversy and public outcry.<sup>41</sup> The 1970s and onwards saw the passage of federal environmental laws like the National Forest Management Act (NFMA), which required long-term, integrated forest plans, shifting the country's forest policy away from timber extraction.<sup>42</sup> The passage of NFMA was spurred by increasing litigation to halt clearcutting, as well as judicial intervention in the USFS's forest management policies.<sup>43</sup> As a result of NFMA, the USFS made substantive changes to its forest management practices by restricting areas where timber harvests could be authorized, placing limits on clearcutting, and committing to maintaining viable populations of wildlife species.<sup>44</sup>

For the next several decades, the USFS made significant attempts to reshape its public image by downplaying its history of prioritizing overextraction.<sup>45</sup> Under the leadership of Dale Robertson and Jack Ward Thomas during the late 1980s and 1990s, the agency moved toward prioritizing ecological needs more than ever before.<sup>46</sup> During this period, however, certain factions of the agency were still committed to prioritizing timber yields.<sup>47</sup> For example, in 1990, forest managers were still attempting to significantly increase harvest rates in the

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Materials/Curriculum%20Packets/Evergreen%20State/Section%20II.html (last visited Mar. 30, 2022) (explaining this phenomenon in Washington).

38. Doug MacCleery, *Reinventing the United States Forest Evolution from Custodial Management, to Production Forestry, to Ecosystem Management*, in RE-INVENTING FORESTRY AGENCIES: EXPERIENCES OF INSTITUTIONAL RESTRUCTURING IN ASIA AND THE PACIFIC (Patrick Durst et al. eds., 2008), <https://www.fao.org/3/ai412e/ai412e06.htm> (last visited Nov. 6, 2021) (“The use of clear-cutting timber harvest practices increased dramatically in national forests after the Second World War.”).

39. See *The Land We Cared For... A History of the Forest Service's Eastern Region*, NAT'L PARK SERV. HIST. ELEC. LIBR., <http://npshistory.com/publications/usfs/region/9/history/chap10.htm> (last updated Jan. 28, 2008).

40. Randal O'Toole, *Reforming the Forest Service*, DOWNSIZING THE FED. GOV'T (July 12, 2016), <https://www.downsizinggovernment.org/agriculture/forest-service>; Federico Cheever, *Four Failed Forest Standards What We Can Learn from the History of the National Forest Management Act's Substantive Timber Management Provisions*, 11 OR. L. REV. 601, 611 (1998).

41. MacCleery, *supra* note 38 (“By the 1970s, an increasingly vocal and well-organized public disliked the visual and other effects of prevailing timber-harvesting activities and sought political remedies to reduce them. Concerns over clear-cutting led to Congress recommending guidelines for the application of clear-cutting on federal lands, and eventually to the passage of the NFMA.”).

42. National Forest Management Act of 1976, 16 U.S.C. §§ 1600–1687 (1994).

43. George Hoberg, *Science, Politics, and U.S. Forest Service Law The Battle Over the Forest Service Planning Rule*, 44 NAT. RES. J. 1, 4–11 (2004).

44. Hoffman & Kammer, *supra* note 32, at 47.

45. See MacCleery, *supra* note 38.

46. *Id.*

47. NANCY LANGSTON, *FOREST DREAMS, FOREST NIGHTMARES: THE PARADOX OF OLD GROWTH IN THE INLAND WEST* 268–69 (1995).

Umatilla National Forest, despite warnings from both agency and non-agency biologists against doing so.<sup>48</sup> Moreover, under NFMA compliant forest management plans, the USFS was still required to project harvesting levels, provide a timber sale program, and detail profitable harvesting methods.<sup>49</sup>

This fraught history of the tension between conservation and extraction persists in the agency's budget structure to this day, thanks to the Knutson-Vandenberg (K-V) Act of 1930.<sup>50</sup> The initial purpose of the K-V Act was to fund reforestation efforts on cutover lands by allowing the USFS to charge timber purchasers a premium.<sup>51</sup> The USFS originally itemized the price of the timber and the K-V premium.<sup>52</sup> However, in 1957, it began combining the sale price and the premium into lump sums.<sup>53</sup> These non-itemized amounts allowed the agency to direct more of its timber sales revenue toward flexible K-V expenditures without any real external oversight.<sup>54</sup> The K-V Act had always required the USFS to return 50 cents per thousand board feet in revenue from each sale to the U.S. Treasury.<sup>55</sup> But under this new accounting practice, the agency channeled greater portions of revenue back into K-V funds, leaving much smaller final amounts to be used to calculate returns to the Treasury.<sup>56</sup>

When Congress enacted NFMA in 1976, the agency's discretion under the K-V Act was broadened even further.<sup>57</sup> NFMA amended the K-V Act to allow expenditures on a wide range of activities, including planting new trees, removing undesirable vegetation growth, undertaking construction, improving wildlife habitat, and maintaining forest roads within the timber sale area.<sup>58</sup> In effect, NFMA supplied the USFS with a largely discretionary source of money. To this day, the K-V fund remains the agency's most versatile fund.<sup>59</sup> Since Congress has restricted USFS funds to developing timber sales, firefighting, and building roads in national forests—resisting the USFS's requests for financial support of other activities—the agency has been forced to rely largely on K-V

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48. *Id.*

49. Hoffman & Kammer, *supra* note 32, at 47.

50. Knutson-Vandenberg Act, 16 U.S.C. §§ 576–576(b) (1994) (originally enacted as Act of June 9, 1930, Ch. 416, 26 Stat. 527).

51. Austin D. Saylor, *The Quick and the Dead: Earth Island v. Forest Service and the Risk of Forest Service Financial Bias in Post-Fire Logging Adjudications*, 37 ENV'T L. 847, 866–67 (2007).

52. *Id.* at 867.

53. *Id.*

54. *See id.*; *see also* Williamson, *supra* note 16, at 688 (“...the Forest Service has the ability to allocate K-V and Brush Disposal funds without significant interference from Congress or other outside entities.”).

55. RANDAL O'TOOLE, THE THOREAU INSTITUTE, REFORMING THE FIRE SERVICE: AN ANALYSIS OF FEDERAL FIRE BUDGET INCENTIVES 20 (2002).

56. *See* Saylor, *supra* note 51, at 867 (“The non-itemized bid assimilated the K-V fee, thus allowing the agency to treat most of the timber sale revenue as off-budget, flexible K-V money.”).

57. *See* National Forest Management Act, Pub. L. No. 94-588, 90 Stat. 2949 (1976) (codified as amended in various sections of 16 U.S.C.).

58. 16 U.S.C. § 576b (2000).

59. Saylor, *supra* note 51, at 866.

funds for essential non-timber activities.<sup>60</sup> The USFS continues to emphasize how crucial the K-V Act is toward ensuring that its reforestation efforts remain well funded in timber sale areas.<sup>61</sup>

The K-V fund is not the only off-budget source of money that comes from timber sales receipts retained by the USFS.<sup>62</sup> This fund and others have perpetuated the agency's reliance on timber revenue to finance continuous sales and other activities, skewing the USFS's approach to forest management.<sup>63</sup> Consequently, there have been instances where agency officials supported timber sales even when such sales damaged the very resources that those officials were entrusted with guarding.<sup>64</sup>

In addition to statutes that allow the USFS to keep a portion of timber sales receipts, the agency faces another statute that measures its success in terms of timber production.<sup>65</sup> Under the Forest and Rangeland Renewable Resources Planning Act of 1974, the USFS is required every five years to prepare a forest management program, which projects timber output and other forest resources according to anticipated budgetary allocations.<sup>66</sup> Critics have long suspected that forest management programs revolve around annual logging targets for each forest, regardless of the target's effects on the forest's health or whether a market for the timber even exists.<sup>67</sup> When a forest's federal budget is then tied to its timber target, this may create perverse incentives to set unrealistically high targets.<sup>68</sup> For instance, in 1990, despite outcry from foresters across the West, Congress approved a 5 percent budget increase for Forest Service regions that

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60. Perri Knize, *The Mismanagement of the National Forests*, ATL. MONTHLY, Oct. 1991, at 104.

61. *Reforestation Overview*, U.S. FOREST SERV., <https://www.fs.fed.us/restoration/reforestation/overview.shtml> (last visited Nov. 3, 2021).

62. The USFS's timber sale expenditures can be divided into two overarching categories: (1) Appropriated funds, line items that Congress authorizes, and (2) off-budget funds, "those capitalized by timber sale revenue and spent without the need for additional authorizations from Congress." The second category of expenditures covers the K-V fund, along with the purchaser credit roads fund (derived from timber purchasers who elect to have the USFS build permanent roads under the sale contract, used to fund construction), the timber pipeline restoration fund (derived from past sales, used to prepare additional sales and recreation projects), the salvage sales fund (derived from selling timber salvaged after fires and other disturbances, used to fund additional sales), and the brush disposal fund (derived from timber purchaser deposits, used to dispose of brush and debris from cutting trees). TALBERTH & NIEMI, *supra* note 17, at 8, 13.

63. Knize, *supra* note 60, at 104.

64. See, e.g., *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 969–71 (9th Cir. 2002) (finding that agency officials attempted to proceed with a Forest Plan, involving timber sales, that was critiqued by their own scientists).

65. Williamson, *supra* note 16, at 686.

66. *Id.*

67. Telephone Interview with Brenna Bell, former Staff Attorney and Policy Coordinator, Bark (Sept. 28, 2021); see e.g., Pete Morton, *The Economic Benefits of Wilderness: Theory and Practice*, 76 Denv. U. L. Rev. 465, 497–98 (1999) (providing an example of a forest management plan where the timber target assigned to that particular forest, by the Washington D.C. office of the Forest Service, determined the harvest level).

68. See Telephone Interview with Brenna Bell, former Staff Attorney and Policy Coordinator, Bark (Sept. 28, 2021).

met or exceeded their timber targets.<sup>69</sup> Even when targets are not strictly binding, they serve as “de facto timber sale quotas.”<sup>70</sup>

The timber industry has long been invested in this process of timber target and budget setting in Congress.<sup>71</sup> Over time, it has supported its interests through campaign contributions to congressional members on relevant appropriations subcommittees.<sup>72</sup> In fact, during the 2022 election cycle, the forest industry (consisting of timber companies, sawmills, pulp mills, and paper mills) donated a total of at least \$3,724,463 to federal candidates, parties, and outside groups.<sup>73</sup> Two of the top five recipients of these donations were members of the House Appropriations Committee.<sup>74</sup> Regular donations of this size have ensured that the industry’s interests are represented when the timber and roads budget is reviewed each year.<sup>75</sup>

The economic incentives built into the USFS’s budget structure impact every level of agency management.<sup>76</sup> Timber sales revenues flow through the entire agency, from the Washington, D.C. office all the way down to the local district offices.<sup>77</sup> As a law student at the Lewis & Clark Law School, Austin Saylor, now a seasoned attorney with the Department of Justice, Environment and Natural Resources Division, argued that the links between timber sales and the agency’s budget create the potential for financial bias at both the institutional and personal level.<sup>78</sup> On the institutional level, the K-V Fund is “structured so as to keep timber sale revenue under agency control – a windfall to [a] bureaucracy, protecting its turf and cherishing the number of its employees and the extent of its empire.”<sup>79</sup> Discretionary funds within an agency afford a great deal of power.<sup>80</sup> On the personnel level, the potential for bias is likely to cause

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69. Knize, *supra* note 60, at 107.

70. Williamson, *supra* note 16, at 687.

71. Knize, *supra* note 60, at 107.

72. *Id.*

73. *Forestry & Forest Products Money to Congress, Summary*, OPEN SECRETS, <https://www.opensecrets.org/industries/contrib.php?cycle=2022&ind=A10> (last visited Sept. 25, 2022).

74. Jaime Herrera Beutler and Derek Kilmer, two members of the Appropriations Committee, appear on the list of the top twenty members of Congress who received donations from the forestry industry. Beutler and Kilmer received \$26,337 and \$27,871, respectively. *Forestry & Forest Products Money to Congress, Top 20 Members*, OPEN SECRETS, <https://www.opensecrets.org/industries/summary.php?ind=A10&cycle=2022&recipdetail=M&sortorder=U> (last visited Dec. 14, 2021); *Membership*, HOUSE COMM. ON APPROPRIATIONS, <https://appropriations.house.gov/about/membership> (last visited Dec. 14, 2021).

75. Knize, *supra* note 60, at 107.

76. “The budget-maximizing theory posits that an agency will tend to make decisions that lead to larger annual budgets, because individuals’ incentives at all levels of management are directly tied to the size of the agency’s budget. While no theoretical framework of agency action is likely to be sufficiently complex to accurately describe all Forest Service actions, studies have shown that ‘budget maximization explains [Forest Service] actions better than other explanations of its activities.’” Williamson, *supra* note 16, at 685.

77. Saylor, *supra* note 51, at 878.

78. *Id.*

79. *Id.*

80. O’TOOLE, *supra* note 55, at 19.

agency employees to approach timber targets and sales with budget maximization in mind.<sup>81</sup>

This prediction of employee behavior stems from the theory that, within the public sector, people have a tendency to believe that they could perform better if only they had more funds for programming at work.<sup>82</sup> Avoiding budget cuts in a government agency where resources may already feel scarce could be a major priority for many employees.<sup>83</sup> Within the USFS, approximately 82 percent of salaries and expenses are appropriated by Congress,<sup>84</sup> suggesting that budget cuts may have a direct impact on employee pay.

### *B. The Effects of the USFS's Budget Structure on NEPA Compliance*

The USFS must comply with NEPA when it proposes major forest management initiatives.<sup>85</sup> Under NEPA, a process of environmental review is triggered when any federal agency proposes any major federal action.<sup>86</sup> A federal action is “categorically excluded” from this process if it would not normally have a significant effect on the human environment.<sup>87</sup> Otherwise, the overseeing federal agency must conduct an Environmental Assessment (EA), an evaluation that determines whether the federal action in question may cause significant environmental effects.<sup>88</sup> An EA typically includes the purpose and need for the proposed action,<sup>89</sup> alternatives to the action,<sup>90</sup> the environmental impacts of the

81. Saylor, *supra* note 51, at 878; O'TOOLE, *supra* note 55, at 19.

82. O'TOOLE, *supra* note 55, at 19.

83. *Id.*

84. *Budget Myth vs. Fact Salaries and Expenses*, U.S. FOREST SERV., <https://www.fs.usda.gov/inside-fs/mail-call/budget-myth-vs-fact-salaries-and-expenses> (last visited Feb. 5, 2022).

85. Examples of major federal actions carried out on federal lands include forest thinning (*Bark v. U.S. Forest Serv.*, 958 F.3d 865 (9th Cir. 2020)), commercial logging and prescribed burning (*Hapner v. Tidwell*, 621 F.3d 1239 (9th Cir. 2010)), post-fire salvage logging (*Sierra Club v. Bosworth*, 199 F. Supp. 2d 971 (N.D. Cal. 2002)), building new infrastructure (*Wild Wilderness v. Allen*, 12 F. Supp. 3d 1309 (D. Or. 2014)), and issuing user permits under forest management plans (*High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630 (9th Cir. 2004)), among other activities. NEPA can be triggered by state and private actions if they are “federalized” through a “federal nexus,” which usually means that a degree of federal control or discretion over the action is needed. Consequently, the federal agency that is involved must comply with NEPA. See Ray Vaughan, *Necessity and Sufficiency of Environmental Impact Statements Under the National Environmental Policy Act*, in 38 AMERICAN JURISPRUDENCE PROOF OF FACTS § 2 (3d ed. 1996).

86. 42 U.S.C. § 4332(2)(C) (1970).

87. 40 C.F.R. §§ 1508.1, 1507.3(b)(1)–(2)(ii) (2018). Once strictly viewed as actions with “negligible environmental impact and capable of being identified in advance based on some common characteristic,” categorical exclusions (CEs) now comprise of another area where the USFS has been heavily criticized for its abuse of discretion. The USFS's CEs have transformed from a narrowly defined, exceptional situation into one of three broad avenues for evaluating agency actions. Kevin H. Moriarty, *Circumventing the National Environmental Policy Act Agency Abuse of the Categorical Exclusion*, 79 N.Y.U. L. J. 2312, 2314, 2322 (2004).

88. 40 C.F.R. §§ 1501.3, 1501.5 (2020).

89. 40 C.F.R. § 1501.5 (2020).

90. *Id.*

action and its alternatives,<sup>91</sup> and a list of agencies and people consulted.<sup>92</sup> Following an EA, the federal agency involved will either (1) issue a Finding of No Significant Impact (FONSI), a document that explains its reasons for finding that the action will have no significant environmental impact, or (2) determine that the action will have significant environmental impacts and prepare an Environmental Impact Statement (EIS), a document that substantially expands on the EA, under a higher standard of scrutiny.<sup>93</sup> Upon completion of the EIS, the agency may decide to proceed with the project even if serious environmental concerns arise in the analysis.<sup>94</sup> Courts generally find this acceptable as long as the agency has taken a “hard look” at the environmental consequences.<sup>95</sup>

As stated earlier, NEPA is regularly triggered by the USFS’s activities, more so than by the actions of most other federal agencies.<sup>96</sup> Subsequently, the USFS has also been sued under NEPA more often than any other federal agency.<sup>97</sup> Many of these lawsuits have involved challenges against projects that contain some aspect of timber harvesting.<sup>98</sup> In some of these cases, plaintiffs have questioned whether the USFS can act as a neutral decision maker, given the impact of its financial incentives on its ability to conduct an objective environmental review.<sup>99</sup>

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91. *Id.*

92. *Id.*

93. *Id.*

94. “Noticeably absent from § 102—or any other provision of NEPA—is a substantive requirement or recommendation for how an agency should proceed in light of its reported findings. . . . The very essence of NEPA is to hold government officials accountable, through transparent decision making, for environmentally destructive actions—ensuring they carefully consider and document the environmental effects of each proposal.” Aaron J. Kraft, *NEPA and Climate Change Beneficial Applications and Practical Tensions*, 25 J. ENV’T L. & LITIG. 559, 563–64 (2010).

95. “A hard look includes ‘considering all foreseeable direct and indirect impacts.’” *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 973 (9th Cir. 2002).

96. Miner et al., *supra* note 8, at 116–17.

97. *Id.*

98. See, e.g., *Bark v. U.S. Forest Serv.*, 958 F.3d 865 (9th Cir. 2020) (involving conservation organizations who challenged the USFS’s authorization of forest thinning in one specific sector of Mount Hood National Forest); *Env’t Prot. Info. Ctr. v. U.S. Forest Serv.*, 234 Fed. Appx. 440 (9th Cir. 2007) (involving environmental protection organizations who sought to enjoin a USFS-sponsored forest-thinning project in Shasta-Trinity National Forest); *Hapner v. Tidwell*, 621 F.3d 1239 (9th Cir. 2010) (involving environmental groups who challenged USFS approval of commercial logging and prescribed burning projects); *Sierra Club v. Bosworth*, 199 F. Supp. 2d 971 (N.D. Cal. 2002) (involving environmental groups who challenged post-fire salvage logging); *Wild Wilderness v. Allen*, 12 F. Supp. 3d 1309 (D. Or. 2014) (involving environmental groups who challenged USFS approval of constructing a Sno-Park in a national forest).

99. See, e.g., Opening Brief of Appellants at 3, *Bark v. U.S. Forest Serv.*, 958 F.3d 865 (9th Cir. 2020) (No. 19-35665) (noting tension between USFS’s public-facing “restoration” rationale for approving a project and its private-facing financial rationale); Opening Brief of Appellants at 23, *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147 (9th Cir. 2006) (No. 05-16776) (arguing that the district court should not apply such a deferential standard to “agency staff making decisions in the context of a financial conflict of interest”); see also Opening Brief of Appellants at 26–27, *Lands Council v. Powell*, 395 F.3d 1019 (9th Cir. 2005) (arguing that the USFS attempted to log in an area that it had intensively logged and damaged for decades, thus disregarding historical cumulative effects).

Consider the recent case of *Bark v. United States*.<sup>100</sup> This case arose out of the Crystal Clear Restoration (CCR) Project, a USFS-sponsored forest management program that spans 11,742 acres of Mount Hood National Forest.<sup>101</sup> The USFS claimed that using forest thinning, among other methods, would improve forest conditions by protecting trees from insects, disease, and high-intensity wildfires.<sup>102</sup> Under NEPA, the USFS was required to conduct an EA of the Project to determine whether it had to prepare an EIS or issue a FONSI.<sup>103</sup> After conducting its EA, the USFS issued a FONSI.<sup>104</sup> In response, conservation organizations—Bark, Cascadia Wildlands, and Oregon Wild—brought claims against USFS under NEPA and NFMA.<sup>105</sup> The plaintiffs were particularly concerned about the USFS’s authorization of forest thinning on the southeastern slope of Mount Hood, one of the Project’s underlying strategies.<sup>106</sup> They first sued the USFS in an Oregon district court.<sup>107</sup> After the district court found no violation of NEPA or NFMA, it granted summary judgment in favor of the USFS.<sup>108</sup> This led the plaintiffs to appeal to the Ninth Circuit.<sup>109</sup>

In their opening brief to the Ninth Circuit, Bark, Cascadia Wildlands, and Oregon Wild reiterated that although the USFS’s purported objective for the CCR Project was to improve forest health and reduce fire risk, its actual purpose was to meet its timber volume targets.<sup>110</sup> That mismatch “between the public facing ‘restoration’ rationale and the internal drive to produce timber,” appellants argued, “highlight[ed] the need for judicial scrutiny to ensure the government is not violating the public trust.”<sup>111</sup> According to the conservation groups, the CCR Project proposal deceptively combined two different strategies.<sup>112</sup> The first—thinning young trees followed by prescribed burning—is well supported by scientific evidence to improve forest health and reduce the chances of high-intensity wildfires.<sup>113</sup> But the extent to which the second strategy—logging large overstory trees (most of which are in their natural fire regime)<sup>114</sup>—supports forest health and fire risk mitigation is heavily debated.<sup>115</sup> The appellants noted that public comments on the proposal cited scientific studies contradicting the

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100. *Bark*, 958 F.3d at 865.

101. *Id.* at 868.

102. *Id.*

103. 40 C.F.R. § 1508.9(a)(1) (2010).

104. *Bark*, 958 F.3d at 869.

105. *Id.* at 868.

106. *See id.* at 865.

107. *See Bark v. United States*, 393 F. Supp. 3d 1043 (D. Or. 2019).

108. *Id.* at 1063.

109. *See Bark*, 958 F.3d at 865.

110. Opening Brief of Appellants at 3, *Bark v. U.S. Forest Serv.*, *supra* note 99.

111. *Id.*

112. *Id.* at 21.

113. *Id.*

114. “The majority of the CCR Project is within Fire Regime Condition Class 1 [(their natural fire regime)], meaning that it is least departed from its natural (historic) range of variability for fuel composition, fire frequency, severity and pattern.” *Id.* at 10.

115. *Id.* at 22–23.

USFS's assertion that logging mature forests would decrease the intensity of future fires.<sup>116</sup> In light of these studies, the appellants argued that the second strategy was incorporated into the project not with ecological resiliency goals in mind, but instead with the aim of satisfying the large timber volume that the USFS had committed to producing under its Timber Sale Pipeline Restoration (TSPR) Fund.<sup>117</sup> This target could not be met through the process of thinning young saplings and plantations (the first strategy) alone.<sup>118</sup>

The conservation groups then questioned why the TSPR agreement and the corresponding timber target were never disclosed in the agency's CCR Project Purpose and its analysis of viable alternatives under NEPA.<sup>119</sup> They speculated that the TSPR timber target explained why the USFS dismissed alternative courses of action, especially ones that would produce more ecological benefits but less timber volume than the CCR Project.<sup>120</sup> The appellants argued that this underlying target should have been disclosed because it impacts the timeline of the project's NEPA review.<sup>121</sup> The TSPR agreement stated that "NEPA should be completed within 1 year from TSPR fund expenditure."<sup>122</sup> The appellants were concerned about whether this one-year requirement constrained the USFS district office's ability to conduct a meaningful and in-depth environmental analysis of the Project.<sup>123</sup>

Upon reviewing the appellants' NEPA claim,<sup>124</sup> the Ninth Circuit held that the agency's FONSI was arbitrary and capricious for two reasons.<sup>125</sup> First, the

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116. *Id.* at 22.

117. *Id.* at 3. The USFS's Regional Office agreed to provide Mount Hood National Forest (MHNH) \$250,000 in TSPR funds for the CCR Project, back in April 2016. The Regional Office also directed MHNH's Forest Supervisor to produce 100,000 CCF of timber, which is around double MHNH's annual timber volume. *Id.* at 9 (citation omitted). The stated objective of the TSPR Fund is to "provide for the efficient, timely, and cost-effective preparation of non-salvage sales to restore a pipeline of sales ready for offer." *Id.* Furthermore, the Barlow District Ranger introduced the CCR Project to the Wasco County Forest Collaborative as an initiative that would provide "shelf stock" to meet MHNH's new timber volume quota. *Id.* at 8. The TSPR is another source of timber revenue funds for the USFS. RIDDLE, *supra* note 35, at 18. It allows revenues from certain timber sales and from additional sales prepared using the fund to be permanently appropriated to the USFS; 75 percent of the available money is allocated to prepare additional timber sales, and the other 25 percent is for recreation projects. *Id.* The TSPR finds its authority in the Omnibus Consolidated Recissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 327, 110 Stat. 1321-206 (1996). *Id.*

118. Opening Brief of Appellants at 22, *Bark v. U.S. Forest Serv.*, *supra* note 99.

119. *Id.* at 45.

120. *Id.*

121. *Id.* at 9-10.

122. *Id.* at 9.

123. *See id.*

124. Note that two claims were alleged: a NEPA and a NFMA claim. The Ninth Circuit did not reach the NFMA claim, which alleged that the USFS did not comply with forest plans and further guiding documents on the Project area as required by NFMA. *Bark v. U.S. Forest Serv.*, 958 F.3d 865, 868-69 (9th Cir. 2020).

125. *Id.* at 870. The court derived its standard of review from the Administrative Procedure Act, which allows courts to overturn an agency's decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1966). In reviewing the USFS's FONSI, the court also found that the USFS had not met NEPA's "hard look requirement." *Bark*, 958 F.3d at 869-

USFS did not appropriately weight both sides of the debate on the effectiveness of its strategies in a project with “highly controversial and uncertain” effects.<sup>126</sup> Second, the USFS did not sufficiently consider the project’s cumulative impacts or possible alternatives.<sup>127</sup> The Ninth Circuit found that the agency’s decision not to prepare an EIS according to this FONSI violated NEPA’s requirements.<sup>128</sup>

*Bark* was a crucial win for the conservation groups. The Ninth Circuit agreed with them that the USFS should have considered the large body of scientific evidence suggesting that it was incorrectly applying the same forest management strategy to young tree plantations and native old forests.<sup>129</sup> While commercial thinning followed by prescribed burning had been shown to restore young plantations, the strategy was not found to benefit native old-growth forests in the same way.<sup>130</sup> However, the Ninth Circuit did not reach the appellants’ claims that the USFS’s ability to conduct a meaningful NEPA review had been compromised by its commitment under the TSPR.<sup>131</sup> Perhaps this is because nothing in NEPA specifically requires an agency to disclose such a conflict of interest.<sup>132</sup>

Despite NEPA’s silence on disclosing conflicts of interest, there has been at least one judge who probed the USFS’s possible financial bias in the context of satisfying the requirements under NEPA. In *Sierra Forest Legacy v. Rey*,<sup>133</sup> the late Judge Noonan on the Ninth Circuit wrote a concurring opinion expressing this very concern.<sup>134</sup> The case examined the USFS’s 2004 Framework for forest plans governing California’s Sierra Nevada region, under which three projects were proposed to fund fire prevention by awarding logging contracts to private entities.<sup>135</sup> Among other claims, the plaintiffs alleged that the USFS failed to consider a range of reasonable alternatives under NEPA.<sup>136</sup> They opposed the 2004 Framework for expanding the agency’s flexible policies around logging and allowing for the removal of larger trees.<sup>137</sup> The agency conceded that removing these large trees did nothing to prevent forest fires and that this allowance was included under the new Framework to make the removal

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70. Under this requirement, the USFS was supposed to consider “[t]he degree to which the [CCR Project’s] possible effects on the human environment are likely to be highly controversial[,] . . . highly uncertain or involve unique or unknown risks,” and “[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts.” 40 C.F.R. §§ 1508.27(b)(4), (5) (2012).

126. *Bark*, 958 F.3d at 870.

127. *Id.* at 871–72.

128. *Id.* at 873.

129. *Id.* at 871.

130. Telephone Interview with Nick Cady, Legal Director, Cascadia Wildlands (Aug. 30, 2021).

131. The court focused its analysis on the body of scientific evidence that the USFS did not consider, but it did not address the reasons behind the agency’s actions. *Bark*, 958 F.3d at 870–72.

132. Without even considering conflicts of interest, the court reached its holding on the USFS’s NEPA review. *Id.*

133. *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1024–26 (9th Cir. 2009).

134. *Id.*

135. *Id.* at 1020.

136. *Id.* at 1018.

137. *Id.*

of fire fuels more cost-effective.<sup>138</sup> The circuit court ultimately remanded this case, finding that the plaintiffs were likely to succeed on the merits of their claim that the USFS did not consider a range of reasonable alternatives under NEPA.<sup>139</sup>

In his concurrence, Judge Noonan criticized how the USFS's partiality contributed to plaintiffs' alleged injury under NEPA and expressed deep concern over the USFS's methods of fundraising.<sup>140</sup> Theorizing why the USFS lacked transparency about its financial goals in its logging projects, Judge Noonan likened an administrative agency's rulemaking to a legislature's act of legislating.<sup>141</sup> Both are processes that have been wrongly "exempted from scrutiny for conflict of interest."<sup>142</sup> Although an agency's actions are scrutinized if a petitioner challenges the action for being "arbitrary and capricious" or an abuse of discretion, they are given a blanket presumption of validity.<sup>143</sup> While acting under a broad multiple-use mandate,<sup>144</sup> the USFS enjoys discretionary authority at every stage of rulemaking, including when making forest plans.<sup>145</sup> Judge Noonan pointed out that the USFS's incentive to pursue certain forest plans is as concerning as it would be if "the agency [were] the paid accomplice of the loggers."<sup>146</sup> He ended his concurrence with two pressing questions that call for a solution to the USFS's financial bias: "Can an agency which has announced its strong financial interest in the outcome proceed objectively? Could an umpire call balls and strikes objectively if he were paid for the strikes he called?"<sup>147</sup>

These two cases and others<sup>148</sup> illustrate the concerning possibility of financial bias. In certain instances, a decision supported by a scientifically rigorous NEPA analysis may simply be irreconcilable with a predetermined timber goal. When choosing between the two, forest managers might have to prioritize their loyalty to the latter, especially if their performance reviews or

138. *Id.*

139. *Id.* at 1024.

140. *Id.* (Noonan, J., concurring) (noting that "[c]ustom or indifference cannot legalize a department from what is required by the criterion of impartiality").

141. *Id.* at 1025.

142. *Id.* at 1026.

143. *See* 5 U.S.C. § 706(2)(A) (1966).

144. The USFS manages land with the overarching goal of meeting a wide range of uses. These include timber production, livestock grazing, outdoor recreation, wildlife preservation, and more. Some of these uses have been known to come into conflict. *See generally The Fully Managed, Multiple-Use Forest Era, 1960-1970*, NAT'L PARK SERV. HIST. ELEC. LIBR., <http://npshistory.com/publications/usfs/fs-650/sec7.htm> (last visited Apr. 1, 2022).

145. *Sierra Forest Legacy*, 577 F.3d at 1026.

146. *Id.*

147. *Id.*

148. In *Earth Island Institute*, the Ninth Circuit cited a series of cases that point to a "disturbing trend in the USFS's recent timber-harvesting and timber-sale activities." These cases put the court on notice that the USFS has a "substantial financial interest in the harvesting of timber in the National Forest." *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1177-78 (9th Cir. 2006), *abrogated by* *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008).

local offices' budgets rely on them doing so.<sup>149</sup> As Judge Noonan noted in *Sierra Forest Legacy*, “[t]he bias created need not be personal, that is, the adjudicator to be found biased need not be paid off by his decision. The bias can arise from his decision being a way of raising money for the municipality he serves.”<sup>150</sup> This suggests that a different solution, beyond judicial interpretation of NEPA, may be needed to address the agency’s financial bias.

## II. THE TRANSFER OF NEPA COMPLIANCE DUTIES AND INTERAGENCY COOPERATION

### A. *Takeaways from the Past, Growing Ecological Concerns, and a Future Solution*

Permitting the USFS to conduct NEPA reviews on timber harvesting projects neglects the economic factors that can improperly influence its decision-making process. Expecting the USFS to complete objective environmental reviews while ignoring these issues is misguided. The NEPA review process consists of a public comment period where, in theory, concerned stakeholders can petition an agency to respond to critiques of bias.<sup>151</sup> Yet *Bark* illustrated how public comment might not mitigate bias. When the environmental groups in *Bark* raised concerns regarding undue financial influence on the USFS’s CCR Project, the USFS’s final NEPA documents still excluded the timber target that the groups alleged had covertly driven the project.<sup>152</sup> This sidestepping suggests that the public comment period is not enough to shed full light on potential bias. Moreover, while courts do review the USFS’s NEPA assessments for scientific rigor and disclosure of environmental impacts, they do not demand perfect agency accountability and transparency.<sup>153</sup> This may be because NEPA does not require agencies to disclose conflicts of interest. If the USFS has met NEPA’s basic procedural requirements, a court has no authority to dismiss a USFS-sponsored project simply because it prioritizes high timber yield over environmental concerns.<sup>154</sup>

These financially motivated environmental reviews may be contributing to irreversible ecological harms, which are then exacerbated by climate change.<sup>155</sup>

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149. See Knize, *supra* note 60, at 107 (finding that forest managers have been awarded bonuses for meeting or exceeding timber harvest goals).

150. *Sierra Forest Legacy v. Rey*, 577 F.3d at 1024.

151. See 40 C.F.R. § 6.203 (2007).

152. Opening Brief of Appellants at 9–10, *Bark v. U.S. Forest Serv.*, *supra* note 99.

153. See 42 U.S.C. § 10,139 (1983); NINA M. HART & LINDA SANG, CONG. RSCH. SERV., IF11932, NATIONAL ENVIRONMENTAL POLICY ACT: JUDICIAL REVIEW AND REMEDIES (2021).

154. See *Kuff v. U.S. Forest Serv.*, 22 F. Supp. 2d 987, 995 (W.D. Ark. 1998).

155. See, e.g., Jim Furnish, *Forest Service “Debate” in Black Hills Must Not be Repeated Elsewhere*, MOUNTAIN J. (Sept. 22, 2021), <https://mountainjournal.org/former-senior-official-in-forest-service-questions-forest-service-thinning-in-time-of-climate-change> (explaining how in the Black Hills of South Dakota, the USFS has pursued an aggressive forest thinning strategy, wiping out older trees that

This is why biased reviews must be put to an end. The debate around conservation versus extraction on federal lands is only intensifying in today's political and economic climate.<sup>156</sup> The USFS cannot mediate this debate between public and private entities without being constrained by its own economic interests. As environmental policy journalist Perri Knize wrote, “[m]anaging the land to sustain its ecology is inherently incompatible with managing it to turn a profit.”<sup>157</sup> And since the USFS has failed to internally address the effects of financial bias on its NEPA reviews, an external solution should be explored instead. The literature suggests that this is long overdue.<sup>158</sup>

Going forward, when the USFS proposes any project that involves timber harvesting and sales, it should assign its NEPA compliance duties to EPA. For each project, the USFS should send its project proposal and any corresponding research over to EPA, which may include data collected on similar past projects, the stakeholders involved, and reasons for the project. The USFS will then wait for EPA to conduct an independent review, after which EPA will either authorize the USFS to proceed with the project or veto it from going forward.

Under this proposed framework, EPA would still adhere to the procedural requirements that NEPA demanded of the USFS. NEPA fundamentally establishes a model for information dissemination, exercised in practice through a set of procedural requirements.<sup>159</sup> NEPA's broad substantive requirements do not require an agency to reject a project simply because its review uncovers bad environmental consequences, or to even choose the least environmentally harmful version of the project.<sup>160</sup> Therefore, EPA could ultimately reach some of the same decisions that the USFS would have. But the key difference would lie in the *process* of conducting reviews. EPA would review logging proposals with a greater sense of neutrality due to the absence of budgetary concerns. EPA might also be more open to working with environmental groups that have long opposed the USFS's scientific conclusions and, in so doing, gain trust on projects

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would be impossible to replace and hurting forest values that are also harmed by climate change, namely carbon storage, fire resilience, and wildlife diversity).

156. David Atkins, *All Things to All People? Competing Interests Complicate Forest Management*, TREESOURCE (June 12, 2008), <https://treesource.org/news/lands/all-things-to-all-people-competing-interests-complicate-forest-management/>.

157. Knize, *supra* note 60, at 112.

158. See, e.g., Marc Fink, *Logging After Wildfire Salvaging Economic Value of Mugging a Burn Victim?*, 19 J. ENV'T L. & LITIG. 193, 194 (2004) (describing how the USFS has prioritized economic concerns over ecological ones in the aftermath of fires by expediting salvage timber sales to maximize their revenue potential, against warnings from conservationists who “view severely burned forests as one of the last places to which the Forest Service should be looking for commercial logging projects in national forests due to their already sensitive condition resulting from the fire.”); Williamson, *supra* note 16, at 686 (“... Forest Service employees are influenced, at least in part, by the institutional desire for greater flexibility and larger budgets”); Earth Island Inst. v. U.S. Forest Serv., 351 F.3d 1291, 1309 (2003) (Noonan, J., concurring) (“... the Forest Service, because of its financial interest in the sale, may be disqualified from approving the sale of timber from the Eldorado Forest.”).

159. Bradley C. Karkkainen, *Toward a Smarter NEPA Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 909–11 (2002).

160. *Id.*

these groups would otherwise oppose. Moreover, EPA might better achieve consensus in circumstances of scientific uncertainty.

*B. Why EPA is the Best Federal Agency for this Note's Proposal*

EPA is the most viable agency to take on the USFS's NEPA responsibilities in projects involving timber harvests and sales. There are three reasons for this: (1) EPA does not rely on timber harvesting for any source of funding,<sup>161</sup> (2) it has sufficient expertise in overseeing NEPA analyses,<sup>162</sup> and (3) at least one model already exists showing how EPA can share responsibility for implementing an environmental law with another federal agency—the U.S. Army Corps of Engineers (Corps).<sup>163</sup>

*1. EPA's Sources of Funding*

From 2006 onwards, Congress funded EPA through the Interior, Environment, and Related Agencies appropriations bills.<sup>164</sup> Funding is annually appropriated to the agency through different accounts, several of which rely on user fees from the regulated industry.<sup>165</sup> This practice of charging entities for the cost of mitigating their harmful activities stands in stark contrast to the USFS's practice of subsidizing activities that enhance the timber industry's profitability.<sup>166</sup>

For example, under the Hazardous Waste Electronic Manifest System Fund, EPA is authorized to establish and collect user fees to recover the full cost of providing services related to the system.<sup>167</sup> Similarly, under the Frank R. Lautenberg Chemical Safety Act, EPA is authorized to collect user fees of up to

161. See generally EPA, FISCAL YEAR 2019 AGENCY FINANCIAL REPORT 36–40 (2019); EPA, FISCAL YEAR 2020 AGENCY FINANCIAL REPORT 38–40 (2020).

162. See *National Environmental Policy Act*, EPA (last visited Feb. 4, 2022), <https://www.epa.gov/nepa>.

163. EPA also shares jurisdiction with a dozen other federal agencies on many regulatory issues and it is well versed in the intricacies and complications of responsibility sharing. RICHARD W. WATERMAN ET AL., *BUREAUCRATS, POLITICS, AND THE ENVIRONMENT* 13 (2004).

164. ROBERT ESWORTHY AND DAVID BEARDEN, CONG. RSCH. SERV., IF11153, U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA): APPROPRIATIONS: FY2020 PRESIDENT'S BUDGET REQUEST (2019).

165. See generally EPA, FISCAL YEAR 2020 AGENCY FINANCIAL REPORT, *supra* note 161, at 38–40.

166. See TALBERTH & NIEMI, *supra* note 17, at 10–11 (explaining that the USFS maintains various timber sale expenditures, which can be derived from the annual budget justifications that the agency prepares for each fiscal year. Funds that are appropriated to the USFS are meant to account for the planning and preparation of timber sales, projects to enhance timber resources. They also cover reforestation and timber stand improvement activities, restoration efforts that would not be needed but for the timber sale program. Additionally, the funds are directed towards thinning activities, which critics claim are less about fire risk reduction and more about generating commercial timber for sale. Lastly, the funds may be used to suppress native species that pose a threat to the timber commodity or cover other miscellaneous activities).

167. EPA, FISCAL YEAR 2020 AGENCY FINANCIAL REPORT, *supra* note 161, at 38 (2020).

\$25 million annually from chemical manufacturers and processors.<sup>168</sup> These fees are meant to defray costs for reviewing new chemicals and monitoring existing chemicals.<sup>169</sup> Funds under the Federal Insecticide, Fungicide, and Rodenticide Act are derived from fees collected from the pesticide industry to offset program costs.<sup>170</sup> Additionally, EPA also runs a Motor Vehicle and Engine Compliance Fee Program, a Lead-Based Paint Fee Program, and an operating permit fee program for emission sources under the Clean Air Act.<sup>171</sup>

EPA's financial disclosures suggest that the agency's budget has no ties to the timber industry.<sup>172</sup> Moreover, the prevalence of user fees in EPA's budget shows that EPA is engaging with its regulated industries in a way that raises less concern for improper financial bias than the USFS's relationship with its regulated industry. While the USFS's budget relies in part on maximizing timber harvests—an activity which benefits its regulated community<sup>173</sup>—EPA's budget relies largely on collecting fees from regulated entities, essentially forcing them to pay for a service that is needed to regulate their industry and mitigate the negative externalities of their actions.<sup>174</sup>

## 2. EPA's NEPA Expertise

EPA is the largest federal agency, with thousands of scientists, engineers, attorneys, and other professionals.<sup>175</sup> It is responsible for producing its own NEPA documents, which has given the agency an extensive body of institutional knowledge over the years.<sup>176</sup> Under section 309 of the Clean Air Act, EPA is also responsible for reviewing EIS statements for proposed actions of other federal agencies and critiquing the acceptability of any environmental impacts.<sup>177</sup> This statutory provision is currently limited since it only grants EPA the ability to review another agency's project.<sup>178</sup> But if EPA disapproves of a

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168. *Id.*

169. *Id.*

170. *Id.* at 39. Similarly, the Pesticide Registration Improvement Act Funds collects pesticide registration service fees. *Id.* EPA is also authorized to collect pesticide maintenance fees. *Id.* at 61.

171. *Id.* at 187-88.

172. See generally EPA, FISCAL YEAR 2020 AGENCY FINANCIAL REPORT, *supra* note 161, at 39-42 (providing details on EPA's financial statements for the fiscal years that ended on September 30, 2020 and 2019).

173. See TALBERTH & NIEMI, *supra* note 17, at 10-13 (analyzing how the USFS's budget justifications tie into subsidizing harmful logging in national forests).

174. Hugh D. Spritzer, *Taxes vs. Fees: A Curious Confusion*, 38 GONZ. L. REV. 335, 364 (2003) (describing regulatory fees, which are intended to recover the cost of enforcing regulations, and burden offset charges, which are meant to cover the cost of externalities produced from the payor's activities).

175. WATERMAN ET AL., *supra* note 163, at 11.

176. See generally *National Environmental Policy Act*, EPA (last visited Feb. 4, 2022), <https://www.epa.gov/nepa> (providing a comprehensive database of EPA's NEPA-related work).

177. Aliza M. Cohen, *NEPA in the Hot Seat: A proposal for an Office of Environmental Analysis*, 44 U. MICH. J. L. REFORM 169, 213 (2010).

178. *Id.*

project, the leading agency is not bound by EPA's guidance and can proceed with the project.<sup>179</sup>

The solution presented in this Note requires amending section 309 of the Clean Air Act, the statutory provision that calls on EPA to review and comment on the environmental impact of "any matter" relating to its authority.<sup>180</sup> Following this amendment, the USFS should promulgate a regulation dictating that for projects involving timber harvests and sales, the USFS will defer entirely to EPA to manage the NEPA review process. Section 309 of the Clean Air Act should then be amended to state that (1) the USFS allows EPA to take over NEPA reviews on projects involving timber harvests and sales, and that (2) the USFS will adhere to EPA's conclusions regarding if and how the projects should proceed.

As one of the primary agencies that regulates the forestry, wood, and paper products industry, EPA possesses broad knowledge of forest management and timber harvesting that would be relevant if it were to share NEPA duties with the USFS.<sup>181</sup> EPA's habitat evaluation guidance for NEPA review illustrates the agency's informed understanding of timber harvesting as a substantial danger to habitats and biodiversity.<sup>182</sup> This guidance presents timber harvesting mitigation models and addresses specific timber harvesting concerns within EPA's identified habitats of concern.<sup>183</sup> Furthermore, EPA has devoted substantial efforts to studying forest management initiatives that affect nonpoint source pollution (pollution that results from many diffuse sources).<sup>184</sup> These initiatives include removal of streamside vegetation, road construction and use, timber harvesting, and mechanical preparation for the planting of trees.<sup>185</sup> EPA can draw upon its institutional knowledge to evaluate the environmental effects of projects involving these activities. It can also integrate its existing research on the relationship between climate change, forests, and wildfires into NEPA reviews of USFS-proposed projects.<sup>186</sup>

### 3. *EPA and the Corps as a Successful Model of Joint Enforcement*

An example of where EPA jointly enforces an environmental law with another agency, the Corps, is found in section 404 of the Clean Water Act of

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179. *Id.*

180. 42 U.S.C. § 7609 (1955).

181. *See Forestry, Wood and Paper Products Sector Information*, EPA, <https://www.epa.gov/smartsectors/forestry-wood-and-paper-products-sector-information> (last visited Nov. 20, 2021).

182. *See* EPA, HABITAT EVALUATION: GUIDANCE FOR THE REVIEW OF THE ENVIRONMENTAL IMPACT ASSESSMENT DOCUMENTS 11 (1993).

183. *Id.* at 19–24.

184. *Basic Information about Nonpoint Source (NPS) Pollution*, EPA, <https://www.epa.gov/nps/basic-information-about-nonpoint-source-nps-pollution> (last visited Nov. 20, 2021).

185. *Nonpoint Source Forestry*, EPA, <https://www.epa.gov/nps/nonpoint-source-forestry> (last visited Nov. 20, 2021).

186. *See Agriculture and Forestry*, EPA, <https://www.epa.gov/agriculture/agriculture-and-forestry> (last visited Nov. 20, 2021).

1972 (CWA).<sup>187</sup> This successful model of joint enforcement between EPA and the Corps can be used as inspiration for EPA and the USFS. Although the bulk of the CWA falls under EPA's purview, the Corps is responsible for implementing the section 404 permit system.<sup>188</sup> Over time, the two entities have developed joint rules to minimize any inconsistencies between their jurisdictions under the CWA.<sup>189</sup>

The Corps is responsible for issuing two kinds of permits: general, which apply to an entire category of activities that result in discharging dredged or fill materials, and individual, which are assigned on a project-by-project basis.<sup>190</sup> It also develops some operational guidelines and makes jurisdictional determinations for implementing the permit program, such as deciding what counts under EPA's definition of "waters of the United States."<sup>191</sup> While the Corps carries out these day-to-day duties, EPA determines the environmental criteria used in evaluating permit applications and the scope of geographic jurisdiction.<sup>192</sup> EPA also approves state and tribal assumption of permitting authority and has the power to either restrict or veto any section 404 permit issued by the Corps.<sup>193</sup> This power can be evoked if EPA finds that the activity under the proposed permit is likely to result in "unacceptable adverse effect[s] on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas."<sup>194</sup>

EPA's veto authority over the Corps has always been controversial because Congress rarely deputizes one federal agency to completely overrule another.<sup>195</sup> It only gave EPA this veto authority to preserve the Corps's preexisting jurisdiction over activities affecting navigation under the 1899 Rivers and Harbors Act.<sup>196</sup> Since the relationship between EPA and the Corps is so unique,

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187. The CWA is the primary federal statute that governs water quality across the nation. To "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," the CWA employs a range of pollution control measures. 33 U.S.C. § 1251(a) (1948). Section 404 establishes a permit system for discharges of dredged or fill material into "waters of the United States." Brigit Rollins, *The Clean Water Act, the Corps, & Section 404*, NAT. AGRIC. L. CTR. (Mar. 4, 2021), <https://nationalaglawcenter.org/the-clean-water-act-the-corps-section-404/>. Activities generally regulated are fill for development, water resource projects, infrastructure, and mining. *Id.*

188. These roles emerged because section 404's roots are in the Federal Rivers and Harbors Act of 1889, which assigned to the Army Corps the responsibility for issuing permits to build structures that might obstruct the use of navigable waters. Rollins, *supra* note 187.

189. See, e.g., *EPA, Army Take Action to Address Implementation Challenges with 2020 Clean Water Act Section 401 Certification Rule*, EPA (Aug. 20, 2021), <https://www.epa.gov/newsreleases/epa-army-take-action-address-implementation-challenges-2020-clean-water-act-section>.

190. Rollins, *supra* note 187.

191. *Id.*

192. *Id.*

193. *Id.*

194. 33 U.S.C. § 1344(c) (1948).

195. Michael C. Blumm & Elisabeth Mering, *Vetoing Wetland Permits Under Section 404(c) of the Clean Water Act: A History of Inter-Federal Agency Controversy and Reform*, 33 UCLA J. ENV'T. L. & POL'Y 215, 222–23 (2015).

196. *Id.* at 218.

some may question whether it can be recreated between EPA and another agency. Yet, a compelling body of research suggests that shared regulatory spaces between agencies can yield many benefits, such as constructive competition, more informed decision making, and reduced monitoring costs for political overseers.<sup>197</sup> Therefore, systems of interagency administration should be considered more often when individual agencies face complex regulatory problems.<sup>198</sup>

One key benefit that has emerged from the Corps's relationship with EPA is the transformation of its approach to addressing environmental issues.<sup>199</sup> Although EPA has only asserted its veto power under section 404(c) thirteen times in the past four decades,<sup>200</sup> the existence of this authority has "prevented economic factors from overriding environmental concerns in Corps' permitting and has . . . been a material factor in the maturation of the Corps as an environmental regulatory agency."<sup>201</sup> The Corps' primary mission was never to protect the environment; its preexisting criteria for project reviews allowed short-term economic concerns to outweigh long-term ecological ones.<sup>202</sup> This was wholly inconsistent with the CWA's purpose to "restore and maintain chemical, physical, and biological integrity of the Nation's waters."<sup>203</sup> By infusing the Corps's enforcement model with EPA's authority and its mission to "protect human health and the environment," Congress reshaped the Corps's priorities, ensuring that the agency would not undermine the purpose of the CWA.<sup>204</sup> Over time, the threat of EPA's veto power has caused the Corps to adopt more environmentally conscious permit conditions, like EPA's "sequencing" approach to mitigation to "avoid[] or minimiz[e] adverse effects before approving substitute resources like artificial wetlands."<sup>205</sup>

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197. Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1151 (2021); see Anne Joseph O'Connell, *The Architecture of Smart Intelligence Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CAL. L. REV. 1655, 1676–78 (2006) (exploring the benefits of agency overlap in the context of national security/intelligence and extending these benefits to administrative agencies more generally); Keith Bradley, *The Design of Agency Interactions*, 111 COLUM. L. REV. 745, 748 (2011) (arguing that due to the pervasiveness of agency interactions, "an administrative agency's most important checks are often other agencies").

198. Eric Biber argues that the "move in administrative law to consider multiple agencies, rather than individual agencies, as the key unit of analysis (whether descriptive or prescriptive) is therefore important and necessary," especially in environmental law. Since environmental law presents cross-cutting problems that often call for the expertise of multiple agencies, it is the perfect laboratory for understanding how different agencies should work together. Eric Biber, *The More the Merrier Multiple Agencies and the Future of Administrative Law Scholarship*, 125 HARV. L. REV. F. 78, 79–80 (2012).

199. Blumm & Mering, *supra* note 195, at 224–25.

200. *Id.* at 224.

201. *Id.*

202. *Id.* at 304.

203. 33 U.S.C. § 1251 (1948).

204. Blumm & Mering, *supra* 195, at 304.

205. *Id.* at 306.

Like the Corps, the USFS approaches project reviews with multiple goals in mind.<sup>206</sup> This multiple-use mandate regularly allows economic concerns, like the financial appeal of timber harvesting, to outweigh ecological ones.<sup>207</sup> Assigning NEPA compliance duties to EPA when dubious financial incentives arise could help ensure that environmental concerns guide NEPA analyses, rather than budgetary pressures. When considering the desirability of one agency abdicating a responsibility to another agency, one should ask whether the agency and its employees are strongly oriented toward a certain mission, and if that mission calls for expanding or withdrawing from a policy area.<sup>208</sup> Because of how its budget is structured, the USFS is often pressured into pursuing high timber yields.<sup>209</sup> The agency's mission of securing a sufficiently high budget may prevent it from conducting fair and objective NEPA reviews on projects involving timber harvesting. This arguably calls for its withdrawal from conducting such reviews.

Some speculate that the working relationship between EPA and the Corps has been so resilient because EPA rarely invokes its authority, only doing so to avoid catastrophic wetland losses.<sup>210</sup> This rare exercise of power signals that EPA takes care not to overstep its boundaries or subsume another agency's function.<sup>211</sup> Perhaps because EPA has been so judicious in exercising this power, courts have generally upheld its decisions.<sup>212</sup> In a similar vein, if EPA were to take on NEPA compliance responsibilities for a category of USFS projects, it should never extend its involvement beyond this specified category. As with any model of interagency cooperation, jurisdictional limits between the USFS and EPA should be clearly delineated from the outset to minimize inefficiency and wasteful overlap.<sup>213</sup>

It should be noted that EPA and the Corps do not always agree,<sup>214</sup> and that any model of shared regulatory space should be prepared to face some degree of jurisdictional conflict.<sup>215</sup> But overall, section 404(c) has succeeded in facilitating conflict resolution between EPA and the Corps.<sup>216</sup> It has encouraged productive negotiation and compromise between the two agencies when they consider

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206. Steven P. Anderson, *Below-Cost Timber Sales & Community Economic Subsidies: A Conflict of Values*, 5 MD. J. CONTEMP. LEGAL ISSUES 129, 130 (1993/1994) (“As it is now, the Forest Service’s legal mission is to provide the greatest good for the greatest number by managing National Forests for ‘multiple uses.’”).

207. Adam Rissien, *Report: Forest Service Routinely Skirts Environmental Protection Laws*, WILDEARTH GUARDIANS (Aug. 27, 2020), <https://wildearthguardians.org/press-releases/report-forest-service-routinely-skirts-environmental-protection-laws/>.

208. Biber, *supra* note 198, at 82.

209. See Williamson, *supra* note 16, at 686–89.

210. See Blumm & Mering, *supra* note 195, at 304.

211. See *id.*

212. *Id.* at 306.

213. See Freeman & Rossi, *supra* note 197, at 1146.

214. Blumm & Mering, *supra* note 195, at 307.

215. Jason Marisam, *Interagency Administration*, 45 ARIZ. ST. L.J. 183, 205 (2013).

216. Blumm & Mering, *supra* note 195, at 308.

permit applications.<sup>217</sup> And ultimately, 404(c) has built a unique administrative culture that brings two federal agencies together in pursuit of ecological protection—a mission which was entirely unanticipated by the Corps prior to the enactment of the statute.<sup>218</sup> This culture has thrived on mutual respect and communication,<sup>219</sup> values that must extend to EPA and the USFS if EPA takes over timber-related NEPA compliance from the USFS.

### III. POTENTIAL BENEFITS, RISKS, AND DRAWBACKS OF THIS SOLUTION

Part III will analyze the potential benefits that could be derived from the solution presented in Part II. It will also lay out some of the challenges that might emerge if the USFS and EPA were to implement the solution. Despite these risks and drawbacks, Part III will ultimately conclude that executing this solution is a far better alternative than leaving USFS's NEPA reviews unchanged.

#### A. *Benefits of Responsibility Sharing between the USFS and EPA*

A growing body of research shows that it is in the best interest of certain agencies to contribute to solving each other's regulatory problems.<sup>220</sup> A system of interagency administration that rests on cooperation and compromise can succeed, which rebuts the traditional stereotype of agencies engaging in turf wars when forced to interact.<sup>221</sup> Congress has parceled jurisdictional authority between agencies before.<sup>222</sup> Many members of Congress are receptive to dividing agency responsibilities because they are fully aware of how complex certain social and economic problems are.<sup>223</sup> Such problems require harnessing the unique capabilities of different agencies.<sup>224</sup> Although an interagency solution may create jurisdictional conflicts and policy inconsistencies at times, many scholars and policymakers believe these costs are worth the benefits gained.<sup>225</sup>

The USFS has much to gain from outsourcing its NEPA responsibilities under the solution presented here. First, it would be able to conserve time and personnel that would otherwise go toward conducting lengthy NEPA analyses in this category of projects.<sup>226</sup> The agency could then redirect these resources to

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217. *Id.*

218. *See id.*

219. What was crucial to the success of joint enforcement was that from its inception, EPA and the Corps entered into three key agreements to clarify major issues around jurisdiction, mitigation, and enforcement. Michael B. Blumm & Bernard Zaleha, *Federal Wetlands Protection Under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and a Call for Reform*, 60 U. COLO. L. REV. 695, 711 (1989).

220. Marisam, *supra* note 215, at 189.

221. *Id.*

222. *See generally id.* at 190–98 (drawing upon several examples of responsibility sharing between federal agencies).

223. Freeman & Rossi, *supra* note 197, at 1142.

224. *Id.*

225. *Id.*

226. *See* Marisam, *supra* note 215, at 190.

conducting more careful NEPA analyses in other areas.<sup>227</sup> Opening up the USFS's capacity to conduct meaningful reviews could limit its future expansion of categorical exclusions<sup>228</sup> and encourage more comprehensive study of project alternatives. Overall, this may improve the USFS's reputation with respect to NEPA, mitigating the substantial criticism it has faced for skirting regulatory compliance in recent years.<sup>229</sup>

The solution presented in this Note may also decrease litigation costs for all interested parties. Environmental groups have repeatedly sued the USFS for alleged NEPA violations.<sup>230</sup> Plaintiffs often bring lawsuits because they oppose proposed projects that implicate timber harvesting.<sup>231</sup> The USFS and environmental groups seem inherently unwilling to trust each other's scientific findings on the effects of many proposed projects, perhaps explaining why these lawsuits become so contentious.<sup>232</sup> If this Note's solution were to be implemented, potential plaintiffs might be less likely to challenge projects because they would perceive those projects as having been objectively reviewed by an agency with no financial stake in the matter.

Consequently, the relationship between the USFS and certain longtime adversaries could be improved over time. Massive distrust has always existed between the USFS and certain environmental groups that have repeatedly brought NEPA-driven lawsuits against the agency.<sup>233</sup> Less adversarial interactions might reduce distrust, leading the agency and environmental groups

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227. *Id.*

228. Upon review by the Council on Environmental Quality, a federal agency may determine that a class of actions does not "individually or cumulatively have a significant effect on the human environment." *Categorical Exclusions*, COUNCIL ON ENV'T QUALITY, <https://ceq.doe.gov/nepa-practice/categorical-exclusions.html> (last visited Mar. 31, 2022). Such classes are referred to as categorical exclusions that do not require an EA or an EIS. *Id.*

229. See, e.g., Jordan Davidson, *Forest Service Wants to Fast-Track Logging Without Environmental Review*, ECOWATCH (Jun. 14, 2019, 11:20 AM), <https://www.ecowatch.com/forest-service-logging-plan-2638830051.html#toggle-gdpr>; Ted Zukoski, *Forest Service is Flunking Biden's Science Test*, THE HILL (May 11, 2021, 5:00 PM), <https://thehill.com/opinion/energy-environment/552824-forest-service-is-flunking-bidens-science-test>; Sam Evans, *Why is the Forest Service Trying to Evade the Public?*, N.Y. TIMES (Aug. 7, 2019), <https://www.nytimes.com/2019/08/07/opinion/forest-service-trump.html>.

230. For example, "[o]f the 133 [Region 1] cases in past 11 years, the majority (75) were by repeat litigants, with 30 cases filed by the Alliance for the Wild Rockies (AWR), 19 by the Native Ecosystems Council (NEC), 8 by the Lands Council, 5 each by the Ecology Center, Friends of the Wild Swan, and Swan View Coalition, and 3 by the Wild West Institute." TODD A. MORGAN & JOHN BALDRIDGE, UNDERSTANDING COSTS AND OTHER IMPACTS OF LITIGATION OF FOREST SERVICE PROJECTS: A REGION ONE CASE STUDY 12 (2015).

231. MARTIN NIE & PETER METCALF, THE CONTESTED USE OF COLLABORATION AND LITIGATION IN NATIONAL FOREST MANAGEMENT 9, 12 (Bolle Center for People & Forests ed., 2015).

232. Ryan Sabalow & Dale Kasler, *'Self-Serving Garbage.' Wildfire Experts Escalate Fight Over Saving California Forests*, THE SACRAMENTO BEE (Oct. 14, 2021, 11:28 AM), <http://www.sacbee.com/news/california/fires/article254957722.html>.

233. Repeat plaintiffs have been characterized as "'rogue activist groups' who abuse the legal system and the procedural and analytical requirements imposed by environmental and public land laws." NIE & METCALF, *supra* note 231, at 3. At the same time, interviews with individuals involved in repeat litigation reveal "a deep and widely shared mistrust of the Forest Service." *Id.* at 20.

to work together to solve complex ecological problems.<sup>234</sup> This is relevant to research suggesting glaring uncertainties in the relationship between forest management, wildfires, and climate change.<sup>235</sup> Reaching a consensus on how to navigate these uncertainties requires continued cooperation and resource sharing across various entities.<sup>236</sup> Improving the relationship between the USFS and its adversaries might improve communication and information sharing. These could be the key to facilitating a long-awaited, much-needed consensus on the role of federal forests in climate change mitigation.

EPA may also derive some benefit from responsibility sharing with the USFS. Generally speaking, interagency contributions have the potential to enhance an agency's reputation by highlighting its skills which are valuable in a federal bureaucracy.<sup>237</sup> This may affect how policymakers and the public perceive the agency and its budgetary needs.<sup>238</sup> More specifically, when an agency takes on a new role that has traditionally belonged to another, it can shape an executive decision that it would otherwise have no jurisdiction over.<sup>239</sup> It can also help another agency with a regulatory problem in a way that suits its own purpose—for instance, reviewing timber harvesting projects with EPA's utmost goal of protecting human health and the environment.<sup>240</sup>

Approaching these projects under EPA's core mission may have the added benefit of better protecting forests that indigenous communities have strong ties to. These communities maintain livelihoods that are deeply intertwined with the natural environment.<sup>241</sup> Guided by their extensive knowledge of sustainable forest management practices, they have the highest respect for their roles as the original stewards of the nation's lands.<sup>242</sup> From a land justice perspective, we

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234. See Naomi Ellemers et al., *Adversarial Alignment Enables Competing Models to Engage in Cooperative Theory Building Toward Cumulative Science*, 117 *PROC. OF THE NAT'L ACAD. OF SCI.* 7561, 7562 (2020) (discussing how reframing adversaries as collaborators leads to shared scientific progress); Rahmat Shazi et al., *Trust as a Predictor of Innovation Network Ties in Project Teams*, 33 *INT'L J. PROJECT MGMT.* 81, 82 (2015) (finding that trust drives social network ties, which lay the groundwork for innovation and coordinated action).

235. Rasoul Yousefpour et al., *A Framework for Modeling Adaptive Forest Management and Decision Making Under Climate Change*, 22 *ECOLOGY AND SOC'Y* 40, 40 (2017).

236. See BRUCE SHINDLER ET AL., *TRUST: A PLANNING GUIDE FOR WILDFIRE AGENCIES AND PRACTITIONERS—AN INTERNATIONAL COLLABORATION DRAWING ON RESEARCH AND MANAGEMENT EXPERIENCE IN AUSTRALIA, CANADA, AND THE UNITED STATES* 1–6 (2014).

237. Marisam, *supra* note 215, at 195.

238. *Id.*

239. *Id.* at 191.

240. *Id.*; *Our Mission and What We Do*, EPA (last visited Nov. 25, 2021), <https://www.epa.gov/aboutepa/our-mission-and-what-we-do>.

241. Peter Manus, *Sovereignty, Self-Determination, and Environmental-Based Cultures: The Emerging Voice of Indigenous Peoples in International Law*, 23 *WIS. INT'L L.J.* 553, 554 (2005).

242. Jim Robbins, *How Returning Lands to Native Tribes is Helping Protect Nature*, *YALE ENV'T* 360 (Jun. 3, 2021), <https://e360.yale.edu/features/how-returning-lands-to-native-tribes-is-helping-protect-nature>.

should be moving federal forest management goals as much in line with their cultural practices as possible.<sup>243</sup>

*B. Risks and Drawbacks Despite Fairer and More Objective NEPA Reviews*

It is possible that this solution causes EPA to veto a substantial number of projects that would have otherwise been approved by the USFS. Because of this, there would have to be some other way to make sure that the USFS still gets the money it needs to carry out essential and environmentally beneficial functions, such as forest research, wildlife habitat and species management, watershed management, and maintenance of recreation resources.<sup>244</sup>

Since the USFS's staff and resources are already overstretched,<sup>245</sup> losing a malleable and lucrative source of funding would be detrimental. The agency still needs to carry out NEPA reviews on other types of projects and perform other essential forest caretaker functions, including firefighting, which has taken up a larger portion of annual appropriations in recent years.<sup>246</sup> The past few decades have already shown a significant decline in the number of NEPA analyses initiated and completed by the USFS overall.<sup>247</sup> Some researchers believe this is the result of insufficient budget allocations, retirement of experienced staff without strong successors, and increasingly severe wildfires that divert the agency's resources away from routine land management.<sup>248</sup> The decline in NEPA reviews is concerning because over the same period of time, there have been "statistically significant upward trends in timber volume sold, timber volume cut and terrestrial habitat restored; and statistically significant downward trends in acres of reforestation and timber stand improvement."<sup>249</sup> Such trends should call for more, not fewer, in-depth environmental reviews.

Adequate funding is needed to fix the USFS's internal operations and give the agency enough resources to act as one of the first lines of defense against destructive wildfires. In 2014, 51 percent of USFS funding was devoted to firefighting, leaving less than half of the agency's money to perform other functions.<sup>250</sup> The agency also suffers from poor resource allocation, as suggested by the substantially different workloads and levels of EIS production between

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243. *See id.*

244. 36 C.F.R. § 200.3 (2000).

245. Fleischman et al., *supra* note 14, at 415.

246. Courtney A. Schultz et al., *Forest Service Fire Management and the Elusiveness of Change*, 15 FIRE ECOLOGY 1, 3 (2019) ("[T]he amount of money spent on fighting wildfire on national forests, both in absolute terms and as a proportion of the US Forest Service's budget, has increased dramatically since 2000 (USFS 2015). As of 2017, wildfire management accounted for about 60 percent of annual appropriations for the agency, leaving less money for everything else. . .").

247. Fleischman et al., *supra* note 14, at 404.

248. *Id.*

249. Todd Morgan et al., *Implementing the National Environmental Policy Act on National Forests*, MONT. BUS. Q. (Jul. 15, 2021), <https://www.montanabusinessquarterly.com/implementing-the-national-environmental-policy-act-on-national-forests/>.

250. Fleischman et al., *supra* note 14, at 415.

individual National Forest management systems.<sup>251</sup> Region 8 (which includes national forests in fourteen states) contains the greatest number of national forests producing no EISs, while Region 5 (California's national forests) contains three of the highest EIS producers.<sup>252</sup> In one study, Professor Forrest Fleischman concluded that more research is needed to understand the factors that drive such variation in project workloads across the National Forest System.<sup>253</sup> This research would demand funding and manpower, but could be crucial in helping the USFS allocate resources where they are most needed and design administrative processes to address project needs across the country.<sup>254</sup> Varying levels of EIS production may simply reflect regions undertaking different numbers of projects. But reason for concern stems from the fact that the USFS has consistently advocated relaxing its NEPA requirements,<sup>255</sup> and, in some instances, its decision to conduct a categorical exclusion or an EA over an EIS could be the result of a substantial cost-savings strategy.<sup>256</sup>

There has been some recent discussion around whether the USFS should start charging higher recreation fees.<sup>257</sup> This suggestion is not new. In the USFS's 1990 planning paper, the agency estimated that it would be able to earn over \$5 billion annually from recreation fees—three times more than what it earned through the K-V Act at the time.<sup>258</sup> Since recreation is relatively low on the scale of environmentally intrusive activities, reorienting the USFS's funding structure to prioritize recreation, instead of timber harvesting, could yield significant environmental benefits.<sup>259</sup> This could include creating incentive schemes that encourage forest managers to enhance the recreational utility of a forest while also decreasing influence from timber companies who seek to merely extract forest resources.<sup>260</sup> Currently, the majority of the USFS's

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251. *See id.* at 408.

252. *Id.* at 410.

253. *Id.* at 415.

254. *See id.* at 416.

255. *See, e.g.,* Bonnie L. Heiple & Michael J.P. Hazel, *US Forest Service Proposes NEPA Streamlining Rule Implications for the Outdoor Recreation Industry*, WILMERHALE (Jun. 24, 2019), <https://www.wilmerhale.com/en/insights/client-alerts/20190624-us-forest-service-proposes-nepa-streamlining-rule-implications-for-the-outdoor-recreation-industry>; Sarah Hosseini, *Expanded Logging Easier Under Proposed US Forest Service Plan*, KCBX (Aug. 12, 2019, 5:40 PM), <https://www.kcbx.org/environment/2019-08-12/expanded-logging-easier-under-proposed-us-forest-service-plan>.

256. Todd Morgan et al., *supra* note 249.

257. *See, e.g.,* Stanislaus National Forest Seeks Public Input for Recreation Fee Increases, LEDGER DISPATCH (Nov. 9, 2021), [https://www.ledger.news/news/stanislaus-national-forest-seeks-public-input-for-recreation-fee-increases/article\\_78a2ed14-4186-11ec-932b-e75d9925762c.html](https://www.ledger.news/news/stanislaus-national-forest-seeks-public-input-for-recreation-fee-increases/article_78a2ed14-4186-11ec-932b-e75d9925762c.html); Damon Arthur, *Camping, Day-Use Fees at Shasta-Trinity National Forest Service Could Go Up in 2022*, REDDING REC. SEARCHLIGHT (Jun. 1, 2021, 3:01 PM), <https://www.redding.com/story/news/2021/06/01/shasta-trinity-forest-proposes-camping-day-use-fees-increase/7491257002/>.

258. Knize, *supra* note 60, at 112.

259. Williamson, *supra* note 16, at 702.

260. *Id.*

proceeds from recreation fees and passes goes toward maintaining buildings, bridges, hiking trails, and other visitor facilities.<sup>261</sup>

Proposals to raise recreation fees at campgrounds and other facilities often face substantial backlash.<sup>262</sup> Such proposals can be dangerous because they deter lower-income individuals, and especially people of color, from accessing public lands and enjoying nature.<sup>263</sup> If the USFS were to raise recreation fees, it should focus on specific amenities fees, rather than entrance or hiking fees. It may also consider maintaining set periods of time where visits to a national forest remain entirely free, waiving fees for lower-income individuals, and driving initiatives that keep lower-income communities and communities of color engaged with their public lands. Ultimately, the question of how the USFS will develop alternative funding remains an open one. But proposals to increase recreation fees should not be immediately dismissed as long as the USFS takes measures to mitigate the impact of higher fees on lower-income individuals. If the USFS can achieve this, an increased fee structure would be preferable to leaving the overstretched agency to grow more reliant on timber yields while assessing environmental consequences of projects with an eye toward the budget.<sup>264</sup>

Another hurdle that this Note's solution faces concerns EPA's resource constraints. By taking on new responsibilities, EPA would have to reallocate personnel, facilities, and funds to managing the workload that comes with the role. Will EPA have the capacity to take on this new responsibility and do it well? It may have to redistribute its existing resources, which could be challenging. Under the Biden administration, which is intent on reversing the Trump administration's environmental rollbacks, EPA's budget is set to increase.<sup>265</sup> However, nothing guarantees that future administrations will continue to

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261. *Recreation Passes & Permits National Accomplishments*, U.S. FOREST SERV., <https://www.fs.usda.gov/visit/passes-permits/reports> (last visited Feb. 8, 2022).

262. See *Recreation Fees, Brief History of a Failed Experiment*, W. SLOPE NO-FEE COAL., <https://westernslopenofee.org/fee-watch/recreation-fee-library-2/recreation-fees-brief-history-of-a-failed-experiment/> (last visited Nov. 29, 2021); Bettina Boxall, *Forest Service to Drop Fees at Most National Parks*, L.A. TIMES (Feb. 29, 2021, 12:00 AM), <https://www.latimes.com/politics/la-xpm-2012-feb-29-la-me-forest-fee-20120229-story.html>.

263. See Thomas More & Thomas Stevens, *Do User Fees Exclude Low-income People from Resource-based Recreation?*, 32 J. LEISURE RSCH. 341, 353–55 (2000).

264. “[U]nless changes are made to its incentive structure, the Forest Service will continue in its current pattern of behavior.” Williamson, *supra* note 16, at 699.

265. President Biden requested \$11.2 billion for EPA's budget in FY 2022, making a 21.3 percent increase from the previous year. See *Federal Budget Tracker*, ECOLOGICAL SOC'Y OF AM., <https://www.esa.org/esablog/science-policy/federal-budget-tracker/#epa> (last visited: Nov. 4, 2021). This covers \$963 million for the new Accelerating Environmental and Economic Justice initiative, which signals the administration's eagerness to implement new programs that address the urgency of key environmental issues. *Id.* Under the Trump administration, EPA saw substantial reductions in scientific personnel, and so President Biden's budget includes \$110 million to restore EPA's workforce. *Id.* The Senate bill provides EPA with \$10.54 billion, a figure the Senate Appropriations Committee believes will facilitate the restoration of around 1,000 staff members lost in the past decade. *Id.* The Senate bill also gives EPA's Science and Technology budget line a 10 percent increase to \$803 million. *Id.*

champion President Biden's approach.<sup>266</sup> If the next administration does not prioritize environmental concerns and value EPA's role, funding could be cut again. EPA would be forced to scramble to reallocate resources. Newly added functions, like carrying out NEPA analyses, could be the first to suffer setbacks.

The question remains open as to how EPA should allocate its discretionary spending to fulfill its new responsibility. In any given year, EPA's discretionary spending authority can be heavily constrained by various interests.<sup>267</sup> Each year, the President submits to Congress a budget that reflects the executive branch's negotiations with different federal agencies.<sup>268</sup> The budget then goes through numerous hearings and adjustments where congressional members can shape it to reflect their own interests.<sup>269</sup> As a result, the final budget can look drastically different than what one particular agency initially proposed to the executive. Once the budget is finalized, certain amounts can be automatically tied up.<sup>270</sup> In 2016, for example, approximately 40 percent of EPA's budget was allocated to State and Tribal Assistance Grants that passed directly through to recipients, meaning EPA could not spend this money.<sup>271</sup> Additionally, another chunk was automatically allocated toward cleaning up contaminated sites, effectively locking up more than half of EPA's budget.<sup>272</sup> Statutory requirements and court-ordered consent decrees may further constrain EPA's budget.<sup>273</sup> Implementing this Note's solution will involve annually monitoring EPA's discretionary funds and ensuring that enough can be allocated toward building out a new agency function.

#### CONCLUSION

The future of forest management has much to gain from this Note's proposed model. An EPA-led review of a logging project might not always yield different results than a USFS-led one, but it would certainly improve the process by which the review is conducted. At the very least, the decision-making process would be shaped by greater trust, transparency, and objectivity. It would be less constrained by misguided financial incentives that once overshadowed environmental concerns. Forest conservation groups would need to be vigilant in

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266. Like many other agencies, EPA is not immune to the effects of shifting political tides. After all, the figure who oversees the agency is the EPA Administrator, who is nominated by and serves at the pleasure of the president. The Administrator has a great deal of authority and discretion over several areas, including budget allocations. The Administrator maintains centralized powers while delegating other geographically based matters to regional offices. These offices are run by administrators who are chosen through the Senate. See WATERMAN ET AL., *supra* note 163, at 13.

267. Jonathan Remy Nash et al., *The Production Function of the Regulatory State: How Much do Agency Budgets Matter?*, 102 MINN. L. REV. 695, 721 (2017).

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

holding EPA accountable under its new role. But they could rest assured knowing that decisions to move ahead with projects would not be directed by an annual budget cycle that is wholly incompatible with wise, long-term forest management.<sup>274</sup>

Addressing the USFS's financial incentives and their impact on the agency's ability to protect the environment is long overdue. Over the next several decades, increasingly difficult decisions will have to be made around forest management and the role of national forests in fighting climate change. These decisions could have irreversible and far-reaching consequences. They should therefore be made with a deep awareness of the precarious health of our nation's forests and in the most fair and transparent way possible.

Economic concerns and resource constraints are crucial to a federal agency's operations, but addressing them should never come at the expense of the natural environment. I hope that my proposed solution will spark discussions on the tension between financial incentives and ecological goals in federal agencies, generally. This will shed light on how we should better protect the environment by holding these agencies to a higher standard and scrutinizing the forces behind their decision making.

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274. "Wise forest management requires deliberate, long-term planning and does not mesh well with annual budget cycles." Williamson, *supra* note 16, at 703.

**We welcome responses to this Note. If you are interested in submitting a response for our online journal, *Ecology Law Currents*, please contact [cse.elq@law.berkeley.edu](mailto:cse.elq@law.berkeley.edu). Responses to articles may be viewed at our website, <http://www.ecologylawquarterly.org>.**