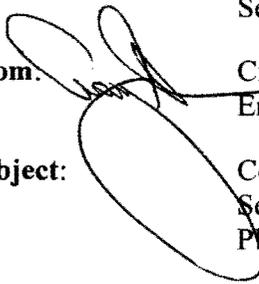




JAN 12 2012

**Memorandum For:** Consultation Record: Section 7(a)(2) consultation on U.S. Forest Service's National Forest System Land Management Planning Rule

**From:**  Craig Johnson, National Coordinator for Section 7 Consultation  
Endangered Species Act Inter-Agency Cooperation Division

**Subject:** Conclusions after concluding formal consultation with the U.S. Forest Service on its proposed National Forest System Land Management Planning Rule (36 CFR 219)

On 11 January 2012, the National Marine Fisheries Service's Office of Protected Resources (NMFS) concluded formal consultation with the U.S. Forest Service on its proposal to promulgate a new National Forest System Land Management Planning Rule (36 CFR 219, "proposed Planning Rule") which establishes requirements for land management planning and the content of plans for all management units in the National Forest System.

NMFS initiated formal consultation on the U.S. Forest Service's proposed Planning Rule, which was published on 14 February 2011 (Federal Register 76(30): 8480-8528), and the Forest Service's 27 July 2011 working draft biological assessment. On 4 October 2011, the Forest Service provided NMFS with its final biological assessment on the proposed Planning Rule, which allowed NMFS to begin a formal analysis of the effects of the Forest Service's proposal. On 11 November 2011, the Forest Service provided NMFS with a copy of its draft final Planning Rule ("draft final Planning Rule"), which reflected the Forest Service's responses to comments it had received on the proposed Planning Rule and recommendations that NMFS and the U.S. Fish and Wildlife Service had provided during the formal consultation on the National Forest System Land Management Planning Rule (I use the term "Planning Rule" to encompass both the proposed and draft final Planning Rule).

This memorandum summarizes the conclusions we reached during this formal consultation, which we will describe in greater detail in the biological opinion that memorializes this formal consultation.

### Assessment Approach

The National Forest System Land Management Planning Rule does not directly affect the environment, endangered or threatened species, or designated critical habitat. The Planning Rule results in effects by controlling the development of and setting standards and criteria that apply to land management plans and the site-specific actions that must comply with those management plans and that ultimately affect the environment endangered or threatened species, or designated critical habitat.



As a result, we could not assess the effects of the Planning Rule using our standard approaches to section 7 consultation. Instead, we employed a programmatic approach to this consultation, in which we treat the Planning Rule as establishing standards for decision-making processes of Forest Service officials who are responsible for approving land management plans. Our assessment, then, asks whether or to what degree that decision-making process insures that subsequent decisions and the actions that result from those decisions comply with the requirements of section 7(a)(2) of the Endangered Species Act of 1973, as amended.

The specific questions we used to guide our assessment, the evidence we considered in our assessment, and our analyses of that evidence are captured elsewhere in this record and will be presented again in our biological opinion.

### **Issues and Conclusions**

Representatives of the U.S. Forest Service regularly met with representatives from our office and our counterparts at the U.S. Fish and Wildlife Service during this formal consultation. Our interactions were very productive and U.S. Forest Service personnel seemed very committed to developing regulatory language that would require land management plans to comply with the requirements of both section 7(a)(2) as well as section 7(a)(1) of the ESA. We worked with Forest Service personnel for months to develop regulatory language that would allow them to fulfill their various mandates while fulfilling their commitment to comply with section 7(a)(2) and section 7(a)(1).

This formal consultation was an excellent example of the interagency cooperation the ESA envisioned. However, two issues remained as we were concluding consultation:

1. although the draft final Planning Rule reflected the Forest Service's commitment to require land management plans to include components that maintain and restore the integrity and resilience of the ecosystems found on units of the National Forest System, the Planning Rule appeared to have omitted an explicit reference to critical habitat; and
2. although the draft final Planning Rule reflected the Forest Service's commitment to require land management plans to include components that contribute to the recovery of endangered or threatened species (rather than merely to protect viable populations of those species), that commitment was not clear because the draft final Planning Rule did not define the term "recovery."

In the final days of the formal consultation, we resolved both issues satisfactorily. The Forest Service resolved the first issue by directing us to Chapter 2670 of the Forest Service Manual (the chapter that incorporates directives for Threatened, Endangered, and Sensitive Plants and Animals). That chapter clearly and explicitly addresses the needs of critical habitat that has been designated for endangered and threatened species under NMFS' jurisdiction and is binding on land management plans and actions taken pursuant to such plans.

The Forest Service resolved the second of these issues by adding a definition of the term "recovery" in the draft final Planning Rule and committing to develop directives that further interpret its commitment to species' recovery.

**Conclusion.** With those two issues resolved, I believe the U.S. Forest Service's Planning Rule creates standards and expectations for land management plans and approval documents that

would reasonable insure that those documents comply with the requirements of section 7(a)(2) of the ESA. As a result, I will argue in the biological opinion that documents this consultation that the U.S. Forest Service has insured that its Planning Rule is not likely to jeopardize the continued existence of endangered or threatened species under NMFS' jurisdiction and is not likely to result in the destruction or adverse modification of critical habitat that has been designated for such species.

I do not expect to draft a biological opinion with an incidental take statement that exempts the "take" of endangered or threatened species incidental to the Planning Rule from the prohibitions of section 9 of the ESA in this Opinion. There are two reasons for this. First, the Planning Rule, by itself, would not result in the "take" of endangered or threatened species. Instead, the Planning Rule controls the development of land management plans, which control the development of site-specific actions. "Take" of endangered or threatened species would only occur when a site-specific actions or project is undertaken taken in compliance with land management plans. Each land management plan and approval document for site-specific actions goes through several stages of review, including consultations pursuant to section 7(a)(2) of the ESA, and each level of review creates an opportunity to cancel, delay, or modify an action before such action might result in the "take" of endangered or threatened species. As a result, in this consultation on the Planning Rule, it is impossible for us to identify the specific actions that might result in the "take" of endangered or threatened species or the number of individuals that might be "taken" by those actions, the proportion of populations of endangered or threatened species, or any surrogate.

Second, land management plans and approval documents for site-specific actions that might result in the "take" of endangered or threatened species would undergo separate formal consultation before any "take" would occur. Any biological opinion that resulted from one of those subsequent consultations would include an incidental take statement that exempted the incidental take of endangered or threatened species, if the opinion concluded that the action considered in the consultation was likely to "take" endangered or threatened species. Based on our interpretation of section 7(b)(4) and section 7(o)(2), deferring incidental take exemptions until subsequent consultations fulfills the letter and spirit of the obligations the ESA places on NMFS.