

Examining the Bush Administration's Record of Rulemaking Reversals in Environmental and Natural Resources Law

- Does NEPA's "Hard Look" Give Teeth to State Farm's "Reasoned Analysis"? -

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<Abstract>

Environmental and natural resources policy can shift dramatically depending on the administration in office. This Article explores why the Bush Administration was unable to articulate a sufficient rationale to reverse some of the policies of the previous administration by analyzing several cases involving rulemaking reversals in the context of grazing, forestry, snowmobile recreation, and the Roadless Rule. In *Motor Vehicle Manufacturers' Association v. State Farm Mutual Automobile Insurance Co.*, the Supreme Court held that recession of a rule is reviewed under the same standard as when an agency engages in a rulemaking. However, the agency must still supply a "reasoned analysis" for the change in policy.

Based on the cases discussed, *State Farm's* "reasoned analysis" appears contextual—the more analysis and data in the record in the first rulemaking, the harder it is for the agency to reverse course both institutionally (because the agency employees studying the issue have to come to opposite conclusions often with the same data) and legally (because federal courts will take a "hard look" at the agency's prior analysis). The National Environmental Policy Act (NEPA) gives teeth to *State Farm* in the environmental and natural resources context because rulemakings are often "major federal actions significantly affecting the quality of the human environment," requiring a detailed Environmental Impact Statement (EIS). The data from an EIS during the initial rulemaking can then serve as a legal barrier to the next administration's attempt to reverse a prior rule because *State Farm's* "reasoned analysis" requires a discussion of the previous administration's data and conclusions.

Key words: Rulemaking, Reversals, NEPA, Public Lands, Reasoned Analysis

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I. Introduction

Environmental and natural resources policy can shift dramatically depending on the administration in office. President George W. Bush's Administration radically changed course from the prior Clinton Administration primarily through administrative rulemaking.¹⁾ Federal administrative agencies have enormous regulatory power under the familiar administrative law framework laid out in *Chevron, Inc. v. Natural Resources Defense Council, Inc.*²⁾ The *Chevron* doctrine seeks to keep federal courts from second-guessing agency expertise,³⁾ instructing courts to uphold an agency's interpretation of an ambiguous statutory provision if the agency's explanation is reasonable.⁴⁾

Beginning in the early 1970's, the federal courts began to take a "hard look" when reviewing administrative agency actions.⁵⁾ In the early 1980's, the Supreme

1) See Richard J. Lazarus, *The Making of Environmental Law* 239 (The University of Chicago, 2004): "The [Bush] administration sought to reverse almost all of the major environmental initiatives promoted by the Environmental Protection Agency (EPA) and the Departments of Agriculture and the Interior under the Clinton administration."

2) *Chevron, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

3) *Chevron*, 467 U.S. at 866: "Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences."

4) *Id.* at 843.

5) See, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); see also Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. Pa. L. Rev. 509, 511-12 (1974).

Court approved a standard to review reversals of policy from one administration to the next.⁶⁾ In *Motor Vehicle Manufacturers' Association v. State Farm Mutual Automobile Insurance Co.*,⁷⁾ the Court struck down the Reagan Administration's rule eliminating a passive safety restraint requirement in new motor vehicles because the administration failed to present an adequate basis and explanation for rescinding the Carter Administration's rule requiring either air-bags or automatic seat belts.⁸⁾ Justice White, writing for a 5-4 majority, held that an agency cannot reverse policy through rulemaking simply because of a change in administration.⁹⁾ Instead, the new administration must supply a "reasoned analysis" for the change.¹⁰⁾

Despite such judicial deference, the Bush Administration was surprisingly ineffective in its attempts to overturn many rules in environmental and natural resources law.¹¹⁾ There are many possibilities as to why these attempts were unsuccessful, including that the federal courts may be becoming increasingly skeptical of such changes, requiring more explanation, or that the speed at which the administration sought to rescind previous rules led to an inability to sufficiently explain the change, or that the Bush Administration was simply inept at explaining

⁶⁾ See generally *Motor Vehicle Manufacturers' Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983).

⁷⁾ 463 U.S. 29 (1983).

⁸⁾ *Id.*

⁹⁾ *State Farm*, 463 U.S. at 57: "An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis..." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 853 (D.C. Cir. 1970), *cert. denied*, 405 U.S. 923 (1971). We do not accept all of the reasoning of the Court of Appeals but we do conclude that the agency has failed to supply the requisite 'reasoned analysis' in this case."

¹⁰⁾ *Id.* at 42: "Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."

¹¹⁾ See *Western Watersheds Project v. Kraayenbrink*, 538 F. Supp. 2d 1302 (D. Id. 2008) (granting an injunction against the implementation of BLM revisions to nationwide grazing regulations under NEPA, FLPMA, and the ESA); *Northwest Ecosystem Alliance v. Rey*, 380 F. Supp. 2d 1175 (W.D. Wash. 2005) (proposed elimination of "survey and manage" standards violated NEPA). See also Chris Bowman, *Analysis: Bush team battered by courts on environment*, *The Sacramento Bee* 1A (May 19, 2008) (stating that, according to the Center for Biological Diversity, the Bush Administration won just one of 78 federal court rulings and settlements in Endangered Species cases).

rulemaking reversals over its two terms in the Executive Branch. This article analyzes several unsuccessful Bush Administration environmental and natural resources policy changes under the *State Farm* rule.

The Obama Administration (like most recent administrations) put a hold on last-minute rulemakings by the outgoing Bush Administration.¹²⁾ Although this action affected so-called midnight regulations,¹³⁾ the administration will have more difficulty reversing completed rulemakings, such as the rule change easing the restrictions on mountaintop removal mining.¹⁴⁾ Therefore, an understanding of how and why the Bush Administration's rulemaking changes have met with judicial skepticism may be of use to the Obama Administration as it seeks to reverse Bush-era rules and defend its own rules in federal court.

This article examines why the Bush Administration was unable to articulate sufficient rationales to reverse some of the environmental and natural resources policies of previous administrations. Part II explores the administrative law framework under which rulemaking reversals proceed, explaining the *State Farm* rationale. Part III synthesizes four relevant examples of court decisions that rejected the Bush Administration's rule changes involving grazing,¹⁵⁾ forestry,¹⁶⁾

¹²⁾ Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4435 (Jan. 26, 2009); *cf.* Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702 (Jan. 24, 2001) (upon taking office, President Bush's Chief of Staff, Andrew Card, issued a similar memorandum).

¹³⁾ *See* Ceci Connolly and R. Jeffrey Smith, *Obama Positioned to Quickly Reverse Bush Actions*, The Washington Post A16 (November 9, 2008): "Transition advisers to President-elect Barack Obama have compiled a list of about 200 Bush Administration actions and executive orders that could be swiftly undone to reverse White House policies on climate change, stem cell research, reproductive rights and other issues..."

¹⁴⁾ *See generally* Excess Spoil, Coal Mine Waste, and Buffers for Perennial and Intermittent Streams, 73 Fed. Reg. 75814 (Dec. 12, 2008). *Cf.* Dept. of Interior News Release, "Salazar Moves to Withdraw 11th Hour Mountaintop Coal Mining Rule," available at http://www.doi.gov/news/09_News_Releases/042709.html (last accessed May 4, 2009) (noting that Secretary Salazar directed the Dept. of Justice to file a pleading in the District Court for the District of Columbia requesting that the "stream buffer zone rule" issued by the Bush Administration be vacated and remanded to the Dept. of Interior for further action).

¹⁵⁾ *Western Watersheds Project v. Kraayenbrink*, 538 F. Supp. 2d 1302 (D. Id. 2008) (granting an injunction against the implementation of BLM revisions to nationwide grazing regulations under NEPA, FLPMA, and the ESA).

snowmobiles,¹⁷⁾ and the Roadless Rule.¹⁸⁾ Part IV analyzes these cases to determine why the Bush Administration had a difficult time defending such policy changes. This article concludes that the Bush Administration's inability to consistently defend why its new environmental and natural resources policies should replace an earlier administration's policies is because the agencies were unable or unwilling to adequately explain why the change was necessary in light of the prior administration's analysis of the problem.

II. Transitions from One President to the Next and the State Farm Rule

Since President Franklin Roosevelt, there have been twelve presidential transitions, with eight being inter-political party changes.¹⁹⁾ These interparty transitions are notable in that the outgoing administration often attempts to cement its legacy, while the incoming administration attempts to dismantle those policies with which it disagrees.²⁰⁾ Since the Carter Administration,²¹⁾ most modern

¹⁶⁾ *Northwest Ecosystem Alliance v. Rey*, 380 F. Supp. 2d 1175 (W.D. Wash. 2005) (proposed elimination of "survey and manage" standards violated NEPA).

¹⁷⁾ *The Fund for Animals v. Norton*, 294 F. Supp. 2d 92 (D.D.C. 2003) (striking down the Bush Administration's rule allowing 950 snowmobiles to enter Yellowstone National Park per day for violations of NEPA and the APA): "The dramatic change in course, in a relatively short period of time and conspicuously timed with the change in administrations, represents precisely the 'reversal of the agency's view' that triggers an agency's responsibility to supply a reasoned explanation for the change." *Id.* at 105.

¹⁸⁾ *People ex rel. Lockyer v. U.S. Department of Agriculture*, 459 F. Supp. 2d 874 (N.D. Cal. 2006) (striking down the Bush Administration's State Petitions Rule, which replaced the Clinton Administration's Roadless Rule, for violations of NEPA and the ESA).

¹⁹⁾ See generally L. Elaine Halchin, *Presidential Transitions: Issues Involving Outgoing and Incoming Administrations 2*, CRS Report for Congress Order Code RL34722 (Nov. 25, 2008).

²⁰⁾ *Id.* at Summary: "Interparty transitions in particular might be contentious. Using the various powers available, a sitting President might use the transition period to attempt to secure his legacy or effect policy changes."

²¹⁾ Jason M. Loring and Liam R. Roth, *After Midnight: The Durability of the "Midnight" Regulations Passed by the Two Previous Outgoing Administrations*, 40 *Wake Forest L. Rev.* 1441, 1443 (2005): "The term itself [midnight regulation] originated in the aftermath of the 'regulatory outburst' of President James E. Carter's administration as it

presidents have attempted to limit the post-term reach of prior presidents in a variety of ways, including: 1) postponing the previous administration's rules,²²⁾ 2) using executive orders to shift policy,²³⁾ and 3) settling cases challenging the previous president's rulemakings.²⁴⁾ Most modern presidents, including Presidents Clinton, Bush, and Obama, have issued memoranda delaying or canceling so called "midnight" regulations which had not yet taken effect.²⁵⁾

1. Midnight Regulations and Rulemaking

"Midnight regulations," defined by some commentators as rulemakings issued during the lame duck period of a presidency (the period between Election Day and the inauguration of the next president),²⁶⁾ are not a new practice. President John Adams' last-minute judicial appointments gave rise to judicial review.²⁷⁾ Nevertheless, the term "midnight regulation" is something of a misnomer, in that often rulemakings which fall under this label may take years to promulgate.²⁸⁾ The Bush Administration attempted to bypass the traditional problems involving

gave way to the Reagan era in 1981. The Carter administration set the record at that time for number of pages printed in the Federal Register during the midnight period, with over 24,000 pages."

²²⁾ *Id.* at 1444: "Succeeding presidents have continued this tradition, postponing the effective dates of midnight regulations passed by the previous administration."

²³⁾ For example, President Clinton reversed President Reagan's ban on U.S. funding for international health groups that provide or give counseling about abortion, President George W. Bush reinstated the ban in 2001, and President Obama reversed the ban in 2009; *see also* Rob Stein and Michael Shear, *Funding Restored to Groups that Perform Abortions, Other Care*, *The Washington Post* A03 (Jan. 24, 2009).

²⁴⁾ *See generally* Michael C. Blumm, *The Bush Administration's Sweetheart Settlement Policy: A Trojan Horse Strategy for Advancing Commodity Production on Public Lands*, 34 *Environmental Law Reporter* 10397 (May 2004).

²⁵⁾ *Cf.* Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 *Fed. Reg.* 7702 (Jan. 24, 2001); Memorandum for the Heads of Executive Departments and Agencies, 74 *Fed. Reg.* 4435 (Jan. 26, 2009).

²⁶⁾ Loring, *supra* note 22, at 1451.

²⁷⁾ *See* Halchin, *supra* note 20, at n.2; *see also* *Marbury v. Madison*, 5 U.S. 137 (1803).

²⁸⁾ Loring, *supra* note 22, at 1488: "Significant regulations, however, cannot be proposed and completed in the period between election day and inauguration day, as it can take years for a significant regulation to clear OMB review."

“midnight regulations” by trying to complete any rulemakings long before it left office.²⁹⁾ Bush’s Chief of Staff, Joshua Bolten, issued a memo stating that rules should be proposed no later than June 1, 2008 and final rules should be issued no later than November 1, 2008.³⁰⁾ However, the Bush Administration still proposed many rules after the deadline.³¹⁾

The Congressional Review Act (CRA)³²⁾ of 1996 offers a legislative remedy to “midnight regulations.” The CRA requires a majority vote from both houses of Congress within sixty days of the publication of a rule to overturn the regulation.³³⁾ Despite this authority, Congress has used the CRA only once, in March of 2001 to void the Clinton Occupational Safety and Health Administration’s (OSHA) ergonomics standard.³⁴⁾ Congress has not used the CRA to overturn Bush Administration rules. Instead, in March of 2009, Congress chose to give the Obama Interior and Commerce Departments the authority in an appropriations rider to withdraw or reissue the Bush Administration’s final rule on interagency cooperation under the Endangered Species Act.³⁵⁾ On April 28, 2009, Secretaries Salazar and Locke used this authority to revoke the rule.³⁶⁾

²⁹⁾ Halchin, *supra* note 20, at 5-6: “The Bush Administration has taken action in anticipation of possible ‘midnight rules’ at the end of the current President’s term. On May 9, 2008, White House Chief of Staff Joshua B. Bolten issued a memorandum to the heads of executive departments and agencies stating that the Administration needed to ‘resist the historical tendency of administrations to increase regulatory activity in their final months.’ Therefore, Bolten said that, except in ‘extraordinary circumstances, regulations to be finalized in this administration should be proposed no later than June 1, 2008, and final regulations should be issued no later than November 1, 2008.’” *See also* Cindy Skrzycki, *Bush Wants Sun to Set on Midnight Regulations*, The Washington Post D03 (June 3, 2008).

³⁰⁾ *Id.*

³¹⁾ *Id.* at n.16 (noting that between June 1 and August 8, 2008, agencies sent more than 40 proposed rules to OMB).

³²⁾ 5 U.S.C. §§801-808 (2000).

³³⁾ Loring, *supra* note 22, at 1449; *see also* 5 U.S.C. §802.

³⁴⁾ Julie A. Parks, *Lessons in Politics: Initial Use of the Congressional Review Act*, 55 Admin. L. Rev. 187, 188 (2003).

³⁵⁾ Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 524; *see also* Interagency Cooperation Under the Endangered Species Act, 73 Fed. Reg. 76272 (Dec. 16, 2008).

³⁶⁾ News Release: Salazar and Locke Restore Scientific Consultations under the Endangered

Typically, agencies promulgate rules using the informal, notice-and-comment process.³⁷⁾ In notice-and-comment rulemaking, the agency publishes a notice of proposed rulemaking in the Federal Register.³⁸⁾ The agency then allows the interested public to comment and the agency considers those comments.³⁹⁾ Lastly, the agency publishes the final rule.⁴⁰⁾ In contrast to “midnight regulations” which can be undone using the CRA, or delayed pending review through executive orders, the revocation of an existing rule requires a subsequent rulemaking.⁴¹⁾

2. The Supreme Court’s Response: *State Farm*

In *Motor Vehicle Manufacturers’ Association v. State Farm Mutual Automobile Insurance Co.*, the Supreme Court reviewed the National Highway Traffic Safety Administration’s revocation of a rule requiring that automobiles be equipped with passive restraints for safety.⁴²⁾ The Carter Administration, after years of studying the issue,⁴³⁾ determined that either air-bags or automatic seat belts could save a substantial number of lives.⁴⁴⁾ Upon taking office, the Reagan Administration delayed the Carter rule and then proposed to rescind the rule altogether.⁴⁵⁾ The Reagan Transportation Department reasoned that since automobile manufactures decided to implement the Carter safety rule by installing only automatic seat belts and not air-bags (the automobile industry vehemently opposed the air-bag),⁴⁶⁾ the

Species Act to Protect Species and their Habitats; available at http://www.doi.gov/news/09_News_Releases/042809c.html (last accessed May 4, 2009).

³⁷⁾ William F. Funk and Richard H. Seamon, *Administrative Law: Examples and Explanations* 142 (Aspen Publishers 2nd ed. 2006).

³⁸⁾ 5 U.S.C. §553(b) (2000).

³⁹⁾ 5 U.S.C. §553(c) (2000).

⁴⁰⁾ 5 U.S.C. §553(d) (2000).

⁴¹⁾ In order to undo or reverse a previous rulemaking, an agency must go through the same analysis as when it promulgates a rule in the first place.

⁴²⁾ *State Farm*, 463 U.S. at 34.

⁴³⁾ *Id.* at 34: “The regulation whose rescission is at issue bears a complex and convoluted history. Over the course of approximately 60 rulemaking notices, the requirement has been imposed amended, rescinded, reimposed, and now rescinded again.”

⁴⁴⁾ *Id.* at 35.

⁴⁵⁾ *Id.* at 38.

safety benefits would not be realized.⁴⁷⁾ The Reagan Administration argued that since the passive belts could be detached by the automobile user, there was no longer a basis for predicting that the safety standard would lead to increased usage of passive restraints.⁴⁸⁾ The insurance industry challenged the National Highway Traffic Safety Administration's rescission of the safety rule.⁴⁹⁾

The Supreme Court, with Justice White writing for a 5-4 majority (concurring in part and dissenting in part),⁵⁰⁾ held that when an agency modifies or rescinds a previously promulgated rule, that agency is required to supply a "reasoned analysis" supporting its decision.⁵¹⁾ The Court explained that "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."⁵²⁾ Because the agency did not consider the alternative of requiring air-bags (earlier versions of the rule did mandate air-bags⁵³⁾) to meet the safety standard, the Court ruled that the agency's action was arbitrary and capricious.⁵⁴⁾

The *State Farm* rule is different from the rule in *Chevron*.⁵⁵⁾ Under *Chevron*, a court is asking whether a regulation is within the statutory authority granted by

⁴⁶⁾ *Id.* at 49: "For nearly a decade, the automobile industry waged the regulatory equivalent of war against the airbag and lost—the inflatable restraint was proven sufficiently effective."

⁴⁷⁾ *Id.* at 38.

⁴⁸⁾ *Id.* at 38-39.

⁴⁹⁾ *Id.* at 39

⁵⁰⁾ *Id.* at 57-59. Then-Justice Rehnquist, joined by Chief Justice Burger and Justices Powell and O'Connor dissented in part, arguing: "The agency's changed view of the standards seems to be related to the election of a new President of a different political party...A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations."

⁵¹⁾ *Id.* at 57.

⁵²⁾ *Id.* at 42.

⁵³⁾ *Id.* at 46: "Indeed, the agency's original proposed standard contemplated the installation of inflatable restraints [air-bags] in all cars."

⁵⁴⁾ *Id.* at 46: "The first and most obvious reason for finding the rescission arbitrary and capricious is that NHTSA apparently gave no consideration whatever to modifying the Standard to require that airbag technology be utilized."

⁵⁵⁾ William Funk, 27 Admin. & Reg. L. News 8-9 (Summer 2002)

Congress.⁵⁶⁾ *Chevron* reviews agency actions as a matter of statutory interpretation.⁵⁷⁾ By contrast, *State Farm* reviews a regulation on the basis of the rulemaking records “for its reasonableness in the sense of whether it will actually achieve its stated purpose.”⁵⁸⁾ As a result, although federal courts give administrative agencies substantial deference when promulgating a rule interpreting an ambiguous statute that the agency carries out, the rescission of a rule under *State Farm* requires federal courts to evaluate an agency’s action in light of the agencies’ previous analyses and conclusions.

III. Examples of Bush Administration Rulemaking Reversals

By analyzing cases involving rulemaking reversals by the Bush Administration, this section seeks to define *State Farm*’s “reasoned analysis” in the context of environmental and natural resources policy. The cases discussed involve the Bush Administration’s attempts to reverse policy on Clinton-era rules including 1) grazing regulations, 2) the Northwest Forest Plan’s “survey and manage” regulations, 3) limits on snowmobile use in Yellowstone and Grand Teton National Parks, and 4) the Roadless Area Conservation Rule (“Roadless Rule”).⁵⁹⁾

1. Grazing- *Western Watersheds Project v. Kraayenbrink*

In *Western Watersheds Project v. Kraayenbrink*,⁶⁰⁾ Judge Winmill of the District Court of Idaho heard environmental plaintiffs’ challenge to the Bush Administration’s revisions of the Clinton-era grazing rules. What follows is a

⁵⁶⁾ *Id.* at 8; *see also Chevron*, 467 U.S. at 842-43.

⁵⁷⁾ *Chevron*, 467 U.S. 842-43.

⁵⁸⁾ William Funk, 27 Admin. & Reg. L. News 8 (Summer 2002)

⁵⁹⁾ *Western Watersheds Project v. Kraayenbrink*, 538 F. Supp. 2d 1302 (D. Id. 2008); *Northwest Ecosystem Alliance v. Rey*, 380 F. Supp. 2d 1175 (W.D. Wash. 2005); *The Fund for Animals v. Norton*, 294 F. Supp. 2d 92 (D.D.C. 2003); *People ex rel. Lockyer v. U.S. Department of Agriculture*, 459 F. Supp. 2d 874 (N.D. Cal. 2006).

⁶⁰⁾ 538 F. Supp. 2d 1302.

discussion of the history of the rulemaking reversal that led to the plaintiffs' challenge and an analysis of the district court's opinion.

(1) History of the Rulemaking

Grazing affects an enormous amount of federal public land acreage.⁶¹⁾ Until the 1930's, the federal government's policy attempted to dispose of lands in the West to homesteaders, miners, and railroads.⁶²⁾ In 1934, Congress put the leftover lands that settlers did not homestead into grazing districts under the Taylor Grazing Act,⁶³⁾ signaling the end of the disposition era.⁶⁴⁾ However, increased livestock grazing resulted in a deleterious effect on the quality of the rangelands.⁶⁵⁾

During the Clinton Administration, the Bureau of Land Management (BLM) and the Forest Service sought to improve grazing management.⁶⁶⁾ BLM promulgated

⁶¹⁾ George C. Coggins, Charles F. Wilkinson, John D. Leshy, Robert L. Fischman, *Federal Public Land and Resources Law 767* (Foundation Press 6th ed. 2007): "Acre for acre, livestock grazing is in fact the most widespread extractive use of the federal lands, found on more than a *quarter of a billion acres*, or a land area 2½ times that of the state of California. It is concentrated... on about 158 million acres of federal lands managed by the BLM, almost all in the eleven western states of the lower forty-eight. About 18,000 permittees hold BLM-issued grazing leases and permits...Grazing is also an important use of some 100 million acres of the national forests..."; *emphasis in original*.

⁶²⁾ Robert L. Glicksman and George Cameron Coggins, *Modern Public Land Law in a Nutshell* 16 (Thompson/West 3rd ed. 2006).

⁶³⁾ 43 U.S.C. §§ 315-315r (2000).

⁶⁴⁾ Glicksman, *supra* note 63, at 2: "Homesteading of the 'public domain' ended for practical purposes with passage of the Taylor Grazing Act (TGA), 43 U.S.C. §§ 315-315r, in 1934. The federally owned lands that had neither been homesteaded nor reserved for federal conservation purposes were withdrawn into grazing districts..."

⁶⁵⁾ Coggins, *supra* note 62, at 769: "But heavy grazing use takes a toll, and today much of BLM's grazing lands bear little resemblance vegetatively to 'potential natural, or climax' plant communities. BLM's surveys of riparian-wetland areas show that only forty percent of the areas surveyed are in 'proper functioning condition.'"

⁶⁶⁾ *See Western Watersheds Project*, 538 F. Supp. 2d at 1306: "Almost 20 years later, the stewards of this rangeland-the BLM and Forest Service-jointly concluded that while '[t]he ecological condition on most uplands has improved[,]...many riparian areas continue to be degraded and are not functioning properly.'" [Administrative Record (AR)] at 68952. This situation caused 'several conservation groups [to] request that the Secretary of the Interior require BLM to improve its grazing administration by encouraging stewardship and designating ways to quickly improve the environment.' AR

new regulations in 1995.⁶⁷⁾ The regulations created the Fundamentals of Rangeland Health (FRH), which are a set of minimum ecological criteria for improving the health of rangelands.⁶⁸⁾ Additionally, the regulations increased public participation because BLM reasoned that increased public participation was essential to achieve long-term improvements in public land management.⁶⁹⁾ BLM also consulted with the U.S. Fish & Wildlife Service (FWS) under section 7 of the Endangered Species Act (ESA), resulting in a Biological Opinion which found it unlikely that the 1995 regulations would jeopardize listed species or result in destruction or adverse modification of critical habitat because FWS assumed the proposed regulations would be fully implemented.⁷⁰⁾

In 2002, the Bush Administration sought to revise the 1995 regulations.⁷¹⁾ The new regulations limited public participation of non-ranchers, allowed grazing permittees to share title to rangeland improvements, and extended deadlines for grazing reductions.⁷²⁾ BLM assembled an interdisciplinary team of experts which reviewed BLM's proposed changes.⁷³⁾ This team recommended that changes to the public participation provisions would have negative impacts on the rangeland because decreased public participation would lead to poorer management decisions.⁷⁴⁾ However, BLM did not alter the proposed regulations.⁷⁵⁾ A second

at 68952.”

⁶⁷⁾ Department Hearings and Appeals Procedures; Cooperative Relations; Grazing Administration—Exclusive of Alaska, 60 Fed. Reg. 9894 (Feb. 22, 1995) (later codified at 43 C.F.R. Parts 1780 and 4100).

⁶⁸⁾ *Western Watersheds Project*, 538 F. Supp. 2d at 1306.

⁶⁹⁾ *Id.*

⁷⁰⁾ *Id.*

⁷¹⁾ *Id.* at 1306-1309.

⁷²⁾ *Id.* at 1309-11.

⁷³⁾ *Id.* at 1307.

⁷⁴⁾ *Id.*: “The team’s report dated November 29, 2002, predicted that the limitations on public input would ‘lead to poorer land management decisions’ and to ‘greater environmental harm, without necessarily sustaining or improving economic conditions.’ AR at 67849. Based on these findings, the team recommended that ‘the definition of interested public be changed to specifically allow for broader public participation...’”

⁷⁵⁾ *Id.*: “The BLM decided not to alter the proposed changes, and published a Federal Register notice on March 3, 2003, setting forth the proposed rules and inviting comments.”

interdisciplinary team⁷⁶⁾ reviewed the proposed rule in 2003, concluding that the new regulations would have adverse effects on wildlife, biological diversity, upland and riparian habitats.⁷⁷⁾ BLM circulated this administrative review copy draft Environmental Impact Statement (EIS) report internally, allowing only a few days for agency review.⁷⁸⁾

On December 8, 2003, BLM published the proposed regulations without a draft EIS.⁷⁹⁾ BLM finally published the draft EIS a month later.⁸⁰⁾ In the draft EIS, BLM substantially re-wrote, without comment, the second interdisciplinary team's conclusions that the proposed changes would have adverse effects on wildlife, biodiversity, and riparian habitats.⁸¹⁾ The draft EIS also rewrote the interdisciplinary team's conclusion that changes in the ownership of range improvements would have long-term impacts on wildlife and instead stated that the changes would have little or no impact.⁸²⁾ Additionally, the draft EIS removed the interdisciplinary team's conclusion that BLM had insufficient funding and personnel to adequately monitor grazing.⁸³⁾ In July 2005, BLM issued a final EIS.⁸⁴⁾ Eight months later, BLM issued an addendum to the final EIS.⁸⁵⁾ Although this addendum discussed the interdisciplinary team's review of the proposed rule, the addendum did not

⁷⁶⁾ *Id.* The interdisciplinary team included a BLM fisheries biologist, a BLM wildlife biologist, a BLM hydrologist, a soils scientist and "other specialists in economics, fuels/fire, recreation, wild horses, and archeology."

⁷⁷⁾ *Id.*

⁷⁸⁾ *Id.* at 1308: "The BLM set November 28th-just 11 days after the [administrative review copy draft EIS] ARC-DEIS was issued-as the deadline for internal comments...Before this small team was even done reviewing the ARC-DEIS, the BLM published the proposed regulation on December 8, 2003."

⁷⁹⁾ *Id.*

⁸⁰⁾ *Id.*

⁸¹⁾ *Id.*

⁸²⁾ *Id.*: "As another example, the ARC-DEIS's conclusion that ownership of water rights or range improvements will greatly diminish the BLM's ability to regulate grazing and have long-term impacts on wildlife was re-written to state that the changes in ownership would have little or no impact...Neither the DEIS nor the FEIS contained any explanation of these changes."

⁸³⁾ *Id.*

⁸⁴⁾ *Id.*

⁸⁵⁾ *Id.*

refute the major criticisms contained in the interdisciplinary team’s review.⁸⁶⁾ Instead, BLM stated that it changed the interdisciplinary team’s conclusions “to correct erroneous interpretations of the proposed rule, correct misstatements of law, and improve its logic.”⁸⁷⁾ BLM issued the final rule in 2006.⁸⁸⁾

(2) District Court of Idaho—Judge B. Lynn Winmill’s Opinion

In *Western Watersheds Project v. Kraayenbrink*,⁸⁹⁾ environmental plaintiffs challenged the Bush Administration’s revisions to the grazing regulations under the National Environmental Policy Act (NEPA), the Federal Land Policy and Management Act (FLPMA), and the ESA arguing that BLM did not take a “hard look” at the environmental impacts of the proposed rule, BLM did not disclose and discuss opposing viewpoints, and BLM did not adequately explain why the agency reversed its prior determinations.⁹⁰⁾ Judge Winmill began his opinion by noting that “[w]ithout any showing of improvement, the new BLM regulations loosen restrictions on grazing.”⁹¹⁾ He also noted that the grazing industry, not BLM, first proposed the changes.⁹²⁾ Because the court found that BLM’s rule change violated NEPA, FLPMA and the ESA, the court enjoined operation of the new regulations until BLM consulted with FWS under the ESA and completed a “hard look” analysis under NEPA.⁹³⁾ BLM did not appeal the case.

The new rule made two changes in the public participation process: 1) BLM

⁸⁶⁾ *Id.* (noting that there was little or no explanation as to why the criticisms contained of the interdisciplinary team were deleted).

⁸⁷⁾ *Id.*

⁸⁸⁾ *Id.* at 1309: “BLM issues its Final Rule and Record of Decision (ROD)... on July 12, 2006.”

⁸⁹⁾ 538 F. Supp. 2d 1302 (D. Id. 2008).

⁹⁰⁾ *See generally* Complaint for Injunctive and Declaratory Relief, 2005 WL 2182737 (D. Id. July 21, 2005).

⁹¹⁾ *Western Watersheds Project*, 538 F. Supp. 2d at 1305; (*emphasis added*).

⁹²⁾ *Id.* at 1305: “While the BLM justifies the changes as making it more efficient, the BLM was not their originator--it was the grazing industry and its supporters that first proposed them. Certainly the industry has a vital interest in being regulated efficiently, but the new regulations reach far beyond that prosaic purpose.”

⁹³⁾ *Id.* at 1324.

changed the definition of “interested parties” from one that allowed an individual or group to be involved in specific grazing allotment decisions if they submitted a written request, to a definition that dropped a group from the list if the group received notice but did not comment;⁹⁴⁾ and 2) BLM narrowed its duty to consult, cooperate, and coordinate with interested members of the public, eliminating public consultation in decisions involving boundary adjustments, changes in active use, emergency closures, permit issuance and renewal, and temporary permit issuance.⁹⁵⁾ Concerning plaintiffs’ NEPA claims, the court’s analysis focused primarily on contradictions in the record by BLM, and whether BLM took a “hard look” as to why public participation should be more limited.⁹⁶⁾ BLM presented economic costs of maintaining a list of the interested public as one reason for the rule change.⁹⁷⁾ However, the agency did not offer any specifics as to the costs incurred through mailing notices to the interested public.⁹⁸⁾ BLM argued the agency relaxed the rule in part because of costs, but BLM admitted in the final EIS that this would only result in “some *minor* administrative cost savings.”⁹⁹⁾ The court concluded that BLM failed to show how the changes in public participation would save on costs because BLM’s analysis only contained a “contradictory and vague discussion” of the issue.¹⁰⁰⁾

BLM’s final EIS offered administrative efficiency as another reason for relaxing the prior grazing regulations because public involvement in routine decisions often produced inefficient results and could even delay the agency’s management response.¹⁰¹⁾ The 1995 grazing regulations observed that the greater the public

⁹⁴⁾ *Id.* at 1309.

⁹⁵⁾ *Id.*: “For these matters, an interested public would be cut out of the discussions between the BLM and the ranchers at the formulation stage of decisions.”

⁹⁶⁾ *Id.* at 1312-13.

⁹⁷⁾ *Id.* at 1312: specifically the “cost of maintaining a list of ‘interested public’ that must get ‘periodic mailings at taxpayer expense’ but have not participated...in years.”

⁹⁸⁾ *Id.* at 1313.

⁹⁹⁾ *Id.*; *emphasis in original.*

¹⁰⁰⁾ *Id.*

¹⁰¹⁾ *Id.*: “BLM believes that in-depth involvement of the public in day-to-day management decisions is neither warranted nor administratively efficient and can in fact delay BLM remedial response actions necessitated by resource conditions.”

participation in the formulation of grazing management decisions, the less chance that the public would appeal.¹⁰²⁾ However, in the new rule's final EIS, the agency did not provide any explanation as to why BLM previously noted the usefulness of public participation, but now attempted to limit such participation.¹⁰³⁾ As a result, the court noted that BLM's EIS did not contain the "reasoned analysis" required under *State Farm* to change course.¹⁰⁴⁾ As discussed further, the Bush Administration's failure to explain why its less-environmentally protective policy should reverse an earlier administration's more-stringent regulations is a hallmark of its failure to substantially reverse the previous administration's rules. Here, the BLM made no attempt to explain its policy change.

BLM's own experts contradicted the agency's analysis on the changes to the Fundamentals of Rangeland Health and ownership of range improvements' provisions of the new rule, further troubling the court.¹⁰⁵⁾ BLM experts found that the new regulations would have "slow long-term adverse effect[s]" on wildlife and would lead to a continued decline in both upland and riparian habitats.¹⁰⁶⁾ The court found no evidence that BLM considered these "substantial criticisms" by BLM's interdisciplinary review team before publishing the rule change.¹⁰⁷⁾ The addendum published after the final EIS discussed some of the concerns raised by this team,¹⁰⁸⁾ but the court viewed this discussion skeptically both for its timing¹⁰⁹⁾ and its limited discussion of BLM's own criticisms of the new rule.¹¹⁰⁾ The court

¹⁰²⁾ *Id.*; citing 60 Fed. Reg. at 9924.

¹⁰³⁾ *Western Watersheds Project*, 538 F. Supp. 2d at 1313; citing *State Farm*, 463 U.S. at 42: "The required 'reasoned analysis' for changing course on public input is entirely missing. There is no detailed discussion of either the volume or quality of comments the BLM receives on day-to-day issues."

¹⁰⁴⁾ *Western Watersheds Project*, 538 F. Supp. 2d at 1313.

¹⁰⁵⁾ *Id.* at 1316.

¹⁰⁶⁾ *Id.*

¹⁰⁷⁾ *Id.* BLM published the rule change only three weeks after BLM's experts issued the report which concluded that the new rule's changes to the Fundamentals of Rangeland Health and allowing ownership of rangeland improvements would have adverse effects both on wildlife and riparian areas.

¹⁰⁸⁾ *Id.*: "...the Addendum's discussion of the ARC-DEIS only identifies minor inaccuracies and is buried deep in the Addendum, almost as an aside."

¹⁰⁹⁾ BLM published the addendum after the Final EIS.

concluded that because BLM did not reveal the conflict among its experts until after the public comment period closed, then the changes to the Fundamentals of Rangeland Health and ownership of range improvements' provisions violated NEPA because BLM did not take the required "hard look" at its own experts' criticisms of the rule change.¹¹¹⁾

The new regulations allowed for delays in addressing grazing abuses in three ways: 1) the rule extended the deadline for correcting violations of the Fundamentals of Rangeland Health; 2) reductions in grazing now required review of monitoring data; and 3) the rule granted a five year extension for the phase-in of grazing reductions.¹¹²⁾ Again, BLM's own experts warned that such delays and reduced monitoring could have a "significant and long-term adverse effect" upon wildlife, biodiversity and special status species.¹¹³⁾ The court noted that the while 1995 regulations were designed to protect against grazing damage and delays in correcting abuses, the new rule promoted delay.¹¹⁴⁾ The court concluded that BLM violated NEPA because the BLM's NEPA analysis failed to analyze the combined effects of the revisions which promoted delay and failed to explain the reasons for changing course.¹¹⁵⁾ In addition, the court concluded, for the same reasons, that

¹¹⁰⁾ *Id.*: "Most importantly, however, the Addendum never refuted the more substantive criticisms of the ARC-DEIS. The BLM's failure to explain itself in the DEIS and FEIS deprived the public of its ability to comment on the BLM's reasoning process."

¹¹¹⁾ *Id.* at 1317.

¹¹²⁾ *Id.*: "(1) The deadline for correcting FRH violations is extended; (2) Grazing reductions generally cannot be based entirely on a standards assessment, but must await review of monitoring data; and (3) The phase-in time for grazing reductions is extended to 5 years."

¹¹³⁾ *Id.*

¹¹⁴⁾ *Id.* at 1319.

¹¹⁵⁾ *Id.*: "Perhaps all these figures overestimate actual grazing damage on the ground. Perhaps riparian conditions are improving so that delay in correcting grazing abuses is inconsequential. Perhaps the BLM needs delay to obtain more reliable data and thereby avoid past mistakes where it unfairly imposed grazing reductions. Any one of these rationales--or something akin to them--could support the BLM's decision to write delays into the revised regulations. However nothing like them has been advanced by BLM, with support in the Administrative Record, as a justification for the new rules. There is no supporting documentation or analysis in the FEIS indentifying past mistaken assessments based on unreliable data, or describing improvements in riparian conditions."

the revisions resulting in delay violated FLPMA.¹¹⁶⁾

The court also took issue with BLM's decision not to consult under the ESA.¹¹⁷⁾ In the prior 1995 regulations, BLM formally consulted with FWS under the ESA, which concluded that the regulations were not likely to jeopardize listed species or result in destruction or adverse modification of critical habitat because FWS assumed the proposed regulations would be fully implemented.¹¹⁸⁾ In the 2006 rule, FWS disagreed with BLM's decision not to consult because of adverse effects on wildlife resources¹¹⁹⁾ and because the 1995 rule's biological opinion assumed that the earlier standards would be fully implemented.¹²⁰⁾ The court held that because BLM's new rule "may affect" threatened or endangered species, BLM's failure to consult was arbitrary and capricious.¹²¹⁾

2. Forestry- *Northwest Ecosystem Alliance v. Rey*

In *Northwest Ecosystem Alliance v. Rey*,¹²²⁾ Judge Pechman of the District Court for the Western District of Washington heard environmental plaintiffs' challenge to the Bush Administration's decision to eliminate the "survey and manage" standards from the Northwest Forest Plan. What follows is a discussion of the history of the rulemaking reversal that led to the plaintiffs' challenge and an analysis of the district court's opinion.

(1) History of the Rulemaking

¹¹⁶⁾ *Id.*

¹¹⁷⁾ *Id.* at 1319-1324. BLM argued that the rule change was largely administrative and thus ESA consultation was not necessary.

¹¹⁸⁾ *Id.* at 1320.

¹¹⁹⁾ *Id.*: "We believe the proposed revisions would fundamentally change the way BLM lands are managed temporarily, spatially, and philosophically. These changes could have profound impacts on wildlife resources."

¹²⁰⁾ *Id.* at 1321: "It is important to recall here that when the FWS signed-off on the 1995 regulations in its [Biological Opinion (BO)], the FWS assumed that the FRH standards would be fully implemented. Now, not only is the FWS not consulted, but the revisions dispense with the FRH standards..."

¹²¹⁾ *Id.* at 1322-23.

¹²²⁾ 380 F. Supp. 2d 1175.

The Northwest Forest Plan grew out of a conflict between timber production and the Endangered Species Act on federal forest lands in the Pacific Northwest.¹²³⁾ The plan required the Forest Service and BLM to manage the forests of Washington, Oregon, and Northern California in order to protect old-growth forests and the species dependant upon them while at the same time allowing for timber harvest and other management activities.¹²⁴⁾ A district court upheld the Northwest Forest Plan in 1994.¹²⁵⁾

The plan's "survey and manage" standards are mitigation measures designed to increase habitat protection under the Northwest Forest Plan.¹²⁶⁾ The standards require the Forest Service and BLM to "1) manage known sites of certain species; 2) conduct surveys prior to ground-disturbing activities; 3) conduct extensive surveys to find high priority sites for hard-to-find species; and 4) conduct general regional surveys to gain information about poorly known species."¹²⁷⁾ The "survey and manage" standards originally required the monitoring of approximately 400 species.¹²⁸⁾

In 2000, the Clinton Departments of Agriculture and Interior evaluated the "survey and manage" standards and amended certain provisions to streamline implementation, including the removal of 72 species from the program.¹²⁹⁾ In 2001, the timber industry challenged the Clinton record of decision, and the Bush Departments of Agriculture and Interior entered into a settlement agreement in March of 2002 requiring the agencies to consider elimination of the "survey and

¹²³⁾ Coggins, *supra* note 62, at 753-54: "The Northwest Forest Plan, the most ambitious exercise in ecosystem management yet undertaken and perhaps the most prominent controversy ever to emerge under the ESA, was born in efforts to protect the northern spotted owl...The Forest Service has traditionally produced about half of the total timber harvest in the National Forest System from the forests of Oregon and Washington."

¹²⁴⁾ *Northwest Ecosystem Alliance*, 380 F. Supp. 2d at 1182.

¹²⁵⁾ *Seattle Audubon Society v. Lyons*, 871 F. Supp. 1291 (W.D. Wash. 1994), *aff'd sub nom.* *Seattle Audubon Society v. Moseley*, 80 F.3d 1401 (9th Cir. 1996).

¹²⁶⁾ *Northwest Ecosystem Alliance*, 380 F. Supp. 2d at 1182.

¹²⁷⁾ *Id.* at 1182-83.

¹²⁸⁾ *Id.* at 1183.

¹²⁹⁾ *Id.*

manage” standards in a supplemental EIS.¹³⁰⁾

(2) Western District of Washington—Judge Marsha J. Pechman’s Opinion

In *Northwest Ecosystem Alliance v. Rey*,¹³¹⁾ environmental plaintiffs challenged the Department of Agriculture and Interior’s elimination of the “survey and manage” regulations from the Northwest Forest Plan under NEPA, FLPMA, and the National Forest Management Act (NFMA). Plaintiffs argued that defendants did not analyze a reasonable range of alternatives under NEPA, that defendants did not analyze the environmental impacts if species were not protected under the Forest Service and BLM’s own special species status programs, and that the agencies’ elimination of the regulations violated NFMA’s diversity mandate.¹³²⁾ Judge Pechman ruled for the plaintiffs because of the agencies’ failure to analyze the adverse effects that removing the regulations would have on “survey and manage” species.¹³³⁾

The Forest Service and BLM’s NEPA analysis assumed that after the elimination of the “survey and manage” standards the agencies own species protection programs¹³⁴⁾ (which seek to avoid actions that lead to a species being listed under the ESA), would apply to most of the “survey and manage” species.¹³⁵⁾ However, in the supplemental EIS the agencies acknowledged that regional

¹³⁰⁾ *Id.*; see also *Douglas Timber Operators v. Rey*, No. 01-6378-AA (D. Or.); see also Michael C. Blumm, *The Bush Administration’s Sweetheart Settlement Policy: A Trojan Horse Strategy for Advancing Commodity Production on Public Lands*, 34 *Environmental Law Reporter* 10397, 10412 (May 2004).

¹³¹⁾ 380 F.Supp. 2d 1175.

¹³²⁾ See generally *Complaint for Declaratory and Injunctive Relief*, 2004 WL 2976334 (W.D. Wash. April 30, 2004).

¹³³⁾ *Northwest Ecosystem Alliance*, 380 F. Supp. 2d at 1181: “Defendants failed to analyze potential impacts to Survey and Manage species if they are not added to or are removed from the Forest Service’s or BLM’s respective programs for special status species. Defendants failed to provide a thorough analysis of their assumption that the late-successional reserves would adequately protect species that the Survey and Manage standard was introduced to protect, particularly in light of their previous position in earlier environmental impact statements.”

¹³⁴⁾ *Id.* at 1183.

¹³⁵⁾ *Id.*

land management officers had not used their authority to add species to these programs.¹³⁶⁾ Plaintiffs argued that the agencies proposed to eliminate the “survey and manage” standards, in part, because species protected by those standards would remain protected under the agencies’ separate programs.¹³⁷⁾ But because protecting species through these programs is discretionary, the supplemental EIS should have analyzed the effects if the agencies did not add species to these programs.¹³⁸⁾ The court concluded that while an EIS cannot mandate the outcome that species be protected under the agencies’ special status species programs, the agencies should inform the public of the environmental effects on these species if the agencies did not include them in these programs.¹³⁹⁾

The Forest Service and BLM’s NEPA analysis also assumed that late-successional forest reserves would adequately protect “survey and manage” species.¹⁴⁰⁾ But the plaintiffs argued that the agencies’ own analysis in both 1994 and 2000 found these forest reserves in a degraded condition, and that the agencies adopted the “survey and manage” standards “precisely to mitigate this problem.”¹⁴¹⁾ In the 2000 supplemental EIS, the agencies stated that no other feasible alternative to the “survey and manage” standards existed that would satisfy the objectives of the Northwest Forest Plan, but that the agencies would continue to acquire new information to increase efficiency and maybe fundamentally shift policy (i.e., eliminate “survey and manage”) in the future.¹⁴²⁾ In the 2004 rule change, the agencies classified increased wildfires and information gained from the years of surveys as the “new information” that justified eliminating the “survey

¹³⁶⁾ *Id.* at 1189: “Species are added to these programs at the discretion of the Regional Foresters and State Directors within the Forest Service and BLM respectively.”

¹³⁷⁾ *Id.* at 1190.

¹³⁸⁾ *Id.*

¹³⁹⁾ *Id.*

¹⁴⁰⁾ *Id.* at 1190: “In its analysis of the environmental consequences of elimination the Survey and Manage standard, the 2004 SEIS claim that most species associated with late-successional and old-growth [habitat] will likely be adequately protected by the Reserve system given that 80% of the Plan area and 86% of late-successional and old-growth forests are in the Reserves.”

¹⁴¹⁾ *Id.* at 1191.

¹⁴²⁾ *Id.* at 1192.

and manage” standards.¹⁴³⁾

The court stated that this “new information” did not address whether conditions had changed in order to show that “survey and manage” standards were no longer needed.¹⁴⁴⁾ The agencies also argued that they have discretion to change policy to carry out the goals of the Northwest Forest Plan.¹⁴⁵⁾ The court concluded that “[w]hile true, this misses the point” because the agencies’ NEPA analysis was inconsistent with its prior analysis that “survey and manage” standards were adopted, in part, to address the degraded condition of the forest reserves.¹⁴⁶⁾ Instead, NEPA required the Forest Service and BLM to explain why the agencies previously thought that the “survey and manage” standards were necessary but now assumed the standard was no longer necessary.¹⁴⁷⁾

3. Snowmobiles- The Fund for Animals v. Norton

In *The Fund for Animals v. Norton*,¹⁴⁸⁾ Judge Sullivan of the District Court for the District of Columbia heard environmental plaintiffs’ challenge to the Bush Administration’s plan to replace the Clinton Administration’s ban on snowmobiles in Yellowstone and Grand Teton National Parks with a winter-use plan that allowed up to 950 snowmobiles to enter the parks each day. What follows is a discussion of the history of the rulemaking reversal that led to the plaintiffs’ challenge and an analysis of the district court’s opinion.

(1) History of the Rulemaking

¹⁴³⁾ *Id.*: “None of this information addresses whether conditions have changed such that the Survey and Manage standard is no longer a necessary part of the overall management of these species.”

¹⁴⁴⁾ *Id.*

¹⁴⁵⁾ *Id.*: “Counsel also argued that apart from this more general new information, the Agencies have the discretion to change their opinion about the best way to balance the Plan’s two goals.”

¹⁴⁶⁾ *Id.*

¹⁴⁷⁾ *Id.*

¹⁴⁸⁾ 294 F. Supp. 2d 92.

Motorized recreation has increased dramatically in the last century, producing new management issues on public lands.¹⁴⁹⁾ For example, the National Park Service (NPS) first permitted snowmobile use in 1963;¹⁵⁰⁾ by 1968, the NPS began implementing winter-use policies to respond to concerns about the effects of snowmobiling.¹⁵¹⁾ In 1997, the Department of Interior settled a lawsuit against the NPS for violations of NEPA and the ESA stemming from the killing of over 1,000 bison that migrated out of Yellowstone National Park along groomed snowmobile routes.¹⁵²⁾ The settlement required the NPS to prepare an EIS on winter-use and to consider the effects of snowmobiling and trail grooming in Yellowstone and Grand Teton National Parks.¹⁵³⁾ In late 2000, the NPS's final EIS called for the elimination of snowmobile use in favor of multi-passenger snowcoaches, with the NPS completely eliminating snowmobile use by the winter of 2003-2004.¹⁵⁴⁾

In January 2001, the Clinton Administration published the snowcoach rule, and the Bush Administration immediately stayed the rule pending a review.¹⁵⁵⁾ Snowmobiling interests challenged the Clinton rule, and in June of 2001 the NPS reached a settlement calling for a supplemental EIS (SEIS) to consider and publicly disclose data on new snowmobile technologies.¹⁵⁶⁾ In 2003, the Bush Administration's final SEIS and record of decision allowed 950 snowmobiles to enter the Yellowstone and Grand Teton National Parks each day.¹⁵⁷⁾

¹⁴⁹⁾ See Coggins, *supra* note 62, at 983: "Technological innovations continue to lead to new recreational stresses and controversies on federal lands; in the last few years, attention has turned to the snowmobile...."

¹⁵⁰⁾ *Fund for Animals*, 294 F. Supp. at 98.

¹⁵¹⁾ *Id.*

¹⁵²⁾ *Id.* at 99.

¹⁵³⁾ *Id.*

¹⁵⁴⁾ *Id.* at 100: "In December of 2000, the Park Service issued a Proposed Rule, which capped snowmobile use in the winters of 2001-02 and 2002-03, and completely eliminated snowmobile use by the 2003-2004 winter season."

¹⁵⁵⁾ *Id.* at 100; *citing* Final Rule, Delay of Effective Date, 66 Fed. Reg. 8,366 (Jan. 31, 2001).

¹⁵⁶⁾ *Id.* at 100-101.

¹⁵⁷⁾ *Id.* at 101.

(2) District Court for the District of Columbia—Judge Emmet G. Sullivan’s Opinion

In *Fund for Animals v. Norton*,¹⁵⁸⁾ environmental and animal rights plaintiffs¹⁵⁹⁾ challenged the Park Service’s decision to allow up to 950 snowmobiles to enter Yellowstone and Grand Teton National Parks under NEPA and the Administrative Procedure Act (APA).¹⁶⁰⁾ Plaintiffs claimed that snowmobiling and trail grooming caused adverse effects including air and noise pollution, threats to wildlife, and adverse health effects on visitors and park employees.¹⁶¹⁾ Plaintiffs further argued that the Park Service’s decision to allow trail grooming and snowmobile use ran counter to the data before the agency in violation of the APA.¹⁶²⁾

Judge Sullivan began his discussion by noting that the agency decision to allow increased snowmobile amounted to a “180 degree reversal” from the previous administration because the Clinton Snowcoach Rule explicitly cited the negative environmental effects that snowmobiles had on the parks.¹⁶³⁾ Such a “dramatic change in course” triggered the responsibility for the NPS to supply a “reasoned analysis” for the change.¹⁶⁴⁾ Judge Sullivan noted that although the Clinton Rule was not longstanding, the rulemaking was “lengthy, complex, and complete,” and involved almost a decade of study.¹⁶⁵⁾ As a result, *State Farm* required the NPS

¹⁵⁸⁾ 294 F. Supp. 2d 92.

¹⁵⁹⁾ Greater Yellowstone Coalition brought the action on behalf of its members and the National Parks Conservation Association, The Wilderness Society, the Natural Resources Defense Council, the Winter Wildlands Alliance, and the Sierra Club. The Fund for Animals brought the action of behalf of its members and the Bluewater Network, the Ecology Center, and four individual plaintiffs.

¹⁶⁰⁾ *Id.* at 96-97

¹⁶¹⁾ *Id.* at 97.

¹⁶²⁾ *Id.*

¹⁶³⁾ *Id.* at 105: “The 2001 Snowcoach Rule, explicitly citing the negative environmental impacts of snowmobiling on the resources and wildlife of the National Parks, mandated that snowmobiling be phased out in favor of snowcoaches. Three years later, at the exact time this phase-out was to be complete, the Court now reviews a newly promulgated rule which allows 950 snowmobiles to enter the Parks each day.”

¹⁶⁴⁾ *Id.*; citing *State Farm*, 463 U.S. at 41; see also *Amox Land Co. v. Quarterman*, 181 F.3d 1356, 1365 (D.C.Cir. 1999) (adopting the *State Farm* rationale).

¹⁶⁵⁾ *Fund for Animals*, 294 F. Supp. 2d at 105.

to fully explain and provide evidence supporting the need for changing course from a ban on snowmobile use to a rule allowing up to 950 snowmobiles to enter Yellowstone and Grand Teton National Parks each day.¹⁶⁶⁾

Evaluating the NPS's explanation for the change in policy, Judge Sullivan found several areas lacking the required analysis. The Clinton rule acknowledged "overall adverse impacts" related to snowmobile use within the parks which adversely affect "wildlife, air quality, and natural soundscapes and natural odors."¹⁶⁷⁾ The Park Service concluded that the easiest way to eliminate these adverse impacts was to eliminate snowmobile use.¹⁶⁸⁾ However, in the 2003 rule, the Bush Administration decided to allow 950 snowmobiles to enter the parks each day, primarily because of quieter and cleaner technology.¹⁶⁹⁾ Judge Sullivan noted that the Clinton rule "explicitly considered...and just as explicitly rejected" improved technology as a means of reducing the adverse impacts.¹⁷⁰⁾ Additionally, the Environmental Protection Agency (EPA), in comments evaluating the technology projections of both the Clinton Administration's rule and the Bush Administration's rule, concluded that "even with new technology, a phase-out of snowmobile use is still necessary."¹⁷¹⁾ The NPS also attempted to mitigate the impact of snowmobile use by using guided group tours to limit interactions with wildlife.¹⁷²⁾ However, Judge Sullivan found these mitigation measures flawed in that they did not actually

¹⁶⁶⁾ *Id.*; citing *State Farm*, 463 U.S. at 41-43.

¹⁶⁷⁾ *Fund for Animals*, 294 F. Supp. 2d at 106; citing Record of Decision; Winter Use Plans for the Yellowstone and Grand Teton National Parks and John D. Rockefeller Jr. Memorial Parkway, 65 Fed. Reg. 80,908, 80,915 (Dec. 22, 2000).

¹⁶⁸⁾ *Fund for Animals*, 294 F. Supp. 2d at 106; citing 65 Red. Reg. at 80,915.

¹⁶⁹⁾ *Id.* at 106: "Defendants have continually explained that the decision to now allow snowmobiling is based on the availability of 'cleaner, quieter snowmobiles,' largely due to the transition from two-stroke snowmobiles to four-stroke snowmobiles and the implementation of Best Available Technology ("BAT") requirements."

¹⁷⁰⁾ *Id.*: citing Special Regulations, Areas of the National Park System, 66 Fed. Reg. 7,260 (Jan. 22, 2001): "Some newer snowmobiles have promise for reducing some impacts, but not enough for the use of large numbers of those machines to be consistent with the applicable legal requirements. Cleaner, quieter snowmobiles would do little, if anything, to reduce the most serious impacts on wildlife."

¹⁷¹⁾ *Id.* at 107.

¹⁷²⁾ *Id.*

require group tours and instead still allowed solo travel.¹⁷³⁾

Judge Sullivan noted that there was a large gap between the Clinton Administration rule and the Bush Administration rule because the Clinton rule reasoned that snowmobile use “adversely impacted” wildlife and park resources to such a degree that snowmobiles should be banned while the Bush rule allowed “nearly one thousand snowmobiles” each day.¹⁷⁴⁾ The court focused on the Organic Act’s¹⁷⁵⁾ “clear conservation mandate” and the “previous conclusion that snowmobile use amounted to unlawful impairment” to come to the conclusion that the agency had not adequately explained the rule change.¹⁷⁶⁾ As a result, the court remanded the rule.¹⁷⁷⁾

The Bush Administration made several ensuing attempts to allow increased snowmobile use in Yellowstone.¹⁷⁸⁾ In the fall of 2008, Judge Sullivan held that the NPS winter-use plan allowing 540 snowmobiles per day was arbitrary and capricious and violated the NPS Organic Act because the Park Service could not explain in the rule why the “major adverse impacts” caused by increased

¹⁷³⁾ *Id.*: “Further, the requirements that snowmobilers travel in groups, under the theory that this will lessen interaction with wildlife, is essentially eliminated in the 2003 Final Rule, as the ‘group’ size is defined as ‘1-11 snowmobiles.’ 68 Fed. Reg. at 69,275. Thus, the Rule continues to allow for snowmobilers to travel alone, thereby eliminating the benefit of ‘group’ travel. Finally, the Final Rule acknowledges the inherent flaws in a tour-guide system, nothing that, even between passengers on the same machine, it is “very difficult if not impossible to communicate with the driver over the noise of a snowmobile. 68 Fed. Reg. at 69,275.”

¹⁷⁴⁾ *Id.* at 107-108: “In 2001, the rulemaking process culminated in a finding that snowmobiling so adversely impacted the wildlife and resources of the Parks that all snowmobile use must be halted. A scant three years later, the rulemaking process culminated in the conclusion that nearly one thousand snowmobiles will be allowed to enter the park each day.”

¹⁷⁵⁾ 16 U.S.C. §1 (2000).

¹⁷⁶⁾ *Fund for Animals*, 294 F. Supp. 2d at 108: “NPS’s explanation that technological improvements and mitigation measures justify this change has, as noted above, proven weak at best.”

¹⁷⁷⁾ *Id.* at 108.

¹⁷⁸⁾ *See generally* Special Regulations; Area of the National Park System, 69 Fed. Reg. 65,348 (Nov. 10, 2004); Winter Use Plans, Environmental Impact Statement, Yellowstone and Grand Teton National Parks and the John D. Rockefeller, Jr., Memorial Parkway, Wyoming, Montana, and Idaho, 70 Fed. Reg. 36,656 (Jun. 24, 2005); Special Regulations; Area of the National Park System, 72 Fed. Reg. 70,781 (Dec. 13, 2007).

snowmobile use were necessary to fulfill park purposes.¹⁷⁹⁾ In November 2008, the Park Service published a proposed rule which would allow as many as 318 snowmobiles in Yellowstone National Park.¹⁸⁰⁾ However, on November 7, 2008, Judge Brimmer of the District Court of Wyoming directed the NPS to reinstate a 2004 rule which allowed up to 720 snowmobiles to enter Yellowstone each day.¹⁸¹⁾

4. Roadless Rule- *People ex rel. Lockyer v. U.S. Department of Agriculture*

In *People ex rel. Lockyer v. U.S. Dept. of Agriculture*,¹⁸²⁾ U.S. Magistrate Judge Laporte of the Northern District of California heard environmental plaintiffs' challenge to the Bush Administration's rescission of the Clinton-era Roadless Rule in favor of the State Petitions Rule. What follows is a discussion of the history of the rulemaking reversal that led to the plaintiffs' challenge and an analysis of the district court's opinion.

(1) History of the Rulemaking

In 2001, the Clinton Administration enacted the Roadless Rule, which prohibited

¹⁷⁹⁾ See *Greater Yellowstone Coalition v. Kempthorne*, 577 F. Supp.2d 183, 209, 210 (D.D.C. 2008): "[t]he Court finds that the Winter Use Plan, as codified in the Final Rule and explained in the 2007 ROD, is arbitrary and capricious, unsupported by the record, and contrary to law. In contravention of the Organic Act, the Plan clearly elevates use over conservation of park resources and values and fails to articulate why the Plan's 'major adverse impacts' are 'necessary and appropriate to fulfill the purposes of the park.' NPS Policies §1.4.3. NPS fails to explain how increasing snowmobile usage over current conditions, where adaptive management thresholds are already being exceeded, complies with the conservation mandate of the Organic Act. In violation of the APA, NPS also fails to provide a rational explanation for the source of the 540 snowmobile limit."

¹⁸⁰⁾ See generally *Special Regulations; Area of the National Park System*, 73 Fed. Reg. 65,784 (Nov. 5, 2008); see also *New Proposal on Snowmobiles in Yellowstone*, New York Times A17 (November 3, 2008).

¹⁸¹⁾ See generally *Order Implementing Temporary Remedy and Granting Motion to Intervene* (D. Wy., Nov. 7, 2008), available at <http://www.nps.gov/yell/planyourvisit/winteruse.htm> (last accessed April 29, 2009).

¹⁸²⁾ 459 F. Supp. 2d 874.

timber harvesting (except for stewardship purposes) and road construction in inventoried roadless areas.¹⁸³⁾ The Forest Service completed an EIS under NEPA and a biological evaluation under the ESA, in which both the FWS and the National Marine Fisheries Service (NFMS) concurred that the Roadless Rule would not likely adversely affect threatened or endangered species.¹⁸⁴⁾

A coalition of state, tribal, and recreation plaintiffs challenged the Roadless Rule in early 2001. In May of 2001, the District Court of Idaho issued a preliminary injunction against the implementation of the rule.¹⁸⁵⁾ Environmental interveners appealed to the Ninth Circuit.¹⁸⁶⁾ The Ninth Circuit reversed the injunction because the plaintiffs failed to establish a strong likelihood of success on the merits of their NEPA claim.¹⁸⁷⁾ In July of 2003, Judge Brimmer of the District of Wyoming struck down the Roadless Rule for failing to comply with NEPA and for violations of the Wilderness Act.¹⁸⁸⁾ Environmentalists appealed that ruling to the Tenth Circuit.¹⁸⁹⁾ During this appeal, the Forest Service adopted the State Petitions Rule.¹⁹⁰⁾ As a result, the Tenth Circuit concluded that the new rule rendered the environmentalists' appeal moot and vacated the district court's judgment.¹⁹¹⁾

The State Petitions Rule allowed individual states to voluntarily petition for a rulemaking to manage all or part of the state's inventoried roadless areas as roadless to prevent further road building and timber management activities.¹⁹²⁾

¹⁸³⁾ *People ex rel. Lockyer*, 459 F. Supp. 2d at 879-80. The Roadless Rule prevented these management activities on 58.5 million acres of federal land. Inventoried roadless areas came out of the review process of roadless areas greater than 5,000 acres contained in the Wilderness Act of 1964. 16 U.S.C. §1132(c).

¹⁸⁴⁾ *Id.* at 880. Before the Roadless Rule took effect, the Bush Administration halted all unimplemented regulations from the Clinton Administration for further review. *See also* Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702 (Jan. 24, 2001).

¹⁸⁵⁾ *Kootenai Tribe v. Veneman*, 2001 WL 1141275 (D. Id. May 10, 2001).

¹⁸⁶⁾ *Kootenai Tribe v. Veneman*, 313 F.3d 1094 (9th Cir. 2002).

¹⁸⁷⁾ *Id.* at 1104.

¹⁸⁸⁾ *Wyoming v. USDA*, 277 F. Supp. 2d 1197 (D. Wyo. 2003).

¹⁸⁹⁾ *Wyoming v. U.S. Dept. of Agriculture*, 414 F.3d 1207 (10th Cir. 2005).

¹⁹⁰⁾ *Id.* at 1210.

¹⁹¹⁾ *Id.*

¹⁹²⁾ *People ex rel. Lockyer*, 459 F. Supp. 2d at 881.

States had until November of 2006 to petition.¹⁹³⁾ The State Petitions Rule's state-by-state approach to roadless protection contrasted the Roadless Rule's uniform national protection of inventoried roadless areas.¹⁹⁴⁾ The Forest Service requested that the Tenth Circuit dismiss environmentalists appeal on the validity of the Roadless Rule because the State Petitions Rule replaced it.¹⁹⁵⁾

(2) Northern District of California—Magistrate Judge Elizabeth D. Laporte's
Opinion

In *People ex. rel. Lockyer v. U.S. Department of Agriculture*, environmental plaintiffs, joined by four states,¹⁹⁶⁾ challenged the State Petitions Rule under NEPA, the ESA, and the APA, arguing that the replacing the Roadless Rule with the State Petitions Rule triggered the requirement to perform an environmental analysis under NEPA and consultation with FWS and NMFS under the ESA.¹⁹⁷⁾ Magistrate Judge Laporte framed the issue as whether the State Petitions Rule was merely a procedural change and not a substantive repeal of the Roadless Rule which would require analysis under NEPA and consultation under the ESA.¹⁹⁸⁾

The Forest Service conducted no NEPA analysis when it promulgated the State Petitions Rule.¹⁹⁹⁾ Instead, the Forest Service issued the rule under a categorical

¹⁹³⁾ *Id.*

¹⁹⁴⁾ *Id.*

¹⁹⁵⁾ *Id.* The Forest Service requested that the Tenth Circuit dismiss the appeal as moot because “the 2001 Rule at issue in this case has now been wholly superseded by the United States Department of Agriculture...” *Id.*

¹⁹⁶⁾ California, Oregon, New Mexico, and Washington. Additionally, Montana filed an *amicus* brief in support of the plaintiffs.

¹⁹⁷⁾ *People ex rel. Lockyer*, 459 F. Supp. 2d at 879.

¹⁹⁸⁾ *Id.* at 883: “The question for the Court is not, of course, which rule is preferable; that is for the Executive Branch. Nor is there any doubt that the Forest Service has the authority to change policies from a uniform national approach strongly protecting roadless areas from human encroachment to a more localized approach permitting more roads and logging, provided that it follows the proper procedures. Rather, the question is whether the Forest Service complied with the procedures mandated by Congress for consideration of potential environment impact prior to changing course, or was exempt from doing so.”

¹⁹⁹⁾ *Id.* at 894.

exclusion arguing that the rule was “merely procedural in nature” and had “no direct, indirect, or cumulative effect on the environment.”²⁰⁰⁾ The Forest Service reasoned that because of the District of Wyoming’s 2003 injunction against the Roadless Rule,²⁰¹⁾ the State Petitions Rule’s replacement of the Roadless Rule was merely procedural because the Roadless Rule was no longer in effect. ²⁰²⁾ Magistrate Judge Laporte noted that the Forest Service could not rely on the Wyoming court’s injunction as an argument that the State Petitions Rule was merely procedural because the Tenth Circuit vacated the Wyoming court’s judgment when the Forest Service asked for a dismissal of that case.²⁰³⁾ Magistrate Judge Laporte concluded that the Forest Service substantively repealed the Roadless Rule when it promulgated the State Petitions Rule because the new rule replaced uniform nationwide protections for roadless areas that the Forest Service previously studied under a lengthy rulemaking and NEPA analysis with a “less protective” state-by-state approach.²⁰⁴⁾

The court noted that even if the revocation of the Roadless Rule’s protections did not trigger NEPA, the State Petitions Rule established a new management regime.²⁰⁵⁾ Under the State Petitions Rule, for the first time, the management of roadless areas could vary from state to state.²⁰⁶⁾ In areas where a national forest crosses an interstate boundary,²⁰⁷⁾ the roadless areas could have different

²⁰⁰⁾ *Id.* at 895; *citing* State Petitions Rule, 70 Fed. Reg. at 25,660.

²⁰¹⁾ *Wyoming v. USDA*, 277 F. Supp.2d 1197 (D. Wyo. 2003).

²⁰²⁾ *People ex rel. Lockyer*, 459 F. Supp. 2d at 895.

²⁰³⁾ *Id.* at 896: “More fundamentally, insofar as Defendants rely on the Wyoming court injunction to argue that the State Petitions Rule did not repeal the Roadless Rule but only replaced it on paper, Defendants ignore the legal effect of the Tenth Circuit’s decision to vacate the judgment of the district court.”

²⁰⁴⁾ *Id.* at 898: “And because the Forest Service has rejected two states’ requests to expedite the petitioning process in an effort to regain the Roadless Rule protection in those states, those protections are lost at a minimum for at least the several years it has and will take to get petitions accepted and complete rulemaking.”

²⁰⁵⁾ *Id.* at 899.

²⁰⁶⁾ *Id.*

²⁰⁷⁾ For example, at oral argument the government stated that: “The question of what would happen if, say, the State of Oregon and the State of California submit petitions that vary with regard to a hypothetical areas that crossed both is one that would be crossed at the time that it occurred.” *Id.*

management strategies depending on whether the underlying state had petitioned for roadless protection or not.²⁰⁸⁾ The Forest Service failed to analyze the potential impacts of changing the management regime from one that provided uniform nationwide protections to roadless areas to a rule that allowed neighboring states to differ in the protections the state afforded to roadless areas.²⁰⁹⁾ The court concluded that the State Petitions Rule could not be promulgated under a categorical exclusion from NEPA because the new rule was not simply a procedure to amend or revise forest plans—instead, it was a substantive rule change.²¹⁰⁾

The court went on to conclude that *State Farm* applied to the Forest Service's decision not to conduct an environmental analysis²¹¹⁾ because the rule change could not be “explained as a product of agency expertise, because the same agency previously determined that a national approach was essential...”²¹²⁾ As in the other cases discussed, the Forest Service reversed policy “without citing any new evidence that would lead to a different conclusion” nor did the Forest Service explain why the agency now concluded that uniform nationwide protections for roadless areas were no longer necessary.²¹³⁾

²⁰⁸⁾ *Id.*

²⁰⁹⁾ *Id.* at 899: “At oral argument, Defendants’ counsel conceded that the Forest Service had not taken a hard look at what would happen if neighboring states submitted petitions seeking differing treatment of roadless areas that cross state borders...Similarly, the Forest Service failed to consider what would happen if one state petitioned for more protection of these roadless areas and the neighboring state did not.”

²¹⁰⁾ *Id.* at 902: “In short, to apply this categorical exclusion to an agency action that repeals a major set of environmental protections nationwide in scope and substitutes a less protective regime that for the first time encourages state-by-state management of national forest stretches the categorical exclusion well past the breaking point. Indeed, Defendants conceded at oral argument that they are not aware of ever having used this categorical exclusion to repeal a substantive rule.”

²¹¹⁾ *See generally Id.* at 903-04.

²¹²⁾ *Id.* at 904; *citing* the Roadless Rule’s Final EIS: “Regardless of how well informed individual decisions may be at the local level, any new road building in inventoried roadless areas still results in a loss of roadless characteristics...[w]hen these individual decisions are aggregated over time, and throughout the country...ecological and social outcomes resulting from the loss of roadless areas may become substantial.”

²¹³⁾ *Id.* at 904.

The Forest Service did not consult with FWS or NFMS to determine if the State Petitions Rule would jeopardize listed species,²¹⁴⁾ arguing that because the State Petitions Rule was “merely procedural,” it would have no effect on listed species and no ESA consultation was required.²¹⁵⁾ The court disagreed, noting that the Roadless Rule had previously determined that roadless areas “were biological strongholds for populations of threatened and endangered species.”²¹⁶⁾ Therefore, repealing these protections may affect threatened or endangered species or their critical habitats, thus triggering ESA consultation requirements.²¹⁷⁾ Magistrate Judge Laporte concluded that because the State Petitions Rule could potentially affect listed species the Forest Service’s conclusion that ESA consultation was not required was arbitrary and capricious.²¹⁸⁾

Because the Forest Service performed no NEPA analysis or consultation under ESA, the court struck down the State Petitions Rule and reinstated the Roadless Rule.²¹⁹⁾ On both the NEPA and ESA issues, the court was clear to hold that the repeal of a regulation does not automatically trigger NEPA analysis or ESA consultation.²²⁰⁾ Further, the court noted that even when an agency engaged in NEPA analysis or ESA consultation in promulgating a rule, the recession of that rule did not always require a NEPA analysis or ESA consultation.²²¹⁾ But in this case, the court concluded that both were necessary because of the State Petitions Rule created a new management regime that allowed states to determine the level of protection afforded to roadless areas within their borders.²²²⁾

²¹⁴⁾ *Id.* at 881.

²¹⁵⁾ *Id.* at 910.

²¹⁶⁾ *Id.* at 911; *citing* 66 Fed. Reg. at 3,245.

²¹⁷⁾ *Id.*: “It would strain credulity to hold that the repeal of the protections in [inventoried roadless areas] would not have *any* effect, as the term is interpreted for the purposes of ESA, on the numerous species that make their home in [inventoried roadless areas].” *Emphasis in original.*

²¹⁸⁾ *Id.*

²¹⁹⁾ *Id.* at 919.

²²⁰⁾ *Id.* at 909, 912.

²²¹⁾ *Id.*

²²²⁾ *Id.*

IV. Defining *State Farm's* "Reasoned Analysis"

In *State Farm*, the Supreme Court held that when an agency rescinds a rule (or replaces a previous administration's rule) the APA requires a "reasoned analysis."²²³ While the cases discussed demonstrate how dramatically policy can change in transitions between presidential administrations of different ideological viewpoints or political parties, the cases also suggest a definition for *State Farm's* "reasoned analysis" in the context of NEPA. Judges Winmill, Pechman, Sullivan, and Magistrate Judge Laporte's opinions imply that when an agency is reversing a rulemaking, federal courts require a "reasoned analysis" under NEPA that: 1) explains why there is a need to change policy and why that change is necessary; 2) fully explains why the past administrations' analysis or assumptions were erroneous or misguided; and 3) addresses the concerns of comment agencies who point out concerns with the new rule.

1. Reasons for the Bush Administration's Failure to Reverse Rules

Several barriers, both institutional and legal, exist to agency attempts to reverse policy. The institutional barriers to rulemaking reversals exist because an agency's analysis of an issue comes from the civil servants at the ground level, but the policy comes from the political appointees at the top of the agency.²²⁴ The political appointees know what they want the outcome of an analysis to be, but they cannot tell the civil servants who collect the data how to analyze the data in such a way to achieve that result. Based on the cases discussed, *State Farm's* "reasoned analysis" appears contextual—the more analysis and data in the record in the first rulemaking, the harder it is for the agency to reverse course both institutionally (because the agency employees studying the issue have to come to opposite conclusions often with the same data) and legally (because federal courts

²²³ *State Farm*, 463 U.S. at 42.

²²⁴ Professor William Funk explained these institutional problems that all administration's face when attempting to reverse a previous administration's policies during an oral presentation of this article on April 22, 2009.

will take a “hard look” at the agency’s prior NEPA analysis). NEPA gives teeth to *State Farm* in the environmental and natural resources context because rulemakings are often “major federal actions significantly affecting the quality of the human environment,”²²⁵⁾ requiring an EIS. The data from an EIS during the initial rulemaking can then serve as a legal barrier to the next administration’s attempt to reverse a prior rule because *State Farm*’s “reasoned analysis” requires a discussion of the previous administration’s data and conclusions.

The statements of past administrations in both NEPA analyses and ESA consultations serve as a significant factor in the rulemaking reversal cases. For example, in *Western Watersheds Project*, the grazing case, BLM made no attempt to explain how range conditions had changed to warrant a reversal of the prior rule’s increases in public participation and criteria for improving the health of rangelands.²²⁶⁾ In *Northwest Ecosystem Alliance*, the court condemned the elimination of the “survey and manage” standards as inconsistent with the Forest Service’s own prior analysis, which had concluded that the standards were necessary to mitigate the degraded condition of the forest reserves.²²⁷⁾ In *People ex. rel. Lockyer*, the court criticized the Forest Service because in the Roadless Rule the agency determined that a national approach to roadless protection was necessary, while in the State Petitions Rule the agency reversed policy without explaining why allowing a state to determine whether or not to protect its roadless areas was necessary.²²⁸⁾ The “reasoned analysis” required by *State Farm* can go a long way toward protecting an administration’s policies after it leaves office. As shown in these cases, a well-reasoned analysis can prevent future administrations from weakening or repealing rules without explaining, chapter and verse, flaws in the prior administration’s analysis.

Moreover, the statements of either the agency promulgating the new rule or other agencies consulting on the rulemaking are important factors in the application of *State Farm*. NEPA usually induces other agencies to comment on a proposal.²²⁹⁾

²²⁵⁾ 42 U.S.C. §4332(c).

²²⁶⁾ *Western Watersheds Project*, 538 F. Supp. 2d at 1313.

²²⁷⁾ *Northwest Ecosystem Alliance*, 380 F. Supp. 2d at 1192.

²²⁸⁾ *People ex. rel. Lockyer*, 459 F. Supp. 2d at 904.

These comment agencies can have the authority to approve, veto, or finance either all or part of the proposal, or the comment agency may have special environmental expertise regarding the project.²³⁰⁾ Because the views of comment agencies are “accorded substantial judicial weight,” the agency proposing the project should seriously consider issues and concerns raised by the comment agency.²³¹⁾ For example, in *Western Watersheds Project*, BLM’s own experts’ review of the rule change to grazing criticized the adverse effects on wildlife and riparian habitats that would result from relaxing the regulations.²³²⁾ In *The Fund for Animals*, the case concerning increased snowmobile use in Yellowstone and Grand Teton national Parks, EPA (commenting on the snowmobile technology and emissions) expressed reservations about the use of snowmobiles within National Park units even if the snowmobiles used cleaner, quieter technology.²³³⁾ Contrary statements either by the agency’s own experts or by a comment agency evaluating the new policy are a significant factor in rulemaking reversal cases. These cases suggest that the statement of comment agencies must be discussed and responded to in order to produce the “reasoned analysis” that *State Farms* requires.

Federal courts require more than simply a change in who occupies the White House. In *State Farm*, then-Justice Rehnquist, writing for Chief Justice Burger and Justices Powell and O’Connor argued that a change in administration was a “perfectly reasonable basis” for an executive agency changing policy.²³⁴⁾ The cases discussed above thoroughly repudiate the dissent in *State Farm*,²³⁵⁾ because the district courts’ required more than a change in administration. For example, in *Northwest Ecosystem Alliance*, Judge Pechman expressly rejected the government’s

²²⁹⁾ See Michael C. Blumm and Stephen R. Brown, *Pluralism and the Environment: The Role of Comment Agencies in NEPA Litigation*, 14 Harv. Envtl. L. Rev. 277, 284 (1990).

²³⁰⁾ *Id.*; citing 40 C.F.R. § 1508.15 and 40 C.F.R. § 1503.1(a)(1).

²³¹⁾ See Blumm, *supra* note 230, at 306 (concluding that a court’s views on NEPA compliance are influenced by a comment agency’s position on the project).

²³²⁾ *Western Watersheds Project*, 538 F. Supp. 2d at 1316.

²³³⁾ *Fund for Animals*, 294 F. Supp. 2d at 107.

²³⁴⁾ *Id.* at 58.

²³⁵⁾ See generally *State Farm*, 463 U.S. at 57-9.

argument that it had discretion to change policy to carry out the goals of the Northwest Forest Plan because the government did not explain why the “survey and manage” standards were no longer necessary in light of the government’s prior NEPA analysis which acknowledged that the standards were necessary to address the degraded condition of the forest.²³⁶⁾

The cases discussed also speak to the thorough analysis of the Clinton Administration’s NEPA and ESA consultations, some of which came from “midnight regulations.”²³⁷⁾ The term “midnight regulations” is clearly a misnomer when applied to all rulemakings that come at the end of a president’s term. While eleventh-hour actions such as the last minute delivery of judicial appointments²³⁸⁾ fit this term, rulemakings such as the Clinton Snowcoach Rule²³⁹⁾ or the Roadless Rule,²⁴⁰⁾ while published in the waning days of the administration, were the product of years of analysis and proceedings.²⁴¹⁾ As a result, the term “midnight regulations” should be reserved for those instances where a president is acting at the last minute and should not be applied to rulemakings which were the product of years of analysis.²⁴²⁾

2. The Supreme Court’s 2009 Discussion of *State Farm*

In 2009, in *FCC v. Fox Television Stations, Inc.*,²⁴³⁾ the Supreme Court

²³⁶⁾ *Northwest Ecosystem Alliance*, 380 F. Supp. 2d at 1190.

²³⁷⁾ The elimination of snowmobiles in certain units of the National Park System and the Roadless Rule came at the end of the Clinton Administration.

²³⁸⁾ See generally *Marbury v. Madison*, 5 U.S. 137 (1803).

²³⁹⁾ Snowcoach Rule, 66 Fed. Reg. 7,260 (Jan. 22, 2001).

²⁴⁰⁾ Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3,244 (Jan. 12, 2001).

²⁴¹⁾ The Clinton Administration published the Snowcoach Rule on January 22, 2001, but had been considering a ban on snowmobiles since 1997. The Clinton Administration published the Roadless Rule on January 12, 2001, but had begun analyzing the impacts of roads on roadless areas in early 1999.

²⁴²⁾ Loring, *supra* note 22, at 1448. The term “midnight regulation” assumes “that regulations promulgated in the midnight period are rushed through the system during the interim period. Significant regulations, however, cannot be proposed and completed in the period between election day and inauguration day, as it can take years for a significant regulation to clear OMB review.” *Id.*

discussed *State Farm* in a 5-4 opinion reversing the Second Circuit and upholding the Federal Communications Commission's (FCC) ban on fleeting expletives.²⁴⁴⁾ The Second Circuit struck down the FCC's new policy, relying in part on its own precedent which required a "more substantial explanation" for an agency reversing policy under *State Farm*.²⁴⁵⁾ Justice Scalia, writing for the majority,²⁴⁶⁾ reiterated that *State Farm* did not require an agency reversing a rulemaking to justify the change "by reasons more substantial than those required to adopt a policy in the first instance."²⁴⁷⁾ Justice Scalia also noted that the APA makes no distinction between an initial agency action and an agency reversing that action.²⁴⁸⁾ He stated that although the agency must show that there are good reasons for the new policy, the agency does not need to demonstrate that the reasons for the new policy are better than the reasons for the old policy.²⁴⁹⁾ However, Justice Scalia conceded that if the "new policy rests upon factual findings that contradict those which underlay its prior policy," a "reasoned explanation" is necessary to disregard those facts and circumstances that were the basis of the prior policy.²⁵⁰⁾ Therefore, it appears that an agency's reversal is not what triggers a *more* "reasoned analysis," but rather the agency's statements and analysis in the first rulemaking.

²⁴³⁾ 2009 WL 1118715 (April 28, 2009).

²⁴⁴⁾ *Id.* at 6. Previously, the FCC indicated that "isolated or fleeting broadcasts" of expletives were not indecent or would not be acted upon. In 2004, the FCC declared that "any such interpretation is no longer good law" and "that the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offense to the broadcast medium is not indecent."

²⁴⁵⁾ *Id.* at 8; citing *New York Council, Ass. of Civilian Technicians v. FLRA*, 757 F.2d 502, 508 (2nd Cir. 1985). The D.C. Circuit has also indicated that when reviewing an agencies' reversal of policy a court's standard of review is "heightened somewhat." *NAACP v. FCC*, 682 F. 2d 993, 998 (D.C. Cir. 1982)

²⁴⁶⁾ Justice Scalia wrote the majority opinion which Chief Justice Roberts, Justice Thomas, and Justice Alito joined. Justice Kennedy concurred in part and concurred in the judgment.

²⁴⁷⁾ *Fox Television Stations*, 2009 WL 1118715 at 9.

²⁴⁸⁾ *Id.*

²⁴⁹⁾ *Id.*

²⁵⁰⁾ *Id.*: "In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."

Justice Kennedy, concurring in part and concurring in the judgment, wrote separately to state his agreement with Justice Breyer that an agency's decision to change course may be arbitrary and capricious unless the agency explains why "it now reject[s] the considerations that led it to adopt that initial policy."²⁵¹⁾ Justice Kennedy explained that when changing course, the agency's reasons for the change should be viewed in light of the data before the agency.²⁵²⁾ Justice Kennedy went on to note that because rulemaking reversals often have a more developed record, an agency's decision to change course may be arbitrary and capricious if the agency ignores its earlier findings without providing a "reasoned explanation" for doing so.²⁵³⁾

Justice Breyer's dissenting opinion²⁵⁴⁾ stated that in order to change policy an agency must do more than simply show reasons why the new policy is a good one—the agency must also explain why it changed policy.²⁵⁵⁾ To answer that question "requires a more complete explanation than would prove satisfactory were [the] change itself not at issue."²⁵⁶⁾ Justice Breyer carefully noted that *State Farm* does not require a heightened standard of review.²⁵⁷⁾ Instead, *State Farm* requires

²⁵¹⁾ *Id.* at 20; citing Justice Breyer's dissent. *Id.* at 28.

²⁵²⁾ *Id.* at 20: "The question in each case is whether the agency's reasons for the change, when viewed in light of the data available to it, and when informed by the experience and expertise of the agency, suffice to demonstrate that the new policy rests upon principles that are rational, neutral, and in accord with the agency's proper understanding of its authority."

²⁵³⁾ *Id.* at 21: "Where there is a policy change the record may be much more developed because the agency based its prior policy on factual findings. In that instance, an agency's decision to change course may be arbitrary and capricious if the agency ignores or countermands its earlier factual findings without [a] reasoned explanation for doing so. An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate." Justice Kennedy went on to note that the FCC reversal of policy here did not implicate *State Farm* because the FCC did not base its prior policy regarding fleeting expletives on factual findings, but on the agency's reading of the Supreme Court's holding in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). *Fox Television Stations*, 2009 WL 1118715 at 21.

²⁵⁴⁾ Justice Breyer wrote a dissent which Justice Stevens, Justice Souter, and Justice Ginsburg joined.

²⁵⁵⁾ *Fox Television Stations*, 2009 WL 1118715 at 27.

²⁵⁶⁾ *Id.*

the same standard of review applied to different circumstances.²⁵⁸⁾ Therefore, in a rulemaking reversal, the agency must focus on why the reasons for adopting the initial policy are no longer good and explain how the agency came to a different conclusion.²⁵⁹⁾

Although *Fox Televisions Stations* and the cases discussed in this article are in different contexts, all involve challenges to an agency's reversal of policy. A careful review of Justice Kennedy's concurrence indicates that he could provide the hypothetical fifth vote in an environmental or natural resources rulemaking reversal because of his statements indicating the importance of the prior data before the agency.²⁶⁰⁾ The cases discussed here seem to suggest that NEPA's "hard look" gives teeth to *State Farm's* "reasoned analysis" because a prior NEPA analysis results in data and conclusions which the next administration must refute to survive "arbitrary and capricious" review. The data from prior NEPA analysis in the Clinton rules distinguish the grazing, survey and manage, snowmobile, and the Roadless Rule cases discussed here from the Supreme Court's analysis in *Fox Television Stations*.²⁶¹⁾ Moreover, support for this conclusion can be found in Justice Scalia's majority opinion in *Fox Television Stations* because he stated that if a new policy rests on factual findings which contradict those from a prior policy, a reasoned explanation is necessary to disregard the facts and analysis that formed the basis of that prior policy.²⁶²⁾

²⁵⁷⁾ *Id.* at 28.

²⁵⁸⁾ *Id.* at 28.

²⁵⁹⁾ *Id.*: "Rather, the law requires application of the same standard of review to different circumstances, namely circumstances characterized by the fact that change is at issue. It requires the agency to focus upon the fact of change where change is relevant, just as it must focus upon any other relevant circumstance. It requires the agency here to focus upon the reasons that led the agency to adopt the initial policy, and to explain why it now comes to a new judgment."

²⁶⁰⁾ *Fox Television Stations*, 2009 WL 1118715 at 21.

²⁶¹⁾ In *Fox Televisions Stations*, the FCC changed its interpretation of the Supreme Court's holding in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), in contrast to the cases discussed in this article in which the agencies attempted to analyze the issue under NEPA and come to a different conclusion.

²⁶²⁾ *Fox Television Stations*, 2009 WL 1118715 at 9.

V. Conclusion

The cases discussed demonstrate that *State Farm's* "reasoned analysis" can serve as an effective roadblock to the next administration's attempts to reverse policy. The Bush Administration had a pattern of failing to successfully defend its policies in court because of the federal courts' application of *State Farm*. Further, the cases analyzed in this article, as well as Justices Kennedy, Breyer, and Scalia's discussion of *State Farm* in the *Fox Television Station's* case, suggest that a prior NEPA analysis can give teeth to *State Farm's* "reasoned analysis."

The most recent change in administrations is particularly interesting because of the policies of the Bush Administration and the inter-political party change at the White House, with indications that the Obama Administration will promote a more environmentally-friendly agenda.²⁶³ However, the Obama Administration would do well to learn the lessons that plagued its predecessors in the White House.

The Bush Administration's focus often appeared to be concentrated solely on repealing the Clinton Administration's rules, with little regard to the future of its own regulations. In many cases, both discussed here and elsewhere,²⁶⁴ the Bush Administration's analysis either ignored NEPA or made little attempt to offer the

²⁶³ See generally http://www.whitehouse.gov/agenda/energy_and_environment/ (last assessed May 4, 2009).

²⁶⁴ For example, in *Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160 (D. Mont. 2008), the court granted environmental plaintiff's motion for a preliminary injunction against the FWS attempt to delist the northern Rocky Mountain gray wolf distinct population segment under the ESA. The court noted that in 2004 the FWS rejected the State of Wyoming's 2003 wolf management plan "because it permitted Wyoming state officials to classify the wolf as a predatory animal throughout the state and then failed to clearly commit the state to managing for 15 breeding pairs within its borders." *Id.* at 1163. However, in 2007 FWS approved Wyoming's revised wolf management plan which "suffer[ed] from the same deficiencies as the 2003 plan: it classifies the wolf as a predatory animal in almost 90 percent of the state and only commits the state to managing for 7 breeding pairs outside the national parks." *Id.* The court concluded that although the FWS can change its recovery criteria, the agency must provide a "reasoned analysis" for the change in position. *Id.* See also *Western Harlem Environmental Action v. U.S. E.P.A.*, 380 F. Supp. 2d 289 (S.D.N.Y. 2005) (upholding in part and reversing in part EPA's attempt to revoke certain child safety measure for rodenticides for violations of FIFRA and the APA).

“reasoned analysis” *State Farm* requires. With little and often weak analyses to explain the change in policy, environmental plaintiffs urged the federal courts to review rulemaking reversals and respond by striking down the rules. A well-reasoned NEPA analysis not only provides an effective means to reverse prior rulemakings, but also has the potential to secure an administration’s legacy beyond its years in office by giving teeth to the “reasoned analysis” that federal courts require to change policy.

투고일자 2014.08.31, 심사일자 2014.09.23, 게재확정일자 2014.09.25

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<국문초록>

**부시 정권의 환경 및 천연자원법의 행정입법에 있어 입장변화 평가 :
환경정책법(NEPA)의 “엄격한 심사”가 State Farm에 대한 “합리적 분석”을
견고하게 하는가?**

Patrick L. Aitchison *

환경 및 자연자원 정책은 행정부에 따라 급격히 변할 수 있다. 본 논문은 행정입법의 입장이 번복된 방목, 입업, 스노우 모빌 레크레이션, Roadless 규칙의 몇몇 사례를 살펴보면서, 왜 부시정부가 이전 정권의 정책을 번복하는데 있어 충분한 해명을 하지 못하고 실패했는지 살펴본다. In Motor Vehicle Manufacturers' Association v. State Farm Mutual Automobile Insurance Co. 사건에서, 대법원은 행정부(agency)의 행정규칙 번복(recession of a rule)에 대한 사법심사 기준은 행정부가 규칙을 제정할 때와 동일하다고 판시하였다. 다만 정부는 정책을 바꿀 때 “합리적 분석”을 제공해야 한다.

동 판례의 분석 결과, State Farm 판례의 “합리적 분석”은 문맥상 - 처음 행정입법에 대한 분석과 기록자료가 많을수록 이를 뒤바꾸는 것이 더 어렵다는 것을 시사한다. 제도적으로 행정부 직원은 자신들이 분석한 기존의 자료와 정 반대의 결과를 도출하기가 어려울 뿐만 아니라 사법적으로 연방법원이 정부의 기존 자료의 분석결과를 “엄격심사”할 가능성이 크기 때문이다. 환경 및 자연자원과 관련한 경우 국가환경정책법(NEPA)은 State Farm 판례에 더욱 힘을 실어주는데, 이는 행정입법이 많은 경우 “인간 환경의 질에 상당한 영향을 미치는 주요 연방정부의 행위”이며 따라서 상세한 환경영향평가(EIS)를 수반하는 경우가 많기 때문이다. 기존 행정입법 과정에서 마련된 환경영향평가의 자료는 다음 행정부가 기존 행정입법을 번복하기 어렵게 하는 법적 장애로 작용할 수 있다. State Farm 판례의 “합리적 분석”에 따라 새 행정부는 환경영향평가의 자료를 새롭게 분석해야하는 부담을 떠안기 때문이다.

주제어: 행정입법, 전환, 환경정책법, 공적 토지, 합리적 분석

* 미국 변호사, 2009년 루이스 앤 클락 LL.M.(법학석사), 2008년 세인트 루이스 로스쿨 J.D.