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## Writing the Regulations: Using Scientists to Link Law and Policy

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WRITING THE REGULATIONS:  
USING SCIENTISTS TO LINK LAW AND POLICY

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THE NATIONAL FOREST MANAGEMENT ACT  
IN A CHANGING SOCIETY 1976-1996

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Natural Resources Law Center  
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## I. Introduction

The National Forest Management Act of 1976 contained a new and innovative requirement relating to the drafting of the regulations required under the act. Instead of the traditional advisory committee, the act (in section 6(h)(1)) established a Committee of Scientists which was to "...provide scientific and technical advice and counsel on proposed guidelines and procedures to assure that an effective interdisciplinary approach is proposed and adopted." The origin of the requirement, the manner of selection of the Committee, how it interacted with the Forest Service in drafting the regulations, and its successes and failures are an interesting case history involving the scientific guidance into Federal agency programs. This paper discusses the genesis of the Committee of Scientists, how it was chosen and charged, how the Committee viewed its role and how it interacted with the Forest Service in writing the planning regulations, and provides an evaluation of the Committee's work and of the concept as a means for providing scientific input into government programs.

## II. Genesis of the requirement for a Committee of Scientists

The Committee of Scientists was created in response to Sen. Lee Metcalf's concerns about the ability or willingness of the Forest Service to draft the comprehensive regulations envisioned by NFMA. Metcalf felt that a committee of "wise men" (an unfortunate choice of words!) should be created to provide a means from outside of the Forest Service for input into and evaluation of the regulations. His concerns were voiced during committee markups of the Senate version of the act and are embodied in section 6(h)(1). The language eventually adopted required the Committee to provide "advice and counsel" in drafting the regulations, to "assure an interdisciplinary approach", and to evaluate the regulations by providing "its views when the regulations are proposed for adoption."

III. How was the modus operandi of the Committee and its membership determined?

A. The Forest Service requested the National Academy of Science in the fall of 1976 to make recommendations concerning the role of the Committee, how it should operate, and to recommend persons to serve on the Committee.

B. The Academy's Board of Agriculture and Renewable Resources responded with a series of recommendations which the Forest Service accepted. Perhaps the most important recommendation was that the scope of the Committee's work should be expanded beyond section 6(g) of NFMA to include the entire section of the Act dealing with planning. The Board also recommended that the Forest Service establish a continuing scientific committee to "provide advise and counsel to the Secretary of Agriculture on National Forest System resource planning", a recommendation which the Service did not follow.

C. The Committee, consisting of seven persons (T. Box, R. R. Foil, R. W. Stark, E. L. Stone, D. E. Teegarden, W. L. Webb, and A. W. Cooper, Chair) each with a very different background, was appointed in the early spring of 1977 and met first in May of that year. In its operation, the Committee generally followed the National Academy's recommendations in that it met regularly (18 times in total), kept in close contact with agency personnel, and played an active rather than passive role in the regulation drafting process. The Committee was charged by Assistant Secretary Rupert Cutler to include in its work the entire planning apparatus of NFMA, as the Academy had recommended. The Committee itself expanded its role to include several sections outside of section 6 (the planning section) which had a direct impact on forest planning, including such controversial areas as timber harvest scheduling and marginal lands.

IV. How did the Committee carried out its work?

A. The Committee played three roles. First, it provided technical advise on the development of the planning process and on

many of the controversial technical issues included in NFMA and which, of necessity, became part of the planning process. Second, the Committee advised and critiqued draft materials the Forest Service prepared as it moved through the process of developing the regulations. Finally, the Committee actually drafted material for it and the Forest Service staff to consider, much of which actually ended up in the text of the final regulations.

B. The role described above implies that the Committee had several relationships with the Forest Service staff. On the one hand, it worked with them in a collegial relationship accepting and modifying each others draft materials so as to develop a coherent, workable set of regulations. On the other hand, the Committee stepped out of this collegial role in the end and provided a public critique in the Federal Register of the drafts of the regulations produced by the Forest Service. It is important to understand that, although much written material originating in the Committee does appear in the regulations, the final version is the work of the Forest Service and not of the Committee.

V. What lessons can be learned from the Committee of Scientists and its work about the problem of providing scientific guidance to Federal agencies?

I have argued elsewhere that the Committee of Scientists represents a unique and workable model of a way to provide scientific expertise to a government agency in a process such as regulation drafting. Others do not accept this argument. Here I will evaluate the Committee of Scientists "experiment" from my own perspective together with the critiques offered by others. One must understand that my views are obviously not unbiased since I was a member of the Committee and further that my recollections of the problems we encountered may well be lost in the rose-colored tint of the glasses of time.

A. The fact that the Committee was small in size was a distinct advantage. If the Committee were reappointed today I fear that the Forest Service would succumb to political correctness and

appoint one of everybody to insure that every possible view was "adequately represented." The Committee of Scientists, fortunately, was appointed at a time when it was more important to get people who could deal with knowledge and dispassion about the issues rather than to insure that each and every view was represented by a member. The members of the Committee obviously brought with them their own peculiar prejudices and perceptions of planning and the technical issues in forest management which were important at that time. These were regularly evident during its discussions. Nonetheless, the small number of members made it possible to thrash out an acceptable view (not necessarily a compromise) when that might have been almost impossible in a larger, more diverse group.

B. The Committee served as a forum in which important technical issues could be discussed on their merits free of the stress of partisan debate. Obviously, the Forest Service staff had its own biases, dictated from several quarters, and these may well have shaped some of the debate. Nonetheless, the Committee was able to consider the technical and scientific merit of contentious issues and make its recommendations on the basis of such consideration. In theory, the traditional advisory committee can play the same role. However, as I have pointed out, most such committees today are made up of persons who represent various interest groups. Because they represent the factions involved in the debate, their work may be biased toward compromise solutions which may, or may not, be the best solutions to problems. The members of the Committee, however, represented no one except their own peculiar views of the issues involved in forest planning. Furthermore, the Committee was not encumbered by agency affiliation and loyalty and did not even have any accountability for anything it recommended! Consequently, the Committee was free to determine the solutions that were technically best and then work to incorporate them into regulatory language. The result was, in some cases, compromise but in others it was clearly an opting toward a view which might not have emerged from a different environment. The Committee was largely

able to avoid mixing scientific and political considerations before the appropriate scientific position was reached.

C. The Committee meetings offered an environment in which to debate highly charged issues free of the emotion and rhetoric which frequently accompanies such discussions. Most of the persons who interacted with the Committee realized that emotion and rhetoric would not make much difference in the end result. Consequently, despite the fact that representatives of numerous interest groups attended the meetings the debate tended to be more focused and without "speeches for the record" from the participants.

D. The fact that the Committee's views had to accompany the drafts of the regulations as they appeared imparted a degree of freedom to the Committee that most advisory committees do not have. Most advisory committees are able to release the results of their work only through, and with the concurrence of, the agency with which they have been working. It is true that the Committee's report had to accompany the Forest Service's draft of its proposed regulations, but the Service had no editorial control over the nature of its report. The Committee was able to say what it thought was right without concern that its view might be edited away or administratively "deep-sixed." This freedom to publish put the Committee in the enviable position of being able to tell the Forest Service that the agency could reject any of the guidance the Committee might make but commentary on that rejection would appear in the Federal Register and the agency would thus be compelled to respond in the court of public opinion. This did happen in some cases and I am convinced that this freedom to publish did result in some materials appearing in the final regulations which might otherwise not have been there.

## **VI. A critique of the Committee of Scientists as a model for scientific input to government decision-making**

Obviously, the concept of the Committee of Scientists and the way it did its work had imperfections. These ranged from



nagging concerns to fatal flaws, depending upon whose opinions one accepts.

A. One of the Committee's weaknesses was inherent in one of its strengths. That was the group's small size. The fact that there were only 7 members dictated that each discipline was represented by only one member and some disciplines and concerns were not represented at all. To be sure, the knowledge of many members overlapped, but in the end there was really only one card-carrying economist, and one card-carrying wildlife biologist, to name two central issue areas. In practice, this meant that the Committee often bowed to the views of the resident "expert" and, in the process, may not have given adequate consideration to differing views. Although this is a clear problem, the Committee could deal with it when it realized it was a problem by turning either to the Forest Service or outside third parties for assistance.

B. There are a number of respected critics of the NFMA regulations and the concept of the Committee of Scientists who believe that the Committee, instead of being free to take whatever views it felt were appropriate, was rather a captive of the Forest Service. The belief is that the scope of the Committee's considerations was largely limited by what the Forest Service brought to it and that it really was not free to, or simply did not, dig deeply enough into resolution of critical issues such as clearcutting through alternatives not necessarily agreeable to the Forest Service. Although this may have been true in some cases, there are notable exceptions. Perhaps the most important is the area of timber harvest scheduling where the framework of the final proposal in the regulations reflects most clearly the work of one of the Committee members and is quite different from proposals originally brought forward by the Forest Service.

C. It has also been stated that the Committee's independence was actually exploited by the Forest Service to add credibility to its planning process. The Committee served as a "heat shield" behind which the agency could achieve its objectives in the way the regulations dealt with the most contentious techni-

cal issues. That may well be true. However, it can be argued that is in part what Lee Metcalf had in mind when he proposed the concept of a committee of scientists. True, he wanted persons to provide independent perspectives and critique, but it can also be argued that he wanted it not only to insure adequacy of the regulations but also to contribute to their acceptance once they were completed.

D. Perhaps the most important criticism of the Committee concept lies in the fate of the regulations that it helped prepare. If one believes that those regulations and the planning process they describe have not worked, and you are in the majority if you believe this, then it follows that the Committee either could not, or did not, do the job it was supposed to. There is not much answer to this criticism because in the abstract it is right. However, one has to view the first draft of the regulations against the situation that existed in 1977-79. To my knowledge, no Federal natural resource agency had at that time any comprehensive planning regulations. NFMA forced the Forest Service to cut very new ground. The newness of this ground was apparent during the first 6 months of the Committee's work when virtually every framework for planning brought forward by the Forest Service was not only unworkable but also indecipherable. The final regulations represented the first such regulations developed, to my knowledge, by any US natural resource agency and their failure (or success) must be viewed against that fact. Furthermore, as I will indicate later in my comments, the failure of the regulations has, in my opinion, little to do with their technical inadequacies.

Hubert Humphrey was motivated by a desire to "get the Forest Service out of the courts and back in the forest" when he proposed his bill which, in time, came to be NFMA as we now know it. Humphrey believed that a planning process, with public involvement, offered the best sort of forum in which to resolve issues of management of the National Forest System. He also viewed the regulations as a necessary adjunct to this planning process. Simply because the process has not worked the way it

was envisioned does not necessarily mean it was a failure. Rather, it represents a first attempt to produce agreement in a field where disagreement has been the rule.

E. The work of the Committee and the regulations have been criticized because the planning work cost vastly more than the Forest Service originally estimated and has taken far longer to complete than the law and the regulations envisioned. Everyone was warned on both of these points by the Committee in its May 4, 1979 report. The Forest Service estimates were unrealistic and everyone knew that.

## VII. Postscript

This conference has as its major theme two questions: how well has NFMA worked over the past 20 years and how well will it work in the 21<sup>st</sup> century. As I have said previously most dispassionate observers do not feel, based on a variety of considerations, that either NFMA or its implementing regulations have worked very well. The nature of the Committee of Scientists and of its work have, as I have also indicated, relatively little to do with this pessimistic conclusion.

The fundamental problem is that in order for a set of planning regulations to work the interested parties have to have an incentive to make them work. Up to now, that desire has not been evident. My personal reaction regarding the contesting interest groups to paraphrase what Franklin D. Roosevelt said to the coal miners and mine owners in the 1930's, "a pox on all your houses."

The regulations themselves can only describe a process and provide certain standards that the process, or its component parts, must meet. The process envisioned by the regulations can be made more detailed and more explicit and the standards to be met by plans can be enlarged to cover more issues and can be increased in specificity to almost any extent. However, no such process can ever work unless the parties which have interests in the outcome want it to work. In the very last section of the introduction to its May 4, 1979, report, the Committee of Scien-

tists made a plea that "the planning process envisioned by these regulations must be supported by all parties with interests in the National Forests. The process can be made to work, but not if it is approached divisively. Implementation of these regulations can bring about either of two futures. The next few years can be a constructive period of common dialogue, common effort and cooperation, or they can be a continuation of the present paralysis of mistrust, bickering and negativism. It is clear that the nation's interests will be served only by diligent pursuit of the former, constructive path."

Obviously no one paid the least attention to this admonition. The reason is, I think, that the parties with interests in the outcome of management of the National Forests do not want to resolve their differences because at this time it serves their respective interests better for them to continue to fight. There are, of course, important principles being contested. But I remain as convinced now as I was when I chaired the Committee that if it is in the interests of the parties to do so, they will rationalize these differences. Therefore, it is my belief that no planning regulations, regardless of their specificity, technical elegance, or logical coherence, will resolve the dilemma of the future of the National Forests. That will have to be done by parties who understand that it is in both their interests and those of the nation that the contesting stop and the agreeing begin. Planning regulations can help achieve that, but ultimately the people of the nation, compelled either by desire or necessity, through their representative interest groups will have to resolve the problems.

#### VIII. General references

- Committee on Agriculture, Nutrition, and Forestry, United States Senate. 1979. Compilation of the Forest and Rangeland Renewable Resources Planning Act of 1974.
- Cooper, A. W. 1980. Allocation of Federal Lands: NFMA as an example. Paper presented to the Society of American Foresters meeting, October 1980.

Daniels, S. E. and K. Merrill. 1992. The Committee of Scientists: A Forgotten Link in National Forest Planning History. For. Cons. and History 36: 108-116. See also pages 117-131 of the same reference for additional comments by 6 others on this subject and a rejoinder by Daniels.

National Forest Management Act. 1976.

Popovich, L. 1978. The "Wise Man" Committee—an education for the educators. J. For. 76:424-427.

Wilkerson, C. F. and H. M. Anderson. 1987. Land and Resource Planning in the National Forests. Island Press, Washington, DC. 396 pp.