

Planningruleno

From: John E. Y. Scola [jeyscol@pacbell.net]
Sent: Friday, June 08, 2007 8:54 PM
To: Planningruleno
Subject: Planning Rule Rewrite

Any rewrites of the The National Forest Management Act (NFMA) should NOT weaken the act. This act is important to preserving our environment for our children and our children's children.

Planningruleno1

From: Kelsey Ramage [ramage@cruzio.com]
Sent: Friday, June 08, 2007 9:21 PM
To: Planningruleno1
Subject: Forest Service must abide by NFMA management rules

Dear Forest Service Administration

Please accept these scoping comments for the preparation of the environmental impact statement to analyze and disclose potential environmental consequences associated with the National Forest System land management planning rule.

The EIS should analyze the impacts on the national forests of exempting forest plans from environmental review and meaningful public input under the National Environmental Policy Act.

The Forest Service should ensure that the public has access to adequate information for the evaluation of the environmental consequences of forest plans. Given the size and complexity of most forest plans, the Forest Service should ensure that enough time is allowed for informed public comment.

The EIS should analyze the effects of eliminating resource protection standards from forest plans and the impacts of eliminating wildlife viability and monitoring requirements.

The Forest Service should consider alternatives to the 2005 planning rule that include strong standards to protect forests, waters and wildlife, and evaluate the adoption of some or all of the 1982 and 2000 regulations. Alternatives should also include requirements for forest plans to address the impacts of climate change.

Exempting forest management plans will eliminate the study or disclosure of the cumulative impact of management activities across the national forest, something usually done at the planning stage.

The agency should not make it easier for timber, oil, gas, mining and motorized recreation companies to profit from the use of public forests while eliminating the need for forest managers to assess potentially harmful impacts on water, wildlife, recreational use, old growth and roadless areas.

Our forests belong to our nation, not to special interests who expect to profit from this shared resource. Future generations of our grandchildren will respect the work you do today to provide for and preserve this remarkable and irreplaceable legacy despite the pressures of greed and commerce.

Do not try to rewrite the rules for NFMA. Our nation cares about our forests deeply.

Thank you for the opportunity to comment.

I appreciate your time and consideration.

Kelsey Ramage
Santa Cruz, Ca.

Planningruleno

From: Amanda Dorell [BABYBUDDHA@COASTSIDE.NET]
Sent: Saturday, June 09, 2007 5:24 AM
To: Planningruleno

I object to the 2005 rewrite of the forest management planning rules.
Amanda Dorell

Planningruleno

From: bluecanyon@wildblue.net
Sent: Saturday, June 09, 2007 6:45 AM
To: Planningruleno
Subject: RE: Planning Rule NOI Comments

Forest Service
PO Box 162969
Sacramento, CA 95816-2969

Dear Forest Service,

Please accept these scoping comments for the preparation of the environmental impact statement to analyze and disclose potential environmental consequences associated with the National Forest System land management planning rule.

I recommend that the USFS adopt rules the same or similar to those of the September 18, 1982 Federal Register USFS planning rules. I support rules like these is because they track closely the 1976 National Forest Management Act (NFMA) and what it requires the USFS to do. The 2005 planning rules do not track the NFMA well and often leave out significant requirements or make them optional. The USFS should list all the mandatory requirements of the NFMA and then ensure that rules are prepared and implemented which contain these requirements and that these rules are covered by the EIS. The NFMA has not changed and the requirements that the USFS must adhere to are still the same.

The public looks to the National Forest Management Act to ensure that the Forest Service will maintain viable wildlife populations and properly manage our national forests for future generations. A critical component of past forest planning regulations is the requirement of mandatory resource protection standards for all forest plans. The EIS needs to analyze the direct and indirect effects of eliminating resource protection standards from forest plans and the impacts of eliminating wildlife viability and monitoring requirements.

In the development of the forest planning EIS, I urge that the Forest Service reconsider the exemption of forest management plans, revisions or amendments from environmental review and meaningful public input under the National Environmental Policy Act (NEPA). Without the full NEPA process (an EIS), the public is not given adequate information to evaluate the environmental consequences of forest plans and disregards the best available science in favor of commercial interests. The planning rule EIS should fully analyze impacts of exempting forest plans from NEPA and consider alternatives that require full NEPA analysis and public participation.

The Forest Service should also take into account the breadth of new scientific and socio-economic information. The Forest Service should fully analyze other alternatives to the 2005 planning rule that include strong standards to protect forests, waters and wildlife, and evaluate the adoption of some or all of the 1982 and 2000 regulations. Alternatives should also include requirements for the agency to develop plans to address impacts of climate change in accordance with the Global Climate Change Prevention Act of 1990 (7 U.S.C. 701).

Since this is the first time the public has the opportunity to participate in an EIS process for the new forest planning regulations, the Forest Service needs to modify NEPA deadlines in order to allow time to thoughtfully consider public comments throughout the NEPA process.

Please! Not still more damage by this administration to our nat'l treasures!!

Thank you for the opportunity to comment, Barbara Versluis
HC64 Box 13
Magdalena, NM 87825

Planningruleno

From: dcd87106@cs.com
Sent: Saturday, June 09, 2007 11:10 AM
To: Planningruleno
Subject: Planning Rule NOI Comments

Forest Service
PO Box 162969
Sacramento, CA 95816-2969

Dear Forest Service,

I am writing regarding the National Forest System land management planning rules. I recommend that the USFS adopt rules the same as or similar to those of the September 18, 1982 Federal Register USFS planning rules.

Those rules track closely the 1976 National Forest Management Act (NFMA) and what it requires the USFS to do. The 2005 planning rules do not track the NFMA well and often leave out significant requirements or make them optional. The NFMA has not changed and the requirements that the USFS must adhere to are still the same.

The public looks to the National Forest Management Act to ensure that the Forest Service will maintain viable wildlife populations and properly manage our national forests for future generations. In the development of the forest planning EIS, I urge that the Forest Service reconsider the exemption of forest management plans, revisions or amendments from environmental review and meaningful public input under the National Environmental Policy Act (NEPA).

The Forest Service should also take into account the breadth of new scientific and socio-economic information, including requirements for the agency to develop plans to address impacts of climate change in accordance with the Global Climate Change Prevention Act of 1990.

Thank you for the opportunity to comment, Doug Deaton unknown Albuquerque, NM 87102

Planningruleno

From: bspears@spearsarchitects.com
Sent: Saturday, June 09, 2007 12:34 PM
To: Planningruleno
Subject: RE: Planning Rule NOI Comments

Forest Service
PO Box 162969
Sacramento, CA 95816-2969

Dear Forest Service,

It is essential to preserve the integrity of our forests for the millenia to come. Short-sited exploitation leads to poverty and permanent loss of our biological richness. Think long-term for the centuries and miullenia to come.

I recommend that the USFS adopt rules the same or similar to those of the September 18, 1982 Federal Register USFS planning rules. I support rules like these is because they track closely the 1976 National Forest Management Act (NFMA) and what it requires the USFS to do. The 2005 planning rules do not track the NFMA well and often leave out significant requirements or make them optional. The USFS should list all the mandatory requirements of the NFMA and then ensure that rules are prepared and implemented which contain these requirements and that these rules are covered by the EIS. The NFMA has not changed and the requirements that the USFS must adhere to are still the same.

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The Forest Service should also take into account the breadth of new scientific and socio-economic information. The Forest Service should fully analyze other alternatives to the 2005 planning rule that include strong standards to protect forests, waters and wildlife, and evaluate the adoption of some or all of the 1982 and 2000 regulations. Alternatives should also include requirements for the agency to develop plans to address impacts of climate change in accordance with the Global Climate Change Prevention Act of 1990 (7 U.S.C. 701).

Since this is the first time the public has the opportunity to participate in an EIS process for the new forest planning regulations, the Forest Service needs to modify NEPA deadlines in order to allow time to thoughtfully consider public comments throughout the NEPA process.

Thank you for the opportunity to comment, Beverley Spears 2200 Fort Union Dr Santa Fe, NM 87505

Planningruleno1

From: mkrscrim@kitcarson.net
Sent: Saturday, June 09, 2007 2:06 PM
To: Planningruleno1
Subject: RE: Planning Rule NOI Comments

Forest Service
PO Box 162969
Sacramento, CA 95816-2969

Dear Forest Service,

I live on a National Forest boundary and chose this place for that reason. The Forest is not an industrial site ripe for the taking and logging and mining projects should NOT be made easier. I love the forest for its beauty and recreational value and am out in it often. Please accept these scoping comments for the preparation of the environmental impact statement to analyze and disclose potential environmental consequences associated with the National Forest System land management planning rule.

I recommend that the USFS adopt rules the same or similar to those of the September 18, 1982 Federal Register USFS planning rules. I support rules like these is because they track closely the 1976 National Forest Management Act (NFMA) and what it requires the USFS to do. The 2005 planning rules do not track the NFMA well and often leave out significant requirements or make them optional. The USFS should list all the mandatory requirements of the NFMA and then ensure that rules are prepared and implemented which contain these requirements and that these rules are covered by the EIS. The NFMA has not changed and the requirements that the USFS must adhere to are still the same.

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Since this is the first time the public has the opportunity to participate in an EIS process for the new forest planning regulations, the Forest Service needs to modify NEPA deadlines in order to allow time to thoughtfully consider public comments throughout the NEPA process.

Thank you for the opportunity to comment, Mary Ray HC 30 Dusty Route Winston, NM 87943

Planningrulenoι

From: melody sclippa [sharks913@hotmail.com]
Sent: Sunday, June 10, 2007 1:33 PM
To: Planningrulenoι
Subject: forests

Dear Sirs, As a paerent and grandparent I feel it is too important not to take care of our Forests and protect them from destruction. Simple things like saving a tree may not seem important right now, but it will change our future if we do not. Our children and their children deserve to have those forests when they are grown up. Please ensure that they are kept safe from ruin.

Thank you for your time and consideration on this matter.

✉ *Melody Sclippa*

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Planningruleno

From: Tara Power [tarap@pwrcom.com]
Sent: Sunday, June 10, 2007 1:33 PM
To: Planningruleno
Subject: Planning rule, Notice of Intent Comments

planningruleno@fscomments.org

RE: Planning Rule, Notice of Intent (NOI) Comments
Dear USDA Forest Service

We recommend that the USFS adopt rules the same or similar to those of the September 18, 1982 Federal Register USFS planning rules.

Roads serving residential property within and adjacent to national forest are motorized public roads, open to all. These routes define an underlying network from which other management decisions necessarily must be built upon.

In the development of the forest planning EIS, I urge that the Forest Service reconsider the exemption of forest management plans, revisions or amendments from environmental review and meaningful public input under the National Environmental Policy Act (NEPA). Without the full NEPA process (an EIS), the public is not given adequate information to evaluate the environmental consequences of forest plans and disregards the best available science in favor of commercial interests. The planning rule EIS should fully analyze impacts of exempting forest plans from NEPA and consider alternatives that require full NEPA analysis and public participation.

Ernest Power
Tara Power
721 Manhattan Ct.
San Diego, CA 92109

Planningruleno1

From: Steven W. Moore [s.w.moore@att.net]
Sent: Sunday, June 10, 2007 9:28 AM
To: Planningruleno1
Subject: Change in Forest Planning Rules - Comment

1. The Forest Service should extend the comment period to 90 days.
2. The 1982 Rule, with all of its protections for wildlife should be an alternative in the EIS
3. Any rule adopted should require that all Forest Plans be developed with a requirement for full National Environmental Policy Act disclosure and analysis.
4. All alternatives for the final rule should include measurable and enforceable "standards".
5. All alternatives, including the selected alternative, for the final rule must include the requirement to maintain "viable populations" of native fish and wildlife species on forest service managed lands.
6. The selected alternative for this proposal should include a requirement that all project level decisions "be consistent with the best available science".
7. The selected alternative should reinstate standards that protect the national forests from excessive and destructive logging, by following Congress' specific instructions that the Forest Service, through the National Forest Management Act, develop regulations that limit the size of clear cuts, protect streams from impacts associated with logging, ensure prompt reforestation, and restrict the annual rate of cutting.

First and foremost the thirty-day comment period and lack of public meetings on the proposal does not do justice to an issue as important to myself and the American public as the future management of our National Forest lands and the wildlife, recreational, and water quality values they hold. Given the broad disapproval of the 2005 rule, and the failure of the Forest Service and the current administration to protect wildlife habitat, clean water, and the recreational values of National Forest lands over the past six years, the public should be given every opportunity to provide comment on this proposal, rather than be intentionally shut out of the process.

Sincerely,
Steven W. Moore



June 4, 2007

Planning Rule NOI Comments
P.O. Box 162969
Sacramento, CA 95816-6724

RE: National Forest System Land Management Planning (Fed. Reg. Vol. 72, No. 91)

To Whom It May Concern:

Thank you for this opportunity to provide comment on the Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS) on the National Forest System land management planning rules referenced above. Please accept these comments on behalf of the members of the American Forest Resource Council (AFRC). AFRC represents over 80 wood product manufacturers and forest landowners in twelve states. Our mission is to create a favorable operating environment for the forest products industry, ensure a reliable timber supply from public and private lands, and promote sustainable management of forests by improving federal laws, regulations, policies and decisions that determine or influence the management of all lands.

AFRC has been very actively involved not only in applying these rules over the years but also in commenting and effecting meaningful changes since the 1982 rule. In fact, AFRC was actively engaged in the long process that led to the 2005 rule and is very surprised, given its level of involvement, that the court would rule there was inadequate opportunity for public comment.

Nevertheless, I am writing to urge you to move as quickly as possible to complete the EIS on the 2005 National Forest System Land Management Planning Rule. In my view, this NEPA process is unnecessary and is distracting the Forest Service from the important work of revising forest plans and proposing actions to restore forest health. The court's injunction has already disrupted several ongoing plan revisions

The 2005 rule provides much needed improvements to the 2000 rule, which was so hopelessly unworkable that the agency was using the 1982 rules.

The 2005 rule:

- Improves public involvement. The previous processes required involvement over 5-7 years, whereas the new rule will reduce that to 2-3 years, allowing citizens to efficiently engage.
- Focuses environmental analysis at the appropriate level. The 2005 rule focuses analysis at the project level, where specific environmental conditions are known. The court erred in forcing the agency to conduct NEPA on the 2005, which doesn't propose specific, on the ground actions.

- Better responds to the latest scientific knowledge and changing natural conditions. Forest planning will be based on state-of-the-art scientific information as the National Forest Management Act intended.

- Saves the government millions of dollars annually and enables the agency to better manage our national forests. The Forest Service estimates it spends more than 40% of its budget and time on administrative and legal work, rather than in the forest. The 2005 rule would save more than \$27 million annually, savings that will allow land managers to get more accomplished on the ground.

As the agency must conduct NEPA on the 2005 rules pursuant to the court order, I urge the agency to analyze only the proposed rule and the no action alternative. The agency must disclose to the public the impact of failing to reduce time and resources spent on planning, which would be the result of either dropping or significantly changing the 2005 rule.

Last, your NOI states “Scoping will include review of comments previously collected during promulgation of the 2005 planning rule...agency planning directives...and the Agency categorical exclusion for land management planning...” As such, I also wish to make it official that all of the comments AFRC submitted in those arenas also be included herein by reference.

Thank you very much for your prompt attention to this important matter. As you are well aware, the COW forests in Eastern Washington and the Blue Mountains forests in Eastern Oregon are currently undergoing forest plan revisions. This issue before you now needs expeditious remedy to avoid complications and possibly the waste of several years’ effort on these six national forests.

If you have any questions, please contact me at 503-222-9505 or Chuck Burley at 541-480-2186.

Sincerely,

A handwritten signature in black ink, appearing to read "Tom Partin", with a long horizontal flourish extending to the right.

Thomas L. Partin
President

ANNA MORRISON

RECEIVED JUN 11 2007

June 7, 2007

Planning Rule NOI Comments
P. O. Box 162969
Sacramento, California 95816

Dear Comment Reader:

After being a participant in the Forest Plan updates of Region 6 in the late 1980's early 1990's and the frustration with the long and cumbersome process to develop 10-15 year plans, I wholeheartedly support the 2005 National Forests System Land Management Planning Rule (2005 Rule). This new rule expedites, without compromising public input and allows the agency to start managing our public lands which is their charge.

The pluses of the 2005 Rule are as follows:

- Improves public involvement- 2-3 years is an ample time for the public to give input on any concerns or suggested changes
- Focuses environmental analysis at the local level where environmental conditions are known. The court was wrong in ruling that NEPA was required. The 2005 rule doesn't propose specific on the ground action.
- Saves the taxpayers millions of dollars annually allowing the agency to better manage our national forests. The Forest Service budgets anymore are eaten up doing administrative and legal work instead of work on the ground.

I also urge you to analyze only the proposed rule and the "no action" alternative. It is imperative that a cost analysis of applying the 2005 Rule vs. dropping it or significantly changing the Rule be disclosed to the public.

Thank you for the opportunity to comment.

Sincerely,



Anna Morrison

25160 E. Broadway, 3B, Veneta, Oregon 97487 541.935.8759

Anna Morrison
P.O. Box 404
Florence, OR 97439

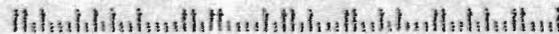
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Planning Rule NOI Comments
P. O. Box 162969
Sacramento, California 95816

95816+2969



Planningruleno

Form 8

From: Bob Jeckell [rjeckell@comcast.net]
Sent: Friday, June 08, 2007 7:54 PM
To: Planningruleno
Subject: Objections/Recommendations to 2005 rewrite of forest management planning rules

To: USDA Forest Service:

Please consider these comments in regard to the preparation of the environmental impact statement to analyze and disclose potential environmental consequences associated with the National Forest System land management planning rule.

The EIS should analyze the impacts on the national forests of exempting forest plans from environmental review and meaningful public input under the National Environmental Policy Act.

The Forest Service should ensure that the public has access to adequate information for the evaluation of the environmental consequences of forest plans. Given the size and complexity of most forest plans, the Forest Service should ensure that enough time is allowed for informed public comment.

The EIS should analyze the effects of eliminating resource protection standards from forest plans and the impacts of eliminating wildlife viability and monitoring requirements.

The Forest Service should consider alternatives to the 2005 planning rule that include strong standards to protect forests, waters and wildlife, and evaluate the adoption of some or all of the 1982 and 2000 regulations. Alternatives should also include requirements for forest plans to address the impacts of climate change.

Exempting forest management plans will eliminate the study or disclosure of the cumulative impact of management activities across the national forest, something usually done at the planning stage.

The agency should not make it easier for timber, oil, gas, mining and motorized recreation companies to profit from the use of public forests while eliminating the need for forest managers to assess potentially harmful impacts on water, wildlife, recreational use, old growth and roadless areas.

Thank you for your consideration.

Robert Jeckell
1016 La Salle Drive
Sunnyvale, CA 94087

Planningruleno1

Form 7

From: esanchezee@netscape.net
Sent: Saturday, June 09, 2007 8:07 AM
To: Planningruleno1
Subject: RE: Planning Rule NOI Comments

Forest Service
PO Box 162969
Sacramento, CA 95816-2969

Dear Forest Service,

Please accept these scoping comments for the preparation of the environmental impact statement to analyze and disclose potential environmental consequences associated with the National Forest System land management planning rule.

I recommend that the USFS adopt rules the same or similar to those of the September 18, 1982 Federal Register USFS planning rules. I support rules like these is because they track closely the 1976 National Forest Management Act (NFMA) and what it requires the USFS to do. The 2005 planning rules do not track the NFMA well and often leave out significant requirements or make them optional. The USFS should list all the mandatory requirements of the NFMA and then ensure that rules are prepared and implemented which contain these requirements and that these rules are covered by the EIS. The NFMA has not changed and the requirements that the USFS must adhere to are still the same.

The public looks to the National Forest Management Act to ensure that the Forest Service will maintain viable wildlife populations and properly manage our national forests for future generations. A critical component of past forest planning regulations is the requirement of mandatory resource protection standards for all forest plans. The EIS needs to analyze the direct and indirect effects of eliminating resource protection standards from forest plans and the impacts of eliminating wildlife viability and monitoring requirements.

In the development of the forest planning EIS, I urge that the Forest Service reconsider the exemption of forest management plans, revisions or amendments from environmental review and meaningful public input under the National Environmental Policy Act (NEPA). Without the full NEPA process (an EIS), the public is not given adequate information to evaluate the environmental consequences of forest plans and disregards the best available science in favor of commercial interests. The planning rule EIS should fully analyze impacts of exempting forest plans from NEPA and consider alternatives that require full NEPA analysis and public participation.

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Since this is the first time the public has the opportunity to participate in an EIS process for the new forest planning regulations, the Forest Service needs to modify NEPA deadlines in order to allow time to thoughtfully consider public comments throughout the NEPA process.

Thank you for the opportunity to comment, Elaine Sanchez
6653 Hillwood Ln
Dallas, TX 75248



WYOMING GAME AND FISH DEPARTMENT

5400 Bishop Blvd. Cheyenne, WY 82006

Phone: (307) 777-4600 Fax: (307) 777-4610

Web site: <http://gf.state.wy.us>

GOVERNOR **PLR117.**
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ED MIGNERY

June 7, 2007

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WER 11630
United States Forest Service
Notice of Intent
Environmental Impact Statement
National Forest System Land
Management Planning Rule
Docket ID No. fr11my07-21

Dave Sire
Planning Rule NOI Comments
PO Box 162969
Sacramento, CA 95816-2969

Dear Mr. Sire:

The staff of the Wyoming Game and Fish Department has reviewed the Notice of Intent for the Environmental Impact Statement for the National Forest System Land Management Planning Rule. We offer the following comments for your consideration.

Lack of Cumulative Impacts Assessment – Failure to perform a full EIS in a Forest Plan (as in the 2005 Planning Rule) results in lack of cumulative impacts assessment across the landscape. This oversight must be captured in follow-up documents, as each project-level EIS would then have to provide the cumulative impacts from immediately surrounding projects. This would make each project-level analysis more cumbersome if cumulative impacts assessments are not to be ignored.

Allocation Decisions – Whether called allocation or “suitability,” a decision is rendered through the 2005 rule, which requires NEPA analysis.

Standards and Guidelines – The 2005 rule ignores past “standards and guidelines” that were developed to guide on-the-ground management, and fails to replace these with a similar product. We particularly found the standards useful in pointing toward those management items that would achieve desired conditions, and suggest adding them or their equivalent back into the rule process. Without this, the forest plans contain little actual planning guidance, but rather would rely heavily on the discretion of the forest supervisor, and will not support the details of the decisions made.

Adaptive Management/Performance-Based – If the Forest Service determines that plans must have NEPA analysis, we suggest building in performance-based language, which employs adaptive management ideas (e.g., based on current information, increases management flexibility when changes occur, does not limit the document to prescribed methodology). Performance-

Mr. Dave Sire
June 7, 2007
Page 2 - WER 11630

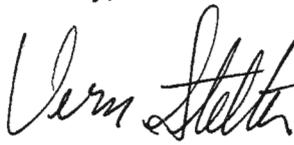
PLP 1177

based measures also bring in state cooperators for assistance in monitoring, consultation, and thus increases state agency collaboration regarding their respective resources.

Because of the nature of Forest Plans, we believe they must be analyzed using the NEPA process. The Plans must provide decisions and direction that are necessary to comprehensively guide forestland management. While we agree the 1982 Rule needs work, converting the 2005 Rule to a more usable NEPA-analyzed rule will require a major overhaul. We see little choice but to revert to the 1982 Rule in the interim.

Thank you for the opportunity to comment.

Sincerely,


JOHN EMMERICH
DEPUTY DIRECTOR

JE:VS:gfb

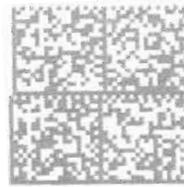
cc: USFWS

**WYOMING
GAME AND FISH DEPARTMENT**

5400 Bishop Boulevard



Cheyenne, WY 82006



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06/08/2007

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Dave Sire
Planning Rule NOI Comments
PO Box 162969
Sacramento, CA 95816-2969

June 5, 2007

Planning Rule NOI Comments
P.O. Box 162969
Sacramento, CA 95816-2969

RECEIVED JUN 11 2007

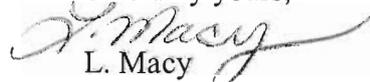
Dear Mr. Clark,

Comment on Change in Forest Planning Rules:

First and foremost the thirty-day comment period and lack of public meetings on the proposal does not do justice to an issue as important to myself and the American public as the future management of our National Forest lands and the wildlife, recreational, and water quality values they hold. Given the broad disapproval of the 2005 rule, and the failure of the Forest Service and the current administration to protect wildlife habitat, clean water, and the recreational values of National Forest lands over the past six years, the public should be given every opportunity to provide comment on this proposal, rather than be intentionally shut out of the process.

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Sincerely yours,



L. Macy
Hauppauge, NY

Ms. Linda E. Macy
607 Devonshire Rd
Hauppauge, NY 11788-4527

LONG ISLAND NY 117

06 JUN 2007 PM 4 L



PLR118

Planning Rule NOI Comments
P.O. Box 162969
Sacramento, CA 95816-2969

ATTENTION: MR. CLARK

95816+2969





Idaho Conservation League

PO Box 844, Boise, ID 83701 208.345.6933 Fax 208.344.0344

Mark Rey
Under Secretary for Natural Resources and Environment
Rule NOI Comments
P.O. Box 162969
Sacramento, CA 95816-2969

RECEIVED JUN 11 2007

E-mail: planningrulenoifsccomments.org

June 6, 2007

RE: Idaho Conservation League Comments Regarding the NOI to Prepare an EIS for the National Forest System Land Management Planning Rule

Dear Mark Rey,

Thank you for considering our comments on the Notice of Intent to prepare an EIS for the National Forest System Land Management Planning Rule. For thirty years, the Idaho Conservation League has worked to protect Idaho's clean water, wilderness, and quality of life through citizen action, public education, and professional advocacy. For more information or to become a member, visit www.wildidaho.org. As Idaho's largest state-based conservation organization we represent over 9,000 members, many of whom have a deep personal interest in protecting our water, wildlands, and wildlife from commercial development activities.

We are concerned that the 2005 regulations implementing NFMA released the Forest Service from accountability to conserve and sustain public natural resources. The Draft EIS should include a reasonable range of alternatives to these regulations, including promulgation of all of or part of the 1982 and 2000 NFMA regulations. These alternatives and their effects to public resources should be analyzed rigorously under NEPA as they will have serious and broad implications for the National Forest System. These alternatives should also be reviewed by an independent scientific review committee as required by NFMA.

Lastly, we are concerned that the timeline for the Draft EIS is unreasonable. We believe that the timeline for comments should be extended past June 11, and that more time should be taken to identify the scope of issues referenced in hundreds of comments, and develop a reasonable range of alternatives. It is unrealistic accomplish these tasks AND release a Draft EIS by the end of the month.

Once again we thank you for the opportunity to submit comments on this project. Please send us any subsequent documents for this project. We look forward to continuing to work with the Forest Service on this project and others in the future.

Sincerely,

Bradley Smith,
Public Lands Associate

Idaho Conservation League Comments Regarding the NOI to Prepare an EIS for the National Forest System Land Management Planning Rule

Standards Versus Guidelines

By the USDA's own admission, the 2005 planning rule "embodies a paradigm shift in land management planning." 70 Fed. Reg. at 1024. Indeed, the wholesale replacement of standards with discretionary guidelines alone demonstrates a "paradigm shift." At least twice in the National Forest Management Act (NFMA) guidelines *and* standards specifically mentioned. (See 16 U.S.C. § 1604(c) and (g)). These standards and guidelines are intended to conserve and sustain public resources (i.e. natural resources, fish and wildlife) on the various units of the National Forest System.

However, under the 2005 planning rule, units of the National Forest System often opted to include only the discretionary guidelines. Any reference to standards included those incorporated from a regional level. For example, the draft Idaho Panhandle National Forests Land and Resource Management Plan (LRMP) contains objectives for managing geographic areas on its forests, but the only reference to *standards* were those incorporated from the Northern Region. Relying solely on the regional office for standards implies that the Idaho Panhandle National Forests should be managed the same as the Black Hills National Forest in South Dakota. Such LRMPs fail to recognize the forest-specific resources that demand different management considerations. It implies that the Black Hills and the Idaho Panhandle have the exact same resources, the exact same fish and wildlife species and the exact same management issues. Further, it is not clear how any future amendments or updates to regional standards and guidelines would be considered and implemented at the forest-level.

Standards and guidelines must be proscribed for each unit of the National Forest System as required by NFMA. The type of "paradigm shift" the Forest Service sought to implement under the 2005 NFMA regulations would require a similar "paradigm shift" in Congress, the intent of which has not been demonstrated to date. The standards and guidelines that result from the forest planning process are intended to conserve and sustain public resources and ensure that the Forest Service is held accountable when public resources are not conserved and sustained. If standards and guidelines are not in place to conserve natural resources, fish and wildlife, the agency loses the incentive to conserve and sustain these resources.

If the Forest Service is intent on eliminating resource protection standards from Forest Plans, the environmental impact statement (EIS) must analyze the direct, indirect and cumulative effects of this action pursuant to the National Environmental Policy Act (NEPA). 40 C.F.R. § 1502.16(a)-(d). This includes, but is not limited to, the direct, indirect, and cumulative effects on:

1. Sensitive, threatened, and endangered species (which will also require consultation with the U.S. Fish and Wildlife Service and NOAA Fisheries pursuant to Section 7 of the Endangered Species Act (ESA));
2. Plant and animal diversity (See 16 U.S.C. § 1604(g)(3)(B));

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This unrealistically expedited timeline raises questions about the commitment by the department and the Forest Service to thoroughly develop and consider alternatives and their effects on the natural and human environment. It suggests that the department and the agency have already predetermined the alternative to be implemented and the rule to be promulgated. Such an approach would, once again, be contrary to federal law and would likely result in a failed effort.

Under NEPA, federal agencies are prohibited from predetermining the alternative to be implemented for a major federal action. Specifically the regulations implementing NEPA require that “[t]he statement shall be prepared early enough so that it can serve practically as an important contribution to the decision-making process and *will not be used to rationalize or justify decisions already made.*” 40 C.F.R. § 1502.5 (emphasis added). This means that the EIS should be prepared early enough to include a reasonable range of alternatives, but not so early that issues to be raised in scoping are excluded from the range of alternatives because they were not synthesized beforehand.

Clearly any agency is incapable of reviewing and synthesizing the issues being raised in this scoping process in the timeline suggested in the NOI. Presumably hundreds, if not thousands of comments will be submitted by a vast representation of organizations, other agencies, state and local governments, and individuals. It is entirely implausible that the department and the Forest Service will be capable of receiving all comments by June 11, identifying the scope of issues, developing a reasonable range of alternatives, and releasing a Draft EIS by the end of the same month. As such, the USDA and the Forest Service should adopt a more realistic timeline for identification of the scope of the issues, development of a reasonable range of alternatives, preparation of a Draft EIS, and subsequent preparation of an FEIS and promulgation of a final rule.



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June 11, 2007

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Transmitted by email

Re: Comments Concerning Scope of Analysis for National Forest System Land Management Planning Rule EIS

Dear Madam or Sir,

On behalf of WildWest Institute (formerly the Ecology Center), Alliance for the Wild Rockies, and The Lands Council, please accept the following comments on the scope of analysis for the National Forest System Land Management Planning Rule EIS (hereinafter, "planning rule EIS"). WildWest Institute and Alliance for the Wild Rockies are conservation organizations working to ensure protection of biological diversity and ecosystem integrity in the Wild Rockies and Inland Northwest bioregions, which encompass part of the Northern Rocky Mountains bioregion. We have collective decades of participating in the public dialogue concerning management of national forests in these bioregions.

Our national forests are irreplaceable, and provide clean drinking water, clean air, habitat for rare and endangered fish, plants and wildlife, and recreational experiences for people to appreciate and enjoy these values. Scientists and the American public increasingly recognize the complexity of forest ecosystems, and have learned the ecological consequences of having prioritized resource extraction above conservation in past management of the national forests. It is time the Forest Service recognize the damage it has done to our priceless national forest heritage, and formulate regulations that emphasize **restoration** of the damaged watersheds and forest ecosystems.

The American people do not want their forests to further degraded by logging, mining, oil exploration and drilling, livestock grazing, and the indirect and cumulative effects surrounding those developments, such as noxious weeds and insufficiently limited motorized access. This is something the Forest Service ought to be acutely aware of. In 1994, a Forest Service Values Poll of a representative sample of the American public was asked to indicate their level of agreement with the statement, "Natural resources in public forests and grasslands should be made available to produce consumer goods." **57% of the American public who offered and opinion on that**

question disagreed with that statement. In fact, 26% of those polled stated they “Strongly Disagree,” which is far more than any other response category.

Results of a June 1998 national survey of the American people by Market Strategies, Inc. and Lake, Sosin, Snell, Perry and Associates, Inc. found that 69% oppose logging in national forests. And in January of 2000 results of a national survey by American Viewpoint were released that reveal solid support for ending resource extraction on national forest lands. Among other questions, people were asked, “In general, do you favor, or oppose allowing logging, mining, and other industrial activities on national forest lands?” Sixty percent said they oppose, and only 31% said they favor.

To us, the most fundamental and important requirement found in the National Forest Management Act (NFMA) is that the Forest Service must preserve diversity. The 1982 regulations addressed this issue in several ways, one of which is with the mandatory viability requirement, along with the related requirement to monitor population trends of indicator species in response to management actions. In assessing the potential impacts of the proposed rule, the Forest Service must include an analysis of the potential impacts to fish and wildlife species from the elimination of the 1982 viability requirement and its other related biodiversity clauses.

After over a century of management, old-growth forests are relatively scarce, well below the range of natural variability on many national forests. Since old growth is characterized by a high degree of diversity, the planning rule EIS should include an alternative that sets aside all of the remaining old growth from the direct effects of logging, “fuel reduction” and all other vegetation management projects.

Given the widespread public support for protecting **all** roadless areas, the planning rule EIS alternatives must require that the forest planning process include assessment all roadless areas of 1000 acres or more for their Wilderness suitability. The planning rule EIS must also go further, and direct that national forest planning include a mandate to re-assess all roadless area boundaries so that roadless inventories are updated any time activities are proposed or analyzed that may impact Wilderness suitability.

In recently proposed changes to the planning regulations, the Forest Service recognized that **sustaining the ecosystem** must be the first guiding principle of forest planning; if uses are not ecologically **sustainable**, they cannot be continued over the long-term and will likely impair or eliminate other uses or values provided by the forest. Ecosystem sustainability is closely related to biological diversity. Sustainability may be defined as:

The ability of any enduring social or natural system to continue functioning into the indefinite future without being forced into decline through exhaustion of key resources. In a sustainable system, the demands placed upon the environment by people and commerce can be met without reducing the capacity of the environment for future generations. Essentially, it is recognized that economic security, community vitality, equity, quality of life, and commitment to the welfare of future generations depends upon maintaining and restoring ecological integrity.

From the foreword in Noss (2001), D.C. Carlton states:

For real sustainability, the conditions, processes, abundances, and ecological interactions that can sustain all native elements of biological diversity (at safe and historically reasonable densities) would be present. ... Ecological sustainability occurs when each ecosystem is fully functioning with all of its natural parts. ... (W)e can and must demand that the concept of ecological sustainability be incorporated in our environmental legislation, public education, and all land management decisions so that it becomes a necessary, primary, and central consideration in all questions involving development.

Following from this expressed need to sustain all native elements of biological diversity, Noss (2001) states:

Ecosystems have three basic components: **composition, structure, and function**. Together, they define biodiversity and ecological integrity and provide the foundation on which standards for a sustainable human relationship with the earth might be crafted.

Composition includes the kinds of species present in an ecosystem and their relative abundances, as well as the composition of plant associations, floras and faunas, and habitats at broader scales. We might describe the composition of a forest, from individual stands to watersheds and regions.

Structure is the architecture of the forest, which includes the vertical layering and shape of vegetation and its horizontal patchiness at several scales, from within stands (e.g., treefall gaps) to landscape patterns at coarser scales. Structure also includes the presence and abundance of such distinct structural elements as snags (standing dead trees) and downed logs in various size and decay classes.

Function refers to the ecological processes that characterize the ecosystem. These processes are both biotic and abiotic, and include decomposition, nutrient cycling, disturbance, succession, seed dispersal, herbivory, predation, parasitism, pollination, and many others. Evolutionary processes, including mutation, gene flow, and natural selection, are also in the functional category.

The composition, structure, and function of an ecosystem are intricately interdependent, such that a change in function, for instance an increase in the frequency or severity of fires or windstorms, produces corresponding changes in the species composition and physical structure of the ecosystem.

One of the most useful ideas is the concept of “natural” or “historic” range of variability. This concept recognizes that natural ecosystems are always changing, but that variation over time falls within certain bounds. The species that make up an ecosystem have evolved within this range of variability. They have adapted to these conditions.

Ecosystems are nested at multiple scales, and thus sustainability must also be assessed and analyzed at multiple scales. Logically, the answers to the following types of questions are fundamental to sustaining ecosystems: What is the range of natural variability in the diversity in a cubic centimeter of forest soil, in terms of numbers and types of organisms? What is the range of natural variability in the diversity of plant species in the understory of a one-acre patch of larch/Douglas-fir forest on a north aspect in Montana? What is the natural range of variability in the diversity of forest types found in major drainages of a national forest in the Northern Region?

Noss (2001) also states, “If the thoughtfully identified critical components **and processes** of an ecosystem are sustained, there is a high probability that the ecosystem as a whole is sustained.” (Emphasis added.) Thus, we believe that the planning rule EIS must address NFMA diversity requirements in terms of the interrelatedness of composition, structure, and function—necessarily integrating into the analyses the concept of **diversity of natural processes**.

We are aware that the agency has committed an enormous amount of resources to write proposed Revised Forest Plans under the 2005 regulations. Unfortunately, for the planning rule, it appears that the Forest Service is merely going through the motions and has already made its final decision to adopt rules that would be essentially identical to the 2005 regulations. The Forest Service is accepting these scoping comments on its “proposed” action through June 11, 2007, but the agency states that it expects the draft planning rule EIS to be completed sometime later this month! There is no way the Forest Service can review and incorporate all scoping comments, and analyze the various issues and concerns raised in those comments for the planning rule EIS, within a matter of days.

We have reviewed proposed Revised Forest Plans (RFPs) the Forest Service wrote under the earlier erroneous assumption that the 2005 regulations met legal requirements. Those include the Lolo, Kootenai, Bitterroot, Flathead, and Idaho Panhandle National Forests. The way those Proposed RFPs are written, it seems the Forest Service is attempting to make NFMA, its newly adopted regulations, and the RFPs entirely unenforceable. NFMA mandates such as avoiding irreversible damage to the productivity of the land, for example, apparently mean nothing to the agency.

The difference between mandatory standards on one hand, and the vague, discretionary “guidelines” found in those Proposed RFPs is the difference between “insuring” a substantive requirement like species viability or soil productivity, and “considering” them as mere factors in a larger equation. In other words, it is a question of accountability and enforceability of the Forest Plans.

Merely adopting vague and unenforceable objectives, goals, and guidelines as those RFPs does nothing to *assure* compliance with binding and applicable laws and regulations, nor will it get to ecological sustainability. NFMA, after all, is a proactive, forward-looking piece of legislation, not a reactive, remedial statute. All too often society and western civilization have dealt with serious environmental problems only after they have caused great harm, much to our disadvantage (e.g., ESA, Superfund, depletion of the ozone layer with CFCs, etc.). By requiring forward-looking planning and public commitments after careful environmental study under

NEPA, NFMA sought to preserve biological diversity, water quality, and soil productivity before they were sacrificed to short-term economic interests, so that we could pass this natural heritage on to our grandchildren (and to avoid the high cost of later remediation).

Contrast this fundamental proposition with the approach taken by those Proposed RFPs under the proposed planning rule, which converts such seminal statutory requirements as providing for biological diversity into a fuzzy “desired conditions” to be strived for, but if never actually achieved—“so what?”

The Proposed RFPs were able to achieve such a level of meaninglessness because the 2005 regulations eliminated the need for writing EISs for the Plans. Regardless of the alternative in the planning rule EIS, each must require the Forest Service to prepare EISs as part of the forest plan revision process.

In addition to the fish and wildlife viability requirement, the 1982 NFMA regulations included a number of mandatory, quantifiable standards referred to as “management requirements,” including numeric limits on the size of clearcuts and streamside buffers. The planning rule EIS must assess the likely and potential environmental consequences resulting from the proposed elimination of these enforceable, numeric standards.

The planning rule EIS must include the 1982 NFMA regulations as a reasonable alternative to the proposed action, and include it for full analysis. The 1982 regulations included such forward-thinking ideals for maintaining biological diversity, including following requirements to insure well-distributed viable populations and soil productivity. Management directives under the 1982 regulations also included ideals that should have been implemented, although they never were, such as for considering Sensitive species at all levels of planning.

The planning rule EIS must disclose the degree to which Forest Service management under the 1982 regulations, and any subsequently tentative set of regulations has been found to be in violation of those regulations or of NFMA itself. A commitment to sustainability in all its dimensions requires that evaluation of and management for ecosystem and species diversity be mandatory and legally enforceable. The new planning rule must direct forest planning to incorporate even less discretionary and more enforceable standards into the Forest Plans.

The Forest Service must also consider the 2000 NFMA regulations as a reasonable alternative to the proposed rule that must be fully assessed in the planning rule EIS. Those regulations were the result of years of work by the agency, as well as a 13-member Committee of Scientists, which was convened by the Forest Service pursuant to NFMA to review the Forest Service planning process and offer recommendations. The Committee held public meetings across the county before issuing its final report in March, 1999, which led to the issuance of the 2000 regulations. The Committee’s 1999 report had two overarching themes: (1) ecological sustainability is a prerequisite to social and economic sustainability and should be the first responsibility of the Forest Service and (2) the public needs to have early, broad, and continuous involvement in national forest planning and stewardship.

The analysis must disclose how each alternative responds to the March 1999 Committee of Scientists report.

The 2000 regulations included such notions as “focal species.” Noss (2001) expands upon the Management Indicator Species and Sensitive species concepts in discussing focal species, keystone species, and dominant species:

(C)onservationists should identify groups of species whose vulnerability can be attributed to a common cause, such as loss of area or fragmentation of particular habitat type or alteration of a fire or hydrologic regime. Species in each group then can be ranked in terms of their vulnerability to those threats. Lambeck identified **area-limited species, dispersal-limited species, resource-limited species, and process-limited species** as vulnerability groups. For each group, the **focal species**—the species we should focus on in developing **conservation plans**—are the ones most demanding for the attribute that defines that group. ... Together, these species tell us what patterns and processes in the landscape must be sustained in order to sustain biodiversity.

... I would add **keystone species**, which have a profound influence on the ecosystems they are part of, out of proportion to their abundance. Top predators, for example, are often keystone species because they control the diversity and composition of lower levels in the food chain by regulating populations of major herbivores or competitors. So are beaver, woodpeckers, gopher tortoises, and other “ecological engineers” that create habitats used by many other species. I would also add **dominant species**, which shape the ecosystem through their domination of biomass. A drastic decline of a once-dominant species—or ecosystem—could be just as significant ecologically as the loss of a keystone. The severe reduction of salmon stocks in the Pacific Northwest apparently has had profound consequences across aquatic and terrestrial food webs.

The planning rule EIS must consider the pervasive, and likely increasing, effects of climate change on the ecology of the national forests. Noss (2001) states:

Global climate change poses some of the most severe top-down challenges to sustainability at local and regional scales. To counter these threats, we must protect critical climatic refugia, enhance connectivity parallel to climatic gradients so that species can track shifting conditions, and sustain the biodiversity that makes ecosystems more resilient to change.

The Forest Service must consult with other government agencies as part of the public process for adopting a new planning rule. This includes consultation with the U.S. Fish and Wildlife Service regarding species listed under the Endangered Species Act.

The planning rule EIS must clearly disclose how the NFMA Regulations interface with directives such as those written in the Forest Service Manual (FSM) and Forest Service Handbook (FSH). This is a potentially serious issue, since development and adoption of

directives such as the FSM and FSH have usually been accomplished outside the NEPA process. For example, in the Forest Service document, “Directives Briefing-Forest Management and Timber Suitability” it states:

While many of NFMA requirements were formerly included in the planning rule, the new planning rule recognizes that most NFMA requirements do not need to be in the rule itself. Many NFMA requirements are now included in the Directives, now out for public review and comment. (Directives Briefing - Forest Management and Timber Suitability, 3-15-05 Final, For Internal Use.)

Lacy, 2001 points out the failure of most regulatory mechanisms to adequately address soils:

As federal agencies focus increasingly on addressing environmental protection from an holistic perspective under the current regime of environmental laws, a significant gap remains in the federal statutory scheme: protection of soils as a discrete and important natural resource. Because soils are essential building blocks at the core of nearly every ecosystem on earth, and because soils are critical to the health of so many other natural resources—including, at the broadest level, water, air, and vegetation—they should be protected at a level at least as significant as other natural resources. **Federal soil law (such as it is) is woefully inadequate as it currently stands. It is a missing link in the effort to protect the natural world at a meaningful and effective ecosystem level.**

... This analysis concludes that **the lack of a public lands soil law leaves the soil resource under-protected and exposed to significant harm, and emasculates the environmental protections afforded to other natural resources.**

(Emphasis added.) The problems Lacy (2001) identifies of regulatory mechanisms exist in all versions of NFMA regulations issued or proposed to date, and thus the planning rule EIS must strengthen protection of soils for each alternative.

Finally, the planning rule EIS must disclose **how** the Forest Service will address the issue of “best available science” in the context of Forest Plans. Sullivan et al. (2006) state:

Often, scientific and political communities differ in their definition of best available science and opposing factions misrepresent the concept to support particular ideological positions. Ideally, each policy decision would include all the relevant facts and all parties would be fully aware of the consequences of a decision. But economic, social, and scientific limitations often force decisions to be based on limited scientific information, leaving policymaking open to uncertainty.

The American Fisheries Society and the Estuarine Research Federation established this committee to consider what determines the best available science and how it might be used to formulate natural resource policies and shape management actions. The report examines how scientists and nonscientists perceive science, what factors affect the quality and use of science, and how changing technology influences the

availability of science. Because the issues surrounding the definition of best available science surface when managers and policymakers interpret and use science, this report also will consider the interface between science and policy and explore what scientists, policymakers, and managers should consider when implementing science through decision making.

As part of their implicit contract with society, environmental scientists are obliged to communicate their knowledge widely to facilitate informed decision making (Lubchenco 1998). For nonscientists to use that knowledge effectively and fairly, they must also understand the multifaceted scientific process that produces it.

A common misconception of nonscientists is that science can provide objective answers to the thorny question, “How *should* we manage this ecosystem or resource?” Such questions can be answered only by reconciling the socially constructed values and expectations of the stakeholders at the policymaking table. Scientists may, of course, participate in goal setting, but they should neither be expected nor claim to be completely objective under those circumstances. In contrast, science can inform society about the consequences of its management goals and actions, which may lead to revised goals and actions, but goal setting itself is outside the realm of science.

Science is a dynamic process that adapts to the evolving philosophies of its practitioners and to the shifting demands of the society it serves. Unfortunately, these dynamics are often controversial for both the scientific community and the public. To see how such controversies affect science, note that over the last decade nonscientists have exerted increasing influence on how science is conducted and how it is applied to environmental policy. Many observers find this trend alarming, as evidenced by several expositions titled “science under siege” (e.g., Wilkinson 1998; Trachtman and Perrucci 2000).

Also controversial are recent legislative efforts to define best science, to mandate that certain kinds of data be given greater weight by decision makers, or to establish by law the qualifications for those who would conduct peer review (Bolten 2004). This in itself is contrary to the quest for the best available science because legislators—usually nonscientists—are seeking to dictate which type of science is best and then casting it as law, ignoring the fact that the best available science will continually evolve.

To achieve high-quality science, scientists conduct their studies using what is known as the scientific process, which typically includes the following elements:

- A clear statement of objectives;
- A conceptual model, which is a framework for characterizing systems, stating assumptions, making predictions, and testing hypotheses;
- A good experimental design and a standardized method for collecting data;
- Statistical rigor and sound logic for analysis and interpretation;

- Clear documentation of methods, results, and conclusions; and
- Peer review.

Peer review.—A basic precept of science is that it must be verifiable, and this is what separates science from other methods of understanding and interpreting nature. The most direct method of verification is to redo the study or experiment and get the same results and interpretations, thus validating the findings. Direct verification is not always possible for nonexperimental studies and is often quite expensive and time-consuming. Instead, scientists review the study as a community to assess its validity. This latter approach is the process of peer review, and it is necessary for evaluating and endorsing the products of science. **The rigor of the peer review is one way to assess the degree to which a scientific study is adequate for informing management decisions.** The use of peer review in applied sciences such as fisheries, natural resource, and environmental science has proven to be problematic because there are two components to consider, the science and the policy based on it.

Peer review has a different meaning to scientists than it does to the public. To scientists, peer review is a formal process conducted by active, knowledgeable experts in the general field of the study of interest. The peer review covers (1) the validity of the methods used, (2) whether the methods and study design adequately address the objectives, (3) whether the results that are reported are adequate for interpretation, (4) whether the results support the conclusions, and (5) whether the findings represent a significant advance in scientific knowledge. Typically, several knowledgeable scientists conduct the review independently and anonymously.

While the scientific community is primarily interested in the validity of the research, the public and policymakers are more interested in the impact of science on societal decisions. Thus the basis for judging science differs, as does the meaning of valid evidence (Clark and Majone 1985). The policy implications of science are judged not only on the basis of its quality but also regarding how it influences the public. Science, as well as discussions of “best” science, become controversial to nonscientists only when it has the potential to change societal policy. In any peer review process, the selection of reviewers helps set the tone for the critique.

In a scientific peer review, reviewers are selected because they are thought to be fair, unbiased, and knowledgeable, and anonymity is preserved to encourage frankness. For public reviews, reviewers are often selected because they can articulate opposing points of view, and reviewers’ identities and credentials are revealed, helping to inform the debate. Such differences in style and substance are often misunderstood and unappreciated by both scientists and nonscientists. The U.S. Office of Management and Budget, which advises the president, recently proposed standards for conducting peer reviews of regulatory science. These standards are opposed by many scientists because they contradict conventional peer review in several important aspects, particularly by (1) disclosing the identities of

the reviewers, (2) encouraging public—that is, nonscientist—participation, and (3) modifying conflict-of-interest criteria (Bolten 2004; Kennedy 2004). Recognition that scientific review and public debate inform different aspects of policymaking is important, but it is also important to recognize that one cannot replace the other.

Scientific information and information related to science conventionally has been available in four basic forms, all of which are useful in policy development and management. The first is the peer-reviewed literature, which formally presents the findings of scientific research after an extensive, independent review by other experts in the field. The second is the gray literature, which does not typically receive an independent peer review but which may be reviewed in-house, that is, within the author's own institution. The third is the opinion of individuals who are considered experts in the field. Typically no review is implied, although the experts' reputations may attest to the quality of their statements. Finally, there is anecdotal evidence, such as public testimony, which generally must stand on its own. Each form typically reflects different scientific content and exhibits different degrees of review, timeliness, and availability (See Table 2).

Peer-reviewed literature.—The most readily available and reliable sources of information are scientific journals, monographs, and books. This type of information is considered the most reliable mainly because it has undergone peer review. It is widely available because it is generally published in a standard format, is held by many libraries, is often accessible through the Internet, and is catalogued by a variety of abstracting services. Peer-reviewed literature is often not as timely as other information sources because time is needed to do a proper review.

Gray literature.—Gray literature, such as some agency or academic technical reports, is also available, but until recently has not been widely accessible. This literature commonly contains reports of survey, experimental or long-term historical data along with changes in protocols, meta-data, and the progress and findings of standard monitoring procedures. Gray literature may be reviewed internally, such as by other agency scientists, but it typically does not contain significantly new findings that would require review by a broader or more independent audience. Like the peer-reviewed literature, gray literature is increasingly accessible through rapidly evolving electronic forums.

Expert opinion.—The third source of scientific information is professional experts such as university and government scientists. Expert opinion can be highly reliable, especially when it is based on the experience of multiple experts who collectively function as peer reviewers of a sort. Furthermore, it may be the only form of scientific knowledge available for some crucial policy issues. Questions such as “Is this stock overfished?,” “Is this species imperiled?,” and “Is this water body impaired?” often require substantial amounts of expert opinion to answer them. In fact, judgments about the recovery of imperiled species are based largely on expert opinion (Schemske et al. 1994).

Anecdotal evidence.—A final source of information that should be acknowledged is anecdotal evidence. Webster’s dictionary defines an anecdote as a short narrative of an interesting, amusing, or biographical incident; basically, it is a short story about a personal experience. In fisheries and environmental science, anecdotal evidence often becomes available through public comments at regulatory meetings, through newspaper or popular journal coverage, or through letters sent to government representatives or the media. It may reflect traditional ecological knowledge, that is, knowledge that is not generally available to the public but passed on from one generation to the next within various fishing and environmental communities. Scientific communities often put much less credence in this type of information because it is difficult to access, verify, and review. This is so even when anecdotal evidence is generated by the scientific community itself. The public can be offended when their input is dismissed as “anecdotal,” but the process of science would be impeded if this type of information were dealt with inappropriately. One reason for reconsidering the role of anecdotal evidence in informing science is that today it is easier to document, look for patterns in, and follow up on less-structured forms of information than it was in the past. This is an area that will require greater examination. As discussed in the section on the democratization of science (below), anecdotal evidence may often be relevant at the science–policy interface.

Politicization of Science

Many nonscientists and scientists believe that science is being increasingly politicized. Articles in newspapers (e.g., Broad and Glanz 2003) and professional newsletters document frequent instances in which the process and products of science are interfered with for political or ideological reasons. In these cases, the soundness of science, as judged by those interfering, turns on the extent to which the evidence supports a particular policy stance or goal. What was previously an objective scientific debate then becomes centered on values in a public forum. Some environmental sociologists refer to such a debate as a “tournament of values” (Hull and Robertson 2000). Politicization is especially problematic for scientists supervised by administrators who may not feel the need to follow the same rules of scientific rigor and transparency that are required of their scientists. While public debate about science-informed issues is important, for we must identify values of concern and risks associated with alternative management actions, political intervention itself can be a major barrier to the sound practice and application of science.

Scientists committed to the sustainable management of ecosystems are developing new strategies to buffer science from political interference, while keeping open the possibility for a democratic debate. These strategies fall into four main categories:

1. Invoke independent review. The emphasis here is on *independent*, which means that reviewers have little personal stake in the policy outcomes and cannot be intimidated or persuaded by stakeholders. Key strengths of independent review include
 - a. minimizing the influence of special interest groups;
 - b. separating scientific and nonscientific issues;

- c. incorporating all relevant information; and
 - d. articulating all relevant assumptions, risks, and alternatives (Meffe et al. 1998).
2. Develop standard procedures and criteria. The procedures and criteria for guiding management actions should be developed *before* stakeholders are embroiled in controversy. Decision rules should be laid out before the data are even considered. A critical and difficult step is to articulate the uncertainties related to various costs and benefits of potential management actions (Mangel et al. 1996; Shelden et al. 2001).
 3. Revise the bureaucratic structure. Science functions best when the responsibility for it resides in an institution that is politically independent of the policymakers it informs (Hutchings et al. 1997; Wagner 2001). Furthermore, fragmented information and authority enhance the probability of poor policy decisions mediated by political influence (Yaffee 1997). Science-based management is facilitated by viewing resources in a landscape or ecosystem context, which requires scientists to communicate across disciplines (Baron et al. 2002). Thus, bureaucracies that broadly integrate information, while linking management actions with science but keeping the scientific and policymaking functions separate, should produce sound, useful science.
 4. Promote scientific literacy. A society that understands how science works is more likely to value science as an aid in decision making than is a scientifically illiterate society. Scientific literacy enhances citizens' ability to participate effectively in the decision making of modern society and helps them distinguish science from pseudoscience (Maienschein 1998). Scientific literacy means not only being familiar with various facts and technologies but also expecting legitimate disagreement among scientists and being able to think critically to reach an informed opinion on public issues. A more scientifically literate society would probably be less tolerant of political interference with science. Much can be learned from how science and policy have historically interacted to gain insights on how best to link environmental science with policy now (Gunderson et al. 1995). Certainly both scientists and policymakers must act adaptively and learn from the changing science-policy interface.

Thank you for considering our comments. Please keep our organizations on the list to receive all future mailings and notifications concerning the planning rule.

Sincerely,

/s/

Jeff Juel

And on behalf of:

Michael Garrity
Alliance for the Wild Rockies
P.O. Box 505
Helena, Montana 59624

Mike Petersen
The Lands Council
423 West First Avenue, Suite 240
Spokane, Washington 99201

406-459-5936

509-838-4912

References cited:

Lacy, Peter M., 2001. Our Sedimentation Boxes Runneth Over: Public Lands Soil Law As The Missing Link In Holistic Natural Resource Protection. Environmental Law; 31 Env'tl. L. 433 (2001).

Noss, Reed F. 2001. Biocentric Ecological Sustainability: A Citizen's Guide. Louisville, CO: Biodiversity Legal Foundation. 12pp.

Sullivan, Patrick J.; James M. Acheson; Paul L. Angermeier; Tony Faast; Jean Flemma; Cynthia M. Jones; E. Eric Knudsen; Thomas J. Minello; David H. Secor; Robert Wunderlich; Brooke A. Zanetell; 2006. Defining and Implementing Best Available Science for Fisheries and Environmental Policy, and Management. American Fisheries Society, Bethesda, Maryland; Estuarine Research Federation, Port Republic, Maryland. September 2006.

PLR122.

Planningruleno

From: Elsie Silkiss [desilk@rockisland.com]
Sent: Monday, June 11, 2007 10:40 AM
To: Planningruleno
Subject: Planning Rule, Notice of Intent (NOI) Comments

Dear USDA Forest Service

After just returning from a cross country tour and enjoying the beauty of at least seven or more National Forests, we recommend that the USFS adopt rules the same or similar to those of the September 18, 1982 Federal Register USFS planning rules. As we are 83 and 76 years old accessibility is of upmost importance for us as well as others.

Roads serving residential property within and adjacent to national forest are motorized public roads, open to all. These routes define an underlying network from which other management decisions necessarily must be built upon.

In the development of the forest planning EIS, we urge that the Forest Service reconsider the exemption of forest management plans, revisions or amendments from environmental review and meaningful public input under the National Environmental Policy Act (NEPA). Without the full NEPA process (an EIS), the public is not given adequate information to evaluate the environmental consequences of forest plans and disregards the best available science in favor of commercial interests. The planning rule EIS should fully analyze impacts of exempting forest plans from NEPA and consider alternatives that require full NEPA analysis and public participation.

Dan & Elsie Silkiss
371 Hodgson Road
Lopez Island, WA 98261

Planningruleno1

From: boardaway@hotmail.com
Sent: Monday, June 11, 2007 9:46 AM
To: Planningruleno1
Subject: RE: Planning Rule NOI Comments

Forest Service
PO Box 162969
Sacramento, CA 95816-2969

Dear Forest Service,

Most Americans still prefer to keep our natural resources as in tact as possible. Rules that allow easier access to exploitation of these resources are not in the best interests of the majority. We want rules that protect our increasingly precious public lands and their forests waterways etc.

Please accept these scoping comments for the preparation of the environmental impact statement to analyze and disclose potential environmental consequences associated with the National Forest System land management planning rule.

I recommend that the USFS adopt rules the same or similar to those of the September 18, 1982 Federal Register USFS planning rules. I support rules like these is because they track closely the 1976 National Forest Management Act (NFMA) and what it requires the USFS to do. The 2005 planning rules do not track the NFMA well and often leave out significant requirements or make them optional. The USFS should list all the mandatory requirements of the NFMA and then ensure that rules are prepared and implemented which contain these requirements and that these rules are covered by the EIS. The NFMA has not changed and the requirements that the USFS must adhere to are still the same.

The public looks to the National Forest Management Act to ensure that the Forest Service will maintain viable wildlife populations and properly manage our national forests for future generations. A critical component of past forest planning regulations is the requirement of mandatory resource protection standards for all forest plans. The EIS needs to analyze the direct and indirect effects of eliminating resource protection standards from forest plans and the impacts of eliminating wildlife viability and monitoring requirements.

In the development of the forest planning EIS, I urge that the Forest Service reconsider the exemption of forest management plans, revisions or amendments from environmental review and meaningful public input under the National Environmental Policy Act (NEPA). Without the full NEPA process (an EIS), the public is not given adequate information to evaluate the environmental consequences of forest plans and disregards the best available science in favor of commercial interests. The planning rule EIS should fully analyze impacts of exempting forest plans from NEPA and consider alternatives that require full NEPA analysis and public participation.

The Forest Service should also take into account the breadth of new scientific and socio-economic information. The Forest Service should fully analyze other alternatives to the 2005 planning rule that include strong standards to protect forests, waters and wildlife, and evaluate the adoption of some or all of the 1982 and 2000 regulations. Alternatives should also include requirements for the agency to develop plans to address impacts of climate change in accordance with the Global Climate Change Prevention Act of 1990 (7 U.S.C. 701).

Since this is the first time the public has the opportunity to participate in an EIS process for the new forest planning regulations, the Forest Service needs to modify NEPA deadlines in order to allow time to thoughtfully consider public comments throughout the NEPA process.

PLR123

Thank you for the opportunity to comment, Michael Fawns UNKNOWN SEATTLE, WA 00000



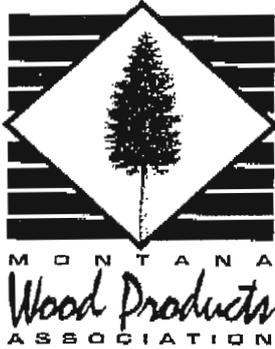
FACSIMILE COVER NOTE

DATE:	6/11/07
TO:	PLANNING RULE NO1 COMMENTS 916-456-6724
FROM:	EJ
PHONE NUMBER	406-443-1566
FAX NUMBER	406-443-2439
PAGES (INCLUDING COVER)	3

MESSAGE:

HAND COPY MADE TODAY -

PLR 125



June 11, 2007

Planning Rule NOI Comments
P. O. Box 162969
Sacramento, CA 95816-6724

These brief comments are submitted on behalf of the Montana Wood Products Association representing 16 member companies all of whom do business in Montana.

We strongly disagree with the court ruling in *Citizens for Better Forestry et al. v. USDA* (N. D. Calif.) ordering the USDA to prepare an environmental impact statement on the 2005 Planning Rule. The Planning Rule is just that – a planning rule. It does not propose site-specific action on the ground which is when environmental review should be conducted.

The 2000 rule was so unworkable that the agency was using the 1982 version for planning purposes until such time that a new rule could be written. Several forest plan revisions were underway in Region 1 of the Forest Service which includes the nine national forests in Montana. The injunction by the California court has severely disrupted progress on these plan revisions and that is extremely disappointing to those of us in the timber community who have participated in good faith in the revisions.

It is very unfortunate that the court ruled to disrupt the planning process underway using the 2005 rule because of a number of positive aspects of the rule, including improved public involvement because of the reduction of number of years that citizens would need to be engaged in the process.

The 2005 rule focuses environmental analysis at the appropriate level which is site-specific actions on the ground. The forest planning would be based on scientific information as intended by the National Forest Management Act because conditions on the ground are constantly changing. The agency estimates it spends nearly half of its resources on administrative and legal work rather than on managing the forests. It is felt the 2005 rule would address those costs and put the money on the ground where it could do some good.

PLR 125

Planning Rule NOI Comments

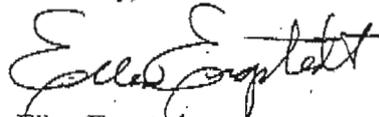
June 11, 2007

Page 2

As the agency appears to not have a choice in whether to do an EIS on the rules because of the court order, we urge the agency to analyze only the proposed rule and the no action alternative. It is critical that the agency disclose to the public the impact of failing to reduce time and resources spent on endless planning which will be the result of either dropping or significantly changing the 2005 Planning Rule.

Thank you for the opportunity to comment on this extremely important issue. Please continue to advise the Montana Wood Products Association as this issue progresses so we can take appropriate action when necessary.

Sincerely,



Ellen Engstedt
Executive Vice President

cc: MWPA Board of Directors

Planningrulenoi

From: Gareth Loy [dgl@GarethInc.com]
Sent: Sunday, June 10, 2007 7:37 PM
To: Planningrulenoi
Subject: National Forest Management Act EIS



dgl.vcf (346 B)

Dear sirs,

The National Forest Management Act (NFMA) was passed in 1976 to help ensure the sustainability of our national forests. The act required the creation of forest management plans. A 2005 Bush administration rule exempted forest plans from filing Environmental Impact Statements under NEPA, claiming that entire forest plans would be "categorically excluded." Now the Forest Service is compiling an EIS to comply with the court's decision and revive the 2005 planning rule change.

The EIS should analyze the impacts on the national forests of exempting forest plans from environmental review and meaningful public input under the National Environmental Policy Act. The Forest Service should ensure that the public has access to adequate information for the evaluation of the environmental consequences of forest plans. Given the size and complexity of most forest plans, the Forest Service should ensure that enough time is allowed for informed public comment.

The EIS should analyze the effects of eliminating resource protection standards from forest plans and the impacts of eliminating wildlife viability and monitoring requirements. The Forest Service should consider alternatives to the 2005 planning rule that include strong standards to protect forests, waters and wildlife, and evaluate the adoption of some or all of the 1982 and 2000 regulations. Alternatives should also include requirements for forest plans to address the impacts of climate change.

Exempting forest management plans will eliminate the study or disclosure of the cumulative impact of management activities across the national forest, something usually done at the planning stage.

The agency should not make it easier for timber, oil, gas, mining and motorized recreation companies to profit from the use of public forests while eliminating the need for forest managers to assess potentially harmful impacts on water, wildlife, recreational use, old growth and roadless areas.

Please accept these scoping comments for the preparation of the environmental impact statement to analyze and disclose potential environmental consequences associated with the National Forest System land management planning rule.

Thank you for the opportunity to comment.

Gareth Loy
274 Sausalito St.
Corte Madera, CA 94925

Planningruleno

From: nplnews@verizon.net
Sent: Monday, June 11, 2007 6:02 PM
To: planningruleno@fscomments.org.
Cc: dsire@fs.fed.us
Subject: FS Planning

Please place us on your mailing list and send copies of NEPA documents to:

NPLNEWS
P.O. Box 527
Ridgecrest, CA 93556

Thanks

Planningruleno

From: Rex Storm [rstorm@oregonloggers.org]
Sent: Monday, June 11, 2007 3:37 PM
To: Planningruleno
Subject: Forest Planning Rule NOI

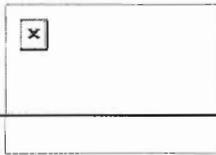
Dear Forest Service:

Attached is my 2-page comment letter concerning the National Forest Planning Rule Scoping. The same is also pasted below.

"Business services for OR forest operators since 1969"

Rex Storm

Forest Policy Manager, Associated Oregon Loggers
 PO Box 12339; Salem, OR 97309
 503-364-1330; fax: 503-364-0836
 email: rexstorm@oregonloggers.org
 web: oregonloggers.org



Associated Oregon Loggers, Inc. ☐ **\$B!** ☐ **CB** 1127 25th St. SE, P.O. Box 12339, Salem, OR 97309

503/364-1330 ☐ **\$B!** ☐ **CB** fax 503/364-0836 ☐ **\$B!** ☐ **CB** email: aol@oregonloggers.org

June 11, 2007

Planning Rule NOI Comments

P.O. Box 162969

Sacramento, CA 95816

e-mail: planningrulenoifscomments.org fax: (916) 456-6724

RE: AOL Comment – Scoping on 2005 National Forest Planning Rule

Dear Forest Service:

This letter is submitted in response to the Forest Service Notice of Intent (NOI) to prepare on EIS on the National Forest System land management planning rules, published on May 11.

I am writing on behalf of Associated Oregon Loggers, Inc. [AOL], which represents more than 1,000 logging and allied forest member companies. These companies play a major role in management of private & public forests throughout Oregon— as contractors, purchasers and vendors of forest management services (operators). AOL members also may occasionally purchaser Forest Service contracts. AOL member companies depend on a reliable timber supply, including federal forests, and we encourage federal regulations & policies that promote active management of federal forests in Oregon—especially the restoration of unhealthy forests. As such, AOL represents substantial expertise in forest management. AOL members are directly impacted by the decisions that will be made as a result of national forest plans.

We appreciate the opportunity to comment, and are writing to urge you to move as quickly as possible to complete the proposed EIS on the 2005 National Forest System Land Management Planning Rule. This NEPA process is redundant to already completed analyses for the 2005 Rule, and should be

6/12/2007

unnecessary—because efforts to complete this EIS distracts the Forest Service from its important work of projects to restore forest health and revising forest plans. The court's injunction has already disrupted several ongoing plan revisions—including the Blue Mountain Forest Plan Revision in Oregon.

We support the 2005 rule, which provides many much needed improvements to the outdated 2000 Rule. The 2000 Rule was so hopelessly unworkable that the agency had defaulted to using the former 1982 Rule. The 2005 Rule would make important enhancements, including:

1. **Enriches public involvement.** The previous processes required involvement over 5-7 years, whereas the 2005 Rule reduces planning to 2-3 years, allowing citizens to efficiently engage.
2. **Focuses environmental analysis at the appropriate level.** The 2005 Rule best focuses analysis at the project level, where specific environmental conditions are known. The court erred in forcing the agency to conduct NEPA on the 2000 Rule, which doesn't propose site-specific actions.
3. **Better responds to the latest scientific knowledge and changing natural conditions.** Forest planning will be based on state-of-the-art scientific information as intended by the National Forest Management Act of 1976.
4. **Saves the government millions of dollars annually, and enables the agency to better manage the national forests.** The Forest Service estimates it spends *more than 40% of its budget and time on administrative and legal work*, rather than in the forest. The 2005 Rule would save more than \$27 million annually, savings that will allow land managers to get more accomplished on the ground.

As the agency must conduct NEPA on the 2005 Rule pursuant to the court order, I urge the agency to analyze only the proposed 2005 Rule and the No Action alternative. Also, we recommend that the agency disclose the full impact of failing to streamline forest planning—as directed by the 2005 Rule—if the 2005 Rule were to be either dropped or significantly changed.

Thank you for the opportunity to comment about the 2005 National Forest Planning Rule. If our comments create questions, please do not hesitate to contact AOL.

Sincerely,

/s/ Rex D. Storm

Rex Storm, CF

Forest Policy Manager

Associated Oregon Loggers, Inc.



Associated Oregon Loggers, Inc. • 1127 25th St. SE, P.O. Box 12339, Salem, OR 97309
503/364-1330 • fax 503/364-0836 • email: aol@oregonloggers.org

June 11, 2007

Planning Rule NOI Comments

P.O. Box 162969

Sacramento, CA 95816 e-mail: planningrulenoifsccomments.org fax: (916) 456-6724

RE: AOL Comment – Scoping on 2005 National Forest Planning Rule

Dear Forest Service:

This letter is submitted in response to the Forest Service Notice of Intent (NOI) to prepare on EIS on the National Forest System land management planning rules, published on May 11.

I am writing on behalf of Associated Oregon Loggers, Inc. [AOL], which represents more than 1,000 logging and allied forest member companies. These companies play a major role in management of private & public forests throughout Oregon— as contractors, purchasers and vendors of forest management services (operators). AOL members also may occasionally purchaser Forest Service contracts. AOL member companies depend on a reliable timber supply, including federal forests, and we encourage federal regulations & policies that promote active management of federal forests in Oregon—especially the restoration of unhealthy forests. As such, AOL represents substantial expertise in forest management. AOL members are directly impacted by the decisions that will be made as a result of national forest plans.

We appreciate the opportunity to comment, and are writing to urge you to move as quickly as possible to complete the proposed EIS on the 2005 National Forest System Land Management Planning Rule. This NEPA process is redundant to already completed analyses for the 2005 Rule, and should be unnecessary—because efforts to complete this EIS distracts the Forest Service from its important work of projects to restore forest health and revising forest plans. The court’s injunction has already disrupted several ongoing plan revisions—including the Blue Mountain Forest Plan Revision in Oregon.

We support the 2005 rule, which provides many much needed improvements to the outdated 2000 Rule. The ’00 Rule was so hopelessly unworkable that the agency had defaulted to using the former 1982 Rule. The 2005 Rule would make important enhancements, including:

1. **Enriches public involvement.** The previous processes required involvement over 5-7 years, whereas the ’05 Rule reduces planning to 2-3 years, allowing citizens to efficiently engage.
2. **Focuses environmental analysis at the appropriate level.** The ’05 Rule best focuses analysis at the project level, where specific environmental conditions are known. The court erred in forcing the agency to conduct NEPA on the ’05 Rule, which doesn’t propose site-specific actions.

AOL Comment – USFS Planning Rule – NOI
June 11, 2007 -- Page 2

3. **Better responds to the latest scientific knowledge and changing natural conditions.** Forest planning will be based on state-of-the-art scientific information as intended by the National Forest Management Act of 1976.
4. **Saves the government millions of dollars annually, and enables the agency to better manage the national forests.** The Forest Service estimates it spends *more than 40% of its budget and time on administrative and legal work*, rather than in the forest. The '05 Rule would save more than \$27 million annually, savings that will allow land managers to get more accomplished on the ground.

As the agency must conduct NEPA on the '05 Rule pursuant to the court order, I urge the agency to analyze only the proposed '05 Rule and the 'No Action' alternative. Also, we recommend that the agency disclose the full impact of failing to streamline forest planning—as directed by the '05 Rule—if, the '05 Rule were to be either dropped or significantly changed.

Thank you for the opportunity to comment about the 2005 National Forest Planning Rule. If our comments create questions, please do not hesitate to contact AOL.

Sincerely,
/s/ Rex D. Storm
Rex Storm, CF
Forest Policy Manager
Associated Oregon Loggers, Inc.

Planningruleno

From: Aaron Everett [aeverett@hills.net]
Sent: Monday, June 11, 2007 4:32 PM
To: Planningruleno
Subject: NOI National Forest System land management planning rule



Planning Rule NOI
06-11-2007.D...

Attached, please find the comments of Black Hills Forest Resource Association on the Forest Service's Notice of Intent to prepare an EIS on the 36 CFR 219 planning rules.

Thank you,
Aaron Everett

"Intellectuals solve problems; geniuses prevent them." (Albert Einstein)

Aaron Everett
Black Hills Forest Resource Association
2218 Jackson Blvd., Suite 10
Rapid City, SD 57702
Office: (605) 341-0875
Cell: (605) 391-7792
Fax: (605) 341-8651
E-mail: aeverett@hills.net
www.bhfra.org

Black Hills Forest Resource Association

2218 Jackson Blvd., Suite 10 • Rapid City, SD 57702 • (605) 341-0875

June 11, 2007

Planning Rule NOI Comments
P.O. Box 162969
Sacramento, CA 95816-2969

To Whom It May Concern:

This letter is in response to the Forest Service's Notice of Intent to prepare an EIS on the 2005 national forest system planning regulations at 36 CFR Part 219 [72 Fed. Reg. 26775 (May 11, 2007)].

The Black Hills Forest Resource Association (BHFRA) is a trade association of forest products companies and federal timber purchasers in the Black Hills region of South Dakota and Wyoming. The BHFRA has been vigorously involved in the long-running forest plan revision process recently completed on the Black Hills National Forest under the 1982 regulations, which ultimately required fifteen years' work to finish a ten-to-fifteen year plan. During this process, our organization went so far as to write our own plan alternatives on two separate occasions. We draw on our broad, deep experience with the Forest Service's planning process in offering the following comments, and hope you find them helpful.

Primarily, we are concerned that the agency put in place a planning process that focuses on the desired future conditions of the National Forest System units rather than speculative analyses of potential future projects which are neither funded nor approved by the Forest Plan.

Standard of Environmental Review

We are well acquainted with Judge Hamilton's ruling in the *Citizens for Better Forestry* case, wherein she found that the preparation of additional NEPA analysis was required in order to promulgate the 2005 rule. However, by preparing an EIS, the Forest Service would be going far beyond the minimum required by NEPA.

We understand that the agency is proceeding with the EIS in order to comply with the court's order while a more reasonable judicial resolution to this matter is pursued. We agree with the Forest Service's contention that the district court's conclusions are legally erroneous. We support Federal Defendants' currently pending motion to amend the judgment so that it does not find violations of NEPA and the ESA.

Forest planning rules compel no on-the-ground actions or impacts, and therefore do not require an EIS. We encourage the Forest Service to state that it is preparing an EIS voluntarily to eliminate litigation issues and allow continued use of the 2005 forest planning rules. This will allow the Forest Service to take advantage of the precedent that voluntary preparation of an EIS does not prove that document is legally necessary.

Alternatives

The Forest Service should analyze the 2005 Rules as the proposed action, and analyze a dual no-action alternative comprised of the 1982 Rules and the 2000 Rules. This would afford the agency satisfaction under the 'reasonable range of alternatives' requirement of NEPA and minimize additional analysis, in that the Forest Service may draw on its extensive experience and analytical content. Realistically defining the range of alternatives would also help ensure the EIS proceeds as expeditiously as possible, so that individual units' ongoing plan amendments and revisions can again proceed with clear regulatory direction.

Scope of the Analysis

The alternatives -- the 1982, 2000, and 2005 Rules -- should be analyzed in an integrated fashion with their accompanying directives. Rules and their directives should function together to simplify and streamline the planning process, not simply direct cumbersome, unnecessary process to the Forest Service manual rather than the regulations.

To be most defensible in court, the EIS should likely describe the areas where the 2005 planning rules replace hard-and-fast management standards that were in the 2000 and 1982 planning rules (which were one subject of Judge Hamilton's ruling) with more statutorily appropriate management direction such as guidelines. The EIS should provide at least a qualitative discussion of the reasonably foreseeable impacts of those changes on future forest plans and future ground-disturbing projects. Another example might be the replacement of single-species management approach from the 1982 "viability" provisions with a broader ecosystem-based approach that is based instead, adhering to NFMA, on plant and animal communities in the 2005 Rule.

The Forest Service often poorly describes the effects of the no-action alternatives, regarding them simply as the 'status quo,' which have no direct effects on the current situation. However, in this case and many others, the no-action's effects would be significant. If the Forest Service is forced to spend ever-increasing amounts of money on planning and litigation under the 1982 regulations, for instance, that many fewer dollars are available in the agency's constrained budget for wildlife habitat improvement projects.

Finally, we believe the Forest Service's proposal for an adaptive management approach under an Environmental Management System in the 2005 Rule will be impossible to implement and will ultimately duplicate efforts to monitor forest plan implementation per 219.16(b). We suggest simply basing adaptive management decisions on forestwide monitoring described in 219.16(b).

Thank you for your time and attention to these comments.

Sincerely,

Aaron Everett
Forest Programs Manager

Planningrulenoi

From: Ken Wilde [KWilde@spi-ind.com]
Sent: Monday, June 11, 2007 4:54 PM
To: Planningrulenoi
Subject: comment

June 11, 2007

RE: Scoping on National Forest Planning Rule

Dear Sir or Madame:

I am writing to urge you to move as quickly as possible to complete the EIS on the 2005 National Forest System Land Manage Planning Rule.

The 2005 rule provides much needed improvements to the 2000 rule:

It will improve public involvement. The previous processes required public involvement for 5-7 years, whereas the new rule will reduce that to 2-3 years, allowing the public to stay interested and engaged.

It will save the government millions of dollars annually and enable the agency to better manage our national forests.

It better responds to the latest scientific knowledge and changing natural conditions. Forest planning will be based on current state of the art scientific information as the National Forest Management Act intended.

It will focus environmental analysis at the appropriate level, the project level, where specific environmental conditions are known.

I urge the agency to analyze only the proposed rule and the no action alternative.

Thank you for considering my comments.

Sincerely,

Ken Wilde

Planningruleno

From: Ryan Talbott [rtalbott@allegghenydefense.org]
Sent: Monday, June 11, 2007 5:21 PM
To: Planningruleno
Subject: National Forest System Land Management Planning Scoping Comments



WildLaw-Scoping-Comments.pdf (...)

I am incorporating by reference the comments submitted by Wildlaw. Those comments are attached.

We would also like to add the following:

Speaking to the issue of whether or not Forest Plans make final decisions, the Allegheny National Forest recently revised it's 1986 LRMP. In the Final EIS for the revised plan, the Forest Service states,

"The ANF also includes three types of administratively designated areas: a Research Natural Area, Scenic Areas and an Experimental Forest." (Revised LRMP ROD-16, 2007)

This is just one example of how forest plans make final decisions.

Thank you,
Ryan Talbott

--
Ryan Talbott
Forest Watch Coordinator
Allegheny Defense Project
311 Pitt Street
Pittsburgh, PA 15221
www.allegghenydefense.org
rtalbott@allegghenydefense.org

June 4, 2007

Planning Rule NOI Comments
P.O. Box 162969
Sacramento, CA 95816-2969

Via: e-mail to planningrulenoifsccomments.org
Re: Comments on Notice of Intent to Prepare an Environmental Impact Statement
on new NFMA Regulations, 72 *Fed. Reg.* 26,775 (May 11, 2007)

Dear Forest Service:

On behalf of WildLaw and our clients the Alabama Wilderness Alliance, Save Our Big Scrub, and Wild South, WildLaw hereby files these scoping comments on the proposed Environmental Impact Statement (EIS) to support the 2005 NFMA Regulations recently struck down by *Citizens for Better Forestry v. USDA* (N.D. Cal.)

The WildLaw Alternative

Instead of just spending its time in a NEPA charade trying to do the minimum technical amount it can legally, the Forest Service should finally attempt to solve the problems with NFMA's implementation. The Forest Service should take the time to do a good job and really figure out new regulations (1) that really comply with NFMA and give the agency a strong scientific basis for management and (2) that resolve most of the conflict around management of the public's forests. We strongly oppose an attempt to just give cursory NEPA review of the 2005 regulations and the interim directives that agency adopted to implement them. Those regulations and directives exempted forest management plans, revisions or amendments from environmental review and meaningful public input under the National Environmental Policy Act. The vague requirements for public participation in those regulations and directives did not ensure that the public has a full and fair opportunity to participate in the forest planning process. NEPA has detailed implementation guidance and a history of implementation that the public has grown to trust and appreciate. The 2005 regulations and directives offered the public no assurances and no accountability.

NEPA requires that an EIS consider all reasonable alternatives to the proposed action. Here, we are proposing a VERY reasonable alternative, one that could, for the first time ever, start to solve many of the problems involved in National Forest management. We expect full analysis of "The WildLaw Alternative" in the DEIS.

The WildLaw Alternative is: Using cooperative conservation approaches, new NFMA regulations and directives should be developed through a facilitated group solving-problem process involving all the diverse interests involved in management of the National Forests. Instead of an agency driven and developed set of NFMA regulations, we propose a collaborative development of solutions to National Forest problems that then lead to new regulations to implement those solutions.

In February 2003, as part of the adoption of the 2005 regulations, the Forest Service brought together approximately 100 interested people to discuss options for protecting biological diversity on the National Forests under the new National Forest Management Act regulations. I was one of the participants in that workshop and the only environmentalist/conservationist who gave a presentation at it. While the agency ultimately ignored everything this group suggested, the people and the balance of types of people (agency, industry, scientists, environmentalists, etc.) at that workshop was excellent. No party of interest could claim not to be adequately represented there. Given a few more days and a real mandate to find common ground solutions to problems on the National Forests, I guarantee that that group would have found at least a handful of common sense solutions 95% of everyone would have agreed with. The agency could have then moved forward on those consensus items and left more contentious issues aside for the time being, thus accomplishing much needed work in the public forests and reducing litigation significantly. The Forest Service chose to go another route and now remains mired in litigation, most of which it loses.

Despite the legal limbo of the various Roadless Rules, the creation of the Roadless Area Conservation National Advisory Committee (RACNAC, of which I am a member) has proven to be a large and unique success. For the first time ever, the agency has successfully brought together diverse interests, got them talking without conflict baggage and seen them produce proposed solutions, some of which go beyond the boundaries of just roadless areas. Other agencies have had success with standing FACA committees and other advisory groups that work to resolve long-standing issues. It is time the Forest Service tried this conflict resolution approach on a larger scale, on the scale of planning for all the National Forests.

Once again, the Forest Service has an opportunity to either plow ahead with what it has already decided to do or the Forest Service can try a different route that has the potential to resolve (finally!) many of the decades-long issues bedeviling the agency and limiting good management on the National Forests. Our comments strongly encourage the agency to try something new in regards to NFMA regulations.

The Forest Service should convene another workshop, like the one in February 2003. But this time, the workshop should have participants who are committed to meeting for at least a week and to following up on what happens at that meeting with further meetings, reviews of documents and other support. A standing FACA committee on NFMA and planning should be created out of that workshop of those participants who have the time and resources to work on such a committee and who can adequately represent the diverse interests involved in National Forest issues.

Further, forest plans should identify scientifically valid restoration programs and have them peer-reviewed by an interdisciplinary team of scientists. If approved by the peer-review, then that process could provide some sort of streamlined site-specific implementation process later for all projects specifically tied to and in compliance with the restoration program. A forest plan could set out parameters (types of projects,

equipment, monitoring, etc.) for a restoration program from which streamlined EAs for restoration projects could be used because it would be tiered to the forest plan and restoration program. This is currently working in the National Forests in Alabama.

A part of these comments, attached at the end, we submit WildLaw's "A Modest Proposal for the U.S. Forest Service." This recently released white paper details how we think much of the management of the National Forests could be solved through cooperative conservation and a new management paradigm of restoration, protection and sustainability for ecosystems and communities. Such an approach should be the agency's focus as it decides on how to implement NFMA. We know that there are teams within the agency working on exactly such an approach. This is an opportunity to make real this new paradigm that solves problems instead of perpetuating them.

General Problems with the 2005 Regulations

While the old 1982 regulations, adopted under President Reagan, had some difficulties that could have used updating or tweaking, most of the "problem" the agency had with them was not that they were hard to implement but that they were hard for the agency to avoid complying with. Despite the agency's claims of burdensome litigation and paper work, there is NOT ONE SINGLE CASE where a court overturned the Forest Service for complying with the 1982 regulations. NOT ONE! As one high level Forest Service official put it (we will protect his identity), "We never got sued for complying with the 1982 regulations. We lost lawsuits because we did not comply with the regulations. We cut corners and got caught." Hard to imagine making a good case with the public why totally new regulations are needed if the reason for getting rid of the 1982 regulations is that you got caught violating them too many times. The 1982 regulations were not "liberal" rules.

When the Forest Service DID try to comply with and properly implement the 1982 regulations, they were hugely successful at it. In 1992, the National Forests in Alabama were the WORST of the forests in the whole Forest Service system; they violated every federal law as often as they could in order to "get the cut out." A series of lawsuits, appeals and other legal actions shut down all logging in the National Forests in Alabama in 1999. Since then, the leadership of the Forests and much of the staff changed. Now, the National Forests in Alabama are implementing scientifically-valid restoration programs, all of which were prepared under (and in full compliance with) the 1982 NFMA regulations. If the 1982 regulations can be followed in Alabama, this could be done anywhere. Being the first to do this new type of restoration work under the 1982 regulations, the Conecuh National Forest prepared a full Environmental Impact Statement (EIS) on what restoration is needed for that forest's unique Longleaf Pine/Wiregrass ecosystem (the rarest forest type in North America) and on what work could be done in five years to correct past mismanagement and restore the natural and healthy forest native there. That restoration plan was not challenged legally in any way and succeeded.

Now, all the National Forests in Alabama and National Forests in Louisiana, Florida and parts of Mississippi are also doing great work at Longleaf Pine restoration, all in

compliance with the 1982 regulations. Actual population trend data on management indicator species is being collected and analyzed. Survey data on threatened, endangered and sensitive species is being collected and analyzed. Public participation is open and good. NEPA analysis for most of these projects is exemplary and does not slow down the agency at all. Indeed, these forests have found that doing NEPA analysis right, instead of trying to shortcut NEPA, makes their final decisions better and more successful. Other examples of good people in the agency doing good work under the old regulations exist in many other areas as well.

So, if there are real, ongoing and tangible examples of the Forest Service successfully implementing the 1982 regulations, why would the agency abandon those rules and replace them with something totally different and untried? It seems that the agency simply does not value or even believe in its personnel who actually do their jobs correctly and successfully. These new regulations seem to be an attempt to immunize, indeed elevate, mendacity, mediocrity and failure in the agency. We hope that is not the case.

The Forest Service was offered the opportunity to figure out how to fix real problems and then encourage the real innovations and successes the agency does have. An effort like that would have been an exciting thing that would truly have produced a better agency, better public relations and much less litigation. Sadly, the agency chose not to take that opportunity. Indeed, this entire scheme of having an EMS for each Forest was NEVER submitted to the public for review and comment, until now under a court order.

But this EIS is yet one more opportunity to try to REALLY solve many of the problems in National Forest management. We sincerely hope that the agency will change course and try something new and exciting this time.

The Forest Service could meet us half way and make a real attempt to solve the real problem areas in NFMA planning and thus come up with a system and set of regulations that bring out the best in the agency. Such an open and cooperative effort could truly solved the "process predicament" and "analysis paralysis" the agency has moaned about for years. Many of us in the conservation community have repeatedly offered to make such a process work with the agency; we were turned down. We make that offer once again.

Another major problem with these new regulations is that, instead of fixing the problems with the old regulations and updating them, the Forest Service decided to throw them out completely and come up with an entirely new and unknown system for National Forest planning. Many have said that the Forest Service "threw the baby out with the bath water." True, these new rules do that, but they also "bring in a new puppy." As this EMS/adaptive management puppy grows into a big dog, it will be interesting to see if it is as easy to train and control as the Forest Service wishes. It may well turn out that this new dog will eventually turn on its master and bite it in the rear. Eliminating planning as it has existed for 25 years and putting in a new system of environmental management systems and "ongoing planning," the agency is dumping a set of problems it knows and could deal with successfully for a whole bunch of new problems that are a total mystery

at this point. We have talked with a number of forest rangers about the new regulations, and every one of them finds the new rules to be unintelligible. "Greek to me," as one ranger put it.

Apparently thinking that a new system, especially a system that has served industry so well in "green washing" itself, would "solve" its problems, the Forest Service hopes these new regulations will insulate the agency from review and interference. Why a public agency would want to separate itself from the public it is supposed to serve is strange but obvious in the current day. But what is really shocking is that the Forest Service thinks this will really make things easier for them. Such an attitude is appallingly naïve. The new regulations will require a total overhaul of how the entire agency and its thousands of employees do things. To think that will go smoother than the work of the past is almost laughable. Instead of resolving the alleged "process predicament," it seems that the agency issued these new rules in order to increase its problems with paperwork and costs.

The ONLY thing that will make management easier for the Forest Service is for the agency to engage in real dialogue with the various groups of people interested in the National Forests and finally start to try to solve problems in a cooperative atmosphere of mutual respect and give-and-take. That is "The WildLaw Alternative."

Further, ditching a "known problem" for an entirely new system is a recipe for disaster, or at least great difficulty, in any context. The rule of unintended consequences will play a large role for the Forest Service in the coming years as its struggles to implement these new regulations. Even on the face of the new rules, it is clear that the Forest Service is doing a number of things the agency clearly did not think through very well. Some examples:

- In the past, the Directives (the Forest Service Manual and Forest Service Handbook) were mostly unenforceable in court. The new regulations make the Directives mandatory and enforceable.
- If the agency then tries to make the Directives too loose and thus unenforceable, they will be in violation of NFMA, because NFMA makes certain unavoidable requirements on the Forest Service and the new regulations put implementation of those requirements in the Directives. If the agency does not meet NFMA's requirements in the regulations, they HAVE to meet them in the Directives, but if they do not meet NFMA's requirements in the Directives, then they HAVE to meet them in the regulations. It is a nice "Catch-22" the Forest Service has invented for itself. Unless some mandatory and enforceable requirements to meet NFMA's dictates are SOMEWHERE, the Forest Service will be in such violation of the law that a lawsuit could shut down an entire Forest, or maybe even the entire National Forest System. Maybe the agency wants such a manufactured "catastrophe" to occur so it can run to Congress and demand that NFMA be gutted, but such a scenario would be a cynical sham. The Forest Service has the power and the opportunity to

solve most of its problems right now, but the agency seems to want to complicate its problems, not solve them.

- Failing to do NEPA alternatives analysis at the planning stage will mean projects will have to consider forest-wide alternatives and identify and consider cumulative impacts forest-wide, a prospect so daunting that we do not envy the poor staffers we know who will have to do this task. But it sure gives us a great legal hook to stop bad projects. We know of a way for the Forest Service to solve this dilemma and have offered that solution to the agency many times, but we will see if the Forest Service continues to refuse our assistance now.
- While an EMS under ISO 14001 was voluntary for industry and not enforceable, as a company could opt out of its EMS any time it wanted and suffer nothing more than only a loss of “certification,” incorporating the ISO 14001 into these regulations makes the ISO’s requirements mandatory for the Forest Service. By melding the ISO’s requirements into the regulations, the Forest Service has given those previously voluntary requirements the force of law against the agency. As litigators, we welcome the opportunity to ask courts to enforce the better parts of the ISO against bad plans and projects. But as owners of these Forests (which is more important), we hope that the Forest Service will do the right thing and really comply with the spirit and letter of the ISO so as to engage in good management, thus avoiding legal unnecessary problems.

The Forest Service can now use this review of its NFMA planning regulations as an opportunity to engage the public, bridge divides and solve real problems. It can build on the working examples of the best of the agency and made a real difference and a real improvement. Along with others in the conservation community, WildLaw explicitly offered repeatedly to work with the agency, instead of being forced to be its adversary. We make that offer once again.

But if the agency moves ahead with rubberstamping the 2005 regulations and directives, we submit the following comments that need analysis and explanation.

NEPA

NEPA includes several valuable elements that contribute to high quality decision-making and ultimately better forest plans. Trying a new approach that gets the various interests involved in the National Forests talking and working together, instead of just fighting over proposals generated entirely inside the agency would have tremendous benefits. At a minimum, this NEPA review of the 2005 should seriously look at changing the 2005 regulations to provide for more analysis and more public participation (especially up-front collaboration) in the development of management plans for National Forests.

The benefits of NEPA include:

1. use of high quality information and accurate scientific analysis;
2. consideration of all reasonable alternatives;

3. rational and balanced comparison of alternatives, including the no action alternative;
4. “hard look” consideration of direct and indirect environmental impacts;
5. cumulative impacts analysis (e.g. how will this forest plan combined with all other forest plans impact sensitive wildlife species?);
6. consideration of the views of credible experts who disagree with the agency’s conclusions;
7. the requirement that environmental considerations be documented;
8. use of an interdisciplinary team;
9. public involvement at both the scoping stage and draft EIS stage, and
10. consideration of mitigation and monitoring.

Under the 2005 rules and their interim directives, there will still be some form of minimal public notice and comment (36 C.F.R. § 219.9), but those requirements remain vague and untested while most of the tried and true NEPA requirements enumerated above will no longer apply to the plan development process. Significantly, the large body of NEPA case law will not apply either, so there will be few if any opportunities to hold the Forest Service accountable for ignoring relevant information and excluding the public.

Interestingly, NFMA § 1604(g) mandates that the NFMA implementing regulations “shall include, but not be limited to (1) specifying procedures to insure that land management plans are prepared in accordance with [NEPA], including, ... direction on when and for what plans an environmental impact statement ... shall be prepared.” While this does not explicitly require full EISs for every forest plan, it does indicate that Congress thought an EIS may be required, at least sometimes, and as the Forest Service well knows, when the significance of impacts is in question, the proper course is to prepare an EA that evaluates significance, and produces either a Finding of No Significant Impact, or, in cases where the effects may be significant, a Notice of Intent to prepare an EIS. Wholesale exemptions from the intent of NEPA do not meet Congressional intent that potentially significant impacts be considered and evaluated.

While it is true that forest plans are programmatic documents, and this view is reinforced by the recent Supreme Court decisions cited by the agency, it is also true that agencies’ programmatic plans are still subject to NEPA analysis, most often in the form of an Environmental Impact Statement. The CEQ regulations (40 C.F.R. § 1508.18) define “major federal action” to include both “new and continuing” --

- “plans ... which guide or prescribe alternative uses of federal resources, upon which future agency actions will be based.”
- “programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.” And
- “policies ... formal documents establishing an agency’s policies which will result in or substantially alter agency programs.”

One cannot read this without coming to the conclusion that forest plans are clearly under the penumbra of major federal actions potentially requiring an EIS.

The Forest Service tries to dismiss the reality that forest plans might have significant effects by saying that the plans are “aspirational” and do not control on-the-ground activities. Under the Forest Service’s view, since forest plans do not influence on the ground activities, then they become essentially meaningless paper exercises. This is NOT what Congress intended when it passed the Resource Planning Act of 1974 or the National Forest Management Act of 1976. The Ninth Circuit has explicitly rejected this interpretation of plans in cases such as *Citizens for Better Forestry*, 341 F.3d 961 (9th Cir. 2003) and *Idaho Conservation League*, 956 F.2d 1508 (9th Cir. 1992). The reality is that forest plans do directly influence on-the-ground activities. NFMA § 1604(i) explicitly requires that “Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans.” This makes very clear that forest plans are meaningful and have potentially significant effects requiring an EIS.

The Forest Service will be Required to Comply with the Law Somewhere

Either the regulations, the directives or the plan adopted under them must have the force and effect of law, or the agency is effectively advocating that its employees act without legal direction. By pushing decision-making to increasingly less formal avenues, the Forest Service is risking the judicial deference it has enjoyed in the past. “[C]ourts properly may accord less weight to such guidelines than to administrative regulations.” *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (U.S., 1976)(discussing the EEOC’s guidelines interpreting and enforcing Title VII where Congress had not given the EEOC the authority to promulgate rules or regulations pursuant to that Title). Under the 2005 regulations, the Forest Service is likely moving all of the actual substance of its direction to employees into the directives in order to take advantage of D.C. and 9th Circuit precedent that says that neither the Forest Service Handbook nor the Forest Service Manual has the “independent force and effect of law.” *Western Radio Services Company, Inc. v. Epsy*, 79 F.3d 896, 901 (9th Cir. 1995). A D.C. District Court agreed, holding that “the manuals, although published in the Federal Register, are not ‘binding’ and do not carry the same weight as regulations,” despite the fact that they were subjected to public comment. See *City of Williams v. Dombeck*, 151 F.Supp.2d 9, 36 (D. D.C. 2001).

The *Fifty-Three Parrots* requirements discussed in *Western Radio* which give an agency pronouncement the “force and effect of law” are that it:

“(1) prescribe substantive rules -- not interpretive rules, general statements of policy or rules of agency organization, procedure or practice -- and, (2) conform to certain procedural requirements. To satisfy the first requirement the rule must be legislative in nature, affecting individual rights and obligations; to satisfy the second, it must have been promulgated pursuant to a specific statutory grant of

authority and in conformance with the procedural requirements imposed by Congress.”

United States v. Fifty-Three (53) Eclectus Parrots, 685 F.2d 1131, 1136 (9th Cir., 1982)(internal citations omitted). In *Fifty-Three Parrots*, the “internal procedure for alerting Customs officers to possible infringements of 19 U.S.C. § 1527 was not intended as a substantive rule, and was not entitled to the force and effect of law against the government.” *Id.*

The 2005 regulations and the directives adopted for them are different for a few reasons. First, they were developed after the Forest Service made a stink about the alleged “analysis paralysis” and “process predicament” the agency manufactured for the media, and not as internal guidance to agency employees. This history should be made apparent in the DEIS. Second, these were intended as substantive rules, no matter what the agency said. Once again, the history of the location of these types of direction can be used to help in this argument.

The Forest Service clearly hopes that the combined effect of *Western Radio*, *SUWA*, and *Ohio Forestry* is to greatly restrain judicial oversight of the Forest Service—the agency wants the freedom to operate outside of the law. We doubt the courts will be as willing to give the agency such unbridled discretion.

There are other problems with the Forest Service’s tactic. *Western Radio* is an extreme opinion, out of line even with the precedent the court cites—the weakest link in the trifecta discussed above. It simply is not as easy as the opinion suggests to determine what is and what is not a regulation. If it were, there would not be hundreds of cases addressing the point. Even *Brock v. Cathedral Bluffs Shale Oil Co.*, which *City of Williams* relies on, does not pretend that the distinction between regulations and general statements of policy is so clear—“[u]nfortunately, there is no axiom to distinguish between regulations an general statements of policy.” See *Brock*, 796 F.2d 533, 536-37 (D.C. Cir. 1986).

Even a quick read of *Brock* makes clear that the *City of Williams* court took an incredibly superficial look at that case which is so important to its decision. While *Brock* does say that publication in the *Code of Federal Regulations* certainly creates binding regulation, the court does not stop there, and the inverse (failure to public in the federal regulations means that a policy or rule is not binding) is certainly not true. *Brock* at 538. *Brock* also considered the degree of freedom of discretion retained by the administrator, the characterization the agency gives the statement, the language of the statement itself, the fact that the statement in question dealt with enforcement discretion, and efforts the Secretary made to keep the enforcement guidelines out of the *Code of Federal Regulations*. *Id.*

On top of all of the problems discussed above, there is the additional problem that the D.C. Court of Appeals has recognized that in addition to legislative rules, “an agency’s other pronouncements can, as a practical matter, have a binding effect.” *Appalachian*

Power Co. v. EPA, 208 F.3d 1015, 1021 (D.C. Cir. 2000)(see quote at beginning of section V). Certainly at least parts of the FSM and FSH as well as the other documents we relied on will be considered binding in the D.C. Circuit regardless of whether they can be pegged “legislative” or “substantive.”

There is at least one factual problem with the Ninth Circuit ruling as well. The *Western Radio Services* court says that the FSM and FSH are not published in the *Federal Register*. This is not true. At least some part of the FSM are published in the *Federal Register*. See, e.g., amendments to Forest Service Manual Chapter 1920, 53 FR 26,807 (July 15, 1988). These directives were published in the *Federal Register*.

The agency’s care to avoid standards in plans by calling them guidelines and avoiding helping verbs will not matter. The stated purpose of these directives is “to provide consistent overall guidance to Forest Service line officers and agency employees in developing, amending, or revising land management plans.” 70 Fed. Reg. 14637 (March 23, 2005),

If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency’s document is for all practical purposes “binding.” *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000).

The agency gains a broader protected sphere of discretion when it goes through formal rulemaking. If decisions are made on an *ad hoc* basis by line employees, rather than guided by rules, courts will show less deference to agency determinations. While the general rule under *Chevron* is deference to agency interpretation of a statute, there are definite limits to the doctrine. If a statute that an agency administers “is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). “Judicial deference to reasonable interpretation by agency of statute that agency administers is dominant, well-settled principle of federal law.” *National R. Passenger Corp. v Boston & Maine Corp.*, 503 US 407 (1992). Pushing all decisions to the project level by allowing frequent plan amendments without environmental review is not a reasonable interpretation of laws requiring the Forest Service to plan.

There is also the issue of the vacuum left in the place where substantive regulations used to be. The agency has taken it upon itself to vacate the level of law-making that Congress clearly intended to organize when it adopted the National Forest Management Act.

“The National Forest Management Act (‘NFMA’) requires the Secretary of Agriculture, who is responsible for the Forest Service, to develop ‘land and resource management plans’ to guide the maintenance and use of resources within

national forests. 16 U.S.C. §§ 1601-1604. In developing these plans the Secretary must determine the environmental impact these plans will have and discuss alternative plans, pursuant to the National Environmental Policy Act ('NEPA'), 42 U.S.C. § 4321 et seq."

Sierra Club v. Marita, 46 F.3d 606, 608-609 (7th Cir., 1995). "Administrative agencies do not possess the discretion to avoid discharging the duties that Congress intended them to perform." *Marathon Oil Co. v. Lujan*, 937 F.2d 498, 500 (Colo. 1991).

Substantive as well as legal problems will arise from a too-casual planning process. For example, it is unclear how the Forest Service, having delegated all monitoring decision-making to the individual forest level, will comply with FLPMA's inventory requirements. 43 U.S.C. § 1711(a) requires that "[t]he Secretary shall prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values (including, but not limited to, outdoor recreation and scenic values), giving priority to areas of critical environmental concern. This inventory shall be kept current so as to reflect changes in conditions and to identify new and emerging resource and other values." Yet the new regulations allow "[m]onitoring information in the Plan Document or Set of Documents [to] be changed and updated as appropriate, at any time." See § 219.6(b). Especially if the directives are not binding, the Forest Service may find less hospitable standards of judicial review in areas of such clear conflict. By relieving itself of the detailed 1982 regulations and substituting watered-down regulations and bulky directives the Forest Service has provided its opponents with a good argument that it is not doing any planning at all at the plan level.

Cumulative Effects in Relationship to Other Administrative Initiatives

Cumulative effects of the proposed NFMA regulations and directives must also be analyzed. This proposal is one of several related administrative proposals and directives relating to national forest management. Some, but not all, of these administrative actions are part of the Bush Administration's Healthy Forests Initiative. The other changes include:

- CE of hazardous fuel reduction projects from National Environmental Policy Act (NEPA).
- CE of timber sales up to 70 acres and salvage sales up to 250 acres.
- Guidance from Council on Environmental Quality concerning environmental assessments of fuel reduction projects.
- Guidance from U.S. Fish and Wildlife Service and National Marine Fisheries Service concerning endangered species consultations on fuel reduction projects.
- Interim Directive on NEPA Categorical Exclusions and Extraordinary Circumstances.

A comprehensive analysis of the cumulative impacts of these efforts to "streamline" land management and planning on the national forests is required by NEPA before these or any other regulations can be finalized. Failure to do a full EIS on the impacts of the new NFMA regulations, the new CE for management plans, and the others is a clear violation

of NEPA, because the impacts of changing literally every regulation dealing with the national forests and their management are clearly significant. The cumulative effects are to eliminate virtually any opportunity for the public to comment on or appeal these kinds of projects and to eliminate NEPA cumulative effects and alternatives analysis from the entire management of 192,000,000 acres of public land.

Cumulative impacts analysis is mandatory in any NEPA analysis. Yet the Forest Service is openly planning not to do NEPA analysis for this proposal and all the other related actions. You are failing to consider cumulative impacts for this proposal. CEQ regulations mandate consideration of cumulative impacts at the threshold, EA stage of NEPA process. As the 10th Circuit recently explained:

“In determining whether a proposed action will significantly affect the environment and therefore trigger an EIS, the agency must consider: [w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts. ...CEQ regulations define a cumulative impact as: the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.... Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. Therefore, in determining whether the [proposed action] will significantly affect the environment, the [action agency] must consider the impact of reasonably foreseeable future actions.”

Airport Neighbors Alliance, Inc. v. U.S., 90 F.3d 426, 430 (10th Cir. 1996), citing 40 C.F.R. § 1508.27(b)(7); 40 C.F.R. § 1508.7.

Cumulative impacts analysis must incorporate empirical data whenever possible in order to anticipate the significance of proposed action. See 42 U.S.C. § 4332; 40 C.F.R. § 1500.2. However,

“It must be remembered that the basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of proposed action before the action is taken and those effects fully known. Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as crystal ball inquiry.”

Sierra Club v. Sigler, 695 F.2d 957, 970 (5th Cir. 1983) (internal quotations omitted), quoting *Scientists' Institute for Public Information, Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973)).

As stated by the Ninth Circuit in *Thomas v. Peterson*, 753 F.2d 754, 760 (9th Cir. 1985):

“We believe that consideration of cumulative impacts after the road has already been approved is insufficient to fulfill the mandate of NEPA. A central purpose of an EIS is to force the consideration of environmental impacts in the decisionmaking process. *See, e.g., Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585 (9th Cir. 1981); *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975); *Lathan v. Brinegar*, 506 F.2d 677, 693 (9th Cir. 1974) (en banc); *Calvert Cliffs' Coordinating Committee v. AEC, Inc.*, 146 U.S. App. D.C. 33, 449 F.2d 1109, 1113-1114 (D.C. Cir. 1971). That purpose requires that the NEPA process be integrated with agency planning ‘at the earliest possible time,’ 40 C.F.R. § 1501.2, and the purpose cannot be fully served if consideration of the cumulative effects of successive, interdependent steps is delayed until the first step has already been taken.”

To claim that the adoption of management plans will not have a significant impact on the environment is patently wrong, especially when their interactions with the other proposed regulatory changes for the National Forests are considered.

Categorical Exclusion for Management Plans

Part of this proposal to readopt the 2005 regulations means that the agency will also propose to adopt a Categorical Exclusion (CE) for the adoption, revision and amendment of management plans. That proposal is also not wise or legal.

The Forest Service is inappropriately trying to extend the Supreme Court decisions in *Ohio Forestry* (which generally held that the substantive requirements of a forest plan are not enforceable until they are implemented at the project level) and *Norton v. SUWA* (which held that the public does not have a right to compel the government commit resources to undertake certain actions that are called for in planning documents). The questions addressed in these cases are clearly far different than the question addressed by this CE (whether an EA or EIS is required for preparation of a programmatic forest plan).

The Forest Service tries to dismiss the reality that forest plans might have significant effects by saying that the plans are “aspirational” and do not control on-the-ground activities. Under the Forest Service’s view, since forest plans do not influence on the ground activities, then they become essentially meaningless paper exercises. This is NOT what Congress intended when it passed the Resource Planning Act of 1974 or the National Forest Management Act of 1976. The Ninth Circuit has explicitly rejected this interpretation of plans in cases such as *Citizens for Better Forestry*, 341 F.3d 961 (9th Cir. 2003) and *Idaho Conservation League*, 956 F.2d 1508 (9th Cir. 1992). The reality is that forest plans do directly influence on-the-ground activities. NFMA § 1604(i) explicitly requires that “Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans.” This makes very clear that forest plans are and have potentially significant effects requiring an EIS.

The proposed CE will not work.

Forest Plans Do Make Final Decisions

The main justification in the new regulations for not doing NEPA analysis at the plan revision stage is “Typically, a plan does not include final decisions approving projects or activities.” 70 *Fed. Reg.* 1,023, 1,025 (Jan. 5, 2005). The Forest Service even miscites *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 737 (1998) for this proposition that plans “don’t actually do anything.”

But this excuse is not viable. *Ohio Forestry* did not hold that plans never include final decisions. The basic ruling in *Ohio Forestry*, which is a ruling on ripeness, is that **general** forest plan decisions that do not have on-the-ground effects until a second phase of decision making (at the project level) by the Forest Service cannot be challenged on their face. Rather, in most instances, one has to wait until a project is proposed based on the faulty forest plan decision. However, the Supreme Court indicated two exceptions to that rule. First, challenges to NEPA violations in preparation of the plan could be brought once the NEPA documentation is final. Similarly, procedural violations under NFMA could possibly be brought after the forest plan is finalized. A third exception, not applicable in that case, is that any final decision the plan itself makes (such as the decision on what areas to recommend as wilderness) can be challenged without waiting for projects, because such final decisions in a plan do not need a later, project-level decision to become operative.

Up until now, National Forest plans did indeed make a number of important final decisions. As examples are the new revised plans for six National Forests in Region 8 which were finished in 2004. These plans covered the National Forests in Alabama, the Chattahoochee and Oconee National Forests in Georgia, the Cherokee National Forest in Tennessee, the Sumter National Forest in South Carolina, the Jefferson National Forest in Virginia, and the Daniel Boone National Forest in Kentucky. Total, these new plans cover 3.9 million acres of public land in a region of the country with very little public land. Each and every one of those plans stated that it was indeed making certain final decisions. Here is the list of final decisions made by the new plan for the National Forests in Alabama:

“The revised Forest Plan will decide and establish the following:

“1. Determining the Forest-wide multiple-use goals, objectives, and standards for the Forest, including estimates of the goods and services expected.

“2. Determining multiple-use management prescriptions and management areas containing desired conditions, objectives and standards.

“3. Identifying land that is suitable for timber production.

“4. Determining the allowable sale quantity (ASQ) for timber and the associated sale schedule.

“5. Recommending wilderness areas.

“6. Recommending wild and scenic river status.

“7. Determining monitoring and evaluation requirements.

“8. Identifying the lands that are administratively available for mineral development (including oil and gas), and consent to lease the available lands.”

All the other plans make the same decisions. If the Forest Service is no longer going to make these final decisions during planning, when will the agency make them? For many of these decisions, the new regulations do not say, which will be a major problem for the agency both in court and in practical application, because many of these decisions are forest-wide decisions which cannot be made in a site-specific project analysis.

The 2005 regulations attempt to shift some of these decisions to the Directives or to individual projects. But decisions about the recommendations for things like wilderness areas and wild and scenic rivers will still come at the planning stage usually. Indeed, even the new regulations anticipate this final decision for wilderness recommendations. Section 219.7(a)(5)(ii) specifically states, “Unless otherwise provided by law, all National Forest System lands possessing wilderness characteristics must be considered for recommendation as potential wilderness areas during plan development or revision.” This is a final decision with great “on the ground” implications. If the Forest Service does not do an EIS or similar level of analysis for making the final decisions on what areas do and do not deserve wilderness protection, that lack of information and analysis would have serious *California v. Block* type problems. Any supporting data or studies expressly relied upon in making decisions about wilderness recommendations must be “available and accessible” to the public. *California v. Block*, 690 F.2d 753, 765 (9th Cir. 1982) (quoting *Trout Unlimited, Inc. v. Morton*, 509 F.2d 1276, 1284 (9th Cir. 1974)). A failure to consider a reasonable range of alternatives on wilderness recommendations would be an obvious and easily litigated NEPA violation.

The regulations contain other irreconcilable problems for the agency in this area. In § 219.7(a)(2)(v), the agency deals with “special areas.” “Special areas such as botanical areas or significant caves may be designated, by the Responsible Official in approving a plan, plan amendment, or plan revision. Such designations are not final decisions approving projects and activities.” One cannot designate an area as “special” without some kind of analysis to support that designation, and the designation is indeed a final decision. Just because it is not a “final decision approving projects and activities” that does not mean it is not a “final decision.” A decision to make a “special area” closed to all logging, mining and drilling done without NEPA analysis would surely not be something the Administration and its friends in industry would agree is “not final” and

thus beyond their ability to challenge in court. Calling a rock a potato does not make it taste good when fried.

The agency is trying to create a distinction that does not apply here. As stated in their notice adopting these regulations:

“The Department emphasizes that project or activity decisions are generally not appropriate for inclusion in a plan level document; experience has shown that including project and activity decisionmaking in planning has actually delayed the planning and project and activity processes without improving natural resource management or public participation. Thus, by sharpening the distinction between planning and project and activity decisions, the Department expects both better planning decisions and more useful and timely environmental analysis for project and activity decisionmaking.” 70 *Fed. Reg.* 1,203, 1,040 (Jan. 5, 2005).

No one disputes that project decisions are different from plan level decisions. The agency thinks that by emphasizing the distinction between a plan and project level decisions, it can evade NEPA analysis for a plan. But the real requirement for NEPA analysis is not the type of decision made (project versus plan) but **whether a final decision is made**, period. If a plan makes a final decision, even if that is not a “project or activity decision,” the plan does something that triggers NEPA requirements. Yes, general guidelines and similar things in a plan are not final decisions, even if they would affect project decisions directly, but plans DO make final decisions, such as designation or special areas, opening of lands to mineral exploration and development, and recommendations for wilderness areas. No poorly executed trick of semantics will save the Forest Service from this reality.

Under the National Forest Management Act, plans must

“(1) provide for multiple use and sustained yield of the products and services obtained [from national forests] in accordance with the Multiple-use, Sustained Yield Act of 1960, and in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness; and

“(2) determine forest management systems and procedures...and the availability of lands and their suitability for resource management.”

16 U.S.C. § 1604(e).

Coordinating the various resources, as required by paragraph (1) above, has become increasingly difficult, as national forest use is at an all time high, and continues to increase. Some uses conflict with other uses, such as motorized versus non-motorized recreation, and large scale logging and grazing versus providing habitat for wide-ranging species of wildlife. Thus the Forest Service has a difficult job balancing all these demands. To accomplish this, many decisions are made in forest plans that determine, to a considerable degree, what type of management can later take place, since emphasizing

a certain type of management on a given area of national forest land reduces the likelihood of some activities prevailing on that same land. For example, land designated in a plan for timber production will have reduced wildlife values compared to land that is managed to maintain or improve wildlife habitat.

Designations made in forest plans can and do preclude other uses from occurring. For example, designating a research natural area in a plan means that manipulative activities such as logging and certain forms of recreation will likely be prohibited from occurring on that land. Similarly, areas designated for developed recreation would not be managed to maintain habitat for threatened, endangered, or sensitive species of wildlife, nor for dispersed recreation that provides solitude.

Furthermore, decisions made in a forest plan to emphasize a certain type of management on a given piece of land are seldom changed at the project level. Any such change would require a forest plan amendment.

Implementing any forest plan over its 15-year life is likely to involve the implementation of many projects, such as timber sales, fuels reduction, livestock grazing, travel management, watershed restoration, etc. None of these projects would occur if not first authorized by a forest plan. In other words, forest plans authorize broad programs which consist of a potentially quite large number of individual projects.

Even under the vague, stripped-down plans that would be produced under the new Planning Regulations, the decisions made would set the stage for what projects could later occur, as such plans would include determinations of suitability of land for various resources and the designation of special areas. See 36 C.F.R. § 219.7(a)(2)(iv) and (v), 70 *Fed. Reg.* 1,057. Specifically, plans would decide the fate of lands possessing wilderness characteristics (36 C.F.R. § 219.7(a)(5)(ii)), an extremely important aspect of forest planning. Plans also make decisions on which lands are available for mineral leasing. See 36 C.F.R. § 228.102(c) and 70 *Fed. Reg.* 1,039.

The Preamble to the previously proposed rule allowing CEs for forest plans even admits that plans set the stage for later projects and activities:

“In essence, a plan simply is a description of a vision for the future that, coupled with evaluation, provides a starting point for project and activity NEPA analysis.”

70 *Fed. Reg.* 1,063.

Finally, the Preamble to the 2005 Planning Regulations admits, “approval of a plan, plan amendment, or plan revision is a final action under the CEQ regulations”. 70 *Fed. Reg.* 1,031.

In sum, forest plans determine what types of projects can occur and where they can occur, even if they do not determine exactly which projects will occur or when. Since all

projects, permits, contracts, etc. must be consistent with the forest plan (16 U.S.C. § 1604(i)), it is clear that plans are important in determining what activities can occur.

The Legal Cases Cited by the Forests Service do not Support this CE

In the Federal Register notice announcing the comment period for the issue of environmental documentation of plans, the Forest Service cited two Supreme Court cases, *Ohio Forestry Ass'n v. Sierra Club* and *Norton v. Southern Utah Wilderness Alliance* (70 Fed. Reg. 1,032 and 1,062 et seq. (January 5, 2005)), to support its proposal to no longer require environmental documentation for forest plans. Neither of these cases supports this proposition.

A. OHIO FORESTRY. In this case, the U.S. Supreme Court ruled that a substantive challenge to the Wayne National Forest plan was not ripe for judicial review because the plaintiffs could not show the type of immediate, legally recognized harm required for judicial involvement. However, the decision does not stand for the proposition that forest plans have no significant environmental impacts because they are just management tools, as the Preamble to this rule implies. On the contrary, the case makes it clear that, even if a plaintiff cannot show harm from the substance of an adopted plan, it can show harm, and even sue, if it can show that the plan was adopted without the environmental impacts analysis required by NEPA. See *Ohio Forestry*, 523 U.S. 736, 737 (1998).

In fact, Justice Breyer's decision for the majority recognizes the potential environmental impacts of a proposed forest plan when it states:

“Despite the considerable legal distance between the adoption of the Plan and the moment when a tree is cut, the Plan's promulgation nonetheless makes logging more likely in that it is a logging precondition; in its absence logging could not take place.”

Ohio Forestry, 523 U.S. at 730.

B. SUWA V. NORTON. In this case, environmental organizations sought to force the Bureau of Land Management to take action to protect the suitability of certain areas of land for wilderness designation. Because no action was planned by the agency, the Court ruled that an EIS was not required because there was no major federal action pending. This is clearly not the case here, where the Forest Service's proposed rule governs what is undisputedly a federal action – formulating and approving a forest plan. Nor does the case support the proposition that the adoption, revision and amendment of forest plans have no significant environmental impacts, as is alleged in the Preamble to the proposed rule. The U.S. Supreme Court does point out the obvious fact that land management plans serve to guide future agency action, but it does so in the context of a determination that, as such, the agency's failure to enforce the specific provisions of the plan is not necessarily actionable. The Court's discussion does not in any way address, much less support, the proposition that management plans have no significant environmental impacts that would allow documentation of forest plans with a categorical exclusion.

That land management plans have a primary purpose to provide general management direction is a truism that requires no U.S. Supreme Court citations. The cases cited do not support the Forest Service's contention that forest plans have no significant environmental effects.

NEPA Problems with a Planning CE

Part of the rationale for the dropping of NEPA analysis for new or revised plans is:

“From more than 25 years of NFMA planning experience, the Department concluded that it can most efficiently and appropriately evaluate and analyze the environmental consequences of an array of potential projects and activities when those matters reach the status of a proposal. Making planning a more continuous process, not dependent on environmental impact statements that only give a prediction at one point in time, will actually make plans more relevant to projects by collecting, evaluating, and monitoring data on an ongoing basis, thereby maintaining a current base of information that Forest Service can use at the project or activity level.” 70 *Fed. Red.* 1,023, 1,041-42 (Jan. 5, 2005).

While there is some truth and appeal to this dropping of the long and cumbersome planning EIS process, we fail to see how the Forest Service will do a legally adequate job at only the project level of meeting NEPA's requirements for analysis of alternatives and an analysis of indirect and cumulative impacts. Despite the burdensome nature of doing an EIS when revising a plan, that process did have a real positive feature – it provided a detailed analysis of alternatives and overall indirect and cumulative impacts that projects could tier to. Now, the Forest Service has pushed the very onerous job of analysis of alternatives and indirect and cumulative impacts onto the very first project that occurs after a revised plan is adopted. Surely this is not a consequence that the agency intended or wants. But this consequence exists, because while the agency may be able to avoid doing this required analysis at the planning stage, it will HAVE to do it sometime. No project will be able to move forward legally until this analysis is done.

Cumulative effects analysis requires “some quantified or detailed information. . .” *Neighbors of Cuddy Mountain v. U.S.F.S.*, 137 F.3d 1372, 1379 (9th Cir. 1998). “General statements about ‘possible’ effects and ‘some risk’ do not constitute a ‘hard look’ absent a justification regarding why more definitive information could not be provided.” *Id.* at 1380.

NEPA regulations require that the Forest Service “integrate the NEPA process with other planning at the earliest possible time.” 40 C.F.R. § 1501.2. Many courts have recognized this means cumulative impacts analysis cannot be deferred. In *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985), the Forest Service prepared an EA for a logging road, considering only the impacts of the road itself and ignoring the impacts of logging timber the road was designed to access. The Forest Service promised cumulative impacts would be considered in EAs or EISs prepared for individual timber sales. *Id.* at 760. The

Ninth Circuit found this impermissible under NEPA. The court concluded that NEPA “cannot be fully served if consideration of the cumulative effects of successive, interdependent steps is delayed until after the first step has already been taken.” *Id.* The court stated that “consideration of cumulative impacts will serve little purpose if the road has already been built. Building the road swings the balance decidedly in favor of timber sales. . .” *Id.* The Ninth Circuit went on to state clearly in *Neighbors of Cuddy Mountain v. U.S.F.S.*, 137 F.3d 1372 (9th Cir. 1998), that the Forest Service cannot “defer consideration of cumulative impacts to a future date. ‘NEPA requires consideration of the potential impact of an action before the action takes place.’” 137 F.3d at 1380 (quoting *City of Tenakee Springs v. Clough*, 915 F.2d at 1308, 1313 (9th Cir. 1990); see also *Kern v. Oregon Natural Resources Council*, 284 F.3d 1062, 1075 (9th Cir. 2002) (not appropriate to defer consideration of cumulative impacts when meaningful consideration can be given now).

The Forest Service argues that the impacts of the management activities proposed in the plans are too far in the future and are too vague or uncertain to be considered in detail in the plans. The Forest Service made a similar argument without success in *Thomas v. Peterson*, where the court said the Forest Service “may not escape compliance with the regulations by proceeding with one action while characterizing the others as remote or speculative.” 753 F.2d at 760; see also *Kern*, 284 F.3d at 1072 (“we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as ‘crystal ball inquiry.’”). In one case where the court allowed the Forest Service to defer detailed cumulative effects analysis to the project level, the court still required the Forest Service to “analyze [cumulative] impacts, including possible synergistic effects from implementation of the Plan as a whole, before specific sales.” *Resources Ltd. v. Robertson*, 35 F.3d 1300, 1306 (9th Cir. 1994). The court recognized that “consideration of specific projects in isolation is insufficient to replace analysis of the impact of a program as a whole.” *Id.*

ISO 14001

Adoption of ISO 14001 was also part of the 2005 regulations. Because the EMS in the ISO 14001 that the agency has chosen to incorporate into its 2005 regulations requires clear goals at the planning level, the agency may have created internal conflict in its regulations by trying to move that power to the line officer level simultaneous with adopting ISO. The planning regulations say that where a desired project does not conform to the plan, the Responsible Official may “[a]mend the plan contemporaneously with the approval of the project or activity so that it will be consistent with the plan as amended. The amendment may be limited to apply only to the project or activity.” 36 C.F.R. § 219.8(e)(3) (2004). Such amendments may be made without public notification. 36 C.F.R. § 219.9(b) (2004). Since there is no limit on the number of amendments (and no public check on the agency), Forests may be administered in an *ad hoc* fashion that is contrary to Congressional intent. See, e.g. 16 U.S.C. § 1601 (establishing the “necessity for a long term perspective in planning”). Allowing an opt-out at any time the project of the day does not comply with the plan not only undermines the whole reason for planning, but it turns the requirement of NFMA on its head. NFMA requires that

“resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans”. 16 U.S.C §1604(i). If there is essentially no plan, it is impossible to be consistent. This description of project-by-project planning does not fit with the policy driven EMS any more than it fits into the legal requirements of NFMA.

“For that part of the EMS within the scope of the land management planning process, the land management plan identifies the most pressing environmental issues that need attention. The land management plan also outlines important resources and special environmental niches. The Responsible Official, usually the Forest Supervisor, will be considered top management, who makes the commitment to continual improvement of environmental performance, prevention of pollution and compliance with legal requirements within the environmental policy. (FSM 1921.04c).”

FSH 1901.12 chapter 20.23, exhibit 01, Selected ISO 14001 Elements, Planning Documents, and Relationship of Planning Documents and EMS. The choices made at the planning level are actually more important with the ISO in use than they were before. ISO is just a tool—a framework for making decisions. It cannot operate in an environment where goals are hazy and constantly changing.

Comments on Specific Regulations and Directives

Unless the agency does take a “hard look” at The WildLaw Alternative and moves in that direction to try something new, we regretfully suspect that this EIS will be a rubberstamp exercise of the 2005 regulations and the directives that followed them. Thus, for the record, we submit these comments on the problems we found in the 2005 regulations and directives. NEPA requires that the DEIS analyze these comments, these problems and the potential impacts from these problems, IF you decide to go through with the proposal as it is.

2005 Regulations

§ 219.2(b): Departs from old regulations in approval of forest plans in that now the forest supervisor approves them instead of regional forester. Old § 219.4(b)(3). Regional Forester or Chief may now elect to approve plan or plan amendment. However, under both the old and the new rules, the forest supervisor has the ability to amend the forest plan.

§ 219.2(d)(3): New rules require plan revision at least every 15 years as opposed to a 10 year preference for revision, but at least every 15 years in the old rules. Old § 219.10(g).

§ 219.3(a): Nature of land management planning: No real equivalent to this section was in the old regulations, but where the new regulations talk about land management that is “adaptive” and is based on “useful and current information,” the old regulations talked about using a “continuous flow of information”. Old § 219.4

- Additionally under the old regulations, there was a detailed provision on monitoring and evaluating how well forest objectives and standards were being met. Old § 219.12(k). Through this process, recommendations could be made which would precipitate a forest plan amendment/revision.

§ 219.3(b): This regulation is an obvious departure from how courts were previously interpreting the force and effect of plans. Under this regulation, plans do not create any legal rights and do not approve or execute projects and activities. The obvious question in light of this regulation is what is the purpose of plans are if they do not carry any legal authority.

- This provision seems to fly in the face of NFMA which states that “resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans.” 16 U.S.C §1604(i). Bottom line is that if plans are only goals or objectives and do not create any legal rights then there is no need for projects to be consistent with the plan, and this violates the Act.
- The Forest Service relies on the *Ohio Forestry* case for the proposition that forest plans are merely “tools.” The agency quoted directly from *Ohio Forestry*: plans “do not grant, withhold, or modify any contract, permit, or other legal instrument, subject anyone to civil/criminal liability, or create any legal rights.” The *Ohio Forestry* court was actually paraphrasing Justice Brandeis in *United States v. Los Angeles & Salt Lake R. Co.*, 273 U.S. 299, 309-310, (1927). *Ohio Forestry* is a case about ripeness and when judicial review of forest plans is permitted. Obviously forest plans did not exist in Brandeis’ day; there is an argument to be made that the Forest Service took this part of *Ohio Forestry* out of context. The Forest Service also seems to contradict their contention that forest plans do not matter further on down in the regulations.
- The Forest Service also seems to like the SUWA case, *Norton v. Southern Utah Wilderness Alliance*, 124 S. Ct. 2373 (2004). First off this case is on BLM land and although it involves a land management plan, FLPMA instead of NFMA is the controlling statute. Secondly, SUWA was attempting to enforce mere statements in the BLM’s plan to monitor off road vehicles in wilderness study areas. This should be distinguished from forest plan standards, which under the new regulations do not exist since they have only “guidelines.” Justice Scalia does concede that under the APA the BLM does need to act in accordance with and conform to LUPs. Additionally the BLM is prohibited from taking actions that are inconsistent with provisions of LUPs.
- § 219.8(e) seems to contrast and be inconsistent with earlier sections of the regulation since it says that approved projects and activities must be consistent with applicable plan components.

§ 219.4: A controversial regulation that eliminates preparation of an EIS for all forest plan revisions based on a categorical exclusion. The justification is that since forest plans are aspirational or tools, there are no significant impacts on the environment based on a

forest plan. This initial premise will need to be successfully overcome for a successful NEPA challenge to the categorical exclusions of forest plan revisions from NEPA.

- The Act does not seem to be helpful on this point since NEPA applies in situations where the regulations describe “when and for what plans an EIS” is required. 16 U.S.C. §1604(g)(1). Presumably the agency could say that an EIS is never required for a Forest Plan revision; however, the Act does somewhat imply that in some cases an EIS would be required, otherwise Congress would not have included this provision.
- This regulation is a very wide departure from the old regulations which had detailed provisions for preparation of an EIS for forest plans. An argument could be made that, by removing wildlife protections for MIS and species listed under the ESA, there is a significant impact on the environment, and an EIS would be required for a forest plan revision.

§ 219.5 Environmental Management Systems

- This new section requires each National Forest to develop and maintain an environmental management system (EMS) according to the requirements of ISO 14001.
- A detailed discussion of EMS and ISO 14001 is below.

§ 219.6 Evaluations and monitoring

- This provision is not as new and exciting as the Forest Service would have people believe, since there were similar requirements under the old regulations under § 219.7(f). Additionally, under a monitoring and evaluation program, forest plans could be revised accordingly. Old § 219.10(g), also see old § 219.11(d).
- The plan monitoring program described in § 219.6(b) is not really new at all either, since this was previously required under old § 219.12(k).
- § 219.6 (a)(1)(ii) *Conditions and trends*. The current social, economic, and ecological conditions and trends, and substantial changes from previously identified conditions and trends must be described based on available information, including monitoring information, surveys, assessments, analyses, and other studies as appropriate. Evaluations may build upon existing studies and evaluations. There really is no process for assuring the Forest Service will collect relevant and necessary information. Permitting merely the use of available information (especially if the available information is nothing) gives the agency an excuse for not collecting the right monitoring information to begin the process.

§ 219.7(a)(2)(ii): “Objectives” are said to be aspirational but previously seemed to be more concrete and were a measurable timed result. Old § 219.3.

- Part (iv) suitability is out of line with the old regulations and the Act, which requires “the secretary to identify lands within the management area which are not suited for timber production...” 16 U.S.C. § 1604(k).
- The old regulations required the Forest Service to avoid logging areas that could not be adequately restocked or where resource damage could not be

avoided because of lack of technology. Old § 219.14. The new regulation on suitability does not make any reference to lands that should be treated as unsuitable as directed in the Act. The suitability of an area will apparently be determined at the project level, which conflicts with the Act.

§ 219.7(a)(5)(ii) states, “Unless otherwise provided by law, all National Forest System lands possessing wilderness characteristics must be considered for recommendation as potential wilderness areas during plan development or revision.” Arguably, this is the regulations’ one improvement over the old rules. The 1982 regulations in § 219.17 had a longer and more detailed section on wilderness recommendations, but § 219.17 boiled down to a constrained and convoluted analysis of only inventoried roadless areas. The new section allows “all” lands having wilderness characteristics, not just those in the official inventory, to be considered for wilderness. Now, the agency may gut this in the Directives, but on its face, this is the one new section that seems to hold some promise.

§ 219.8(e) Ensuring project or activity consistency with plans:

“If an existing (§219.8(a)) or proposed (§219.8(b)) use, project, or activity is not consistent with the applicable plan, the Responsible Official may take one of the following steps, subject to valid existing rights:

“(1) Modify the project or activity to make it consistent with the applicable plan components;

“(2) Reject the proposal or terminate the project or activity, subject to valid existing rights; or

“(3) Amend the plan contemporaneously with the approval of the project or activity so that it will be consistent with the plan as amended. The amendment may be limited to apply only to the project or activity.”

- This section seems to undercut any teeth or even the purpose of a plan. Like with zoning that can be swallowed and destroyed by the variances that allow incompatible things to happen anywhere, these new regulations say there will be a plan, but the plan means nothing as it can be amended any time to allow anything.
- With forest planning and projects, NFMA requires the agency to put the chicken before the egg, but § 219.8(e)(3) allows the Forest Service to put the egg first.

§ 219.9: A lot of discussion here about public participation, but obviously, since there will be no forest plan EISs, public participation could be severely reduced and almost entirely at the discretion of the forest supervisor.

§ 219.9(b)(2)(iii): “Public notification of evaluation reports and monitoring program changes may be made in a manner deemed appropriate by the Responsible Official.”

- This is going to cause confusion. Some National Forests make better use of the web, etc. than others, but this will give a reluctant Forest Supervisor an easy out

for hiding reports. This really doesn't even leave much room for the Forest Service to address this in the Directives.

- These regulations should be changed to require that all public notification info should be required to be put on the web and mailed or e-mailed to all persons who request it.

§ 219.10(b) Sustaining ecological systems: The weak and fuzzy language in this section seeks to “provide a framework to contribute to sustaining native ecological systems by providing ecological conditions to support diversity of native plant and animal species.” Unfortunately, NFMA is somewhat unhelpful in that the Forest Service is only required to provide for diversity of plant and animal communities to the extent that doing so meets multiple use objectives. 16 U.S.C. § 1604(g)(3)(B). Steps taken to protect tree species diversity are only necessary “to the degree practicable”. *Id.*

§ 219.11 Role of science: This is a major change since the new regulations only require the Forest Service to “take into account” best available science, whereas in the draft 2002 planning regulations the agency was directed to take actions “consistent with” the best available science. This provision apparently directs the Forest Service to look at the best available science, but it seems they can dismiss it if they choose. The Forest Service is not obligated to use peer reviewed science or any other science advisory board. One hope for giving teeth to this section is litigation over what the subsections in § 219.11(a) mean. A court may well find that the consideration requirements here mean more than simply cursory consideration and summary rejection of the science.

- § 219.11(a)(1) requires that the proposed plan document how the best available science was taken into account in the planning process within the context of the issues being considered.
- § 219.11(a)(2) requires that the proposed plan evaluate and disclose substantial uncertainties in that science.
- § 219.11(a)(3) requires that the proposed plan evaluate and disclose substantial risks associated with plan components based on that science.
- § 219.11(a)(4) requires that the proposed plan document that the science was appropriately interpreted and applied.

§ 219.12 Suitable Uses: Seems to relate to § 219.7(a)(2)(iv): This regulation talks vaguely about areas that could conceivably be considered “unsuitable” for logging. Under this regulation, it seems the Forest Service could easily not designate any areas as unsuitable, and furthermore this regulation does not comply with the Act. The old regulation § 219.14 detailed certain environmental conditions that would preclude logging in certain areas. These conditions include logging methods that would not allow the soil resource to recover or if the area in question could not be adequately restocked.

- By contrast, the new regulation only precludes logging if the land is not forest land or if achievement of desired conditions and objectives would not permit logging. However, these conditions and objectives are merely aspirational and would probably do nothing to cause an area to be designated unsuitable.
- The Act requires that timber be harvested only in situations where:

- Soil, slope, or other watershed conditions will not be irreversibly damaged. 16 U.S.C. § 1604(g)(3)(E)(i).
- There is assurance that such lands can be restocked within 5 years. Id.
- Protection is provided for water bodies of all types including protection of water quality, prevention of sediment build up, deterioration of fish habitat. Id.
- The old regulation § 219.14 outlined prevention of resource damage as described in the Act. Additionally prevention of resource damage was outlined under old regulations § 219.23 and § 219.27. This could be an area where the Forest Service is vulnerable, since they did not establish specific conditions where logging would be considered unsuitable in a certain area.

§ 219.13: Objections to plans: This process is to replace the old § 217 appeals process for forest plans. The justification for the change is that the public and the agency spend too many resources to comply with procedural requirements, and they wanted to make the process more in line with the BLM process. It seems that under the old regulations the appeals process was not described in the NFMA regulations, but instead referenced another section of the CFR detailing the appeals process. In this case, the appeals or objection process is described in the NFMA regulations itself. The new 30-day objection period is not an adequate time to review and comment on an entire forest plan. Once again, public participation is reduced.

§ 219.13(c) *Responding to objections.* (1) The Reviewing Officer (§219.16) has the authority to make all procedural determinations related to the objection not specifically explained in this subpart, including those procedures necessary to ensure compatibility, to the extent practicable, with the administrative review processes of other Federal agencies. The Reviewing Officer must promptly render a written response to the objection. The response must be sent to the objecting party by certified mail, return receipt requested

- This is the quintessential double standard—objections come with a time limit, however, the response does not.

§ 219.14(f) MIS: The Forest Service says that the MIS concept is flawed, because they say the science says that population trends of MIS cannot represent trends for other species. They do not cite any studies for this supposition, and more importantly, they do not offer an alternative that would ensure adequate wildlife viability across the board.

- The regulations do say that collection of population trend data for MIS would still be required if the Forest Plan requires this, but otherwise analysis of habitat would suffice. The Forest Service wants to make any requirements that relate to MIS very flexible, and calls for a “range of methods” to be available for evaluating MIS. MIS monitoring is also not required for individual projects and project areas. Most of this stuff conflicts with the MIS case law under the old 1982 regulations and may not survive legal challenge.

Notable Omissions in the New Regulations

There is no mention of clearcutting in the new regulations. Since the Act requires that plans contain guidelines on clearcutting it follows that the regulations should also describe the parameters for clearcutting. NFMA clearly prescribes that there be guidelines in plans which allow clearcutting, but the Act does not necessarily prefer this method. 16 U.S.C. § 1604(g)(3)(F). Clearcutting is, of course, permitted, but only if it is the optimum and meets other requirements. Plans are also to establish maximum size limits for areas to be cut in a certain operation. Cuts are also to be carried out so that natural resources are protected.

The new regulations reference the Renewable Resource Program, 16 U.S.C. § 1601 and § 1602, which requires a report on personnel requirements, multiple use objectives, etc. Most noteworthy in the RRP is the requirement to “account for the effects of global climate change on forest conditions,” including the effects of climate change on species. An assessment under this program described in § 1601 requires “an analysis of the potential effects of global climate change on the condition of renewable resources on the forests and rangelands in the US.”

- We would be surprised if the Forest Service ever took a close look at this issue during this rushed EIS process, despite some excellent work within the agency about this issue and how it interacts with the National Forests and their management. It took a tremendous amount of foresight by Congress to include this language in law back in the mid-70s. Recent studies (*Nature*, 2004) on this subject indicate that climate change has increased the occurrence of wildfires in Idaho.
- Will this play into any plans or the EMS for any forest? It should.

FSM Directives for the 2005 Regulations

- FSM 1330: “The EMS shall conform to the consensus standard developed by the International Organization for Standardization (ISO) ISO 14001: Environmental Management Systems Requirements (FSM 1921.9).” These standards should be published in the Federal Register, or at least in the directives. Secret laws, or laws accessibly only by those with the financial means to pay for access are not acceptable. The directives do require that “[e]ach Forest Service unit will also keep a copy of the international standard available for public review.” FSM 1331.1 (new directives).
- FSM 1301.5: The definition of independent audit includes the following sentence: “The audit team shall include at least one person from a Regional or Washington Office.” This does not sound like an independent audit.
- FSM 1301.5: The definition of ISO 14001 actually illuminates the reason the ISO is not a substitute for planning. “ISO 14001: An international standard that specifies requirements for an environmental management system to enable an organization to develop and implement a policy and objectives, which take into account legal requirements.” In other words, the ISO is value neutral. The ISO is merely a system to implement the policies and objectives that a business, or in this case, the agency, has chosen. The ISO does not eliminate the hard part of planning, which is considering an adequate range of alternatives and choosing among them.
- FSM 1900: states that the changes to the zero code will make the definitions

consistent with the 2004 planning regulations, but does not provide proposed definitions for public comment;

- FSM 1903: “reasonable manner, at reasonable costs, in a reasonable amount of time....” What is “reasonable”? Digest says this section provides additional guidance on what is “reasonable,” but it does not.
- FSM 1903.4: “Terms used in planning and evaluation shall conform to prescribed definitions found in FSM 1905.” The ISO uses the same terms as the planning regulations, but in different ways. Definitions should be consistent to avoid confusion.
- FSM 1905:
 - The definition of “Activity” seems pretty narrow - are you attempting to limit what is an agency “action”? Courts will not be so limited.
 - “Characteristics of Ecosystem Diversity” is not defined it with some quantifiable measures, so line officers can tell the public what was the historical ecosystem diversity, what is there now, and what planning is aimed to achieve. The term is so fluffy now that it gives very little direction.
 - The definition of cost efficiency states that in measuring cost efficiency, “some outputs - including environmental, economic, or social impacts - are not assigned monetary values, but are achieved at specified levels in the least cost manner.” How in the world can economic outputs be measured with anything other than a monetary value?
 - The definition of “Forest Land” does not require that there actually be any trees in place: “Land at least 10 percent occupied by forest trees of any size or formerly having had such tree cover and not currently developed for nonforest uses. Lands developed for non-forest use include areas for crops; improved pasture; residential or administrative areas; improved roads of any width and adjoining road clearing; and power line clearings of any width (36 CFR 219.16).”
 - The definition of multiple use has a troubling amount of attention paid to mineral extraction: “Consistent with the Federal Land Policy and Management Act of 1976 (FLPMA), multiple-use includes Federal energy and mineral resources underlying National Forest System lands. Exploration and production of those resources is considered one of the “principle or major uses” under FLPMA which, under Sec. 202(e)(1) of that Act, are to be given special consideration in the planning process.” This individual attention is not given to any other use of Forest Service land and is actually in violation of FLPMA by elevating one use over all others.
 - The definition of “Natural Forest” is good: “The condition of a forest environment at any point in time, including associated plant and animal communities that has been reached through natural disturbance regimes and the process of natural succession.” This term should be included in as many planning documents as possible, if it remains unchanged in the final version.
 - The definition of “Net Public Benefits. ...whether they can be quantitatively valued or not.” actually seems good, but it appears to conflict with the definition of “cost efficiency.”
 - The agency is attempting to make no part of the plan binding for the project and activity level. “Objectives. Concise projections of measurable, time-specific

intended outcomes. The objectives for a plan are the means of measuring progress toward achieving or maintaining desired conditions. Like desired conditions, objectives are aspirations and are not commitments or final decisions approving projects and activities (36 CFR 219.7).”

- FSM 1920.3: “When Responsible Officials prepare plans or plan revisions, they must 1. Conduct sustainability evaluations within an area large enough to consider broad-scale social, economic, and ecological factors and trends over large landscapes.” We fail to see how this requirement will be met with the analysis level of merely a CE.
- FSM 1921.03e: “Collaboration: The Responsible Official has discretion to decide on actual methods and timing for public participation and involvement (36 CFR 219.9).” This is too much discretion. NEPA requires public participation as early in the process as possible.
- FSM 1921.14: “Responsible Officials use guidelines to built operational controls into project and activity decisions, such as mitigating measures to reduce environmental impacts. ...A Responsible Official may depart from guidelines when it is necessary.” Again, what is the point of even having NFMA regulations and these directives if the responsible official can deviate from them or the Forest’s plan at any time for any reason?
- FSM 1921.17c: “Lands identified as not suitable for timber production in the plan document or set of documents shall be reviewed at least every 10 years, as needed, to respond to changed conditions in the plan area, or, as otherwise prescribed by law, to determine their suitability for timber production.” This is quite a one-way street since there is no requirement to review changes that may take lands OUT of the “suitable for timber production” category.
- FSM 1921.17d: This provision appears to allow timber harvest in excess of the long-term sustained-yield capacity. FLPMA defines “sustained yield” as “the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use.” 43 U.S.C. § 1702(h). Harvest volume is increased in two ways: as already mentioned, by allowing harvest in excess of what is sustainable, and second by including all “land where timber harvest could occur” rather than production lands only. Thus, the amount of timber that can be harvested sustainably is artificially inflated.
- FSM 1921.17e: The addition of guidelines of maximum size limits for even-aged regeneration harvest is a positive change, however, we need to know what those guidelines are before we can comment on whether the likely size of these projects under the guidelines will be acceptable.
- FSM 1921.17f: Culmination of mean annual increment (CMAI) is inappropriate for use in any areas that are not in even-aged management. The Forest Service should be moving away from the tree farm method of management, especially in the southeast where the pine beetle has done its best to prove how imprudent this method of management is. The incorporation of CMAI suggests that the Forest Service plans to either continue or commence even aged management. This is not a good idea.
- FSM 1921.31: “plan revision process begins when the Responsible Official decides.” A RO can decide to “revise” a plan without higher approval? ROs are given so much authority - when these a public lands to be managed for generations. The directives need to have safeguards that to protect future generations from the potential abuse of

- an RO who is there for only a few years.
- FSM 1921.31b: “The Responsible Official has the discretion to determine the appropriate source, scale, degree of scientific rigor, or other relevant considerations, including timeliness of the information, available staff, and reasonable costs incurred to obtain the information. The Responsible Official should use a three-step process for information collection.” This is outrageous - this is the type of info the Directives should be providing - some “Direction” the agency is providing here! This type of “anything goes” forest planning will not pass muster in court.
 - FSM 1921.32b(2): “The Responsible Official shall determine the scope and applicability of the amendment.” What does this mean - can the RO determine that a Project Decision amendment is only applicable for that one project? This seems to make the plans even more of a farce.
 - FSM 1921.33: “Unless otherwise provided by law, all National Forest System (NFS) lands possessing wilderness characteristics shall be considered for recommendation as potential wilderness areas during plan development or plan revision” While we agree with this requirement, how will the agency determine what lands possess wilderness characteristics? Without specific directives here, each plan will be open to the claim that the consideration required here was totally arbitrary.
 - FSM 1921.51: “The Responsible Official shall involve the public in designing the monitoring program.” While we agree that the public should be involved in the monitoring programs, and we have seen successful examples of this in other contexts, how will it be accomplished? What members of the public will be invited and how will they be involved in designing the monitoring program?
 - FSM 1921.61b: Should be required to tell people if they submit anonymous comments they won't have standing; this section does not require that.
 - FWM 1921.71: “Social, economic, and ecological evaluations must take into account the best available and relevant science.” How will this be accomplished? Again, the directives contain no direction for the responsible officials.
 - FSM 1921.74: Intent here is to reduce the need for species-specific analysis, which is a dangerous scenario. How will the agency know that their ecosystem guidance covers all species, as claimed?
 - FSM 1921.74b: “Identified species should be those for which valid, existing information is sufficient to indicate risk levels.” How will the RO determine that information is valid and sufficient to indicate risks? Again, no direction in the directives.
 - FSM 1921.76: “The extent of trend analysis for any options considered is at the discretion of the Responsible Official.” Trend analysis - considered at the discretion of the RO, but then gives duties; there seems to be conflicting guidance here. Where is the direction that directives should give?
 - FSM 1921.77c: “as deemed appropriate by the Responsible Official consistent with the limits of agency authorities.” You can't even require the RO to contribute to conserving federally listed species? There a huge potential ESA § 7(a)(1) problem here.
 - FSM 1921.82: “A science advisory board may be created by the Responsible Official to conduct the review.” You don't even have consistency in the way the agency uses science. Some forests will have plans based on top-notch scientific review, others

will not = anything goes.

- FSM 1922.04: “The Chief reserves the authority to approve the schedule for revising individual forest plans.” This conflicts with above total discretion given to the RO.
- FSM 1926.13d: a 30-day objection period is way too short. The regulations do not say anything about extending the time period; the agency should put that ability that in here.
- FSM 1926.31: “The Reviewing Officer’s response does not need to be a point-by-point review of the issues.” This not needing to respond in a point-by-point review is not in the regulations, and such a response should be required.

EMS and ISO 14001

The Forest Service seems to be betting the ranch on the use of EMS as set out in the ISO 14001. ISO 14001 was developed for the use of businesses and corporations for polluting facilities. All too often, the ISO has been used to “green wash” a company to make it look like they were concerned for the environment. Other times, it has been effectively used to improve a facility’s operations and lessen its environmental impacts. It has been used by some government agencies on limited scales, but it has never been used agency-wide or even proposed for use on the scale the Forest Service now plans. The Forest Service is literally walking into unexplored territory here; the DEIS must fully analyze all of the potential impacts from this new territory.

The thrust and purpose of the ISO 14001 is process driven; it is designed to provide the process for meeting an organization’s environmental goals and objectives while assessing, and hopefully reducing, its environmental impacts. The ISO will do little to make the Forest Service set good goals and policy, other than the ISO does mandate that an organization’s policy must have “a commitment to continual improvement and prevention of pollution.” ISO 14001 § 4.2. The Forest Service could choose bad policies and goals, such as maximizing subsidized logging of all remaining old growth, but given the media and public relations implications of opening stating bad intentions, it is doubtful the agency would do that. Goals and policies will come in the plan, but the ISO will provide requirements for meeting those goals. If past plans and these new regulations are any indication, the Forest Service will probably set up broad but good sounding goals and policies in its plans; they will probably not openly advocate goals and policies 75% of the public disapprove of. With such “good” goals and policies in place, it may be possible to use the process requirements of the ISO to mandate projects and actions in line with the “good” intentions of the agency. Litigation over the enforcement of the ISO will be a brand new field of law, created thanks to the Forest Service.

The current cost of the ISO 14001 at the American National Standards Institute (ANSI) website is \$81.00. The cost was \$78.00 on December 23, 2004, the day the Forest Service announced the new regulations. Apparently, ANSI anticipates more people buying the ISO as a result of the new rules. Or perhaps it was a regular price increase at the start of the year. Regardless, \$81.00 is an outrageous sum to ask each and every member of the public to pay just so they can participate in the planning and management of their National Forests. It is unprecedented, and the Forest Service has no legal

authority to force the public to make such expenditures in order to participate in the management of their public lands.

The ISO 14001 is a copyrighted product. ANSI will not allow people to have it unless they buy it, and the copyright license is for each copy to be used only by the person who bought it and then on only one computer. Even the person who buys the ISO cannot copy it for their own use. The Forest Service itself will have to work out a large bulk licensing deal with ANSI just in order for its very own employees who must develop the EMS for each Forest to even read the ISO. And the agency complained about the cost of doing planning under the 1982 regulations!

While ANSI has the legal right to enforce their copyright, having a public agency base the management of public land on standards in a document the public cannot see unless they pay for it is very problematic.

When we asked, Forest Service top personnel refused to give the ISO to WildLaw. Granted they were nice and honest about why they could not do so, but the reality remains that they want comments on the new Plan CE and they want people to trust their use of the ISO, all without ever allowing the public to see the standards they are going to use to manage 192,000,000 acres of public land. Almost needless to say, courts will have a real problem with this arrangement; managing public land while keeping the basis for that management secret from the public. As stated by Fred Norbury, Associate Deputy Chief of the Forest Service:

“As I understand it, we can’t distribute copies of the ISO itself because it is copyrighted. This is a question that has been raised by a number of Federal agencies that are following the ISO, and we understand that the Office of the Federal Environmental Executive in the White House and CEQ are working on a solution.

“As you can well imagine, this is a frustrating situation for us, and we’re wide open to any suggestions you have as to how we might work around it.”

E-mail communication to Ray Vaughan, Jan. 14, 2005. Seems odd and somewhat thoughtless that the Forest Service did not have this problem “worked around” prior to releasing and implementing these regulations. It is one of many signs that, despite the great amount of time the agency took on these regulations, the Forest Service did not really think through many of the implications of what they were doing in adopting an entirely new system of National Forest planning.

Sharon Friedman, Assistant Director, NEPA and Project Planning, U.S. Forest Service, had this to say:

“Units of federal agencies in the past have become certified under ISO and the lack of public access hasn’t been an issue with these units.

“We recognize that land management agencies are subject to an entirely different level of scrutiny and interest. One option would be to redraft the standard and then go by the redrafted version, but then people could say that we weren’t using the ‘real’ standard. Plus auditors would have to know the differences from what they usually do. Which is why the public administrator side of me would say ‘if we use the same as everybody else, there will be a fairly competitive market for training, auditors, etc. and the taxpayer will benefit.’ Another option is to talk to ANSI to see, given what you have pointed out about FOIA, we could arrange some creative form of licensing that would solve the problem. It is good for ANSI and good public administration for the feds to adopt this standard.

“We are also exploring a site license for FS employees which apparently EPA and DOD have, which addresses some of your concerns, but this doesn’t help with the public.”

E-mail communication to Ray Vaughan, January 14, 2005.

All this puts the agency in a bind. By adopting the ISO into these regulations, the Forest Service will technically make the ISO a public document, and someone could send a Freedom of Information Act (FOIA) request for it and would have the right to get it that way. No exemption in FOIA will shield the agency from having to release the ISO. Then, THAT requesting party would be able to distribute the ISO without paying for the copyright (so long as they distributed it for free for public policy purposes), as legally, the ISO would be a public document secured under FOIA and subject to fair use and other exceptions of the copyright law. And it would be the Forest Service, not the FOIA requester, ANSI would have to go after for putting their copyrighted material into the public domain. And on the flip side, if the Forest Service could somehow keep this ISO out of the public’s hands under FOIA, then the entire set of regulations will most likely fall to a legal challenge of basing management on a system hidden from the public. Even before these regulations get implemented, problems are already coming up that make it look like the agency itself is not going to like everything about how this new system works out.

Legal Requirements for an EMS

Proposed 36 C.F.R. § 219.5 requires that each unit of the National Forest system establish an environmental management system (EMS). The EMS must include at least “the land management planning process defined by this subpart.” Thus, it would appear that each Forest, even if it does not need to revise or amend its plan (such as the six Forests in Region 8 that adopted new revised plans in 2004), must incorporate the new regulations requirements into their management, via the EMS. Without an EMS, it will not be possible for a Forest to meet the requirements of these new regulations.

Under the 2005 regulations, each and every National Forest must have its EMS in place within three years. New 36 C.F.R. § 219.14(b) provides, “Transition period. For each unit of the National Forest System, the transition period begins on January 5, 2005 and

ends on the unit's establishment of an EMS in accordance with § 219.5 or on January 7, 2008 whichever comes first." With all the newness and uncertainty surrounding the new rules and the requirements for an EMS, it seems difficult to imagine all the National Forests, or even a majority of them, meeting this deadline. It could be argued in court that any Forest that has not met this deadline should not be allowed to implement ANY projects until it does finish its EMS.

The proposed regulations require that "plan development, plan amendment, or plan revision" be completed in accordance with the Forest's EMS. § 219.5(a).

The EMS "must conform to the consensus standard developed by the International Organization for Standardization (ISO) and adopted by the American National Standards Institute (ANSI) as 'ISO 14001: Environmental Management Systems—Specification With Guidance For Use' (ISO 14001)." § 219.5(b). This subsection effectively makes anything in the ISO 14001 that is required a binding requirement on the agency. Therefore, although the ISO 14001 is loose and broad in many aspects, it does have mandatory requirements and the regulations now make anything mandatory in the ISO mandatory for each Forest. In effect, the new regulations make the requirements of the ISO 14001 legally mandatory requirements on the Forest Service, just as if the regulations spelled those requirements out in the regulations themselves. It will be a good legal argument that any failure to comply with ISO 14001 is a failure to comply with the regulations, thus voiding any action taken by the agency that is based on that failure to meet ISO 14001. In the past, legal cases argued that the Forest Service broke the law by not complying with its own regulations; now we will be able to argue that the Forest Service breaks the law by not complying with the ISO 14001. That makes the details of the ISO 14001 very vital.

ISO 14001 requires that an organization working under the ISO "shall establish, document, implement, maintain and continually improve an environmental management system in accordance with the requirements of this International Standard and determine how it will fulfill these requirements." ISO 14001, § 4.1, at 4. Therefore, the Forest Service can be legally held to these requirements, including the requirement to "continually improve" each Forest's EMS. The ISO states it more explicitly at § 4.3.1, which requires, "The organization shall document this information and keep it up to date." Thus, if a Forest adopts an EMS and it sits on a shelf while they go about doing whatever they want, that would be a failure to comply with the ISO, which would automatically be a failure to comply with the regulations.

Another major indication that the Forest Service has released these regulations prior to thinking them through fully is that the agency does not know if the development of an EMS will be "top down" or "bottom up," meaning directed by the national headquarters or by the people who know a particular Forest best. In response to a question from Chris Crews of the Buckeye Forest Council, here is what Sharon Friedman, Assistant Director, NEPA and Project Planning, stated on a message board on the Forest Service's web site:

“[O]ne more question you had was whether the EMS would be ‘bottom up’ or ‘top down.’ This is something we have had many internal discussions about.

“My own feeling is that determining the most important environmental issues for a given forest to address should be determined locally. But complying with statutes and regulations is part of an EMS. So I could see that forests would want to address issues like the Endangered Species Act, Clean Water Act and Clean Air Act, if there were compliance issues, litigation or appeals on those.

“In our discussions internally, I’ve had difficulty imagining an important environmental concern that would be the same for National Forests of Florida, the Custer and the Tongass. Other than something generic like improving conditions for wildlife and clean air and water- but exactly what you need to do to improve the environment for those broad issues would be different on each forest. But that’s where we are.. some think that national things to work on would be a good idea.. but which ones and how specific?”

<http://www.fs.fed.us/forums/eco/get/ew/publiclands21-forum/30/2.html> (Dec. 28, 2004).

The response from Chris is noteworthy:

“While I agree that local direction is important, an EMS has to work with the existing legal framework (ESA, APA, NEPA, etc), not create alternative ones. Maybe we are looking at this issue differently, but I can see a whole host of areas that are similar for all of the national forests. Here are a few examples that I think would apply across the board, regardless of the forest:

“1. Restoring damaged watersheds from decades of destructive industrial logging and resource extraction like oil, gas and coal

“2. Restoring native plant communities while simultaneously removing invasive plant communities, with priority to endangered, rare and threatened species

“3. Development of a comprehensive plan for restoring damage caused by illegal ORV/OHV use, including closing illegal trails and actively enforcing closures

“I believe the 2nd and 3rd were identified by the Chief as major priorities for the entire Service, so it seems odd that no one would see these as obvious areas to start? While the exact techniques would obviously differ from region to region, having an overarching national framework to begin the process would help facilitate that work better. None of them is a generic cleaner water goal, but rather specific actions (restoration or enforcement) that the Service already should know how to do, and is doing in some places.

“That topic can then be subdivided into more detailed action items within that action, like identifying abandoned portals that are leeching acid mine water and

closing them, or surveying current threatened plant communities and looking for viable areas to further restore them into.

“Obviously there are regional and state specific projects that can best be addressed on a local level, but are not mutually exclusive from national planning. I personally think that local or bottom up planning is essential for ecosystem management and restoration, simply because that is the only way possible to seriously approach it.

“Take ORV use. Here in Ohio on the Wayne ORV use is a major problem, with hundreds, if not thousands, of undocumented and illegal trails. The Service is aware of this problem, and has made some efforts to address it, but at the same time they are talking about expanding ORV access and considering OHV (4 wheel jeep style) access. With limited resources (staff and money) to patrol, very little enforcement actually happens. Even with that reality the forest is still unwilling to acknowledge the magnitude of the problem.

“If there were a national priority, let’s say as part of this new EMS, that placed ORV damage, enforcement and land restoration as a major focus or ‘significant aspect’ of the forest focus, and the FS funded it accordingly in the budget, then we might actually see some real solutions and work accomplished. Without a focus and willingness to address a problem head on, I’m not sure how an EMS will really make any difference, regardless of whether it is developed nationally or locally.

“I guess what I really can’t get a grasp on is exactly why the Service thinks an EMS will make anything different. From all the analysis I have seen so far, and from my own research on EMS, it appears to me to be an easy way to make pretty words sound great on paper and give the illusion of great business management, but actually require little changes in the actual operations of a business. I worry that this same thing will happen with the FS. How is the FS addressing this type of concern, knowing that the EMS is still fairly new and there is no accepted scientific standard for forest management using an EMS? What is wrong with NFMA now that requires an EMS?”

<http://www.fs.fed.us/forums/eco/get/ew/publiclands21-forum/30/2/1.html> (Jan. 11, 2005).

Details of ISO 14001:2004

- The ISO itself is not a very long document, just 23 pages. The requirements section of the ISO takes up only six pages (single-spaced). The rest of the 23 pages is mainly an “Annex A,” which is titled “Guidance on the use of this International Standard.”
- Since the Forest Service is proposing to adopt the ISO 14001 environmental management system (EMS), it is worth noting that the ISO itself states, “The success of the system depends on commitment from all levels and functions of the organization, and especially from top management.” ISO 14001, at v (2004). Thus,

unless the EMS required of all National Forests in the new regulations is a sham, then the entire agency must demonstrate its commitment to the standards in the ISO 14001.

- There will be an inherent tension between the EMS developed for each Forest and the regulations themselves. Effective monitoring is vital to a real and successful EMS. Indeed, it is one of the four key parts of an EMS methodology. “Check: monitor and measure processes against environmental policy, objectives, targets, legal and other requirements, and report the results.” ISO 14001, at vi. The regulations do not require any particular monitoring and allow each forest to change its monitoring any time it sees fit. Such lackadaisical monitoring requirements do not even meet the flexible standards of the ISO. Note that the ISO requires monitoring and measuring of the agency’s processes against legal requirements, such as NFMA’s legal requirement to maintain diversity of species. Unless the Forest Service actually and consistently monitors SOMETHING that will measure its results in meeting the legal requirement to provide for diversity, it will be hard for the agency to support ANY project in court. The ISO says that it “contains only those requirements that can be objectively audited.” ISO 14001, at vi. Thus, unless the new regulations and the directives require somewhat consistent monitoring for the EMS for each Forest, it will not be possible to “objectively audit” shifting and random monitoring. It will be easy for one to argue in court that a failure to provide definitive and consistent monitoring such that a Forests’ EMS can be “objectively audited” means that the agency action is arbitrary and capricious. Therefore, the agency may well be unwittingly setting up the various National Forests for failure. The idea behind these new regulations is to give the agency more discretion in planning and implementing projects according to plans. But the regulations attempt to give such unlimited discretion that individual Forests will lack the guidance and internal agency limitations necessary to meet even the loose standards of the ISO. Therefore, an EMS that fails an audit or that can be shown in court not to meet the ISO’s requirements would then automatically be in violation of the regulations, regardless of how loose their specific requirements (or lack thereof) are. A demonstrated failure to meet the ISO would automatically be arbitrary and capricious.

- Another indication that the Forest Service has not thought through these new regulations very well is in the ISO audit area. In a message board on the Forest Service’s web site, again in response to Chris Crews of the Buckeye Forest Council, Sharon Friedman, Assistant Director, NEPA and Project Planning, stated:

“The independent audit process is still being thought through. We want to design a process that is objective. Technically, to conform to the Executive Order (13148) standard we could use auditors from other units of the Forest Service, other federal agencies, or contractors. Ongoing discussions also include developing our own ‘third party’ organization for ensuring objectivity of the audits- this could possibly involve an NGO with a board composed of people with different interests and with the involvement of people knowledgeable about ISO and the academic community.

“Do you or others on the forum have any ideas and experience to share on this?”

<http://www.fs.fed.us/forums/eco/get/ew/publiclands21-forum/30/1/1.html> (Dec. 28, 2004).

- The word “shall” has strong legal implications, implications that were not lost on the Forest Service when it proposed and adopted these new regulations. Interestingly, the six-page requirements section of ISO 14001 uses the word “shall” 61 times; the new regulations use it only 12 times.
- Section 4.2 requires an “environmental policy.” Top management of the agency must “ensure” that the policy

“a) is appropriate to the nature, scale and environmental impacts of its activities, products and services,

“b) includes a commitment to continual improvement and prevention of pollution,

“c) includes a commitment to comply with applicable legal requirements and with other requirements to which the organization subscribes which relate to its environmental aspects,

“d) provides the framework for setting and reviewing environmental objectives and targets,

“e) is documented, implemented and maintained,

“f) is communicated to all persons working for or on behalf of the organization, and

“g) is available to the public.”

ISO 14001, § 4.2, at 4. Arguably, this section requires a great deal of the Forest Service. The policy must be appropriate on the scale of 192,000,000 acres to the nature of the National Forest System.

- Section 4.3.1 requires, “The organization shall ensure that the significant environmental aspects are taken into account in establishing, implementing and maintaining its environmental management system.” “Environmental aspect” is defined as “element of an organization’s (3.16) activities or products or services that can interact with the environment (3.5).” ISO 14001, § 3.6. “Significant environmental aspects” are those “that have or can have significant impact(s) on the environment.” ISO 14001, § 4.3.1. The ISO does not define “significant.” Therefore, since the Forest Service intends for the EMS to mesh with and compliment their NEPA requirements, it is logical to argue that the definition of “significant” in any EMS situation should be the same as in the NEPA context.

“The Department has chosen to require each administrative unit to carry out an EMS based on standards developed by the International Organization for Standards (ISO). Each administrative unit’s EMS will serve as a framework for land management planning, adaptive management and, at the project level, provide information for EISs, EAs, or CEs where required by NEPA.” 70 *Fed. Reg.* 1,023, at 1,042 (Jan. 5, 2005).

- The ISO requires the establishment of objectives and targets. ISO 14001, § 4.3.3. The details of this section are worth quoting, as they set up a series of requirements that may cause trouble for the Forest Service.

“The objectives and targets shall be measurable, where practicable, and consistent with the environmental policy, including the commitments to prevention of pollution, to compliance with applicable legal requirements and with other requirements to which the organization subscribes, and to continual improvement.

“When establishing and reviewing its objectives and targets, an organization shall take into account the legal requirements and other requirements to which the organization subscribes, and its significant environmental aspects. It shall also consider its technological options, its financial, operational and business requirements, and the views of interested parties.

“The organization shall establish, implement and maintain a programme(s) for achieving its objectives and targets. Programme(s) shall include

“a) designation of responsibility for achieving objectives and targets at relevant functions and levels of the organization, and

“b) the means and time-frame by which they are to be achieved.”

- The ISO has good requirements for making sure that the people and resources are available “to establish, implement, maintain and improve the environmental management system.” ISO 14001, § 4.4.1. We are all familiar with how the Forest Service in the past often shortchanged the resources needed to do things like monitoring, mitigation and anything other than build roads, cut trees and drill wells. It is strongly arguable that the ISO requires better:

“Management shall ensure the availability of resources essential to establish, implement, maintain and improve the environmental management system. Resources include human resources and specialized skills, organizational infrastructure, technology and financial resources.

“Roles, responsibilities and authorities shall be defined, documented and communicated in order to facilitate effective environmental management.

“The organization’s top management shall appoint a specific management representative(s) who, irrespective of other responsibilities, shall have defined roles, responsibilities and authority for

“a) ensuring that an environmental management system is established, implemented and maintained in accordance with the requirements of this International Standard,

“b) reporting to top management on the performance of the environmental management system for review, including recommendations for improvement.”

- How many times has one seen the Forest Service use the lack of personnel suited to the decisions being made as an excuse for cutting corners? The ISO frowns on such things. “The organization shall ensure that any person(s) performing tasks for it or on its behalf that have the potential to cause a significant environmental impact(s) identified by the organization is (are) competent on the basis of appropriate education, training or experience, and shall retain associated records.” ISO 14001, § 4.4.2.
- The ISO also has requirements for a number of other things, including communications inside and outside the agency, documentation, control of documents and many other items. We will not go into all of them here, but once plans are being revised, Forest EMSs are being developed and projects are being implemented, it will be wise to compare carefully what the Forest Service does to the requirements of the ISO. We will mention further only some key things about the ISO.
- Again, monitoring in the ISO is more than just window dressing:

“The organization shall establish, implement and maintain a procedure(s) to monitor and measure, on a regular basis, the key characteristics of its operations that can have a significant environmental impact. The procedure(s) shall include the documenting of information to monitor performance, applicable operational controls and conformity with the organization's environmental objectives and targets.

“The organization shall ensure that calibrated or verified monitoring and measurement equipment is used and maintained and shall retain associated records.”

ISO 14001, § 4.5.1. These requirements do not seem to authorize unbridled and ever-changing monitoring. This does not sound like the type of unfettered discretion the agency may have been looking for. Any failure to do actual, real monitoring would be a violation of the ISO, which would be a legal failure to comply with the regulations.

- In the past, when things did not go as the Forest Service planned, there were few requirements that they actually do something about that. Arguably, the ISO makes a major change in this area such that the agency will have to develop new means to deal with failures of their actions. The ISO makes it clear that problems that occur must be addressed adequately:

“The organization shall establish, implement and maintain a procedure(s) for dealing with actual and potential nonconformity(ies) and for taking corrective action and preventive action. The procedure(s) shall define requirements for

“a) identifying and correcting nonconformity(ies) and taking action(s) to mitigate their environmental impacts,

“b) investigating nonconformity(ies), determining their cause(s) and taking actions in order to avoid their recurrence,

“c) evaluating the need for action(s) to prevent nonconformity(ies) and implementing appropriate actions designed to avoid their occurrence,

“d) recording the results of corrective action(s) and preventive action(s) taken, and

“e) reviewing the effectiveness of corrective action(s) and preventive action(s) taken.

“Actions taken shall be appropriate to the magnitude of the problems and the environmental impacts encountered.

“The organization shall ensure that any necessary changes are made to environmental management system documentation.”

IOS 14001, § 4.5.3. “Nonconformity” is defined as “non-fulfilment of a requirement.” § 3.15.

- The ISO provides for an internal audit procedure. These audits must be impartial. “Selection of auditors and conduct of audits shall ensure objectivity and the impartiality of the audit process.” ISO 14001, § 4.5.5. Thus, a demonstration that an audit was not objective and impartial would be a legal failure of the agency to comply with the regulations.

Annex A

- The requirements of the ISO take up only six pages (single-spaced). The rest of the 23 pages is mainly an “Annex A,” which is titled “Guidance on the use of this International Standard.” Annex A contains the ideas and “strictly informative” materials “intended to prevent misinterpretation of the requirements” in the ISO. This is where much of the perceived and actual “softness” of the ISO comes from. We will not be able to make a court require the Forest Service to do anything in Annex A; nonetheless, Annex A is useful in interpreting the requirements in the ISO itself.
- Annex A is clearly written with industrial facilities and similar corporate organizations in mind; most of what it talks about directly applies to such private organizations and how the ISO must be broad enough to cover the myriad possible variation of such facilities. Since the Forest Service is a federal agency, some of the nonbonding guidance in Annex A will apply and much will not. Still, the main thing that separates the use of ISO 14001 by industry and by the Forest Service is that adoption of the ISO into the agency’s regulations makes the requirements of the ISO

mandatory for the Forest Service. A corporation can choose to abide by ISO 14001 or not, or even choose to abide by it and then change its mind and not abide by it. But the Forest Service has legally “locked itself in” with ISO 14001 and must abide by it; the agency cannot decide not to comply with requirements in the ISO unless it repeals the regulation § 219.5.

- Annex A has a statement very applicable to the Forest Service under these new regulations”

“An organization with no existing environmental management system should, initially, establish its current position with regard to the environment by means of a review. The aim of this review should be to consider all environmental aspects of the organization as a basis for establishing the environmental management system.

“The review should cover four key areas:

“— identification of environmental aspects, including those associated with normal operating conditions, abnormal conditions including start-up and shut-down, and emergency situations and accidents;

“— identification of applicable legal requirements and other requirements to which the organization subscribes;

“— examination of existing environmental management practices and procedures, including those associated with procurement and contracting activities;

“— evaluation of previous emergency situations and accidents.

“Tools and methods for undertaking a review might include checklists, conducting interviews, direct inspection.”

Every Forest starting its EMS process should be encouraged to begin with this type of review as part of the process.

Conclusion

Thank you for the opportunity to provide comments on the Forest Service’s proposal to prepare an EIS on new NFMA regulations. Please provide me at the address below all future announcements or documents on this proposal, including the draft EIS.

Sincerely,

A handwritten signature in black ink, appearing to read "Ray Vaughan". The signature is fluid and cursive, with a large initial "R" and "V".

Ray Vaughan
Executive Director of WildLaw and attorney for the other named groups

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A Modest Proposal for the U.S. Forest Service

A White Paper by Ray Vaughan,¹ WildLaw²

“Harmony with land is like harmony with a friend; you cannot cherish his right hand and chop off his left.” “A thing is right when it tends to preserve the integrity, stability and beauty of the biotic community. It is wrong when it tends otherwise.” Aldo Leopold.

“Conservation is the foresighted utilization, preservation and/or renewal of forests, waters, lands and minerals, for the greatest good of the greatest number for the longest time.” Gifford Pinchot, first Chief of the U.S. Forest Service.

After decades of conflict over a handful of issues involving our National Forests, perhaps it is time to ask whether common ground can be found and progress made on areas of agreement. Can those parties and interests who have fought so long over the public lands put aside those conflicts and work together on other issues that make the public’s forests healthier? Can an agency so long captured by a political mindset of short-term extraction move toward the goals of stewardship and sustainability it was originally formed to achieve? Can a way of resolving issues be found instead of people being stuck in a backward-looking paradigm of endless conflict?

We think that the answer to all those questions is “Yes.” Here are our suggestions for moving forward.

WildLaw’s History with National Forest Issues

In 1987, WildLaw’s founder, Ray Vaughan, filed his first appeal of an action by the United States Forest Service (USFS). Now, 20 years later, reflecting back on WildLaw’s work on National Forest issues, we ask what has been accomplished what has worked, and, more importantly, what has not worked and needs a new direction.

Briefly, what have Ray Vaughan and WildLaw done in those 20 years? Here are the raw numbers:

- We have reviewed more than 6,000 USFS NEPA documents (EISs, EAs and CEs).
- WildLaw filed detailed and project-specific comments on at least 2,000 of those proposals.
- We have appealed approximately 400 of those 2,000 projects on which we commented.

¹ Member, USDA Roadless Area Conservation National Advisory Committee (RACNAC).

² WildLaw, 8116 Old Federal Road, Suite C, Montgomery, AL 36117. www.wildlaw.org Many thanks to all the WildLaw staff who helped with this white paper, especially senior staff attorneys Tammy Belinsky, Brett Paden and Steve Novak, and SFN Director Alyx Perry. Also, special thanks to our Board Chair Lamar Marshall of Wild South.

- Out of those 400 appeals, we litigated over 250 of them.
- Out of those 250, we won in court (either through a court order or settlement), 210 of them.
- Of the 150 appeals we did not litigate, we won 55 of those.
- We won two successful lawsuits filed under the 1995 Salvage Rider, rare things indeed under that law.
- Through these successful appeals and lawsuits, we stopped more than 450,000 acres of proposed logging that violated the law or was scientifically unsound. We stopped more than 4,000 acres of proposed strip mining. We protected more than 20,000 acres of historic and archeological areas. We attained a new wilderness area in Alabama, Dugger Mountain, that never would have been designated by Congress if some damaging projects we stopped had instead gone forward.

But such numbers would not mean much, if that was all we had done. Legal action that stopped bad agency actions was not an end unto itself for WildLaw; we wanted the legal tools to open the door to good agency actions and to better management of our public forests. We have had some success in this area:

- By stopping bad management actions and encouraging better management, more than 4,000,000 acres of National Forests in the South now have management plans and projects that are based on good science and emphasize restoration of native ecosystems and sustainable management.
- WildLaw was the source of the model program for identifying, designing, and implementing restorative and sustainable management on each National Forest that solves problems on the land and resolves conflicts over management of these Forests.
- Ten National Forests now have such restoration and sustainable management programs in place right now, all starting with the Conocuh National Forest in 1999.
- Ray Vaughan, WildLaw's Executive Director, was appointed to the RACNAC, an advisory committee to the USDA that has truly brought diverse and often competing interests together in a way that has fostered mutual understanding and problem solving.

From all this experience, WildLaw has developed a model for sustainable management that ends most conflicts over our National Forests, that restores healthy and resilient forests, that gives the USFS positive management and career possibilities, and that provides sustainable economies for communities in and near the Forests. This model is the main subject of this white paper.

While all this is good, it is not enough. What would be enough and what would it look like? What does WildLaw want?

First, what we do not want. WildLaw does not want an agency that is a slavish and harried servant of the irreconcilable self-interested and shortsighted demands of "multiple use," as if anyone really knows what that term means. We do not want an agency

wrapped in controversy and endless conflict. We do not want a land management agency that hides in a bunker of “agency expertise,” afraid of really engaging in conversation with the people who own the forests, who pay the salaries of their managers and who often know those forests better than the agency experts.

We want a USFS that is a model agency the public can be proud of, an agency taxpayers want their money spent on, and an agency that Congress sees as a problem-solver it wants to support. We want a Forest Service that embraces genuine ecological restoration, protection and sustainability such that the many uses of and desires for the National Forests can finally be reconciled by a guiding principle that puts the good of the forest first, in the long-term, over the good of any one interest in the short-term. We want an agency driven by science, not politics. We want an agency that accepts the various public interests involved in our National Forests as indispensable partners in land management decision-making. We want a new USFS.

And a new USFS is coming; internal agency demographics and external realities make that inevitable. The issue is what type of new Forest Service we will have. This is our proposal.

From Conflict to Cooperative Conservation

From our many conversations with USFS personnel at all levels, industry folks, and other interested people, it is clear that a critical mass of people involved in our National Forests are ready to change how business as usual is done. The seemingly endless days of conflict and trench warfare among competing concerns wear down parties while the needs of the forests are sidelined.

Instead of frustration and anger, we propose a new course for positive change in the USFS and on our National Forests. Instead of focusing on the issues and principles we each hold that have divided us over the past decades, we need to begin talking with each other with respect and open minds. Let us focus on the areas of common ground where we can agree on the problems facing our forests, on the issues involved and on the solutions. We can always come back to the contentious issues later, and when we do, we may well find that after a few years of cooperation on common ground issues, we are not so far apart on those problem issues either.

We all now have an opportunity to figure out how to fix real problems and encourage the real innovations and successes the agency can achieve. Such an effort can be exciting while producing a better agency, better public relations, more certainty in forest management, and much less litigation. While there will be issues and areas where we do not agree, we can put those aside for the time being and work on the issues and areas upon which we can agree. In our experience, we find that 20% of the issues on the National Forests divide us, and the conflict around those issues prevents conversations and solutions on the other 80%. In every instance where we have been open to exploring the neglected 80%, we have found common ground with all reasonable people who care for our public lands.

As one of the top litigators against the Forest Service, WildLaw knows where the agency cuts corners and where the agency shines. We know many good people in this agency, good people who are true public servants. We also know the few bad people in the Forest Service, bad people who will do anything they can to make short-term money for their buddies in industry at the expense of the public at large. The few bad folks spoil things for the many good agency employees. Every agency or collection of people is subject to this dynamic of a few dragging down the work of the whole; this is not unique to the Forest Service. But, at this time, we believe that we all really have the chance to reverse this dynamic for the Forest Service, to seize this opportunity to end the days of the few holding back the rest.

We have never sued the Forest Service because we do not like the agency; indeed, we have sued the Forest Service so much because we like this agency. We *do* believe in its true potential to be the greatest land management and protection agency in the world. We *do* have faith in the many good people in the Forest Service; we *know* that if the good people are given the chance to do their jobs, they produce great results with which no one can argue. The Forest Service and the various industries and interests involved with the National Forests could meet environmental and conservation interests half way and make a real attempt to solve the real problems in our National Forests and thus come up with a system that brings out the best in the agency. Such an open and cooperative effort can truly solve the “process predicament” and “analysis paralysis” the agency has moaned about for years.

The current Chief of the USFS, Gail Kimbell, has stated that she thinks that it is time to find some common ground. As she stated recently in a speech:

“Much of her work in forestry came during exciting and contentious times for the Forest Service, she said... ‘There’s a lot to be learned through debate and discourse,’ she said, adding that while debate is very healthy, ‘I hope sometimes we can agree on things.’”

“Forest chief cites OSU roots,” *Corvallis Gazette-Times* (May 12, 2007)
www.gazettetimes.com/articles/2007/05/12/news/community/2aaa05_forestchief.txt.

It is clear that collaborative efforts and cooperative conservation plans have been notably successful in many areas throughout the nation; WildLaw and our Executive Director Ray Vaughan have participated in several such efforts and know some of those successes. But as admirable as those success stories are, they are still the exception, not the rule, of how conservation work is done in America or on our National Forests. Clearly, more efforts are needed so that they become more of the rule. Though it is unclear whether cooperative conservation efforts can be applied more often, more problematic is whether they can be applied to problems on a scale and timeframe beyond that which have been applied thus far. But it is time to try.

While the mechanism of forcing government and industry to do the "right" thing may have lost strength, it is by no means a given that those who once did whatever they could get away with are now reformed. Make no mistake, we will always believe that we need reasonable laws and regulations to form the sideboards of acceptable management, and to prevent the truly bad actions of people who put themselves before others and who put their own economic interests before those of the forests, our country and world. Force, however, is no longer a tool that should be used readily and as a first choice.

So it has been for so many decades -- we talk at each other and when we do not hear, we use the weapons at our disposal to force our will. Environmentalists use the courts. Corporations and government agencies use politicians and money. We both use the media. We all win and lose our share of battles, but what of the war? Who is winning the war?

From what we can tell, no one is winning. Some get rich. Some get power. Some get recognition. Some get short-term satisfaction. But what do the people get? What does the Earth get? What do the forests, rivers and critters get? What do my children get out of all this endless trench warfare? Yes, there has been some progress on many fronts, and I do not mean to discount any of that work.

Our concern is with whether that progress continues. Perhaps the air is cleaner than it was in 1970, but is it really that much cleaner than it was in 1990? Not where I live. Perhaps our rivers are better than they were in 1970, but the sewage treatment plants built in the 1970s now are straining under loads many times their capacity and our waters are really not much better than they were in 1990. Rivers in which we swim are more polluted now than in 1990 and perhaps even 1970. We know of species that are extinct now that were still with us even in 1990.

No major law intended to improve environmental quality in any area has passed Congress since 1990. Sprawl and habitat loss continue unchecked plagues on our natural resources. Some lawsuits have made positive changes -- real improvements on the ground that can be seen. Some cases won only paper victories, as is true of all environmental litigation. On the flip side, much of the legislation passed to suspend, weaken or bypass environmental protections did not work out as well as its proponents thought it would, and upon admission of that fact, we have an opportunity to start really solving problems.

Have we reached the functional end of where command-and-control regulation can take us? While we think that better enforcement could take us a bit further in this direction, it seems clear to us that this era has run its course. If we are not at a dead end yet, the end of this road is plainly just a block or two ahead. We cannot backtrack on the progress we have made; anyone who uses cooperative conservation as a cover to just roll back environmental protections is a scoundrel of the worst kind. Yet, neither can we move forward on the current road. We must find a way to move to a new path that takes us ahead, that does not sacrifice past progress but yet still finds new ways to restore and improve the forests and our lives.

Many know that we have reached the limit of the regulatory paradigm but instead of risking change they defend the status quo. The Bush administration is not trusted and forest management has become far too partisan -- something that should be completely *nonpartisan*. Supporting innovation in natural resource management should not be avoided simply because “the other side” suggests it or because it is not how we did things in the past. I was wrong to judge others, including President Bush and all his appointees. Those appointees whom I have gotten to know personally and professionally seem to be as genuine and honest as any environmentalist I know; they just come from a different perspective. And I cannot say that their perspective is wrong, and it is not my place to judge what is in their hearts.

We hope all those involved have learned some lessons. Maybe it is time to lay aside the weapons with which we are so comfortable and familiar and try some new tools. Cooperative conservation efforts on our National Forests can produce results as good as the rhetoric. One example of success is the largest timber sale in agency history: the Hurricane Katrina salvage project in Mississippi (490,000,000 board feet) was conducted by a collaborative, cooperative process, and it was a success at every level.

If cooperative conservation succeeds on a broader, national scale, all of us can celebrate. If it does not, our forests will continue to degrade and command-and-control regulatory warfare will return. Trusts will be betrayed if cooperation does not lead to better forest management, but the possibilities cannot be known without trying.

A couple of years ago, Congressman Barton said that environmentalists need to come out of the trenches and meet people like him half way and try to solve problems in new ways. Implicit in that statement is that economic and political interests will also have come out of their trenches, meet public interests half way and try new ways of doing things. Cooperative conservation can never mean “I am going to do what I wanted to do anyway, but this time, you will agree with me just because I talked with you about it first.” We must have a truly collaborative process with real, measurable results on the land, water and air. We have been amazed at the knowledge gained, improvements on the ground and even the profitability of collaborative forest management. We look forward to continuing to be amazed at what we can learn from the USFS and how the USFS will do to might make the environment better.

WildLaw is willing to climb out of the command-and-control trench, and has already done so to some extent. We can show you the “bullet holes” for doing so and we may even receive more. But we believe that the opportunity to create a new paradigm is more promising than our remaining entrenched in the status quo.

Details of the WildLaw Proposal for National Forests

Since WildLaw’s founding a decade ago, litigation and other legal actions have been our key methods for stopping egregious and illegal projects on public lands. During these ten years, we have developed critical links between regional efforts to facilitate restoration-

based management on both public and private lands. Building upon and branching out from litigation, we have learned to use a broad array of tools in a proactive approach to both public and private resource management issues in our region: legal defense, economic reform, community empowerment, capacity building, and technical support.

WildLaw's concept of ecological restoration and sustainability for National Forests can help serve as a national policy statement to guide sound forest management. By including social and economic criteria, ecological restoration also bridges the gap between what is good for the land and what is good for communities and workers. Our concept would increase the amount of good work being done in our forests and reverse centuries of unwise resource extraction and development that have fundamentally altered most of America's forests. This history of unguided management has directly contributed to a dramatic loss of habitat, decline in water quality, and disappearing old-growth forests, as well as economic and social harm to communities and workers. Such good restoration efforts only work, however, if they are based on science and recognize that ecosystems are complex and our understanding of them is still limited.

Through a process of truly doing what is best for the land through restoration and management based on sustainability, the Forest Service needs to fully examine the role it could play in restoring community-based forestry economies and cultures in the regions surrounding our National Forests. During a period of significant change in forest policies at the federal, state and local level, WildLaw's vision of ecological forest restoration and sustainability establishes a viable vision for restoring natural ecosystems and a sustainable human relationship with the land.

Simply being an oppositional organization seeking to stop bad projects, while a worthwhile strategy and an integral part of our history, cannot be the only focus for WildLaw. We have an obligation to find ways to make the National Forests more vital and functioning ecosystems that meet the needs of a diverse set of people who use and love these lands. Through our initial experiences with pushing science-based ecological restoration and sustainability, WildLaw has begun a new and proactive/positive avenue of affecting forest management for the better.

We are faced with a synergistic combination of crisis and opportunity, and WildLaw is proposing three strategies:

- 1. Facilitating ecosystem-based forest management that restores and enhances the ecological health and sustainability of forests while producing services and goods for human communities, whether those economic opportunities are recreational or physical byproducts of ecosystem restoration.*
- 2. Developing local, regional, and national markets, value-added enterprises, and business networks that maximize the economic benefits of sustainable forest management for the Forest Service, local private landowners, workers, and communities.*

3. *Developing a skilled workforce of forestry professionals with access to the technical expertise, equipment, and financial resources required to carry out restoration and low-impact management activities on the ground.*

Facilitating ecosystem-based forest management that restores and enhances the ecological health of forests while producing services and goods for human communities

Ecological Restoration Projects

In the late 1990s, WildLaw pioneered the model of ecosystem restoration on the National Forests in the South. Starting in Alabama, WildLaw worked with the USFS to develop the first forest-wide, science-based restoration programs in the nation. These restoration programs in the National Forests in Alabama have been extremely successful and have become national models. Our goal is to spread this model throughout the entire National Forest system nationwide.

Obviously, what is restoration of functioning forest ecosystems and what is sustainable management of those ecosystems will vary from forest to forest. There clearly can be no "one size fits all" approach to what is required on the ground. Some areas will need a hands-off approach, letting nature heal itself. Some areas will need road maintenance, road obliteration, stream restoration and other site-specific actions. Some areas will need thoughtful, long-term manipulation of the vegetation, sometimes through mechanical treatments, sometimes through prescribe fire. Some areas will need aggressive invasives treatment. Some areas will need planning for eliminating uncontrolled harmful recreation while still providing fun and safe areas for all forms of recreation. There is much genuine restoration work to be done.

While the work required on the ground might be different for each Forest, the process for arriving at a consensus of what the restoration and sustainable management needs of a particular Forest are can be universal. It is not a matter so much of using one set of laws and regulations over another. It is more about common sense, openness, humility and a willingness to listen and learn from others whom you may not agree with right now.

To make cooperative restoration programs work on our National Forests, folks like us at WildLaw must maintain vigilance in reviewing, commenting on and, when necessary, challenging projects on our public lands. Cooperative conservation only works when those who would abuse the land and the public for short-term gain cannot do so and when those whom they would adversely influence know they have the room to do the right thing, despite the politics of exploitation. So, we are not going away if cooperative conservation works; if anything, we will be more involved. We hope that the Forest Service and industry will get more involved also; that will be the only way for solutions to work.

For the USFS, to make a change in direction that solves most of the current problems in management of the National Forests, it needs to do these things:

Follow the law, use good science, be honest and open with the public.

For folks in the industry who are frustrated by the unpredictable and intermittent flow of materials from the National Forests and for agency personnel frustrated by the inability to get work done and the inability to do needed management, I want you to imagine something. Imagine a place where the flow of timber off the National Forests is at a known level and stable and predictable for at least 50 years, a place where the harvesting of that timber is not controversial and projects to approve that harvesting are not appealed or litigated, a place where industry, forest practitioners, environmentalists, scientists and agency personnel have all agreed on the management needed. Well, you do not have to imagine such a place. That place is the National Forests in Alabama.

Which takes longer? (1) Doing a quickie EA in four months, or (2) Preparing a full and thorough EIS for two years? Answer: (1). Consider one timber sale we challenged. EA came out, and it was garbage. We appealed and won. Second EA came out much the same, and we appealed and won. Third EA came out, and, yep, WildLaw appealed and won again. Fourth EA came out; it was finally better but still lacking. It got stopped by a lawsuit. So, the project for which the EA took four months to prepare still has not been implemented now ten years after it was started. Near the same time, the Conecuh National Forest started a full EIS on longleaf pine restoration on the forest; it took them about two years to plan and prepare the EIS. They are now starting the phase two EIS tiered to the first EIS. That Ranger won numerous awards, got a bigger vehicle to drive than his Forest Supervisor, and made the local loggers and politicians happy. Scientists and all environmentalists involved in that forest are pleased. The other Ranger who did the crappy EA has disappeared somewhere into the bureaucracy.

The solution to analysis paralysis lies not in changing the rules of analysis but in changing how you do your method analysis. For too long, the agency has compartmentalized (literally) its forests and its work. Trying to make each project look small and insignificant seemed like a good way to avoid doing population data collection, cumulative impacts analysis and a host of other things required by law for "big" projects. This scheme has not served either the forests or the Forest Service.

The Forest Service must stop managing merely by compartment and individual project. Instead, step back and assess at a landscape or watershed level what it is that the forests need and what can be done to meet those needs over a longer term, at least five years. Fifty years would be better. This is not planning but how to implement plans with a broad vision instead of a microscope. The Forest Service also must not focus on "product" being produced for sale; having timber quotas has never helped the forests or the agency. It would be far better to focus on acres restored, watersheds healed, rivers and streams restored, wild places protected, visitor experiences enhanced, conflicts resolved, new workforces created, and the like. Do what the land needs, use the right tools to do the right job, and there will be products and services provided in their own due course. Focus on the work, the land and the people; the rest will take care of itself and be much better than artificial targets.

Take a year or two to develop a full and quality EIS on what restoration really means for your district or forest. Think big. Look at all forest needs, road repair and road obliteration, stream rehabilitation, indeed entire watershed rehabilitation, invasives removal, native forest restoration, etc. Involve all stakeholders at every step, especially at the start of the process. Instead of proposing actions, share each Forest's problems with all the collaborative stakeholders and seek their input on what the solutions (and thus the management actions) should be to solve those problems. Seek out ideas and assistance. Think big. Instead of a series of "small" projects that cumulatively are big (but which you claim are not), admit that what you are doing is one big project and analyze and act accordingly.

Take the time to do a bang-up analysis. Yes, that takes longer than an EA, but the rewards for an agency line officer could be significant. Here are some of them:

- No need to do NEPA analysis, NFMA data collection or ESA consultation for five years. Instead of doing EAs and having to do the same analysis over and over for each project, do all the analysis at once and do 20-40 projects together as one restoration plan. Then, the 20-40 projects will make more sense and do a better job for the land than if you did them all piecemeal. Do the analysis once and then do work in the woods for five years before you have to do analysis again.
- 95% of your opposition will be gone. Why? If you comply with the law, collect and use good data, utilize good science and be open with everyone and keep them involved, the result will be better.
- Really "bulletproof" your work. For years I have heard about Forest Service people trying to "bulletproof" their EAs by using certain language or by making up shortcuts that they think will look like compliance with the law. The only way to "bulletproof" the work is to do the work right. Follow the law, use good science, be honest and open with the public, and no attorney with any sense will dare sue you.
- Awards, big vehicles, commendations, accolades, promotions and fast career advancement (for solving the "analysis paralysis"), and admiration from your fellow agency people and from a variety of folks in the public.

In woodworking, the saying goes "measure twice, cut once." It means to take the time to make sure the planned action is correct and then you get to take that action without making major mistakes and without having to do the work over. For NEPA, NFMA and ESA analysis, the same is true. Take the time to make sure what you are doing is right and done well, then you can do it without having a judge tell you to go do it over again. And over again....

To see how to do this right, look at the Conecuh National Forest in Alabama which prepared an EIS on a five-year program to restore Longleaf Pine over some 4,222 acres. It would give Forest Service restoration work better direction and improved validity if it abandoned all the piecemeal projects and instead looked at the forest as a whole to

prepare and implement a full EIS on a comprehensive restoration program for each forest that could guide the timber management and other actions for a five-year period. One comprehensive and more-thorough analysis gives a better picture of the work that needs to be done (and where it *really* needs to be done) and can be done without the problems that arise from piecemeal implementation.

Read the Conecuh Longleaf Pine Restoration EIS; it is not a long EIS in page-length as it is a good example of site-specific detail and data without unnecessary filler. When they did it, they got a lot of flack within the agency about how "this is not the way we do things," but guess what? Once it was done, it was not appealed or sued over (not even by that 5% who oppose logging for even good reasons), and the Conecuh is now winning awards and national recognition for their work. And rightfully so.

Now, all the forests in Alabama have prepared restoration programs. The Talladega National Forest released their five-year Longleaf Pine restoration EIS in early 2004. It covers 19,000 acres. They had MIS data for the entire area over several years, as well as complete PETS surveys for every acre of that 19,000 acres. That created a baseline and a need which no one could challenge.

Below are photos showing how the Conecuh National Forest uses clearcuts with reserves to eliminate unnatural Slash Pine plantations to restore them to native Longleaf Pine:

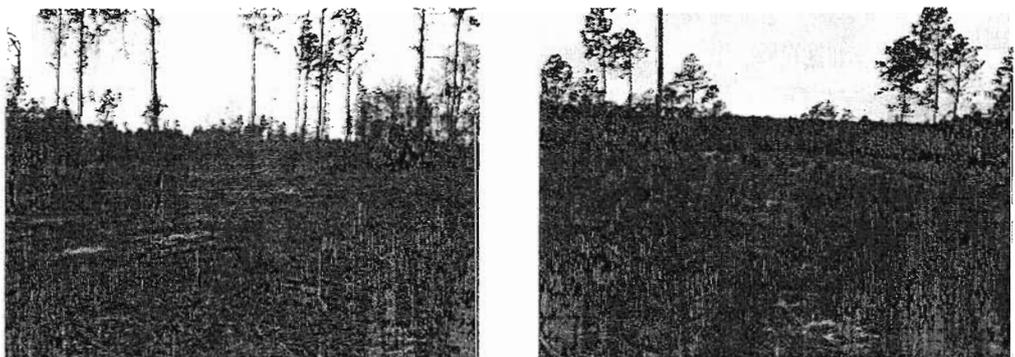


Figure 1: All Longleaf is retained and debris is spread to prevent erosion and rutting.
Figure 2: Longleaf seedlings are planted and prescribed fire maintains the composition of the stand.

These photos show how using prescribed fire for restoration purposes works in the Conecuh.



Figure 3: Longleaf forest in need of fire.

Figure 4: Prescribed fire in action.

Figure 5: Restored Longleaf forest after thinning and with regular prescribed fire.

Benefits of a Restoration/Sustainability Paradigm for the Forest Service

There are many benefits for all interested parties from a shift to this paradigm for the Forest Service:

- The USFS reduces conflict and litigation, most likely a significant amount.
- An end to “analysis paralysis,” “process predicament,” or whatever you call the excessive paperwork the agency engages in to justify plans and projects.
- Legal requirements for the development and implementation of projects and programs become clearer and better defined.
- Resources needed to plan and propose programs and projects are reduced while resources for actual implementation of work and monitoring on the ground increase.
- The timber industry and local communities gain a predictable and sustainable supply of economic and ecologic services and products from the National Forests. This paradigm will never recreate the unsustainable heyday of 12,000,000,000 board feet of lumber coming off the National Forests, but the intended sustainable reality of a more diverse economic engine from the National Forests will emerge.
- The public and conservation organizations gain the comfort that special areas in the National Forests are not the target of exploitation and management resources are expended on restoration of areas that really need that better management.
- Conflicts over hot-button issues are reduced, and “judgment day” on dealing with those issues is postponed, if not eliminated.
- Communications, dialogue and cooperation among previously adversarial parties increases and could lead to a new level of understanding that will solve many of the problems and conflicts on these public lands.
- Restoration and sustainable management improve habitat conditions for all native wildlife on the National Forests.

- The number of species headed toward extinction will be reduced, and those listed under the Endangered Species Act will head more toward recovery.
- Habitat for game species will be enhanced and improved.
- Protection of watershed values and clean water coming off the National Forests will increase.
- Clean air provided by natural forests will increase.
- Forests will become more resilient. Long-term restoration and sustainable management will reduce the National Forests' susceptibility to major damage from fire, insects, drought, hurricanes and other events.
- Restoration of natural ecosystems and sustainable management of those ecosystems will make the forests better able to handle changes due to climate change.
- Restoration and sustainable management make the National Forests a partial solution in reducing the severity of climate change.
- Conflicts between recreational users will be reduced as careful planning of where and how to accommodate the various uses sustainably will help resolve these conflicts.
- Training and new opportunities for forest practitioners and local communities will increase and provide long-term, predictable opportunities.
- A unified and agency-wide program for solving problems through this new paradigm with the widespread support of diverse interests could convince Congress to be more supportive of the agency and its funding needs.
- The National Forests and their management paradigm of restoration and sustainability would be a powerful and true model for the management of private forest lands.
- Work on the National Forests would be a jumpstart for the development of sustainable local economies based around the forests. There has been a lot of difficulty of developing new markets for private forest landowners and practitioners. The National Forests could provide the genesis for this and give it the ability to grow into the broader realm of forestry on all lands.

US Forest Service and Its Opportunities with Communities

WildLaw feels that the US Forest Service has both a relationship to the communities in the areas surrounding its forests as well as an opportunity to help better those same communities. First, many areas near National Forests tend to be rural, with little or no real industry to provide employment. Second, the artificially high and unsustainable harvests of the 1970s and 1980s created a reliance on those forests for jobs that were not sustainable for the long-term. Third, by harvesting most of the resource "capital" from these forests without any accompanying reinvestment, the Forest Service in effect stole from residents in communities surrounding these forests, and they have an obligation to right those wrongs from past mismanagement.

After years of dis-investment from rural forest dependent communities, it is time for a major change. Elsewhere, especially in the West, communities and the Forest Service have recognized this need and have been working towards the creation of a restoration

economy. The trick is how to get dollars for the work. The Forest Service and Congress seem intent on trying to make the forests pay for this out of dwindling forest reserves. To accomplish this, the Forest Service all too often puts out timber sales that involve harvesting the limited old growth or mature, functioning forests in order to pay for restoration. This is like borrowing money at 8% to reinvest it at 4%. It is taking the last capital out of the bank which will continue to bankrupt the forests and surrounding communities.

A sounder approach is to recognize the depleted accounts and to make a reinvestment that could be used to rebuild the capital so that once again we could live off the interest of a sustainable endowment in our forests and communities. This approach allows for the development of local workforces due to the sustainable nature of forest investments and activities, each Forest having its unique set of restoration needs and unique situation for sustainability.

WildLaw feels strongly that the Forest Service is in a position to do this. Science-based ecological restoration could provide the dual benefits of improving and restoring areas of the forests to more natural state and at the same time providing sustainable, well-paying jobs in the process.

As an agency guiding principle, the US Forest Service needs to recognize and embrace the need for ecological restoration and sustainable management on the National Forests. True restoration and sustainability implemented on National Forests can be accomplished by engaging in the following strategies:

1. Every National Forest should engage in an open, cooperative public process to develop a vision for what that Forest needs and should move toward, like all the National Forests in Alabama did. All the restoration needs of that Forest need to be examined and prioritized in a collaborative process that gives all interests the assurance that they are heard and that their needs are met to at least a reasonable level. All available scientific knowledge and expertise on the particular Forest's ecosystems must be fully integrated into the entire collaborative process. The agency should let proposed management actions come out of that process instead of proposing actions prior to the process. If additional authority and funding for this collaborative process are needed, the agency should go to Congress to seek that, showing them the successes the agency has thus far and how this approach can solve many of the problems facing the National Forests. WildLaw and many others we know would be happy to support the agency in this at every level.
2. At the project level and the Forest planning level, the USFS should advocate for ecological restoration whenever appropriate, including having restoration-only alternatives developed for proposed projects. As an example, the 2004 revised plan for the National Forests in Alabama emphasizes restoration as the main management goal for the next 15 years in all the Forests in the state.
3. At every level, starting at the Washington Office, Forest Service decision-makers need to make it a priority to move the National Forests toward this model of ecological restoration, protection and long-term sustainability. Needed changes to

regulations, additions to the Handbook and the Manual, and any needed guidance on this type of work should be developed and adopted with full public participation.

4. More work by the Research Stations should be focused on restoration and sustainability, both in general and in what particular Forests need. For some ecosystems, Longleaf Pine as the primary example, the actions needed to restore the ecosystem are well known. For most forest ecosystems, though, what is needed to restore the forest to a healthy state and keep it in a sustainable management regime is not yet known, or not well known. For such forests, restoration plans should start with well-monitored pilot and experimental projects before moving to a large scale, forest-wide program. For a well designed and monitored project to test restoration techniques for such forests, all parties involved must be willing to accept risk and be willing to allow the agency to fail occasionally without punishment.
5. To make all of the above possible and attractive for Line Officers in the agency, the Forest Service should engage in a thorough and comprehensive training program for its personnel to show them how to engage in the collaborative process to produce good restoration and sustainable management for their individual Forests. There are personnel in the agency who know how to do this; folks in groups like WildLaw and in industry also know how to do this. The agency should sponsor a program of training and education that brings together these people who have experience in this new paradigm so that they can educate others in this process and help them find the cooperative solutions that work for their individual Forests. WildLaw is fully prepared and ready to assist in this educational effort wherever it is needed.

Litigation risk and adversarial relationships would diminish drastically with this approach.

The US Forest Service needs to recognize and embrace its relationships to the communities and workers in the areas surrounding National Forests by exploring and demonstrating the economic incentives created by the quantity of work needed to restore portions of our forests to a more natural state.

1. Explore and demonstrate the economic incentives created by the quantity of work needed to restore portions of our forests to a more natural state.
2. Explore how best to integrate these concepts with the communities. What forms of economic activity will best mesh with the restoration, protection and sustainability needs of individual Forests? For some places, it may be a dispersed recreational emphasis focused on enhancement and protection of major wild areas. For some, more developed recreation will be the best fit. Stream restoration may be the main priority for some forests and how to get local people well-employed doing that work will be key. Many forests will need extensive vegetative management, and training and supporting a work force that can do that work through the best methods possible could provide a great economic boost for

the local communities. We imagine that in most places, it will be a combination of these and more.

3. Assess current capacity of communities with regard to infrastructure, worker capacity, and training. Learn how those capacities mesh with a Forest's restoration needs. Where those capacities do not exist in a Forest's local area, explore ways to bring in or grow locally those capacities. The long-term, predictable nature of restoration work naturally tends to give people (and bankers and investors) the stability they need to invest in new equipment, training and new ways of doing things.
4. Develop and cultivate those resources if not already present. Work with Congress to expand current programs to give grants, low-interest loans and other incentives to areas where the capabilities and resources are needed. Where success grows and conflict wanes, Congress should be willing to invest more.
5. Use the models and markets created from restoration work on the National Forests to broaden the sustainable management of forests to private lands, thus benefiting both the ecosystems and economies of areas beyond the public lands themselves.

Developing a skilled workforce of forestry professionals with access to the technical expertise, equipment, and financial resources required to carry out restoration and low-impact management activities on the ground

One of the greatest obstacles to accomplishing good forest management on the ground is the lack of skilled professionals practicing low-impact forestry. Our forest industry has mainly evolved to rely on large-scale logging operations that maximize short-term timber production, often at the cost of forest health. As a result, the vast majority of our logging workforce is deeply invested in expensive harvesting systems that require very high "production efficiency" to achieve profitability. While timber harvests have increased, the size of our workforce has actually declined. Loggers have had little choice but to follow the lead of industrial forestland owners and timber buyers to remain competitive.

With increasing interest in, as well as demand for, ecosystem-based forest management, the time is right to begin facilitating skill development for logging crews and other forestry and restoration practitioners. Pursuing this goal will require a significant investment in education, equipment financing, business development assistance, and technical assistance, and will require that we engage a new array of partners.

The US Forest Service needs to work with partners such as community colleges, universities, established local logging crews, local mills, and nonprofits such as WildLaw and the Southern Forests Network (SFN) to explore opportunities for workforce development using such strategies as:

1. Meet with potential partners to introduce them to new ideas and gauge their interest in working together (our SFN program recently met with a local university forestry program and community college forestry & logging program).
2. Facilitate collaborative development of pilot projects on National Forests where there is the need to learn how to restore the forest ecosystems there.

3. Examine new markets and new products that can come from restoration activities, including small diameter wood products and products from thinning and clearing of undergrowth (including biomass energy, mulch, specialty crafts, carbon sequestration market credits, and other products).

EVALUATION

While a new paradigm in forest protection and management will take time to take hold and grow, there are ways to recognize and know that it is doing just that:

- Increasing number of valid restoration programs and projects on more National Forests.
- Open recognition by the USFS at all decision-making levels that restoration and sustainability are the goals of management.
- Increased involvement and interest by private forest land interests in the restoration work on National Forests and use of that restoration work as models for their private land work.
- New and increased market and economic opportunities for local communities and forest practitioners in sustainable forestry work, both on public and private lands.
- More National Forest management plans that directly and openly embrace restoration as the primary management goal, such has been done in Alabama, and to a lesser extent, Florida.
- More individual National Forest projects that are restoration based and fewer projects that fail to comply with the law.
- Where legal actions are necessary, they lead to the litigants and the Forest Service using the cases as opportunities to reevaluate management, instead of blindly defending past mistakes or blindly attacking the agency. And for those who challenge the agency, those groups must be open to finding a new direction for management, instead of just saying “no” to management. Industry must be willing not to demonize environmentalists who challenge real violations of the law and bad management decisions; industry should not defend bad agency actions in a mentality of “defend it all, right or wrong.” Industry must be willing to admit that certain activities should not be conducted on the public lands (or not conducted in certain ways or for certain reasons) in order to get better and truly sustainable management on the National Forests. Basically, trench warfare amongst all parties must end, and litigation must be reserved for truly illegal and unwise management decisions. For those instances where some uncooperative groups sue over valid and good projects, based on nothing more than blind allegiance to ideology, other environmental groups must be willing to break ranks and stand up for the good work of the agency. WildLaw is willing to do this and willing to stand by agency decisions that we see were developed through good cooperation and that implement true science-based restoration.
- Increased reporting of the ideas and implementation of restoration and sustainable management, both in the mainstream press and in forestry and academic publications.

- New and increased participation by traditional forestry industry in sustainable forestry efforts to help communities and workers make their work truly sustainable for the land and themselves.

What WildLaw is Willing to Contribute to this Effort

WildLaw is willing to contribute to this effort to remake the Forest Service and create a new management paradigm in the following ways:

- We are willing to share our knowledge and experience in helping the agency develop restoration programs and projects with anyone, including other USFS offices, industry, other environmental and conservation groups, and the public.
- WildLaw is willing to help develop, implement and participate in an education effort to bring the methods of cooperative conservation and the fundamentals of restoration and sustainable management to agency offices and staff nationwide.
- WildLaw can help flesh-out for the agency and other partners the legal requirements for doing this type of work and how the work can be done in the most efficient process possible, while still complying fully with the law. WildLaw pioneered the use of using the processes in the Healthy Forests Restoration Act of 2003 (HFRA) to do salvage and restoration work that resulted in better management. The first HFRA project in the nation was not proposed by the agency but by WildLaw, the Hurricane Ivan salvage done in the Conecuh National Forest. That salvage was not done in isolation but developed in and tied to the existing ecosystem restoration program the Conecuh already had, thus making the salvage not about pulling timber off the forest but about moving the Forest further down the road to healthy sustainability and storm resilience. That pioneering use of HFRA was replicated after Hurricane Katrina to do a very successful job of salvage in the De Soto and Bienville National Forests in Mississippi while enhancing the Longleaf Pine restoration work there and while meeting the requests of local scientists that most of the damaged trees be left where they were for forest health reasons.
- Litigation that we initiate against the Forest Service will be reserved for true grossly illegal and unwise management decisions. We will try internal agency processes and dialogue first before pursuing any legal options. We have never once filed a frivolous or harassing lawsuit or one not based on clear violations of law. Our record of success in litigation proves that fact. Under a restoration management paradigm, we will be more willing to give on first-time, technical, paperwork violations so long as the proposed work on the ground was developed through good science and a good collaborative process and does implement real restoration goals, but we will also expect the agency to do what it takes to prevent such short-cutting of legal and administrative processes in the future. We understand that mistakes happen and that people new to a process often do not fully understand how it is supposed to work. But once a line officer does learn how the process is supposed to work, we will expect them to fulfill that process appropriately. Bad process usually leads to bad work on the ground. Good process usually leads to good work on the ground. That is why WildLaw has

been so willing over the years (and is willing to do more in the future) to help agency personnel learn how the legal and administrative processes should work and can work most effectively. Sham restoration projects will be met with overwhelming and unrelenting opposition.

- For those instances where some uncooperative groups sue over valid and good restoration projects, based on nothing more than blind allegiance to ideology, WildLaw will be willing to break ranks and stand up for the good work of the agency. WildLaw is willing to stand by agency decisions that we see were developed through good cooperation and that implement true science-based restoration.
- WildLaw will stand by and support the agency in seeking from Congress legislation and funding that will facilitate implementation of restoration and sustainability programs on the entire system and that will assist in community and work force development to do the types of work needed for this new paradigm.
- We will not just speak up when we see the USFS doing things wrong; we will do more to emphasize and publicize the positive and exemplary work of the agency.
- We will provide the resources, contacts and expertise of our Southern Forests Network program to bring in the people and knowledge needed on better forestry practices, certification, small market creation and much more.

The time has come for the U.S. Forest Service to grow into the agency it was always meant to be; it has always been closer to this goal than most people realize. It was just that the conflict over a few issues often hid the many good things that were happening unnoticed. A lot of work has gone on inside and outside the agency to make this possibility real; even much of the conflict which has divided and hurt us all for so long was an important and vital part of making this moment possible. We believe that the people in the agency and the people outside the agency who care about these public lands can come together at this time and make this new paradigm happen.

What are you willing to do to make this change happen?

We welcome any and all thoughts, concerns and reactions.

Thank you,
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Planningruleno

From: MLeahy [MLeahy@defenders.org]
Sent: Monday, June 11, 2007 7:07 PM
To: Planningruleno
Subject: Cmnts NFMAregs EIS Scoping Defenders of Wildlife

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June 11, 2007

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Re: Scoping Comments, Notice of Intent to Prepare an Environmental Impact Statement, National Forest System Land Management Planning (91 Fed. Reg. 26,775 (May 11, 2007))

Please accept these scoping comments from Defenders of Wildlife on the environmental impact statement (“EIS”) for the National Forest System Land Management Planning regulations. Defenders of Wildlife (“Defenders”) is a non-profit conservation organization founded in 1947 and based in Washington, D.C., with offices across the country. Defenders has more than 500,000 members and supporters across the nation. Defenders is dedicated to protecting and restoring all native wild animals and plants in their natural communities.

Incorporation of past comments

Please incorporate by reference all of the comments submitted previously by Defenders of Wildlife on proposed and final regulations, rules, and directives for management and planning under the National Forest Management Act (“NFMA”), 16 U.S.C. § 1600 *et seq.*, including the comments submitted on April 7, 2003 on the National Forest System Land and Resource Management Planning Proposed Rule (67 Fed. Reg. 72,770 (2002)); on March 7, 2005 on National Environmental Policy Act Documentation Needed for Developing, Revising, or Amending Land Management Plans; Categorical Exclusion (70 Fed. Reg. 1062 (January 5, 2005)); on the regulations adopted November 9, 2000 (65 Fed. Reg. 67,514 (2000)); on the suspension of those regulations on May 17, 2001 (66 Fed. Reg. 27,551 (2001) (codified at 36 C.F.R. 219.35(b)), (66 Fed. Reg. 27,555 (2001) (codified at 36 C.F.R. 219.35(b)); on the indefinite extension of that suspension (67 Fed. Reg. 35,431 (2002) (codified at 36 C.F.R. 219.35(b)); and on proposals to modify NFMA regulations going back to the early 1990s.

Purpose and timing of scoping

The purposes of “scoping” under NEPA are to provide “adequate notice and [begin] a meaningful dialogue with members of the public about a proposed action,” specifically including to “narrowing the issues to receive in-depth treatment in the EIS and determining the range of actions, alternatives, and impacts to be addressed in the EIS.” *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1117 (9th Cir. 2002). Defenders submits these comments solely to facilitate these purposes, they are not intended as a substantive review of any set of NFMA management planning regulations.

The scope of the EIS will depend on the nature of the regulations being analyzed. The regulations being analyzed will not be made clear to the public until late June, 2007. *Notice of Intent to Prepare an Environmental Impact Statement*, 91 Fed. Reg. 26,775, 26,776 (May 11, 2007) (“2007 Proposed Rule”). Further, the full scope of the regulations will not be understood until the Administrative Procedure Act has been complied with, and the public has had an opportunity to review, provide input into, and influence the regulations. Therefore, these general scoping comments reference specific regulations as examples, but are not intended to be limited to a specific set of regulations.

NFMA

The NFMA requires regulations to be adopted that address specific resource management issues. 16 U.S.C. § 1604(g)(3). These regulations must: provide for the diversity of plant and animal communities in each national forest (§ 1604(g)(3)(B)); restrict timber harvesting to avoid irreversible damage to soils, slopes, and watersheds and detrimental changes to waterways, wetlands, and riparian areas (§ 1604(g)(3)(E)); limit the size and shape and otherwise limit the use of clearcutting and other even-aged logging practices (§ 1604(g)(3)(F)); and require the identification of the suitability of national forest lands for resource management (§ 1604(g)(2)(A)).

The 1982 NFMA Rule

Regulations adopted by the Forest Service in 1982 to implement the NFMA include many substantive requirements for managing resources on the national forests and grasslands. *See generally National Forest System Land and Resource Management Planning*, 47 Fed. Reg. 43,026 (Sept. 30, 1982) (“1982 Rule”). The 1982 Rule, among many other things, establishes guidelines for determining where and how much logging can occur on national forests, sets specific planning requirements for a variety of resources including wilderness, wildlife, grazing, recreation, minerals, water, and soils, and establishes “minimum specific management requirements” for logging and other activities. *See* 36 C.F.R. §§ 219.14, 219.16, 219.18-.25, 219.27 (1982). The 1982 Rule establishes many important environmental safeguards for national forest resources, including 100-foot buffer zones around riparian areas, maximum size limitations on clearcuts, and standards for identifying national forest lands not suitable for timber production. 36 C.F.R. §§ 219.27(d)(2), 219.14, 219.27(e) (1982). The 1982 Rule establishes important projects specifically for wildlife on national forests and grasslands, for example requiring each planning unit to ensure “[f]ish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area”, and to monitor “[p]opulation trends” and “relationships to habitat changes” of “management indicator species” whose “population changes are believed to indicate the effects of management activities.” 36 C.F.R. § 219.19 (1982); *see also id.* § 219.27(a)(6) 34.

The 2005 NFMA Rule and Changes to the Management of Resources on National Forests

In 2005, significant changes were made to how resources on national forests were to be managed. 70 Fed. Reg. 1023 (“2005 Rule”). The 2005 Rule eliminated many of the substantive standards and guidelines adopted to implement NFMA mandates, 16 U.S.C. § 1604(g), including the wildlife population viability and management indicator species regulation, and “minimum specific management requirements” such as clearcut size limits, minimum riparian buffers, and management requirements governing water, soils, and plant and animal diversity. The 2005 Rule allowed projects to be carried out even if inconsistent with the governing forest plan, 36 C.F.R. § 219.8(e)(3) (2005), ignoring NFMA’s mandate that “[r]esource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans.” 16 U.S.C. § 1604(i); *see also* 16 U.S.C. § 1601(d)(1) (national forests shall be managed “in accordance with land management plans.”). In doing so, the 2005 Rule eliminated a long-standing national forest management rule, that “all outstanding and future permits, contracts, cooperative agreements, and other instruments for occupancy and use of affected lands are consistent with the plan.” 36 C.F.R. § 219.10(e) (1982). The 2005 Rule also attempted to eliminate the applicability of the NFMA management planning regulations to site-specific projects, *see* 36 C.F.R. § 219.2(c) (2005), eliminating another long-standing tenet of national forest management. *See, e.g., Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 760 n. 6 (9th Cir. 1996); 67 Fed. Reg. at 72,776 (“§ 219.3 in this proposed rule does not contain direction for site-specific actions.”). And the 2005 Rule would have ended consideration of the implications of many of the most important wildlife and resource management decisions, those made at the forest-wide level, by categorically excluding forest management plans from NEPA. 36 C.F.R. § 219.4 (2005).

Issues to Address

The EIS must consider the impacts of any changes made to the management of resources on national forests and grasslands. The EIS must specifically consider the impacts of weakening or eliminating regulations and requirements that provide protections for wildlife and other resources on national forests and grasslands. Examples of some of the regulations and requirements that have provided protections for wildlife and other natural resources on the national forests and grasslands have been discussed above. Examples of how the 2005 Rule would have eliminated certain protective regulations and requirements have also been discussed. However, all of the direct and indirect effects of the regulatory changes that would be wrought by the 2007 Proposed Rule must be considered.

The baseline and reference point for NEPA analysis of the effects of the 2007 Proposed Rule must be the 1982 Rule. Regulations for national forest management and planning adopted in 2000 were suspended before they were ever implemented, and all final national forests and grassland plans have been written to comply with the 1982 Rule.

To the extent relevant aspects of the 2005 Rule are included in the 2007 Proposed Rule, the EIS should address the following questions, among others. How could management of forests and wildlife change if forest managers are no longer required to maintain viable

populations of native wildlife species? How will forest managers understand the impacts of the resource management decisions made in the forest plan on wildlife without tracking the populations and habitat relations of indicator species? How will forest managers understand the impacts of those decisions if they never consider the impacts of those decisions? What are the impacts of clearcuts larger than the maximum size allowed in specific geographic areas under the 1982 Rule? What are the impacts on water quality and aquatic species and habitats of timber sales, roads, and other management activities within 100 feet of rivers, streams, and lakes? How will forest managers consider the needs of species whose range extends beyond a project area, or beyond a forest, without regional guides and consideration of impacts at the forest scale? How will forest managers understand how much of a forest or grassland to manage for certain species if they no longer evaluate what it means to set manage different acreages and different areas for species? How will forest managers understand the impacts of allocating certain parts of a national forest to logging, or heavy motorized vehicle recreation, if they do not consider the impacts of making that allocation? These are the types of questions the EIS should address.

The EIS needs to specifically consider the impacts of categorically excluding the resource management decisions made in forest management plans from environmental analysis. Many of the decisions for managing wildlife and other resources are made upon adoption of a management plan, including many of the most important decisions. The EIS should consider how these decisions are likely to change if forest managers no longer consider their impacts. The EIS should also consider how projects and project-level NEPA analysis are likely to change if forest managers are no longer able to tier to the analysis of management plan decisions. Will project-level EISs be more extensive, or less informed? The EIS should analyze a substantial subset of national forest and grassland management plan EISs, look at what decisions in the management plans were analyzed for environmental impact, then consider how management of that forest or grassland might be different if those impacts were never identified and considered.

Timing

The proposed timeline for completing the NEPA analysis of the 2007 Proposed Rule does not appear to allow adequate time for public input, review and acceptance of public input, and environmental analysis. For example, the Draft EIS (“DEIS”) on the 2007 Proposed Rule is due out in June, even though the scoping comments that are supposed to help define what issues are considered and assessed in the DEIS are not due until June 11. 91 Fed. Reg. 26,775, 26,776. And the final EIS is due out a few months later. *Id.* NEPA analyses of much narrower less impactful federal actions often take significantly longer than the proposed timeframe. Further, public notice and comment pursuant to the Administrative Procedure Act must be requested, received, considered, and addressed. More time is required to adequately allow for and consider public comments.

Alternatives

The EIS should consider a variety of alternatives to the 2005 Rule and 2007 Proposed

Rule. The EIS should consider an alternative continuing to manage national forests and grasslands under the 1982 regulations. The EIS should consider an alternative that maintains strong, enforceable standards in management plans, and maintains the requirement that project be consistent with the governing management plan. The EIS should also consider alternatives that retain the requirement to analyze the impacts of resource management decisions made in forest management plans pursuant to NEPA. The EIS should also consider alternatives requiring forest managers to plan for and address the impacts of climate change.

Conclusion

The Ninth Circuit found that NFMA management planning regulations are not merely “paper-pushing,” but “play[] some, if not a critical, part in subsequent [lower-level] decisions.” *Citizens for Better Forestry v. U.S. Department of Agriculture*, 341 F.3d 961, 975 (9th Cir. 2003) (quoting *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1516 (9th Cir. 1992)). The Ninth Circuit also concluded that weakening NFMA management planning regulations would, “(with reasonable probability) influence for the worse the environmental safeguards in [forest plans] promulgated thereunder, which in turn will likely result in less environmental safeguards at the site-specific plan level.” *Id.* The impacts of these changes, and what they mean for management of the resources on national forests, must be considered in the EIS. Considering the impacts of changes to the NFMA management planning regulations is especially important in this EIS since, contrary to previous NFMA Rules, the Forest Service has proposed to categorically exclude consideration of the impacts of the decisions made in forest management plans from NEPA analysis, leaving all future analysis to the project level. *See* 36 C.F.R. § 219.4(b).

Thank you for considering these comments.

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Planningruleno

From: Tom Troxel [t_troxel@hills.net]
Sent: Monday, June 11, 2007 8:02 PM
To: Planningruleno
Subject: Comments on NOI

Attached are the Intermountain Forest Association's comments on the Notice of Intent to prepare an EIS on the 36 CFR 219 planning rules.

Thank you for your consideration of these comments.

Tom Troxel

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June 11, 2007

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To Whom It May Concern:

This letter is in response to the Forest Service's Notice of Intent to prepare an EIS on the 2005 national forest system planning regulations at 36 CFR Part 219 [72 Fed. Reg. 26775 (May 11, 2007)].

The Intermountain Forest Association-Rocky Mountain Division (IFA) is a trade association of forest products companies and federal timber purchasers in Colorado, South Dakota and Wyoming. IFA has been actively involved in forest planning for the national forests in the Rocky Mountain Region, and we draw on that experience in offering the following comments. Primarily, we are concerned that the agency put in place a planning process that focuses on the desired future conditions of the national forests rather than speculative analyses of potential future projects that are neither funded nor approved by forest plans.

Standard of Environmental Review

We have reviewed Judge Hamilton's ruling in the *Citizens for Better Forestry* case, wherein she found that the preparation of additional NEPA analysis was required in order to promulgate the 2005 rule. However, by preparing an EIS, the Forest Service would be going far beyond the minimum required by NEPA.

We understand that the agency is proceeding with the EIS in order to comply with the court's order while a more reasonable judicial resolution to this matter is pursued. We agree with the Forest Service's contention that the District court's conclusions are legally erroneous. We support Federal Defendants' currently pending motion to amend the judgment so that it does not find violations of NEPA and the ESA.

Forest planning rules compel no on-the-ground actions or impacts, and therefore do not require an EIS. We encourage the Forest Service to state that it is preparing an EIS voluntarily to eliminate litigation issues and allow continued use of the 2005 forest planning rules. This will allow the Forest Service to take advantage of the precedent that voluntary preparation of an EIS does not prove that document is legally necessary.

Alternatives

The Forest Service should analyze the 2005 Rules as the proposed action, and analyze a dual no-action alternative comprised of the 1982 Rules and the 2000 Rules. This would satisfy the 'reasonable range of alternatives' requirement of NEPA and minimize

additional analysis, in that the Forest Service may draw on its extensive experience and analytical content. Realistically defining the range of alternatives would also help ensure the EIS proceeds as expeditiously as possible, so that individual units' ongoing plan amendments and revisions can again proceed with clear regulatory direction.

Scope of the Analysis

The alternatives -- the 1982, 2000, and 2005 Rules -- should be analyzed in an integrated fashion with their accompanying directives. Rules and their directives should function together to simplify and streamline the planning process, not simply direct cumbersome, unnecessary process to the Forest Service manual rather than the regulations.

The EIS should describe the areas where the 2005 planning rules replace hard-and-fast management standards that were in the 2000 and 1982 planning rules (which were one subject of Judge Hamilton's ruling) with more statutorily appropriate management direction such as guidelines. The EIS should provide at least a qualitative discussion of the reasonably foreseeable impacts of those changes on future forest plans and future ground-disturbing projects. Another example might be the replacement of single-species management approach from the 1982 "viability" provisions with a broader ecosystem-based approach that is based instead, adhering to NFMA, on plant and animal communities in the 2005 Rule.

The Forest Service often poorly describes the effects of the no-action alternatives, regarding them simply as the 'status quo,' which have no direct effects on the current situation. However, in this case and many others, the effects of the no-action alternative would be significant. If the Forest Service is forced to spend ever-increasing amounts of money on planning and litigation under the 1982 regulations, for instance, then fewer dollars are available in the agency's constrained budget for implementation of projects.

Finally, we believe the Forest Service's proposal for an adaptive management approach under an Environmental Management System in the 2005 Rule will be impossible to implement and will ultimately duplicate efforts to monitor forest plan implementation per 219.16(b). We suggest simply basing adaptive management decisions on forestwide monitoring described in 219.16(b).

Thank you for your time and attention to these comments.

Sincerely,

Tom Troxel
Director

Planningruleno

From: Mary Krueger [mary_krueger@tw.s.org]
Sent: Monday, June 11, 2007 3:04 PM
To: Planningruleno
Subject: Planning Rule NOI EIS scoping comments - The Wilderness Society

Please find attached scoping comments on the NOI for the Planning Rule EIS submitted by the Wilderness Society. These comments were also sent via hard-copy USPS delivery, certified, return receipt requested, postmarked today.

Thank you,
Mary



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THE WILDERNESS SOCIETY

Planning Rule NOI Comments
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Sacramento, CA 95816-2969
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June 11, 2007

Re: Comments on Notice of Intent to Prepare an Environmental Impact Statement for the 2005 National Forest System Land Management Planning Rule

Dear Forest Service,

The Wilderness Society has had a long standing interest in the management of the National Forest System. We have participated in land management plan revisions in every region of the Forest Service. In addition, we have been plaintiffs in a number of important cases affecting agency management, including the case that precipitated this Notice of Intent (NOI). We offer the following comments on the NOI to prepare an Environmental Impact Statement (EIS) for the 2005 National Forest System (NFS) Land Management Planning Rule (2005 Rule). The notice of intent and request for comments was published in the Federal Register at 72 Fed. Reg. 26775 (May 11, 2007).

Concerns with the NOI

The NOI is Lacking in Required Information

The NOI is lacking in a number of important respects. The Purpose and Need discusses the reasons the agency rejected the 2000 Rule and discusses elements of the 2005 Rule, yet fails to address the purpose and need for the NOI. What is the purpose and need? As discussed below, we believe it is fundamentally to create a land management planning rule that implements the National Forest Management Act (NFMA). Yet the act is not mentioned anywhere in the entire NOI. Does the agency not agree that the Planning Rule must implement the NFMA? Are “easy to implement” and “within the Agency’s capability” the only criteria in meeting the purpose and

need? This needs to be explained more fully in the DEIS. The Forest Service must be explicit that the purpose and need is to implement the requirements of the NFMA.

Speed of the Schedule

The published schedule would seem to indicate an unrealistically aggressive approach to completion of the NEPA process for the land management planning rule. We question the extent to which public concerns will be adequately addressed given the proposed schedule. The NOI indicates the agency intends to publish the DEIS in June, less than 20 days after scoping comments are due. We question whether the comments can be analyzed in that short a time frame, let alone inform the development of alternatives and the completion of a legally adequate DEIS.

In addition, the public has a right to review the US Fish and Wildlife Service (FWS) and National Marine Fisheries Service’s (NMFS) Biological Opinions (BO) on the proposed rule and alternatives. The findings of the two agencies BO’s must be integrated into the DEIS so the public can comment meaningfully on the alternatives under consideration. Without these completed BOs in hand, the Forest Service would merely be speculating on the nature of the opinions and the effects the FWS and NMFS biological opinions would have on the proposed rule and alternatives.

We hope that the Forest Service is not so anxious to get a new planning rule through the NEPA process that it fails to fulfill its responsibilities to involve the public and to take a hard look at the effects of its proposal.

“Straightforward and Easy to Implement”: The Agency Test?

The NOI discloses that the 2005 Rule resulted from an agency review of the 2000 Rule. That review rejected the 2000 Rule as “neither straightforward nor easy to implement.” Federal Register, Vol. 72, No. 91, Friday May 11, 2007, page 26776. The Forest Service then created the 2005 Rule in an effort to create a “planning process that was more readily understood and that was within the Agency’s capability to implement.” *Id.* We believe the 2005 Rule failed on these counts as well.

While “readily understood”, “straightforward”, “easy to implement” and “within Agency capability” might be useful criteria by which to judge a proposed rule, they are certainly not the only or even controlling criteria. We note that the NOI makes not a single mention of the National Forest Management Act, the law to which the rule must conform. We are concerned that this oversight is an indication of the agency’s intent to circumvent or ignore the law’s requirements. The EIS must examine the proposed rule and alternatives in light of how well they implement the NFMA. These requirements are spelled out below.

The Real Test: NFMA

The NFMA provides the fundamental statutory authority and purpose for the NOI, as well as numerous specific requirements that must be incorporated into the planning regulations and into

all forest plans. Directly relevant to the NOI's purpose and need, Section 6 of NFMA requires the Forest Service to:

- “Use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences.”
- “Provide for public participation in the development, review, and revision of land management plans”
- “Assure that [forest] plans ... include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness.”
- “Determine forest management systems, harvesting levels, and procedures in light of all of the [multiple] uses... and the availability of lands and their suitability for resource management.”
- “Form one integrated plan for each unit of the National Forest System.”
- “[Describe] the planned timber sale program and the proportion of probable methods of timber harvest....”

In addition, Section 6(g) of NFMA requires the Forest Service to adopt regulations that “set out the process for the development and revision of the land management plans, and the guidelines and standards prescribed by this subsection.” Specifically, regulations must:

- “Insure that land management plans are prepared in accordance with the National Environmental Policy Act.”
- “Require the identification of the suitability of lands for resource management.”
- “Provide for obtaining inventory data on the various renewable resources.”
- “Identify special conditions or situations involving hazards to the various resources.”
- “Insure coordination of the economic and environmental aspects of various systems of renewable resource management, including the related systems of silviculture and protection of forest resources, to provide for outdoor recreation (including wilderness), range, timber, watershed, wildlife and fish.”
- “Provide for diversity of plant and animal communities....”
- “Insure research on and (based on continuous monitoring and assessment in the field) evaluation of the effects of each management system....”
- “Insure that timber will be harvested from National Forest System lands only where [watersheds will not be damaged, reforestation is assured, and aquatic resources are protected].”
- “Insure that clearcutting and [other even-aged cutting methods will only be used under certain circumstances and with specified environmental safeguards].”

The NOI provides no inkling that any of these statutory requirements of NFMA govern the rulemaking process for the development and revision of forest plans. If the Forest Service chooses to proceed with this rulemaking process, we strongly recommend that the agency issue a new NOI that explains the statutory basis and purpose for the rulemaking.

Review of the 2005 Rule and Directives

The NOI for the National Forest System Land Management Planning Rule discloses that “scoping will include review of comments previously collected during promulgation of the 2005 planning rule (70 FR 1022), agency planning directives (72 FR 4478, 71 FR 10956, 71 FR 5124), and the Agency categorical exclusion for land management planning (71 FR 75481).” Federal Register at 72 Fed. Reg. 26776 (May 11, 2007)

In light of the scoping request and the ruling by the Ninth Circuit which brings us all to this point, we submit these additional comments on the 2005 Rule, the directives and (covered in the section below) the Agency categorical exclusion for land management planning.

The Proposed Rule EIS Must Evaluate the Effects of Weakening or Eliminating Substantive Resource Protection Standards and Regulatory Standards Required by NFMA

The adoption of the NFMA in 1976 “reflected the nation’s collective view of the national forests” in the mid-1970s: “...serious mistakes had been made and... it had become necessary to put sideboards on the agency’s discretion. No longer would it be acceptable for the Forest Service to run the national forests as it saw fit...” Charles F. Wilkinson, *The National Forest Management Act: The Twenty Years Behind, The Twenty Years Ahead*, 68 U. Colo. L. Rev. 659, 666-67 (Summer 1997).

To that end, the NFMA established a tiered approach to forest management. The Forest Service’s land management regulations and plans must “insure consideration of the economic and environmental aspects of . . . resource management, including the related systems of silviculture and protection of forest resources, to provide for outdoor recreation (including wilderness), range, timber, watershed, wildlife and fish.” 16 U.S.C. § 1604(g)(3)(A). Regulations and plans also must “require the identification of the suitability of lands for resource management,” “provide for the diversity of plans and animal communities,” and permit timber harvesting only when streams and soils are protected, with special limits on clearcutting and other even-aged regeneration. § 1604(g)(2-3). In turn, site-specific projects must be consistent with the applicable forest plan. § 1604(i).

In keeping with this framework, the prior planning regulations adopted in 1982 imposed mandatory, enforceable and substantive sideboards for the management of various forest resources, such as recreation (including ensuring the consideration of roadless areas), soils, water, fish and wildlife habitat and timber, to ensure forest plans and the projects implementing them met these and other NFMA requirements. The 2005 Rule eliminates these substantive standards or substantially weakens these substantive standards and guidelines that NFMA explicitly requires, replacing them with unspecified, discretionary direction that has little resource protection value.

While the 2005 Rule suggested the planning directives would set some of these guidelines, the directives are not the regulations required by the NFMA, may be more difficult to enforce, and generally provide non-binding direction which does not ensure a minimum level of protection needed for consistency and to limit those officials who lack the desire to protect forest resources.

The 2005 Rule and its directives scrap binding forest plan standards in favor of loose guidelines which rangers may deviate from at the project level, turning the entire NFMA concept of tiered, accountable forest planning and implementation on its head. The rule affords individual rangers too much discretion, allowing officials to act within the range of guidelines and to depart from guidelines when an official deems circumstances to warrant it. The rule also allows forest officials to implement projects that are inconsistent with the forest plan by simply writing a project-specific exemption. Thus, any direction adopted in forest plans with public involvement can be ignored almost at will. In implementing the 2005 regulations, the Forest Service has gone to absurd lengths to ensure that new Forest Plans do not limit project decision-making, going so far as to prohibit use of imperative wording in forest plan standards and guidelines. This approach seeks to render forest plans meaningless and undermines and circumvents the NFMA requirement to adopt forest plans and carry out projects consistent with those plans. 16 U.S.C. § 1604. Again, this runs contrary to the intent of the NFMA. See Wilkinson at 675. This approach to forest planning defeats NFMA's purpose of establishing a "minimum" level of natural resources protection below which the Forest Service will not fall and eliminates the environmental benefits of coordinated resource planning adopted under NFMA. It is not logical to assume that an agency which cannot meet specific obligations and generally lacks accountability somehow will achieve better results only if afforded more discretion.

The EIS must examine the effects of this change on the human environment. The total absence of enforceable standards in the forest planning regulations or in forest plans means, for example, the Forest Service will no longer be able to ensure that its forest managers will avoid activities that harm species in the plan area. *Cf. Or. Nat. Res. Council v. Daley*, 6 F.Supp. 2d 1139,1155 (D. Or. 1998)("Absent some method of enforcing compliance, protection of a species can never be assumed").

In addition, centralized forest planning under NFMA allows the Forest Service and the public to balance resource values and multiple uses across the forest, with attention to environmental consequences. Purely aspirational plans are absent this assessment of environmental effects, which then must be completed at the project level. The Rule EIS must evaluate the ability of the agency to complete forest-wide analysis at the project level. This should include an assessment of the lack of a Land Management Plan EIS to tier to should the agency still feel this is the way they intend to proceed. The Forest Service needs to assess and disclose the impact on the "first project after a plan is finalized" to understand the effect forest-wide analysis at the project level will have.

Traditionally, planning regulations have standards and guidelines, as required by NFMA, to ensure a mix of uses in the NFS. The EIS should evaluate the effect of the loss of regulatory sideboards to guide and balance the mix and the loss of enforceable forest plan standards to ensure follow-through in implementation. These changes undermine, for example, the ability to evaluate uses which can only be effectively addressed and provided at the forest-wide level, such as securing large tracts of mature forest for forest interior species, distributing opportunities for backcountry recreation, and assessing timber harvest levels for the planning period. The agency cannot have it both ways: opening the forest to all uses in an aspirational plan while failing to analyze the effects of this decision at both the plan and project levels.

The Proposed Rule Must Use Regulations to Set Forth NFMA Requirements, Not the Directives System

The Forest Service moved most of the substantive direction for NFMA implementation to the agency directives system under the 2005 Planning Rule. This is problematic for a number of reasons. Either the regulations, the directives or the plans adopted under them must have the force and effect of law, or the agency is effectively advocating that its employees act without legal direction. By pushing decision-making to increasingly less formal avenues, the Forest Service is risking the judicial deference it has enjoyed in the past. “[C]ourts properly may accord less weight to such guidelines than to administrative regulations.” *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (U.S., 1976)(discussing the EEOC’s guidelines interpreting and enforcing Title VII where Congress had not given the EEOC the authority to promulgate rules or regulations pursuant to that Title).

Under the 2005 regulations, the Forest Service is likely moving all of the actual substance of its direction to employees into the directives in order to take advantage of D.C. and 9th Circuit precedent that says that neither the Forest Service Handbook nor the Forest Service Manual has the “independent force and effect of law.” *Western Radio Services Company, Inc. v. Epsy*, 79 F.3d 896, 901 (9th Cir. 1995). A D.C. District Court agreed, holding that “the manuals, although published in the Federal Register, are not ‘binding’ and do not carry the same weight as regulations,” despite the fact that they were subjected to public comment. See *City of Williams v. Dombeck*, 151 F.Supp.2d 9, 36 (D. D.C. 2001).

The *Fifty-Three Parrots* requirements discussed in *Western Radio* which give an agency pronouncement the “force and effect of law” are that it:

“(1) prescribe substantive rules -- not interpretive rules, general statements of policy or rules of agency organization, procedure or practice -- and, (2) conform to certain procedural requirements. To satisfy the first requirement the rule must be legislative in nature, affecting individual rights and obligations; to satisfy the second, it must have been promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress.”

United States v. Fifty-Three (53) Eclectus Parrots, 685 F.2d 1131, 1136 (9th Cir., 1982)(internal citations omitted).

In *Fifty-Three Parrots*, the “internal procedure for alerting Customs officers to possible infringements of 19 U.S.C. § 1527 was not intended as a substantive rule, and was not entitled to the force and effect of law against the government.” *Id.*

The 2005 regulations and the directives adopted for them are different for a few reasons. First, they were developed after the Forest Service’s focus on “analysis paralysis” and “process predicament”, and not as internal guidance to agency employees. This history should be made apparent in the DEIS. Second, these were intended as substantive rules, no matter what the agency said.

The Forest Service clearly hopes that the combined effect of various cases such as *Western*

Radio, SUWA, and Ohio Forestry is to greatly restrain judicial oversight of the Forest Service—the agency wants the freedom to operate in some gray area where it always has the discretion to eliminate legal constraints. We doubt that Congress or the courts will be as willing to give the agency such unbridled discretion.

There are other problems with the Forest Service's tactic. *Western Radio* is an extreme opinion, out of line even with the precedent the court cites—the weakest link in the three cases discussed above. It simply is not as easy as the opinion suggests to determine what is and what is not a regulation. If it were, there would not be hundreds of cases addressing the point. Even *Brock v. Cathedral Bluffs Shale Oil Co.*, which *City of Williams* relies on, does not pretend that the distinction between regulations and general statements of policy is so clear— “[u]nfortunately, there is no axiom to distinguish between regulations and general statements of policy.” See *Brock*, 796 F.2d 533, 536-37 (D.C. Cir. 1986).

Even a quick read of *Brock* makes clear that the *City of Williams* court took an incredibly superficial look at that case which is so important to its decision. While *Brock* does say that publication in the *Code of Federal Regulations* certainly creates binding regulation, the court does not stop there, and the inverse (failure to publish in the federal regulations means that a policy or rule is not binding) is certainly not true. *Brock* at 538. *Brock* also considered the degree of freedom of discretion retained by the administrator, the characterization the agency gives the statement, the language of the statement itself, the fact that the statement in question dealt with enforcement discretion, and efforts the Secretary made to keep the enforcement guidelines out of the *Code of Federal Regulations*. *Id.*

On top of all of the problems discussed above, there is the additional problem that the D.C. Court of Appeals has recognized that in addition to legislative rules, “an agency’s other pronouncements can, as a practical matter, have a binding effect.” *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000) (see quote at beginning of section V). Certainly at least parts of the FSM and FSH as well as the other documents relied on will be considered binding in the D.C. Circuit regardless of whether they can be pegged “legislative” or “substantive.”

There is at least one factual problem with the Ninth Circuit ruling as well. The *Western Radio Services* court says that the FSM and FSH are not published in the *Federal Register*. This is not true. At least some part of the FSM are published in the *Federal Register*. See, e.g., amendments to Forest Service Manual Chapter 1920, 53 FR 26,807 (July 15, 1988). These directives were published in the *Federal Register*.

The agency’s care to avoid standards in plans by calling them guidelines and avoiding helping verbs will not matter. The stated purpose of these directives is “to provide consistent overall guidance to Forest Service line officers and agency employees in developing, amending, or revising land management plans.” 70 Fed. Reg. 14637 (March 23, 2005).

If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State

permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes "binding." *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000).

The agency gains a broader protected sphere of discretion when it goes through formal rulemaking. If decisions are made on an *ad hoc* basis by line employees, rather than guided by rules, courts will show less deference to agency determinations. While the general rule under *Chevron* is deference to agency interpretation of a statute, there are definite limits to the doctrine. If a statute that an agency administers "is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). "Judicial deference to reasonable interpretation by agency of statute that agency administers is dominant, well-settled principle of federal law." *National R. Passenger Corp. v. Boston & Maine Corp.*, 503 US 407 (1992). Pushing all decisions to the project level by allowing frequent plan amendments without environmental review is not a reasonable interpretation of laws requiring the Forest Service to plan.

There is also the issue of the vacuum left in the place where substantive regulations used to be. The agency has taken it upon itself to vacate the level of law-making that Congress clearly intended to organize when it adopted the National Forest Management Act.

"The National Forest Management Act ('NFMA') requires the Secretary of Agriculture, who is responsible for the Forest Service, to develop 'land and resource management plans' to guide the maintenance and use of resources within national forests. 16 U.S.C. §§ 1601-1604. In developing these plans the Secretary must determine the environmental impact these plans will have and discuss alternative plans, pursuant to the National Environmental Policy Act ('NEPA'), 42 U.S.C. § 4321 et seq."

Sierra Club v. Marita, 46 F.3d 606, 608-609 (7th Cir., 1995). "Administrative agencies do not possess the discretion to avoid discharging the duties that Congress intended them to perform." *Marathon Oil Co. v. Lujan*, 937 F.2d 498, 500 (Colo. 1991).

Substantive as well as legal problems will arise from a too-casual planning process. For example, it is unclear how the Forest Service, having delegated all monitoring decision-making to the individual forest level, will comply with FLPMA's inventory requirements. 43 U.S.C. § 1711(a) requires that "[t]he Secretary shall prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values (including, but not limited to, outdoor recreation and scenic values), giving priority to areas of critical environmental concern. This inventory shall be kept current so as to reflect changes in conditions and to identify new and emerging resource and other values." Yet the new regulations allow "[m]onitoring information in the Plan Document or Set of Documents [to] be changed and updated as appropriate, at any time." See § 219.6(b). Especially if the directives are not binding, the Forest Service may find less hospitable standards of judicial review in areas of such clear conflict. By relieving itself of the detailed 1982 regulations and substituting watered-down regulations and bulky directives the Forest Service has provided its opponents with a good argument that it is not doing any planning at all at the plan level.

ISO 14001 and the Forest / Grassland EMS

Use of ISO 14001 and the requirement to create and maintain an environmental management system (EMS) on every unit of the national forest system was an entirely new element of the final version of the 2005 Planning Rule as noted by the Ninth Circuit. Implementation of ISO 14001 by the Forest Service presents a number of opportunities and challenges which we discuss below. The Rule EIS must analyze the effects of this requirement and must disclose how exactly it meshes with planning requirements under NFMA. In fact, a starting point would be for the agency to explain exactly how the EMS implements the NFMA.

ISO 14001 was developed for the use of businesses and corporations for polluting facilities. All too often, the ISO has been used to “green wash” a company to make it look like they were concerned for the environment. Other times, it has been effectively used to improve a facility’s operations and lessen its environmental impacts. It has been used by some government agencies on limited scales, but it has never been used agency-wide or even proposed for use on the scale the Forest Service now plans. The Forest Service is literally walking into unexplored territory here, if experience to date is any indication the agency may be walking off a cliff. The DEIS must fully analyze all of the potential impacts from this new territory. Litigation is highly likely given the ways in which the agency has indicated it intends to use (and not necessarily enforce) the ISO 14001; this will be a brand new field of law, created thanks to the Forest Service.

Secret Rules: Paying to See ISO 14001

The fact that the ISO 14001 is a copyright protected document that in effect creates a set of rules that citizens must buy to see is outrageous. The current cost of the ISO 14001 at the American National Standards Institute (ANSI) website is \$81.00. The cost was \$78.00 on December 23, 2004, the day the Forest Service announced the new regulations. This is an outrageous sum to ask each and every member of the public to pay just so they can participate in the planning and management of their National Forests. It is unprecedented, and the Forest Service has no legal authority to force the public to make such expenditures in order to participate in the management of their public lands.

The ISO 14001 is a copyrighted product. ANSI will not allow people to have it unless they buy it, and the copyright license for each copy is to be used only by the person who bought it and then on only one computer. Each copy of the ISO is watermarked with the individual’s ordering data in order to track copyright infringement. While ANSI has the legal right to enforce their copyright, having a public agency base the management of public land on standards in a document the public cannot see unless they pay for it is very problematic.

The Forest Service itself needs to work out a large bulk licensing deal with ANSI just so its very own employees who must develop the EMS for each Forest can even read the ISO. This internal arrangement as well as the details on how the public might understand the ISO and participate without having to pay to participate in Forest Service management should have been resolved before the Rule was released. That it is still unresolved is unconscionable. It is likely the courts will have a real problem with this arrangement: managing public land while keeping the basis for that management secret from the public.

It is also one of many signs that the Forest Service did not really think through many of the implications of what they were doing in adopting an entirely new system of National Forest planning.

All this puts the agency in a bind. By adopting the ISO into these regulations, the Forest Service will technically make the ISO a public document, and someone could send a Freedom of Information Act (FOIA) request for it and would have the right to get it that way. No exemption in FOIA will shield the agency from having to release the ISO. Then, THAT requesting party would be able to distribute the ISO without paying for the copyright (so long as they distributed it for free for public policy purposes), as legally, the ISO would be a public document secured under FOIA and subject to fair use and other exceptions of the copyright law. And it would be the Forest Service, not the FOIA requester, ANSI would have to go after for putting their copyrighted material into the public domain. And on the flip side, if the Forest Service could somehow keep this ISO out of the public's hands under FOIA, then the entire set of regulations will most likely fall to a legal challenge of basing management on a system hidden from the public.

Legal Requirements for an EMS: Does Forest Service Intent or Compliance with the ISO Prevail?

Proposed 36 C.F.R. § 219.5 requires that each unit of the National Forest system establish an environmental management system (EMS). The EMS must include at least “the land management planning process defined by this subpart.” Thus, it would appear that each Forest, even if it does not need to revise or amend its plan (such as the Forests that adopted new revised plans under the 1982 regulations), must incorporate the new regulations requirements into their management, via the EMS. Without an EMS, it will not be possible for a Forest to meet the requirements of these new regulations.

Under the 2005 regulations, each and every National Forest must have its EMS in place within three years. New 36 C.F.R. § 219.14(b) provides, “Transition period. For each unit of the National Forest System, the transition period begins on January 5, 2005 and ends on the unit’s establishment of an EMS in accordance with § 219.5 or on January 7, 2008 whichever comes first.” With all the newness and uncertainty surrounding the new rules and the requirements for an EMS, it seems difficult to imagine all the National Forests, or even a majority of them, meeting this deadline. Whatever the deadline date, it could be argued in court that any Forest that has not met this deadline should not be allowed to implement ANY projects until it does finish its EMS.

The proposed regulations require that “plan development, plan amendment, or plan revision” be completed in accordance with the Forest’s EMS. § 219.5(a).

The EMS “must conform to the consensus standard developed by the International Organization for Standardization (ISO) and adopted by the American National Standards Institute (ANSI) as ‘ISO 14001: Environmental Management Systems—Specification With Guidance For Use’ (ISO 14001).” § 219.5(b). This subsection effectively makes anything in the ISO 14001 that is required a binding requirement on the agency. Therefore, although the ISO 14001 is loose and broad in many aspects, it does have mandatory requirements and the regulations now make

anything mandatory in the ISO mandatory for each Forest. In effect, the new regulations make the requirements of the ISO 14001 legally mandatory requirements on the Forest Service, just as if the regulations spelled those requirements out in the regulations themselves. It will be a good legal argument that any failure to comply with ISO 14001 is a failure to comply with the regulations, thus voiding any action taken by the agency that is based on that failure to meet ISO 14001. In the past, legal cases argued that the Forest Service broke the law by not complying with its own regulations; now one will be able to argue that the Forest Service breaks the law by not complying with the ISO 14001. That makes the details of the ISO 14001 very vital.

ISO 14001 requires that an organization working under the ISO “shall establish, document, implement, maintain and continually improve an environmental management system in accordance with the requirements of this International Standard and determine how it will fulfill these requirements.” ISO 14001, § 4.1, at 4. Therefore, the Forest Service can be legally held to these requirements, including the requirement to “continually improve” each Forest’s EMS. The ISO states it more explicitly at § 4.3.1, which requires, “The organization shall document this information and keep it up to date.” Thus, if a Forest adopts an EMS and it sits on a shelf while they go about doing whatever they want, that would be a failure to comply with the ISO, which would automatically be a failure to comply with the regulations.

However, the Forest Service seems to think that it can adopt the ISO without having to comply with it. In a document entitled the Rocky Mountain Region EMS FAQs, the Forest Service states,

“Certification” refers to the issuing of written assurance (the certificate) by an independent, external body that has audited an organization's management system and verified that it conforms to the requirements specified in the standard. “Registration” means that the auditing body then records the certification in its client register. For practical purposes, in the ISO 14001 contexts, the difference between the two terms is not significant and both are acceptable for general use.

Certification is not compulsory. An organization can develop and implement an EMS without seeking to have its management system audited and certified by an independent, external certification body. The Forest Service is *not seeking certification at this time.*” (emphasis added).

What is the point of creating and maintaining an EMS if the agency has no intention of being held to its standards? This is again, an instance of the Forest Service seeking greater discretion to allow itself to slip in and out of having to comply with rules and regulations. The Forest Service will consent to an audit, but only an internal audit conducted by fellow employees? The agency must be clear in the Rule EIS about the extent to which they are proposing use and compliance with the ISO 14001.

Passing the Test: ISO Audits

Another indication that the Forest Service has not thought through these new regulations very well is in the ISO audit area. The ISO provides for internal and external independent audit procedures. These audits must be impartial. “Selection of auditors and conduct of audits shall ensure objectivity and the impartiality of the audit process.” ISO 14001, § 4.5.5. Thus, a

demonstration that an audit was not objective and impartial would be a legal failure of the agency to comply with the regulations. It is important to point out that the ISO 19011 governs the guidelines for quality and environmental management systems auditing. As with ISO 14001, this ISO must also be purchased from ANSI (at slightly higher cost). The Forest Service is not free to make up qualifications for auditors or standards for audit. They are set by the ISO.

The Forest Service may want to review its auditing success to date. Progress around the country on the creation of EMSs has been slow and inconsistent. Only two units to our knowledge have even completed the first (internal) audit: the Cimarron and Comanche National Grasslands and the Dixie-Fishlake National Forests. Both units failed to pass their audits.

Elements the Rule EIS Must Evaluate and Disclose

The Effect of Categorical Exclusions at Various Levels of FS Decision-Making

The cumulative effects of the proposed NFMA regulations and directives must be analyzed in concert with the numerous other efforts to streamline NEPA and Forest Service decision-making. This proposal is one of several related administrative proposals and directives relating to national forest management. Some, but not all, of these administrative actions are part of the Bush Administration's Healthy Forests Initiative. The other changes include:

- CE for hazardous fuel reduction projects from National Environmental Policy Act (NEPA) analysis.
- CE of timber sales up to 70 acres and salvage sales up to 250 acres.
- Guidance from Council on Environmental Quality concerning environmental assessments of fuel reduction projects.
- Guidance from U.S. Fish and Wildlife Service and National Marine Fisheries Service concerning endangered species consultations on fuel reduction projects.
- Interim Directive on NEPA Categorical Exclusions and Extraordinary Circumstances.

A comprehensive analysis of the cumulative impacts of these efforts to "streamline" land management and planning on the national forests is required by NEPA before these or any other regulations can be finalized. Failure to do a full EIS on the impacts of the new NFMA regulations, the new CE for management plans, and the others is a clear violation of NEPA, because the impacts of changing literally every regulation dealing with the national forests and their management are clearly significant. The cumulative effects are to eliminate virtually any opportunity for the public to comment on or appeal these kinds of projects and to eliminate NEPA cumulative effects and alternatives analysis from the entire management of the national forest system.

Cumulative impacts analysis is mandatory in any NEPA analysis. The agency must consider the cumulative impacts for this proposal in concert with the other procedural changes outlined above. CEQ regulations mandate consideration of cumulative impacts at the threshold, EA stage of NEPA process. As the 10th Circuit recently explained:

“In determining whether a proposed action will significantly affect the environment and therefore trigger an EIS, the agency must consider: [w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts. ...CEQ regulations define a cumulative impact as: the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.... Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. Therefore, in determining whether the [proposed action] will significantly affect the environment, the [action agency] must consider the impact of reasonably foreseeable future actions.”

Airport Neighbors Alliance, Inc. v. U.S., 90 F.3d 426, 430 (10th Cir. 1996), citing 40 C.F.R. § 1508.27(b)(7); 40 C.F.R. § 1508.7.

Cumulative impacts analysis must incorporate empirical data whenever possible in order to anticipate the significance of proposed action. See 42 U.S.C. § 4332; 40 C.F.R. § 1500.2. However,

“It must be remembered that the basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of proposed action before the action is taken and those effects fully known. Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as crystal ball inquiry.”

Sierra Club v. Sigler, 695 F.2d 957, 970 (5th Cir. 1983) (internal quotations omitted), quoting *Scientists' Institute for Public Information, Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973)).

As stated by the Ninth Circuit in *Thomas v. Peterson*, 753 F.2d 754, 760 (9th Cir. 1985):

“We believe that consideration of cumulative impacts after the road has already been approved is insufficient to fulfill the mandate of NEPA. A central purpose of an EIS is to force the consideration of environmental impacts in the decisionmaking process. See, e.g., *Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585 (9th Cir. 1981); *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975); *Lathan v. Brinegar*, 506 F.2d 677, 693 (9th Cir. 1974) (en banc); *Calvert Cliffs' Coordinating Committee v. AEC, Inc.*, 146 U.S. App. D.C. 33, 449 F.2d 1109, 1113-1114 (D.C. Cir. 1971). That purpose requires that the NEPA process be integrated with agency planning ‘at the earliest possible time,’ 40 C.F.R. § 1501.2, and the purpose cannot be fully served if consideration of the cumulative effects of successive, interdependent steps is delayed until the first step has already been taken.”

To claim that the adoption of management plans will not have a significant impact on the environment as the agency has done is patently wrong, especially when interactions with the other proposed regulatory changes for the National Forests are considered. This analysis triggers a review of the agency position that land management plans can be categorically excluded.

Review of the Forest Plan CE

We believe the agency overstepped its authority and failed to adequately analyze the effects of issuing the categorical exclusion (CE) for land management planning. Land management plans are federal actions. Land management plans make decisions. And intensity analysis to assess the severity of the impact of potential effects shows that land management plans clearly pass the threshold for significance of environmental effects and thus trigger NEPA. We examine the Forest Service’s own experience with one of the land management plans that had been proceeding under the 2005 Planning Rule to show that this is the case.

Land Management Plans are Federal Actions

The National Environment Policy Act mandates that all federal agencies prepare a “detailed statement by the responsible official,” (i.e., an EIS) for any proposed "major federal action significantly affecting the quality of the human environment” (42 U.S.C. § 4332 (2)(C)):

Environmental impact statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations (Sec. 1508.18). Agencies shall prepare statements on broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decisionmaking (40 C.F.R. §1502.4(b)).

Forest and Grasslands Land Management Plans constitute a meaningful point in agency planning and thus fall under this provision.

Forest and Grassland Planning Constitute “Major Federal Actions” Requiring an EIS

The Council on Environmental Quality (CEQ) regulations that implement NEPA regard the development of formal plans and guidance documents to be “federal actions” that fall within the scope of NEPA. Section 1508.18, referred to in the provision above, includes the definition of “major federal action,” which includes “actions with effects that may be major.” Section 1508(a) further defines the term “actions” to include “new and continuing activities ... new or revised agency rules, regulations, plans, policies, or procedures...” The Land Management Plans for the National Forests and Grasslands in the national forest system are obviously plans even under the 2005 Rule and so fall under this definition of “actions.” Section 1508.18(b) describes categories of federal actions and includes in subsection 2 the “[a]doption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.” Land Management Plans are

very clearly formal plans/official documents prepared by a federal agency specifically to guide uses of Federal resources, upon which later projects or actions will be based.

Further, as discussed below, Land Management Plans meet the second prong of the NEPA analysis, that they “significantly affect[] the quality of the human environment” (42 U.S.C. § 4332 (2)(C)). Land Management Plans will determine how every acre of the each national forest and grassland are managed for up to fifteen years, and every action on every acre of these forests and grasslands during this time will have to comply with the final plans.

Plans Make Decisions

Plans Determine How Areas Will Be Managed and How Projects Will Be Implemented

The National Forest Management Act requires that

Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans. 16 U.S.C. 1604(i).

Thus if not first authorized in a land management plan, projects and activities could not occur.

The Forest Service had relied on the *Ohio Forestry* case to justify no longer requiring NEPA documentation for Forest Plans. See 70 Fed Reg 1062, January 5, 2005. However, it is important to review *Ohio Forestry*; it merely stated that specific provisions of a specific forest plan were not ripe for judicial review. It did not say the Wayne National Forest Plan was exempt from NEPA documentation because that was not at issue in the case, although the Court did note that one part of the Plaintiffs’ case could have proceeded if they had brought a NEPA violation against the forest plan, and that NEPA challenges to Forest Plans in general would be ripe for review. Indeed, note the following from Justice Souter’s majority opinion, referring to logging levels approved in a national forest plan that was challenged in the case:

Despite the considerable legal distance between the adoption of the Plan and the moment when a tree is cut, the Plan’s promulgation nonetheless makes logging more likely in that it is a logging precondition; in its absence logging could not take place. Ohio Forestry Ass’n v. Sierra Club, 523 U.S. 726, 730 (U.S. 1998).

Further, the “considerable legal distance” the Supreme Court relied in large part on was shrunk considerably by the now enjoined rule. Of the Court’s five elements of this “distance”, three were eliminated by the 2005 rule and one minimized. The Court made its ruling based on the fact that regulations “ensure that the project is consistent with the Plan”, *Id.*, whereas the now enjoined regulations would have allowed forest managers to readily exempt projects from forest plans at the project level. 36 C.F.R. Sec. 219.8(e)(3) (“[t]he Responsible Official may . . . Amend the plan contemporaneously with the approval of the project or activity so that it will be consistent with the plan as amended. The amendment may be limited to apply only to the project or activity.”). The Court relied on the prospect that the Forest Service would have to “conduct an environmental analysis pursuant to [NEPA] . . . to evaluate the effects of the specific project and to contemplate

alternatives”, Ohio Forestry at 730, but legal and regulatory changes now allow many projects, including large timber sales, to be implemented without any NEPA analysis or consideration of alternatives for others, as discussed below. Finally, the Court was partially swayed that the Forest Service “provide[s] those affected by proposed logging notice and an opportunity to be heard.” Ohio Forestry at 730. It is questionable whether the lessened opportunities for public notification and involvement on categorically excluded and otherwise fast-tracked projects would still meet this prong of the Court’s analysis.

Thus the Forest Service misconstrued the intent of Ohio Forestry in suggesting that it forms a legal basis for exempting Forest Plans from documentation under NEPA.

In addition to the legal reasons why an EIS is necessary, the Forest Service cannot sufficiently account for significant environmental impacts and conduct a meaningful cumulative effects analysis at the project level alone. Analyses at this level, by definition, cover only a small portion of a national forest or grassland. Thus waiting until the project stage will mean that significance assessments and cumulative effects analysis will never occur on a Grassland- or Forest-wide basis. Such reviews are very important to anticipate effects of proposed actions. Even small, localized action can have far-reaching effects on, for example, watersheds, migratory species, and to wide-ranging wildlife species such as pronghorn, swift fox, and imperiled fishes. This is especially the case when numerous actions take place over the life of a forest or grassland plan.

Furthermore, the 2005 planning regulations treatment of NEPA, as well as any new rules to be proposed in light of the District Court ruling need to be viewed in the context of other NEPA-related actions by the Bush Administration. This Administration has adopted a series of regulatory changes – mostly under the umbrella of the “Healthy Forests Initiative” -- aimed at reducing the Forest Service’s duties to comply with NEPA at the project level, such as for timber sales. NEPA analysis will therefore never be done at all for many significant timber sales and other projects. In addition, the Bureau of Land Management (BLM) leases the subsurface minerals for units of the national forest system. BLM does not conduct NEPA analysis prior to leasing. The impacts of oil and gas are never considered through NEPA until the application for permit to drill (APD) stage. And BLM has recently instituted a policy which greatly increases the use of categorical exclusions in processing APDs (BLM Instructional Memorandum No. 2005-247, September 30, 2005).

In the case of the Comanche-Cimarron Grasslands (and no doubt a number of other NFS units) two other Categorical Exclusion (CE) categories might also apply to the management of the grasslands. Under CE category 10, up to 4500 acres of prescribed burning to reduce hazardous fuels can be categorically excluded from NEPA documentation. See FSH 1909.15, section 31.2. See also 70 Fed Reg 33826, June 5, 2003. Similarly, category 11 allows categorical exclusion on up to 4200 acres for post-fire rehabilitation activities, which can include repair of roads, trails, and minor facilities. (See FSH and Fed Reg, id.)

Finally, Section 339 of the 2005 Consolidated Appropriations Act (P.L. 108-447), created a “new” type of CE, which applies throughout fiscal years 2005 – 2007, and grants the Forest Service the authority to reauthorize livestock grazing on as many as 900 allotments with no NEPA analysis.

As the agencies own experience shows, the combination of CEs has the potential to eliminate consideration of environmental effects. Any new planning rules proposed must take into account the lack of NEPA analysis applied at the project specific stage for many types of projects and activities.

Intensity Analysis

Land management plans in progress under the 2005 Rule included desired conditions, objectives, and guidelines that would lead to significant impacts on the quality of the human environment and thus trigger NEPA and the requirement for preparation of an EIS. The CEQ regulations list ten factors to be considered in evaluating the severity of impact [40 C.F.R. § 1508.27(b)]. If, under these ten factors, a major federal action such as a forest or grasslands plan might have environmental impacts, then an Environmental Impact Statement is required. A few examples of elements of a Land Management Plan that would lead to significant impacts are identified below. We use the Cimarron and Comanche National Grasslands Land Management Plan (as proposed when the 2005 Planning Rule was enjoined) to show the ways in which even the Forest Service’s “new plans” have significant environmental impacts precluding the use of a CE. Examination of the elements shows that Land Management Plans are likely to pass the significance test. Therefore, an environmental impact statement must be prepared. A few of these elements are discussed below.

1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

The Forest Service argues that since plans set forth strategic guidance and information and do not propose any specific action, that the Plans themselves will not have any effects on the environment. We do not believe this is true. The “strategic guidance” is imbedded with a number of decisions that have environmental effects. Designation of a Research Natural Area (RNA) carries with it numerous measures to protect habitat conditions that are not available to non-designated areas. Once the decision has been made to not recommend areas for RNA status, those protections are precluded for those areas, and significant adverse effects to unique resources become more likely. And if suitability decisions have been made that preclude protection of that habitat (for example, by allowing grazing or oil and gas development in unique habitats), then significant adverse effects are likely. In the case of the Cimarron and Comanche National Grasslands (CCNG) Plan this was further compounded by the decisions made to lump a number of unique ecosystems together into just four recognized ecosystems. The unique characteristics of each ecosystem have been lost in the act of combining, and hence the unique habitat needs are lost to management oversight. This is likely to result in adverse effects to a number of unique and rare ecosystems.

3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

Again, the Forest Service argues that because plans do not propose any specific actions, the plans themselves will have no effect. We do not agree with this conclusion. The decisions on suitability (or in some cases the decisions not to revisit decisions made in the past) are and will continue to have significant adverse effects to unique characteristics such as historic and cultural resources, wetlands, and ecologically critical areas.

For example, in the case of the CCNG plan the desired condition for livestock grazing includes the role that the Grasslands would have in contributing to local economies by continuing to offer livestock grazing permits (Plan at 60). The continuance of livestock grazing in certain areas is causing and will continue to cause significant impacts, including destruction of significant habitat for species-of-concern and ecologically critical areas, harm to wildlife from fencing, and continued persecution of native fauna seen as harmful to ranching. The Specialist's Report on Water Resources noted that certain riparian areas have been damaged due to livestock grazing and are classified as "non-functioning" (Water Resources, pg. 10). The damages caused to these riparian areas by livestock grazing are significant environmental impacts, and the continuance of livestock grazing will only further add to these impacts.¹

6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

In the case of the CCNG (and indeed in making their case for the 2005 Rule), the Forest Service argued that:

"The Plan itself does not require, compel, or establish a precedent for future actions, with or without significant effects, and does not represent a decision in principle about an implementing action." (EA, pg. 2)

This test of intensity is one of the central reasons a land management plan requires an EIS. The whole purpose of Land Management Plans under the 2005 rule was to set desired conditions, objectives, and guidelines that establish precedent for future actions and decisions. The plan's desired conditions and objectives would determine the future purpose and need statements for projects, which would limit the range of those future projects. The 1982 planning regulations used slightly different terminology, but the principle was the same. Project purpose and need at the site-specific level is set by the Plan. The Plan may not compel future action, but no project will be proposed, let alone implemented, that is inconsistent with Plan components. If this is not the case, if the plan is essentially meaningless due the ability to change it at will without adequate assessment and disclosure, then the Rule fails the test of the implementing the requirements of the NFMA.

The agency is in effect arguing that nothing has to happen just because there is a Plan, but this is disingenuous. The Forest Service will continue to actively manage the National Forests and Grasslands and those actions will be guided and directed by the individual unit Plans. Actions inconsistent with plan components and direction will not occur without plan amendment. Because all future actions having significant impacts on the quality of the human environment will be

¹ Under the CCNG Plan, all ecosystems and all but two proposed Special Areas would remain suitable for livestock grazing. Plan at 100-102.

carried out based on the desired conditions, objectives and guidelines in the Plan, the Plan itself represents a decision in principle about future considerations.

By the Forest Service's own description, Forest Plans establish "desired conditions, objectives, guidelines, suitability of areas and special areas" that guide how National Forest and Grasslands lands and resources will be used, and upon which future agency actions will be based, and are the "starting point for project and activity NEPA analysis." (70 Fed. Reg. 1063, 1064). Final decisions and guidance for future decisions that result from any Forest or Grassland Plan amendment and revision include:

1. *Determining the Forest-wide multiple-use goals, objectives, and guidelines for the Forest, including estimates of the goods and services expected.* The CCNG Plan provided goals (Desired Conditions), objectives (Strategy), and guidelines (Design Criteria) to guide Grassland management and resource uses and laid the foundation for future project-level decisions that, by law, must conform to provisions of the land management plan. The CCNG Plan outlined specific goals, objectives and guidelines to govern future land administration (i.e. land ownership; land acquisition by the Forest Service, and land exchanges); management and protection of ecological resources (including specific wildlife species, plant species, and ecosystems); extraction of oil and gas from the Grasslands and revenue and employment generation from this use; wind power development on the Grasslands; livestock grazing management, promotion of recreational opportunities to benefit the local community (which included increasing access to areas and improving roads and trails); maintenance of physical resources (including heritage resources; oil, gas, and other minerals; and paleontological resources); and Special Area designations.
2. *Identifying land that is suitable for timber production, mineral development (including oil and gas), livestock grazing, and/or other commercial and non-commercial uses.* The CCNG Plan was very specific in identifying areas suitable for uses that included livestock grazing, oil and gas development, OHV use, and utility corridors. The Plan presented suitable uses for each ecosystem, (as defined by the Forest Service) and for each proposed Special Area.
3. *Recommending special areas, research natural areas, wilderness areas, and wild and scenic river status.* The CCNG Plan recommended the designation of nine Special Areas to protect "their unique or special characteristics" (Plan Appendix D). The Plan provided specific management objectives for these proposed Special Areas that included: removing roads, eliminating noxious weeds, and protecting a species-of-concern from predators via tree removal. Plan at 91-93. The Plan established a set of suitable uses for the proposed Special Areas (Plan at 79-80) and provided guidelines for managing these areas that included: managing off-highway vehicle (OHV) use to protect plants of concern; advising that "new structures, facilities, and pipelines" should avoid unique geological features; and managing livestock grazing in some areas to protect plant and animals of concern. Plan at 112-114.

The Cimarron and Comanche Land Management Plan clearly established a precedent for future actions, and thus it met the significance test. This factor alone required an EIS. As the Forest Service itself acknowledged, the plan would set the goals, objectives, and guidelines for how the Grasslands would be managed. It is simply untenable to argue that the plan did not set a precedent for future action.

7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

The Forest Service argued that “there cannot be cumulative significant effects of the (CCNG) Plan when the Plan itself does not have effects” (EA, pg. 8). As we pointed out in our draft plan comments at the time, this statement appeared without any supporting evidence, thus we disagreed with the agency conclusion.

The Strategy section of the CCNG Plan indicated that Off-Highway Vehicle use would be suitable in three of the four identified ecosystems in the Grasslands (Plan at 100). OHV use may be an individually insignificant impact when considered on one small area alone. However, the cumulative impact of OHV use on three out of the four ecosystems collectively makes it reasonable to anticipate a cumulatively significant impact on the environment.

The Strategy section of the Plan also indicated that livestock grazing, fire use and management, oil and gas development, and utility corridors would be suitable on all four of the identified ecosystems, (Plan, id). The designation of each ecosystem as suitable for all these uses presented cumulatively significant impacts on the environment. Even the special areas were found suitable for most uses. Plan at 100-102.

8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

As noted in the Design Criteria section of the CCNG Plan, “[p]rior to ground disturbing activities, significant paleontological resources would be salvaged and curated in a federally approved repository” (Plan at 112). This shows that ground disturbing activities would occur with the capacity to damage or destroy paleontological resources. It also assumes that salvage would constitute an acceptable method of preserving site integrity and would not result in an adverse effect under the National Historic Preservation Act (NHPA). We believe this assumption was premature and could have resulted in adverse effects to significant scientific, cultural, and historical resources.

We use the example of the Cimarron and Comanche National Grasslands Plan to show that the Forest Services’ implementation of the 2005 Rule was problematic in its dismissal of the need for analysis under NEPA. The other national forest plans that had been proceeding under the 2005 Rule had the same problems. We believe the Forest Service must prepare environmental impact

statements for all Land Management Plans that disclose the possible impacts from implementing these plans. The disclosure must include the effects on a multitude of resources from implementing various projects likely to be authorized under the plan.

Splitting the Decision: A Violation of NEPA

Forest Service action in the short time in which the agency began to implement the 2005 Rule would seem to indicate agency agreement that land management plans do indeed have effects which require analysis under NEPA. Unfortunately, the agency has chosen not to acknowledge this. Instead, the Forest Service has attempted to circumvent NEPA and split these various facets into separate processes and decisions. This is a violation of NEPA.

Significance under NEPA cannot be avoided by breaking an action down into smaller component parts. 40 CFR 1508.27(b)(7). Yet, that is exactly what it appears the agency had been doing under the 2005 Planning Rule. The Forest Service argued that land management plans “do(es) not approve projects or activities with accompanying environmental effects” and that analysis under NEPA was not needed. CCNG, June 24, 2006 Response to Comments at 11 (and elsewhere in numerous Forest Service materials). However, over time, the agency began to acknowledge that certain key decisions made in land management plans do require analysis under NEPA. Each of these plan elements are discussed below.

Roadless Inventory / Wilderness Evaluation

The Forest Service seems to have changed its mind mid-stream. After a long delay Chapter 70 of the FSH 1909.15 was released. In it the agency added a requirement that the Wilderness evaluation process must be completed with a decision under NEPA. FSH 1909.15 Chapter 70. Wilderness evaluation has from the beginning been an integral component of land management plans and has typically been listed by the agency as one of the “decisions” made in a land management plan. We are happy to see agency acknowledgement that analysis and a decision under NEPA are required. However, rather than call for a separate decision, the Forest Service should recognize that land management plans are not the solely aspirational vehicles the agency has claimed and drop the use of the planning CE.

Landscape Level Assessments and Decisions

The Forest Service has also begun to pull landscape level assessments and decisions out of the plans and to complete them under separate NEPA analysis. The Travel Management Rule (36 CFR 212) is now being completed across the national forest system in a separate NEPA process. Oil and gas leasing analysis which is conducted at the forest or grassland-wide level must be prepared with NEPA analysis. 36 CFR 228.102(c). The Forest Service is conducting Recreation Facility Site Planning outside the comprehensive land management planning process. All of these processes should be considered in an integrated fashion at the land management plan level. Decisions in any of these processes should not preclude decisions at the plan level. At a minimum the Rule EIS must examine the cumulative and indirect effects of conducting these various assessments in a piecemeal fashion.

Section 106 Compliance under NHPA

Finally, the agency acknowledged in direction provided to the field on December 15, 2006 that land management plans are considered undertakings under the National Historic Preservation Act (NHPA) and as such necessitate another level of review with State Historic and Tribal Historic Preservation Officers in order to meet Section 106 requirements. The Forest Service had not yet detailed how this was to take place before the 2005 Planning Rule was enjoined. Agency Section 106 compliance has always proceeded in concert with evaluation under NEPA to take advantage of the public participation and integrated analysis of significance components of NEPA.

In the case of the Cimarron and Comanche National Grasslands Plan (the lead plan in the country in use of the 2005 Planning Rule) we believe the analysis of adverse effects on listed and eligible National Register of Historic Places properties under Section 106 review would have triggered NEPA because the suitability decisions made in the plan threatened historic and pre-historic resources on the Grasslands. This included, among others, the decision that the Santa Fe National Historic Trail was suitable for OHV use.

Just as the Forest Service must consult with expert agencies under the Endangered Species Act the agency has consultation responsibilities under the various archaeological and historic resource protection laws. Because the proposed planning rule is an undertaking the agency must also fulfill its duties under the National Historic Preservation Act (NHPA), which requires that federal agencies whose activities have the potential to affect a listed property must give the Advisory Council on Historic Preservation (ACHP) an opportunity to comment on the undertaking and its effects on listed or eligible properties.

The Forest Service must disclose how it intends to meet its Section 106 obligations without triggering NEPA if it intends to use the land management plan CE. We believe review of this and the other issues in this section show that land management plans do make decisions with the potential for significant adverse effects that necessitate analysis in an EIS under NEPA.

ISO 14001 and the EMS

The provision for the preparation and maintenance of an environmental management system (EMS) has been problematic from the time it was first introduced. To the extent that the Forest Service uses it as a replacement for monitoring and evaluation measures that should be a part of the regulations demanding compliance and consistency with a Land Management Plan, the EMS could represent another decision split off from the planning process in order to avoid significance.

In conclusion, rather than admit that plans do make decision and require the completion of an EIS to analysis the significance of effects under NEPA, the Forest Service has chosen to split the land management planning process into a number of discreet decisions. This is clearly a violation of NEPA. We hope that as the agency decides the next course of action in proposing a new planning rule that this central tenet of NEPA is taken into account. Comprehensive land management planning necessitates an integrated approach.

Alternatives to Analyze in the Proposed Rule EIS

The Wilderness Society recommends that the Forest Service evaluate several alternatives in the draft EIS on the planning regulations. Federal regulations governing the NEPA process require agencies to “rigorously explore and objectively evaluate all reasonable alternatives...” 40 C.F.R. 1502.14(a).

1982 Regulations

The EIS should consider the option of continuing to implement the NFMA regulations that have guided the initial development and revision forest plans since 1982. Prepared with the assistance of a Committee of Scientists as required by NFMA, the 1982 regulations provide comprehensive planning guidance for the management and protection of national forest resources. They contain important requirements to provide diversity of plant and animal communities and ensure viability of all native vertebrate species. They also require a detailed evaluation of timberland suitability pursuant to Section 6(k) of NFMA. In addition, they require that forest plans and revisions be evaluated through an EIS process.

2000 Regulations

Another obvious option is to implement the revised NFMA regulations that were promulgated in November 2000, based on recommendations of a second Committee of Scientists. The 2000 regulations make ecological sustainability the first priority of planning and management and give the agency more flexibility in addressing resource management and protection issues. They broaden the viability requirement to cover all species, while providing exceptions where it is not feasible for plans to guarantee viability. They modify the process for evaluating timberland suitability. Like the 1982 regulations, the 2000 regulations call for plans to utilize the EIS process.

The Bush Administration decided in 2001 to suspend the 2000 regulations, supposedly on the basis of an internal analysis that found the new regulations to be overly burdensome. However, that analysis was not conducted pursuant to NEPA and was never made available for public review and comment. If the Forest Service still believes the 2000 regulations are too burdensome, it should “rigorously explore and objectively evaluate” the administrative feasibility issue along with the comparative environmental effects of the regulations in the draft EIS.

Species Viability Alternatives

The Rule EIS must evaluate impacts on wide-ranging species where conservation must be focused at the multi-forest or regional level (e.g., grizzly bear, lynx, wolverine), especially since the 2005 rule eliminates the "regional guide" approach to planning and the Forest Service has excluded forest planning from the EIS requirement so that no further NEPA will occur until site-specific project decisions. This lack of a regional approach will have wide-ranging effects in assessing the impacts to species such as Indiana bat and Canada lynx. Without a regional approach project specific analysis will be far more difficult and more likely to fail legal scrutiny.

Wilderness Society Vision

Consistent with NEPA's requirement to evaluate a broad range of alternatives, the Forest Service should consider at least one reasonable alternative that provides greater protection of forest resources than the 1982, 2000, and 2005 regulations. We believe that The Wilderness Society's forest vision (America's National Forests: A Vision for the Future, <http://www.wilderness.org/Library/Documents/upload/The-Wilderness-Society-s-Forest-Vision.pdf>) provides the basis for developing such an alternative. This alternative would recognize the potential for national forests to become a magnificent system of public lands managed to maintain and restore the health and integrity of ecosystems, providing all Americans with an outstanding natural legacy that will be passed along unimpaired for future generations. The national forests should be a cornerstone for an interconnected network of wildlands dedicated to large-scale ecosystem conservation in America. The forest vision includes specific principles and actions that would be appropriate components of a conservation-oriented alternative that would be consistent with NFMA.

Roadless Inventory / Wilderness Evaluation Standards Alternatives

The draft EIS should evaluate alternative standards for identifying roadless areas and evaluating potential wilderness in forest plans. The Forest Service recently made significant changes in the roadless area inventory criteria, without evaluating the potential effects on roadless areas or allowing public review and comment on the changes. On January 31, 2007, the agency amended the Wilderness Evaluation section of the Forest Service Handbook in ways that could allow many currently inventoried roadless areas to be removed from the inventory. Under the traditional inventory criteria, areas are considered roadless if they "do not contain improved roads maintained for travel by standard passenger-type vehicles..." The new planning direction replaces that objective standard with a much more discretionary standard: any area is considered roadless if it does not contain a road "that the Forest Service determines is necessary for the protection, administration, and use of the NFS and the use and development of its resources." The draft EIS should examine the likely effects of these two alternative criteria on roadless area designation and protection.

In addition, we recommend that EIS examine an alternative that would require all roadless areas greater than 1,000 acres to be inventoried and protected. The current minimum size for an inventoried roadless area is 5,000 acres, with limited exceptions for smaller areas. However, new scientific information indicates that roadless areas over 1,000 acres often have important ecological value and should be considered for protection.

Timber Suitability Requirements

The proposed rule must fulfill the requirements of the NFMA. This includes among other things, the following requirements:

- “[Describe] the planned timber sale program and the proportion of probable methods of timber harvest...”
- “Determine forest management systems, harvesting levels, and procedures in light of all of the [multiple] uses... and the availability of lands and their suitability for resource management.”
- “Require the identification of the suitability of lands for resource management.”
- “Insure coordination of the economic and environmental aspects of various systems of renewable resource management, including the related systems of silviculture and protection of forest resources, to provide for outdoor recreation (including wilderness), range, timber, watershed, wildlife and fish.”
- “Insure that timber will be harvested from National Forest System lands only where [watersheds will not be damaged, reforestation is assured, and aquatic resources are protected].”
- “Insure that clearcutting and [other even-aged cutting methods will only be used under certain circumstances and with specified environmental safeguards].”

These NFMA requirements are not optional and should not be treated as elements which may vary in whether they are addressed from alternative to alternative. All must be addressed. The manner in which they might be fulfilled could vary by alternative, but not whether they are addressed at all.

At least one if not more of the alternatives should include the 1982 NFMA regulations for determining timber suitability. The 1982 version of 36 CFR 219.14 should be included in its entirety. This is the only set of timber suitability regulations for which the agency has implementation experience.

The 2005 Rule turned timber management on its head. We note in particular the definition of long-term sustained yield (LTSY) which, as with many other elements of the 2005 Rule underwent a complete and unforeseeable change in definition between the draft and final rule. LTSY is defined as follows in FSH 1909.12, Chapter 60.5:

Long-term Sustained-yield Timber Capacity. The highest uniform wood yield that may be sustained under specified management intensities consistent with multiple-use objectives after stands have reached desired conditions.

This definition turns the concept of long-term sustained yield on its head. Desired conditions are aspirational elements of plans under the 2005 Rule. As such, they are “visionary” and set long term goals to strive for. They are not specific in nature, nor are they likely to be reached in the plan period or even in the planning horizon. And yet they now set the long-term sustained yield capacity. This means that LTSY is whatever the Forest Service says can be produced under the management intensity it wants to set for the multiple-use objectives it wants to achieve AFTER

the Forest Service has determined that stands have reached their desired conditions. This definition gives the Forest Service unbridled power and discretion to harvest whatever, whenever and (in combination with changes in timber suitability) almost wherever they want to harvest for as long as they want. This is precisely the type of abusive management the NFMA was created to stop. The regulations must be written to curb this kind of discretion.

Protect All Mature and Old Growth Forests

The Wilderness Society recommends that the Forest Service consider and adopt an alternative that protects all remaining mature and old-growth forests in the national forests. Leading forest scientists, including Dr. Jack Ward Thomas, Dr. Jerry Franklin, and Dr. Norm Johnson, have concluded that comprehensive old growth protection is warranted because the ecological and social values of these intact forests far outweigh their economic value as timber. Nearly all of the lumber mills and communities that once relied on old-growth timber have now re-tooled and made a transition to utilizing smaller diameter material.

Nature and Scope: Environmental, Social and Economic Issues

“As part of the scoping process, the Forest Service solicits public comment on the nature and scope of environmental, social, and economic issues related to the rulemaking that should be analyzed in the draft environmental impact statement.” Federal Register at 72 Fed. Reg. 26776 (May 11, 2007). Examination of the following issues should be required under the new rule.

Climate Change

The Wilderness Society and many other organizations, both national and international, believe that global climate change may be the most significant environmental challenge of the 21st Century. Therefore, we strongly recommend that the Forest Service consider the climate change issue in all alternatives in the draft EIS. The alternatives all should provide clear direction on how to address climate change in forest plan revisions. Because climate change will affect every national forest in the U.S., it is appropriate and essential that the Forest Service provide national guidance, rather than leaving it up to each forest to decide whether it is a significant planning issue.

The regulations should require the agency to develop plans that will lessen human impacts on global climate change, or will make national forest resources more resilient to climate change. The proposed rule must include direction for the analysis and consideration of the effects of global climate change on the full range of forest and grasslands resources. In addition, the effects of global warming on potential regeneration success (including assessments of likely vegetation change) must be a planning requirement.

Integration of Fire Planning and Land Management Planning

The Forest Service must do a better job of integrating land management and fire plans, especially as the agency moves toward wildland fire use which necessitates an integrated approach

to understanding land management resource goals. The Rule should set direction requiring integrated examination of fire (use) planning in the overall context of land management plans.

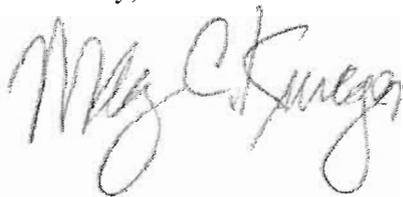
Economic Effects of Land Management Plans

The NFMA requires that the Forest Service adopt regulations that “insure coordination of the economic and environmental aspects of various systems of renewable resource management, including the related systems of silviculture and protection of forest resources, to provide for outdoor recreation (including wilderness), range, timber, watershed, wildlife and fish.” “provide for diversity of plant and animal communities...”. Nowhere in the 2005 Rule is there any “coordination of the economic aspects”; in fact economics do not seem to have been addressed. The CCNG in their plan created under the 2005 Rule claimed that there are no social and economic effects from a land management plan. We do not agree with that statement and further point out that, regardless, the Forest Service must meet direction in the NFMA. The new planning rule must set forth regulations that meet the economic requirements.

We look forward to continued discussion of the planning rule. With this letter we are requesting (paper) copies of the EIS to be sent to each of the staff members below.

Thank you for your time and consideration.

Sincerely,



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