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*Sustaining the Legacy*

Subject: Comments on the 2011 Forest Service Proposed Rules for National Forest System Land Management Planning

On March 26, 1903 President Teddy Roosevelt spoke to the Society of American Foresters on the importance of professional management of the "Forest Reserves" now known as National Forests. In part he said "your attention must be directed to the preservation of forests, not as an end in itself but all a means of preserving and increasing prosperity of the Nation."

The members of the National Association of Forest Service Retirees (NAFSR) thank the Forest Service for the opportunity to comment on the proposed planning regulations as presented in the Federal Register Volume 76, Number 30, pages 8480-8528, published on February 14, 2011.

NAFSR is a non-profit, non-partisan, organization, dedicated to the promotion of the ideals and principles of natural resources conservation upon which the U.S. Forest Service was founded. It is committed to the science based sustainable management of the national forests for the public good.

NAFSR's members are uniquely qualified to remember the prodigious efforts of past planning attempts under many past regulations and to bring their experience to inform the currently proposed rule. NAFSR selected a small team of its members to evaluate the proposal. Along with a combined length of service of more than 100 years and breadth of experience of former line officers, from District Ranger, Forest Supervisor, Regional Forester, Station Director and Deputy Chief spanning five Regions, an Experiment Station and the Washington Office. We also received individual comments from several of our members that have been incorporated in our response.

Our collective memory of NFS planning spans the time from Ranger District Multiple Use Plans under the Multiple Use Sustained Yield Act of 1960 (MUSY) to the latest iteration of planning under the National Forest Management Act of 1976 (NFMA). The Forest Service again embarks on another round of planning rules. We are very concerned about the time and expense expended for planning over the course of forty years, time and expense that could have been devoted to actual management and improvement of the national forests. We do not propose to shortcut planning, but rather to constrain its effort to that necessary to meet the basic intent of the law while devoting time thus saved for beneficial treatments of the forest landscapes. In fact, in recognition of the time and cost associated with past forest planning efforts, it was our understanding that the Agency wished to develop a process that was responsive to changing conditions, including acquisition of new information, while streamlining the effort.

## General Comments

First, as former Forest Service employees, we are aware of the sincere, honest, and professional effort that went into developing the proposed rule. Clearly the Agency has tried to balance the needs of the Administration and the many comments received from the public on the previous proposal. We also note that you have incorporated some of our earlier comments in this version. For example, we are pleased that you have recognized the need to use modern tools, such as the Internet and virtual meetings, and to consider and evaluate public preferences and values in the planning process. Further, providing additional opportunities for pre-decisional collaboration and public participation combined with pre-decisional objection opportunities may improve public acceptance of forest plans developed under the new planning regulations. We also are pleased that you recognize the need to find new ways for dealing with the issue of species diversity, although we believe that the approach presented will open up new areas of controversy and litigation.

However, we believe that the overall content of the proposal is overly ambitious, overly optimistic, complex, costly, and promises much more than it can deliver. Rather than providing a simplified, streamlined process for developing and amending plans, we fear that the opposite will result. This is especially troubling in what are likely to be difficult times for funding of federal programs of all kinds. Without addressing the overarching issue of the fundamental purposes of the national forests in this age of controversy, it is unlikely that any of the current controversies involving the use of the national forests will be resolved by this proposal. This issue must be addressed by Congress if there is to be a change from the multiple use and sustained yield principles set out in MUSY and reaffirmed with passage of NFMA. Nonetheless, the proposed planning regulations purport to establish new purposes and priorities for the national forests, such as dealing with climate change and providing “ecosystem services,” and management for “ecosystem restoration,” for which there are no statutory authorities.

While the proposal is thorough, it is long and tedious to read. At the same time, it is short on useful and workable details—and the devil is in the detail. We are told that more information on how the promises in the rule text and explanatory materials will be fulfilled will be found in the Forest Service Manual and Handbook Directives to be issued at a later date. Unfortunately, given the lack of trust of the Agency among many of the most vocal and litigious members of the public, this is not likely to bring much comfort. Further, while many of the goals in the proposed rule are commendable, such as coordinating across the landscape, they may be unattainable.

The purpose of land management plans must be clear. Planning itself will not improve forest conditions. This is especially true if plans are continuously appealed and litigated. Plans are meant to improve conditions but are wasteful of effort and expense without positive results. Current planning generally falls short in its ability to work its way through the legal hoops. In this regard, the various planning rules and resultant forest planning have failed. Many NAFSR members believe that conditions on the national forests continue to decline. Insect epidemics, frequent large scale wildfires, an unsustainable uneven distribution of age classes of trees, and over-stocking leading to a decline in health and susceptibility to external agents prevail, especially in the west. This is in spite of great effort and expense, most probably exceeding more than one billion dollars over the last thirty years of planning under NFMA.

**NAFSR can only conclude that the costs, and the unhealthy conditions now existing on national forests, point to the fact that national forest planning to date has not just failed, but has failed utterly. NAFSR believes that the proposed regulation will not correct the fundamental deficiencies in past planning efforts.**

It appears to NAFSR that the past is about to repeat itself under the proposed rule. It is exceedingly complex, with 48 pages in the Federal Register, with 30 pages devoted just to explanation of the rule. This complexity, along with some inconsistencies explained later, present the unfortunate responsible officials an impossible task, in our opinion, to construct a plan that meets the intent of NFMA, improves the health of the national forest and minimizes legal assaults and administrative appeals. A rule that requires more than twice its number of pages for explanations should be ample evidence of onerous complexity.

**Finally, we wish to strongly emphasize that the U.S. Forest Service role primarily resides by statute in producing, protecting and actively managing wildlife and fisheries habitat. All encompassing species situations/status is by statute and "Public Interest Doctrine" are primary responsibilities of the U.S. Fish and Wildlife Service, USDI, National Marine Fisheries, NOAA and the respective States.**

### **Forest Planning and NEPA**

The planning rule contributes to complexity by forgetting, or perhaps ignoring, a unanimous Supreme Court (the Court) case that ruled a forest plan, in this case the plan for the Wayne National Forest, did not affect the environment and therefore was not "ripe" and therefore was not judiciable (OHIO FORESTRY ASSOCIATION, INC., PETITIONER v. SIERRA CLUB et al. May 18,1998).

The proposed rule itself is accompanied by a Draft Environmental Impact Statement (EIS) that finds a lack of effect on the environment from a programmatic regulation or forest plan. The Court's decision stated: **"As this Court has previously pointed out, the ripeness requirement is designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'**" (Emphasis added). Clearly, the proposed rule and ensuing forest plans will not have concrete effects on the ground.

Experience has shown that activities anticipated in the forest plan, such as proposed silvicultural treatment, can be changed drastically by natural events such as insect outbreaks and fire or by changes in the Agency budget. Thus, the plan does not commit the Agency to a particular action. The commonality of such changes amply demonstrates the futility and waste of speculative front end NEPA analysis which is more appropriately done at the project level.

In further argument against a NEPA analysis at the forest plan level, Section 2.9.5 of the proposed rule states: "A new plan or plan revision requires preparation of an environmental

impact statement”. The Court denies this need. Secretary Vilsack has himself, in a letter to Senator Murkowski when discussing the Tongass Plan, acknowledged the premature nature of the forest plan:

“The Forest Service does not see a need to amend the Plan as part of the transition to young growth management. The Tongass Forest Plan is a permissive document similar to a local zoning ordinance. It allocates land to various designations where some types of activities are prohibited and other activities are allowed, subject to standards and guidelines that vary among the different designations. However, it does not make the final decisions on what activities will remain in place at any given location. **Only project-level site-specific decisions authorize activities to be conducted.** Accordingly, a forest plan cannot commit the Agency to a level of activity, and the estimated level of activities that would be possible under a forest plan does not carry the force of law.”  
(Emphasis added)

While in our view, this is true, the Secretary cannot in this case take this stand and then require a NEPA analysis in all other plans.

To further emphasize the futility of evaluating impact under NEPA when no impacts are to be concretely prescribed, the planning rule at 219.7 New plan development or plan revision, . . . the responsible official shall;

- (i) Review ...
- (ii) Identify ...
- (iii) Consider ...
- (iv) Identify ...
- (v) Identify ...
- (vi) Identify ...
- (vii) Identify ...
- (viii) Identify ...
- (ix) Identify ...

Nothing in these nine instructions expresses or implies tangible, concrete actions affecting the environment. They are process requirements only.

**NAFSR strongly recommends dispensing with NEPA requirements for the planning rule and for forest plan revisions and amendments, since there is no commitment to activities on the ground (or preclusion of further plan amendments to allow activities) and no effect on the environment of the planning actions themselves.** In the interest of full display, however, NAFSR would like to see an economic analysis of the cost of implementing the plan.

### **Major Concerns with the Proposed Planning Regulations**

1. The proposed rule provides that "the plan must include plan components to maintain the diversity of plant and animal communities...and maintain viable populations of species of conservation concern within the plan area."

Maintaining viable populations should not be a requirement of the regulations because there is no requirement in the NFMA to "maintain viable populations" and measuring and proving that a forest plan will "maintain" a viable population is nearly impossible, leaving the Forest Service vulnerable to lawsuits. The proposed rule creates a new obligation to "conserve" fish and wildlife species that are "candidates" for listing under the Endangered Species Act (ESA). This will create a clamor for the Forest Service to develop recovery-like plans for conservation of candidate species even though recovery plans are not required for unlisted species by the ESA. It will also provide fertile ground for litigation.

We are pleased that the proposed rule no longer requires providing for species diversity at the species population level and recognize that forest service lands provide only a portion of needed habitat for species as part of a larger landscape. NFMA required diversity only at the ecological community level. Further, other state and federal agencies are mandated to manage species viability at the population level. Since maintaining viability of vertebrate populations remains challenging and technically infeasible, the agency has necessarily relied on surrogates to satisfy this requirement. If, as we maintain, this requirement is unachievable, the requirement itself may be invalid. Thus, we commend the agency for returning to the original language of NFMA and focusing on maintaining the diversity of plant and animal communities in the planning area with consideration of the role that the national forests play in the larger landscape.

**The Forest Service should develop rules that focus on maintaining the diversity of habitats rather than imposing requirements to identify, survey, and maintain "a viable population" that is not required by the NFMA.**

If the final rule continues to include the concept of "species of conservation concern," we also recommend deleting paragraph 36 CFR 219.9 (b) (3) and replacing it with "Conserve species of conservation concern [using the proposed definition of 'species of conservation concern'] within the plan area through formal partnership agreements with appropriate state, federal, tribal, and private entities." And, delete the current definition of "species of concern" in 36 CFR 219.19, page 8525 and replace it with "Species of conservation concern: Species other than federally listed threatened or endangered species or candidate species identified by the NatureServe Network of the Natural Heritage Programs and Conservation Data Centers according to NatureServe Conservation Status Rank as G1, T1, N1, Si, and G2, T2, N2, S2; and by states as threatened and endangered.

The proposed species diversity approach using "fine" and "coarse" filters may be an improvement over the current process, but will be the subject of much litigation. In addition, measuring and proving that a forest plan will "maintain" a viable population is nearly impossible, leaving the Forest Service vulnerable to lawsuits. Additionally the regulation proposes to expand the "maintain viable populations" requirement to include invertebrates such as slugs and insects, plants, and fungi. This will end up continuing the futile exercise to "survey and manage" that brought forest activities to a snail's pace, if not to a grinding halt.

The proposed rule also does not include the phrase "to meet overall multiple-use objectives" to make clear that the Forest Service obligation to provide for diversity of plant and animal communities is in the context of the balance required to meet overall multiple use objectives.

The rule should focus on maintaining the diversity of habitats in this multiple use context rather than imposing requirements to identify, survey and maintain “a viable population” that is not required by NFMA.

2. The proposed rule establishes a new layer of planning called "Assessments".
3. The proposed rule defines ecosystem services too broadly and improperly elevates ecosystem services to the same level of importance as multiple uses as defined and listed in MUSY.
4. The proposed rule contains complex and unrealistic monitoring requirements; for instance, the regulation requires biennial monitoring evaluation reports and monitoring of "measurable changes related to climate change". This proposed regulation is unrealistic. In pursuit of the perfect and in response to public pressure, monitoring plans could quickly grow in size, complexity, and cost. This would result in limiting needed projects to only those for which limited monitoring funds were available. Further, we don't believe that it is possible to measure changes related to climate change within a two-year time frame over the geographic scale of a national forest.
5. The proposed rule inappropriately gives equal status to “protection of recommended wilderness and steam corridors eligible for Wild and Scenic River designation” as that of Congressionally designated Wilderness and Wild and Scenic Rivers.
6. The proposed rule states that “Plans will guide the management of NFS lands so that they are ecologically sustainable and contribute to social and economic sustainability...” This language and accompanying provisions in the rule text effectively establish a binding requirement for ecological sustainability, above the requirement that the plan “contribute” to social/economic sustainability. This disparity is not justified by any rationale, including any difference in ability of the agency to control or influence various aspects of sustainability which vary widely by forest and geographic area.
7. The expressed objective of use of best available science is a special concern that we address in detail later in our comments.

## **Helpful Proposals**

1. The proposed rule stating that Forest Supervisors will generally be the "responsible official" who approves land management plans (219.2) should be beneficial.
2. The use of a pre-decisional objections process and limiting it to those who have been substantially engaged in the process should be beneficial. Requiring objections before the final plan is released allows the Forest Service to consider changes before their final decision, as will making the forest supervisor the responsible official. However, we believe that given the likely length and complexity of the plans, proposed period for filing a request to participate in an objection and for filing an objection may be too short.

## Areas Needing Additional Emphasis

1. The Forest Service Planning Regulations should assure Forest Plans are written in partnership with the states in which the National Forest is located.
2. Retain intergovernmental coordination in the proposed rule. Communities - including Tribal entities - in close proximity to or socially and economically dependent on a national forest should be a partner in developing a National Forest Land Management Plan.
3. The final rule should include provisions for land exchanges, conveyances and adjustments with states, communities and tribal entities.

## Concerns About Terminology

The draft regulation includes ambiguous, undefined and confusing terminology. For example:

**Broader landscape** often appears. What is broad enough under the circumstances will be contentious.

**Stressor** is a new term and should be defined, with examples.

**Default width** has no real meaning by itself. What does the term imply when considering management activities in riparian areas? What activities are permitted and what are proscribed? Is it meant to be a substitute for “buffer”? If so, it is even more ambiguous than “buffer”.

What does **landscape scale integration of terrestrial and aquatic ecosystems** mean? How would the responsible official know when it is met?

What are **system drivers**?

Where will be the guidance across planning areas to determine the effects **of climate change** and how it might affect the planning area?

What is meant by **connectivity of ecosystems and watersheds in the plan area**? Does it mean that a watershed must be “connected” to other watersheds? One could argue that a watershed has connectivity if it’s connected to a hydropower system or a domestic water supply system. Can it mean that like ecosystems must be connected to each other? The plan will be doomed if these components are not “connected”.

What is meant by the term **ecosystems**, anyway? Presumably it’s a discrete delineated area with similar characteristics, but exactly what are those characteristics, and in what manner is the responsible official obliged to select among various and numerous possible components comprising a “system”?

It would be helpful to the lay reader to have examples of what **ecosystem services** are.

The definition of **conservation** is incomplete. We suggest adding “and the management of natural and renewable resources with the objective of sustaining their productivity while providing for human use compatible with sustainability of these resources” based on the “Dictionary of Forestry,” edited by John Helms and published by the Society of American Foresters in 1998.

As indicated earlier, we have concern about the use of **species of conservation concern** especially since it seems to have no accepted definition in the literature.

### **Special Concerns about the “Use of Best Science” Requirement**

The Forest Service has chosen to place in regulation at draft Section 219.3 mandatory requirements that the agency extensively document and then determine what constitutes "best available scientific information" in the planning process. While a laudable objective if clearly stated as an aspirational goal, this requirement is nothing short of astonishing in view the volume of litigation which has burdened the agency in recent years, much of it involving contested science of resource protection.

To place such a regulatory burden on the agency is unwise, unnecessary as a matter of policy or law, unfunded, unstaffed and (as far as we know) unprecedented in federal regulation on such a broad scale. Not only must the agency take into account "best science", but such science must be documented and an explanation given regarding how it was considered. Further, draft Section 219.3(c) provides:

*(c) For the plan decision document, describe how scientific information was determined to be the most accurate, reliable, and relevant information available .....*

Science does not come labeled "good, better, best" and its adequacy is often a matter of professional judgment or the “eye of the beholder”. The draft regulation mandates the consideration of such rapidly evolving scientific fields as climate change and habitat connectivity in which there is substantial disagreement within the scientific community. Yet the above quoted regulation would require the responsible Forest Service officer to determine which scientific information is “the *most* accurate and reliable” in every field.

In discussing diversity of plant and animal species communities, the Forest Service explanatory materials at 76 FR 8494 stated:

*Additionally, it is important to note that the proposed rule is not limited to “vertebrate” species as required under the 1982 provisions. The proposed rule would include native plants and native invertebrates (fungi, aquatic invertebrates, insects, plants, and others) for which the Agency currently has very minimal biological information on their life histories, status, abundance, and distribution. (emphasis added)*

In light of this admission, it seems even more unlikely that the responsible forest officer is capable of staying aware and abreast of the “best science” involving all biological information which may be implicated in planning decisions. Further, the “best” science for one species may suggest a different management regime than the “best” science for another species accorded protection under the regulations. The Forest Service alludes to this problem in the draft regulations at 76 FR 8493, noting that a conflict may exist between protecting candidate species and other species or (the best science for resource) management objectives. While replete with direction to document the existing environment through assessments and to determine the best science for individual species and resources, NAFSR is greatly concerned that the draft regulation provides no guidance to the responsible official in balancing resource protection measures with the sustained yield of multiple uses or in determining which “best science” controls when various resource values dictate different management. Finally, the Forest Service would be subjecting itself to the highest degree of legal risk by incurring an unwise and unnecessary legal duty to identify “best” science. Further, the agency completely misapprehends and misstates the legal risks of its “best” science requirement in the draft regulation explanatory notes at 76 FR 8485:

*The Agency has a longstanding practice of considering relevant factors and explaining the bases for its decisions. Including this section in the proposed rule, with its explicit requirements for determining and documenting the consideration of the information most accurate, reliable, and relevant to making planning decisions, will help to ensure a consistent approach across the National Forest System. However, this section is not intended to impose a higher standard for judicial review than the existing “arbitrary and capricious” standard.* (emphasis added)

A federal court will find it unnecessary to reach the “arbitrary and capricious” standard at all--the court only need find that the agency violated the explicit terms of its own regulations in failing to consider, to cite, or to correctly determine “best” some element of relevant science. A simple failure on a single resource element would allow plaintiffs to prevail and to recover their legal fees under the Equal Access to Justice Act which provides that such fees are to be assessed, not from the Judgment Fund, but from the Forest Service budget!

It is well established law that federal courts are expected to defer to the technical and administrative expertise of federal agencies. The Forest Service regulation would invert this process, needlessly creating a mechanism for judicial review of what constitutes “best” science. Nothing in the makeup of the federal judiciary suggests that federal bench has any particular scientific qualification to make such determinations.

The Forest Service offers no valid reason for, and obtains no benefit from inviting the federal courts to review the question of what constitutes “best” science. NAFSR strongly recommends that the longstanding commitment of the Forest Service to the use of science in management be reflected in guidance contained in Forest Service Directives System as an administrative goal, not as a legal duty to make an inherently difficult and controversial determination.

Finally, since best science is almost impossible to define, we believe a better requirement would be to use a "science-based" approach to planning. Further, the mandate to describe "how scientific information was determined to be most accurate, reliable, and relevant" should be

modified to simply require that the science used in the plan be referenced. Scientific results should be judged on their own merit by evaluating whether the science met accepted requirements for research such as statistical standards, peer review, publication, etc. Various scientific studies should not be placed in an arbitrary competition over which is best.

Again, we appreciate the opportunity to provide comments on the draft forest planning regulations. As Forest Service retirees, we have a special appreciation of the Agency and its people. Our hope is that our comments will be useful for improving the planning regulations and avoiding the problems of the past.

We would be willing to meet with you to discuss any of these comments.

Sincerely,

*Ronald E. Stewart*

Ronald Stewart  
Chair, NAFSR Ad Hoc Committee on Forest Service Planning Regulations,  
on behalf of the Members and the Board of Directors of NAFSR