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USDA FS Planning Rule
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To Whom It May Concern:

Please find enclosed comments that we have prepared on the United States Forest Service's proposed rule for "National Forest Management Planning."

The Regulatory Studies Program (RSP) of the Mercatus Center at George Mason University is dedicated to advancing knowledge of regulations and their impact on society. As part of its mission, RSP produces careful and independent analyses of agency rulemaking proposals from the perspective of the public interest. This comment on the Forest Service's proposed rule does not represent the views of any particular affected party or special interest group, but is designed to evaluate the effect of the Forest Service's proposal on the public interest generally.

The Regulatory Studies Program appreciates the opportunity to comment and we hope that consideration of these comments will enhance the quality and development of regulations regarding national forest management planning.

Sincerely,

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REGULATORY STUDIES PROGRAM

**Public Interest Comment on
The U.S. Forest Service's
Proposed Rule for
National Forest Management Planning¹**

The Regulatory Studies Program (RSP) of the Mercatus Center at George Mason University is dedicated to advancing knowledge of the impact of regulation on society. As part of its mission, RSP conducts careful and independent analyses employing contemporary economic scholarship to assess rulemaking proposals from the perspective of the public interest. Thus, this comment on the U.S. Forest Service's Planning Rules does not represent the views of any particular affected party or special interest group, but is designed to evaluate the effect of the Agency's proposals on overall consumer welfare.

I. Introduction

In December, 2002, the Forest Service proposed to revise the rules that govern its national forest planning process. These rules were first written in 1979 under the National Forest Management Act of 1976. The rules were revised in 1982 and again in 2000. Now the Forest Service says that the 2000 revision is difficult to implement, so it is proposing yet a third revision.

This comment first reviews the history of the Forest Service's planning process. It then reviews the 2000 planning regulations, and the comments filed by the Mercatus Center on those. The next section evaluates key aspects of the current proposal, and these comments conclude with recommendations for improving the way the Forest Service manages national forests.

II. History of National Forest Planning & Rulemaking

In 1952, *Newsweek* magazine noted that the Forest Service was "the only major government branch showing a cash profit" and described the agency as "one of Uncle Sam's soundest and most businesslike investments."² The magazine added that the

¹ Prepared by Randal O'Toole, The Thoreau Institute. This comment is one in a series of Public Interest Comments from Mercatus Center's Regulatory Studies Program and does not represent an official position of George Mason University.

² *Newsweek*, "Fabulous Bear, Famous Service Fight Annual Billion-Dollar Fire," June 2, 1952, pp. 50-54.

administration, Congress, and most national forest interest groups were pleased with the agency's management of the national forests.

In the decade following *Newsweek's* praise, however, the Forest Service and its reputation dramatically changed. It more than tripled timber sale volumes. It shifted from selection cutting, which was popular because of its minimal impact on scenery, to clearcutting, which was so ugly and unpopular that the Forest Service in previous decades had used clearcutting on private lands to justify expansion of the National Forest System. It built roads into areas that it had previously declared off limits to development. Although few people realized it at the time, in its zeal to produce timber sales the Forest Service went from being a profitable agency to a highly unprofitable one.

These changes led to enormous controversies in the 1960s and early 1970s as hunters and anglers disturbed by clearcutting joined with hikers upset about the roading of wilderness areas. In 1964, Congress passed the Wilderness Act, which took the decision to develop about 10 million acres of national forest lands out of Forest Service hands. But the controversies didn't go away, in part because the act also directed the Forest Service to study tens of millions of other roadless acres for possible inclusion in the Wilderness System.

What no one understood at the time was that incentives built into the Forest Service budget encouraged managers to choose clearcutting over selection cutting and timber sales over other values, even when—in fact, especially when—timber sales lost money. Congress appropriated money to arrange timber sales and the Forest Service sold the timber at auction to get the highest possible price. To pay for reforestation and other post-sale activities, Congress allowed the Forest Service to keep an unlimited share of timber receipts.

Clearcutting requires the lowest presale cost of any cutting system, but often imposes the highest post-sale cost. Given a sale preparation budget limited by appropriations and a post-sale budget limited only by timber receipts, forest managers quickly discovered they would get the largest budgets by clearcutting. Since they had no authority to charge for recreation, hunting, fishing, or most other resources, they naturally preferred to cut trees even when other resources were more valuable. Since they were not required to return to the Treasury the cost of forest management, many forests designed timber sales so that the revenues would just cover the post-sale costs with nearly none left over for the Treasury.³

Unaware of these incentives and steeped in the tradition of New Deal planning, in 1976 Senator Hubert Humphrey proposed to resolve national forest controversies through a forest planning process. The National Forest Management Act, which was largely authored by Humphrey and his staff, directed the Forest Service to write a comprehensive land and resource management plan for every national forest. The plans, Humphrey hoped, would evaluate roadless areas for their wilderness potential, determine whether

³ Randal O'Toole, *Reforming the Forest Service* (Covelo, CA: Island Press, 1988), pp. 112–123.

clearcutting was the optimal management tool, and insure that timber would be sold only where it was economically efficient to do so. Revision of the plans every ten to fifteen years would insure that the forests kept up to date with new research and changing public tastes.

The Forest Service estimated that it would take five years to write the initial set of forest plans and that they would cost about a million dollars apiece, or roughly \$120 million for plans for all of the national forests. (Though there are 155 forests, many of the smaller forests are managed together by one forest supervisor. Most supervisors wrote one plan for all the forests under their jurisdiction, so there were about 120 plans.)

These estimates proved woefully optimistic. Planning costs in many parts of the country soon grew to tens of millions of dollars per forest, and estimates of total cost of forest planning during the 1980s ranged from about \$1 to \$3 billion. In 1991, fifteen years after passage of the National Forest Management Act and a time when forests should have been starting to revise their plans, many forest plans were still unfinished. At least one forest simply gave up and never finished its plan.

On paper, it shouldn't take long to write a forest plan: Perhaps a year of data collection and analysis, a year to write a draft plan, a year to gather public comments and prepare the final plan. But this assumes that conditions in the third year are the same as they were in the first year. In fact, the political and natural world of national forests is far more dynamic. A fire might burn part of the timber inventory. An animal might be added to the endangered species list. Public comments might identify a new concern not initially considered by forest planners. Every time something like this happened, planners had a choice of starting over or writing a plan that was obsolete before it was even printed.

The Forest Service's planning rules actually hindered, rather than helped, the planning process. The first set of rules were not published until nearly three years after passage of the National Forest Management Act, and until they were available local forests were unwilling to invest too much effort into the process.

Adding to the uncertainty, barely a year after the final rules were published, voters replaced President Carter with Ronald Reagan. The new administration put timber executive John Crowell in charge of the Forest Service, and he vowed to use the planning process to step up national forest timber sales.

The Forest Service did complete several forest plans in the early 1980s, notably the San Juan and Pike-San Isabel in Colorado, Santa Fe in New Mexico, and Hoosier in Indiana. But these plans were successfully challenged by environmentalists, sending them back to the drawing boards and putting other forests on notice that they had better cross every t and dot every i.

On top of that, the Reagan administration issued a revised set of planning rules in 1982. The new rules included a detailed prescription for how each forest was to analyze timber sale levels and develop alternative plans. This led every national forest in Oregon and Washington to scrap everything they had done to that date and start over. At least one of

those forests had been ready to send its final plan to the printer, so the new rules effectively added several years to a planning process that was already at least three years old.

By 1986, ten years after passage of the National Forest Management Act, less than half the national forests had published final plans. Most forests completed final plans by 1990, but environmental groups challenged every plan and many of those challenges led the Forest Service or the courts to send the plans back for revisions. California's Klamath National Forest never published a final plan because a major fire had so changed on-the-ground conditions that planners essentially gave up.

Far from resolving controversies, as Senator Humphrey hoped, the planning process actually made them worse. This was partly because planners tended to create a range of five to nine alternatives from maximum timber to maximum wilderness and other amenities, with the "preferred" alternative somewhere in the middle. This gave interest groups a terrific organizing tool as they encouraged their supporters to write letters in support of the timber or non-timber extreme alternative. Forest managers reasoned that, if everyone on both sides hated them, they must have been doing something right. Yet, by encouraging everyone to hate the Forest Service, they were tearing down the agency's credibility. Moreover, the focus on either timber or non-timber overlooked many opportunities to make timber production compatible with other resources.

Nor did the plans help on-the-ground managers with their day-to-day management. Under pressure to meet deadlines, planners often used obsolete data or simply fabricated data to support preconceived notions. The timber yield tables for one national forest predicted that trees would grow 650-feet tall, or twice as tall as the tallest trees in the world.⁴ Another forest argued that they needed to cut more timber to pay for the roads needed to support roaded recreation, the demand for which, they said, was much higher than actual use even though the forest charged no recreation fees. A memo by the recreation planner revealed that, to justify this reasoning, "I was told by the Forest Planning Team to make sure the demand was higher than our capacity. I did as I was told."⁵

Soon after completion of forest plans, many managers realized that the data used in the plans did not accurately reflect on-the-ground conditions. In 1990, the supervisor of Idaho's Clearwater National Forest wrote superiors saying that his on-the-ground managers found that the plan had exaggerated the forest's capability of producing timber by 50 percent.⁶

⁴ Clearwater National Forest, Prognosis timber yield table computer runs in forest planning files, 1983.

⁵ Bartlett Bertolino, handwritten memo to the record dated 11/17/82 in Hoosier National Forest forest planning files.

⁶ Memo from Fred Trevey, Clearwater Forest Supervisor, to Regional Forester, "Timber Resource Strategy Update," 26 February 1990, 4 pp.

Between 1990 and 1994, national forest timber sales fell from 11.0 billion board feet to 3.4 billion board feet a year, which is well below the level authorized by the forest plans. Since 1999, annual sales have hovered around 2 billion board feet. Part of this dramatic decline is due to timber sale reductions in some of the forest plans, the spotted owl, and environmental challenges to timber sales. But a large part of the reason for lower sale levels is simply that national forest managers collectively decided that a high level of timber sales was incompatible with their mission of sustainable forest management. As a result, they simply ignored the plans.

The ultimate futility of the planning process was revealed in 1998, when the Supreme Court unanimously dismissed a challenge to a forest plan on the grounds that plans made no decisions to challenge. Some lower courts had ordered plans redone, but the Supreme Court said that plans were “not yet ripe for judicial review.” “The plan does not give anyone a legal right to cut trees, nor does it abolish anyone’s legal authority to object to trees’ being cut,” said the court.⁷ People who objected to Forest Service management would have to challenge individual timber sales or other projects.

If plans are immune to legal challenge, the Forest Service has no reason to write a plan that complies with any particular law. On one hand, this gives the agency the opportunity to dig itself out from under the tons of red tape it imposed on itself through the planning process. On the other hand, this leaves unresolved the problems that led to the planning process in the first place: the incentives that encourage the Forest Service to emphasize some resources over others.

A 1990 internal Forest Service critique of the planning process found that forest planning was both too expensive and too time consuming.⁸ This led to a 1991 proposal to revise the rules.⁹ However, the Clinton administration deferred any reconsideration of the rules for most of the decade, and new rules were not published until 2000.

III. The 2000 Rules

The 2000 rules deleted the detailed analytical requirements of the 1982 rules and relied instead on the frequent incantation of such words as *sustainable* and *science*. The 1982 rules set a goal of managing the national forests “in a way that maximizes long term net public benefits in an environmentally sound manner” (§219.1). This was easy to define for resources with monetary benefits and costs, but difficult to define for resources whose benefits were not monetized.

The 2000 rules replaced the “maximum net public benefits” goal with a goal of “sustainability” (§219.1(b)(2)), which the rules defined as “meeting needs of the present

⁷ Sierra Club v. Thomas 118 S. Ct. 1665.

⁸ Forest Service, *Critique of Land Management Planning* (Washington, DC: Forest Service, 1990).

⁹ Forest Service, “Advanced Notice of Proposed Rulemaking,” 56 *Federal Register* 6508, February 15, 1991.

generation without compromising the ability of future generations to meet their needs” (§219.1(b)(3)). If the net public benefits goal could be quantified for only some resources, the new sustainability goal could not be quantified or objectively evaluated for any resource. Yet the terms *sustainable* and *sustainability* appeared in the rules well over fifty times.

The Clinton administration heralded the replacement of net public benefits with sustainability as a major breakthrough in public land management. In fact, it was a regression to Forest Service policies in place before economic issues, such as below-cost timber sales, became important. The Forest Service had adopted a sustained yield policy decades before Congress enshrined that policy into the Multiple-Use Sustained-Yield Act of 1960. That law directed the Forest Service to administer the national forests for a “sustained yield of the several products and services obtained therefrom” (16 USC 529) and defined *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 national forests without impairment of the productivity of the land” (16 USC 531(b)).

Advocates of sustainability claim that it is an advance over sustained yield because sustained yield focused on timber while sustainability looks at all resources. But there is nothing in the law cited above that focuses on timber or any other resources. If the Forest Service ended up focusing on timber, that was not the fault of the sustained yield concept and there is no reason why changing the term to sustainability would fix the problem.

In 1975, the 9th Circuit Court of Appeals ruled that the Multiple-Use Sustained-Yield Act “breathes with discretion at every pore.”¹⁰ Given the definition of *sustainability* in the 2000 planning rules, there is no reason why a court would rule any differently. The net public benefit rule at least was an objective standard that could be evaluated quantitatively. If the Forest Service lost money on those resources for which net benefits could be quantified, and at the same time did more harm than good to resources for which net benefits could not be quantified, then it clearly failed to maximize net public benefits.

As if to overcome the vagueness of the sustainability goal, the rules also required planners to apply the “best available science to contribute to sustainability” (§219.3(a)). The rules repeated the terms *science* and *scientific* more than fifty times but didn’t define them.

To make sure that plans use the best available science, the rules require forest managers to submit plans to “independent, scientific peer reviews” (§219.22(b)). However, such “independent” peer reviews may be conducted by Forest Service scientists (§219.23(b)), which raises the question of how independent they would be. Managers are also encouraged to convene “science advisory boards” to review plans, and such boards are required at the national level and for each of the Forest Service’s nine regions.

¹⁰ Strickland v. Morton, 519 F.2d 467.

The 2000 planning rules introduced a few other new elements, such as a requirement that managers “provide opportunities for collaborative planning” (§219.8(a)) and that they practice “adaptive management” (§219.11). Collaborative planning means that planners are supposed to work more closely with the public in writing the plans. Adaptive management means that managers are supposed to learn from their mistakes and correct the plans as new information becomes available. These are hardly revolutionary concepts; what would have been revolutionary would have been some institutional reforms to insure that they are successfully implemented. But the 2000 rules contained no such reforms.

In Mercatus Center comments on the draft of the 2000 planning rules,¹¹ we wrote that they “fail to solve the problems that originally led to planning, such as the incentives to emphasize timber over other resources.” The comment added that the proposed rules also fail to “solve the problems that planning created, such as polarization, the drain on Forest Service resources, and the fact that plans are obsolete before they are done.” The final rules did nothing to address these issues.

Our comments suggested that the Forest Service needed to rely less on central planning and more on markets to guide forest management.

Relying on markets does not necessarily mean turning the national forests over to private owners, but it does require that national forest managers *act* like owners. Rather than give resources away and get funding from tax dollars, they must bear the costs and enjoy some of the benefits of forest management. Forest users, meanwhile, must be allowed to purchase, trade, use, and not use forest products with a minimum of red tape and transaction costs.

IV. Proposed 2002 Rules

Given that the Supreme Court has ruled that plans make no real decisions, the question arises as to whether it is possible to have a planning process that is useful to forest managers and not merely a burden on taxpayers? To put it another way, is there anything that long-term planning can do that can’t be done more efficiently without planning?

Historically, the Forest Service planned before Congress passed the National Forest Management Act, though the plans tended to be much simpler than today. All Forest Service plans have had two major objectives: First, to allocate lands to their most suitable purposes—timber, wildlife, recreation, range, watershed, or some combination—and, second, to determine the maximum sustainable level of timber, livestock grazing, and possibly other outputs from the allocated lands. The 2000 planning rules add a new objective: Describing “the desired conditions toward which management of the lands and resources of the plan area is to be directed,” which, the rules say, is “a primary focus of a plan” (§219.4(a)(1)).

¹¹ Available at <http://www.mercatus.org/research/RSP20003.htm>

There is good reason to question whether any of these objectives makes ecological or economic sense. Ecologists today recognize that ecosystems are far more dynamic than planners have to assume to be able to calculate the maximum sustained yield of any output.¹² Economists recognize that public demands and tastes change so rapidly that any allocation of lands to various purposes can quickly become obsolete. Given dynamic ecosystems and a dynamic economy, planners are not able accurately to describe the “desired future conditions” of the land.

For example, suppose a plan allocates land to timber at a time when timber prices are high, but then prices fall because of changing market conditions. Should the Forest Service plan timber sales on that land anyway? Historically, the Forest Service never made profitability a criterion for deciding whether to make a timber sale. The maximum net public benefits rule would reject below-cost timber sales unless the Forest Service could show that such sales produced benefits for other resources that were greater than the sale losses, but the agency never applied such a rule to an individual sale.

Alternatively, suppose a plan allocates land to a non-timber use, but then an insect epidemic makes the forest highly susceptible to fires that could spread to more productive timberlands. Should the Forest Service be restricted to non-commercial means of treating these lands even if commercial timber sales could defray some of the costs of treatment?

These simple scenarios barely scratch the surface of the complexities involved in day-to-day forest management. Not only is it impossible for a ten-year forest plan to deal with such complexities, the planning process is in fact an obstacle to solving such problems. Despite the lip service paid in the 2000 planning rules to adaptive management, the very act of writing a plan tends to lead managers to a static landscape view, if only because the effort of amending a plan is itself a long, drawn-out process. The alternative to amending the plan is to ignore it, in which case managers would not be complying with the law, so that there would be no point in writing the plan in the first place.

As we noted in our comments on the draft 2000 rules:

- Reality moves faster than planners can plan;
- The information required to plan a one-million or more acre national forest for ten or more years is more than anyone can comprehend;
- Planning promotes rather than resolves polarization;
- A focus on the planning process leads to a devaluation of substance.

For these and other reasons, it is likely that forest planning cannot provide any useful information to forest managers that they cannot more efficiently get in other ways. This raises the question: What changes to the Forest Service are needed to prevent the controversies that led Congress to pass the National Forest Management Act in the first place? We suggested the following changes in our comments on the draft 2000 planning rules:

¹² Daniel Botkin, *Discordant Harmonies: A New Ecology for the Twenty-First Century* (New York, NY: Oxford University Press, 1992), 256 pp.

- Giving managers accurate signals about public values by charging fair market value for all resources instead of just timber;
- Giving managers incentives to maximize net public benefits by funding them out of a fixed share of user fees rather than out of tax dollars;
- Giving managers incentives to protect non-marketable resources by dedicating a share of user fees to such resources;
- Turning forests into perpetual fiduciary trusts, which obligates managers to preserve the corpus of the trust (an obligation that is legally stronger than either sustained yield or sustainability) and to maximize benefits for some selected beneficiary;
- Decentralizing the Forest Service hierarchy by making individual forest supervisors responsible to a board of directors.

Most of these changes will require changes in the law. In the absence of legislative change, the question becomes: What can the Forest Service do to comply with the law in a manner that generates the greatest net benefits to society?

The proposed 2002 planning rules comes close to answering this question, since they choose ambiguity over specificity at every possible point. This is most obvious by comparing the planning processes specified by the 1982, 2000, and proposed 2002 rules.

A. Planning Process

The 1982 rules dictated a detailed ten-step planning process including:

1. Identification of purpose and need
2. Criteria
3. Data collection
4. Analysis of the management situation
5. Formulation of alternatives
6. Estimating effects of alternatives
7. Evaluation of alternatives
8. Selection of the preferred alternative
9. Plan approval
10. Implementation and monitoring (§219.12(b)-(k))

The “analysis of the management situation” step required planners to identify the maximum production levels of timber and other resources as well as the production levels that would maximize the net present value of outputs with a market price. This step consumed large amounts of planners’ time and resources, yet proved to be a dead end as the results were ignored throughout the rest of the planning process. Since the economic values and other data used in the planners’ computer models often proved to be more imaginary than real, the maximum net present value calculations were also worthless.

The 2000 rules pared this process down to five steps:

1. Identification of issues (§219.4)
2. Information development (§219.5)
3. Proposed actions (§219.6)

4. Decisions (§219.7)
5. Monitoring (§219.11)

Note that all of the analytical steps, including the analysis of the management situation and estimating effects of alternatives, have been deleted. While it might be argued that revisions of forest plans don't need to be as analytical as the original plans, this is untrue for two reasons. First, the data used in the 1980s plans were often so wrong that the plans are worthless. Second, both the world and what we know about it has changed dramatically in the intervening years. By deleting any analytical steps, the 2000 rules essentially concede that planning cannot be very analytical.

The proposed 2002 rules are even more sparse:

1. Initiate planning by describing the current situation, listing issues, and summarizing new information (§219.8(a))
2. Issue a public notice (§219.8(b))
3. Allow a ninety-day comment period on the draft (§219.8(c))
4. Allow people to write objections to the final (§219.8(d))

Except in the first step, the actual process of writing the plan is left to the planners' imagination. Because the plan must comply with the National Environmental Policy Act, it will have alternatives and estimate the effects of those alternatives. But just what those alternatives should be or how the effects would be estimated are not specified in the proposed rules. The advantage of this is that it minimizes the burden on local forest managers and gives them the flexibility they need to respond to local conditions.

B. Public Involvement

The proposed rules introduce more ambiguity into the public involvement process. Senator Humphrey's hope was that public involvement in planning would lead to an amicable resolution of controversies. The 1982 rules encouraged the public to "participate throughout the planning process" (§219.6(a)). But the rules directed planners to specifically seek participation only in three steps: identification of issues (step 1), publication of the draft plan (step 8), and publication of the final plan (step 9). Under pressure to meet deadlines, planners often discouraged public participation at other steps.

When planning collapsed under the weight of polarization and the burden of paperwork required to withstand environmental challenges, planning advocates argued that the problems were due to the Forest Service's failure to do the right kind of public involvement. Leaving the public out of most steps resulted in interest group leaders "involving" the public by promoting massive postcard and form letter campaigns. Instead, national forest officials should have involved those leaders in every step of the process. This would be done through the formation of *consensus groups*, more recently called *collaborative groups*, representing all interests. The groups would act as a sort of board of directors for the forest, helping to prepare every aspect of the plan. This would

help identify less polarizing win-win alternatives and get the major interest groups to buy into the plan.¹³

Advocates of collaborative groups could point to a few successful examples of such public involvement processes on the national forests. But many Forest Service officials were reluctant to yield any power to such groups, and the incentives for interest groups to polarize were always stronger than to cooperate. Moreover, the Federal Advisory Committee Act (5 USC app.) placed strict limits on the ability of the Forest Service to form such collaborative groups to the exclusion of members of the public who may be outside such groups. Nevertheless, collaborative planning received a boost when environmental and timber industry leaders in Quincy, California developed a win-win alternative for the Plumas National Forest despite the steadfast refusal of the Forest Service to participate in the process.

Bolstered by the success of the Quincy group, the Clinton administration wrote collaborative planning into the 2000 planning rules. Having introduced the concept into the rules, however, the administration only required planners to use collaborative public involvement in the “development of landscape goals” (§219.12(b)(1)). Such “cooperatively developed landscape goals” would automatically become an “issue” in step 1 of the process (§219.12(b)(3)). Beyond this mandatory collaborative effort, the 2000 rules do little more than insert the word *collaborative* in otherwise ordinary public involvement language.

The proposed 2002 rules eliminate any reference to landscape goals. While the proposal devotes a whole section to “collaboration, cooperation, and consultation” (§219.12), the rule is completely open ended. “The Responsible Official shall determine the methods and timing of opportunities to participate in the planning process,” say the rules (§219.12(a)). If a collaborative group such as the Quincy group already exists, planners “should consider participating” with such groups (§219.12(b)).

This ambiguity may lead forest managers and planners to overlook opportunities for constructive collaborative planning. But collaboration only works well if it is voluntary. Making collaborative groups mandatory would just place more burdens and obstacles in front of sound forest management. Voluntary collaboration will put pressure on the collaborative groups to demonstrate their value, and will encourage forest managers to use the process to the extent that it helps resolve controversies and helps advance the process.

C. Other Planning Ambiguities

Ambiguities are maintained or introduced into the rules in many other places. Rather than return to the more concrete goal of maximizing net public benefits, the proposed rules

¹³ Julia Wondolleck, “Obstacles and Opportunities for Resolving Forest Planning Disputes,” *Forest Watch* magazine 9(2):14–19; Julia Wondolleck, “Forest Plan Negotiations and the Citizen Group’s Role,” *Forest Watch* magazine 9(7):18–23.

retain the sustainability goal of the 2000 rules (§219.1(b)). Rather than retain the mandates in the 2000 rules for scientific peer review or science advisory boards, the proposed rules allow planners to use “appropriate means to evaluate the consistency and application of science used in the planning process” (§219.14(b)).

Although the Supreme Court ruled that plans cannot be legally challenged, the 2000 rules included an “objection process” that allows people to ask higher levels of the Forest Service to review (and potentially delay or reverse) a plan, plan revision, or plan amendment (§219.32 of the 2000 rules, §219.19 of the 2002 proposal). To hasten the planning process in some situations, the proposed rules allow regional foresters to adopt “interim amendments” that are exempt from the objection process (§219.7(f)).

D. Species Viability

The introduction to the proposed rules state that “the agency’s vision of planning expects a land and resource management plan to contain . . . more specific outcome-based objectives (i.e., measurable standards of performance).”¹⁴ Recognizing that not all resources are marketable, many free-market advocates have suggested the use of such performance standards for non-market resources.

Historically, the forest planning rules have contained one strong performance standard, a requirement that forest managers “maintain viable populations” of vertebrate wildlife. The 1982 rules required planners to

Maintain viable populations of existing native and desired non-native vertebrate species in the planning area. For planning purposes, a viable population shall be regarded as one which has the estimated numbers and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area. In order to insure that viable populations will be maintained, habitat must be provided to support, at least, a minimum number of reproductive individuals and that habitat must be well distributed so that those individuals can interact with others in the planning area. [§219.19]

This turned out to be the most important part of the forest planning process because it was the strongest objective standard recognized by the courts. This standard was influential in leading the Forest Service to greatly reduce Pacific Northwest timber sales in order to protect the Northern spotted owl.

The 2000 planning rules required that plans “provide a high likelihood that those [ecological] conditions are capable of supporting over time the viability of native and desired non-native species” (§219.20(b)(2)). The words “high likelihood” could be interpreted as a slight relaxing of the 1982 standard, but the expansion from “vertebrate species” to all species could be considered a broadening of the rules.

¹⁴ Forest Service, “Proposed Rules,” *Federal Register* December 6, 2002, p. 72773.

The 2000 rules also added a new requirement that plans “provide for maintenance or restoration of the characteristics of ecosystem composition and structure within the range of variability that would be expected to occur under natural disturbance regimes of the current climatic period” (§219.20(b)(1)). This is in response to environmental proposals that the Endangered Species Act be supplemented by an “endangered ecosystems act.”

As a practical matter, if ecologists believe that 50 percent of a forest consisted of trees older than 300 years in pre-Columbian times, this paragraph requires planners not to cut trees until half the forest is once again older than 300 years. Once again, this suggests a very static view of the forest rather than the dynamic view now held by most ecologists.

The 2002 proposed planning rules provide two options for the “ecological component of sustainability” (as the 2000 rules call this section). With respect to species, option 1 requires that plans “provide a high likelihood of supporting over time the viability of native and desired non-native vertebrates and vascular plants well distributed within their ranges in the plan area” (§219.13(b)(2)(ii)). This appears similar to the 2000 rule. However, in the definitions section of the proposed rule, *species* is defined for the purposes of option 1 to include only vertebrate species.

While vertebrate species are more prominent in the public mind, ecologists say that invertebrates are often more important to ecosystem health. Fungi, for example, play a critical role in recycling of nutrients. There is no ecological reason for the rule to exclude invertebrate species from protection.

With respect to ecosystems, option 1 requires that plans “provide for measurable progress toward the maintenance or restoration of ecological conditions that will support the diversity of plant and animal communities and tree species and other characteristics of ecosystem diversity” (§219.13(b)(2)(i)).

Option 2 is relatively more dramatic, substituting the concept of *biological diversity* for both species and ecosystem diversity. Option 2 requires that plans “provide for biological diversity at ecosystem and species levels within the plan area” (§219.13(b)(2)). The proposal adds that plans, “to the extent feasible, should foster the maintenance or restoration of biological diversity in the plan area” (§219.13(b)(2)(i)). Biological diversity is defined in the rules as “focused specifically on the diversity of ecosystems within landscapes and of species within ecosystems” (§219.23).

The differences between options 1 and 2 may seem arcane, but they are in fact huge. While option 1 follows the existing policy of focusing on viable populations of individual species, option 2’s focus on “biological diversity” could conceivably allow managers of a national forest to neglect individual species so long as a “diversity” of species is maintained, or it could permit actions toward a vague goal of “biological diversity” that don’t protect a single species. In the larger context of public and private landscapes, this is a significant change.

Some species of wildlife are compatible with intensive timber management. Others may require unfragmented landscapes and are reduced or eliminated when timber cutting or

other disturbances take place. In some areas, the former species may outnumber the latter. Prior to the requirement that plans maintain viable populations of all vertebrate species, many national forests managed for a maximum number of species, which often meant that the species that needed unfragmented landscapes lost out.

Where private lands are managed for timber, species that are compatible with management are generally found in abundant numbers. While the number of species that benefit from unfragmented landscapes may be smaller, they are more likely to be rare, threatened, or endangered.

By focusing on individual species viability, the existing rules (and, apparently, option 1) effectively direct national forest managers to provide habitats that may not be found on private lands. Viable populations of species that are compatible with intensive timber management usually exist on private lands, so national forest managers can safely ignore them.

Option 2, however, would allow national forest managers to focus on the less measurable goal of biological diversity regardless of species viability. While option 2 encourages the “restoration of biological diversity,” this is only “to the extent feasible.” This means that managers could choose to get the higher local diversity that sometimes results from timber management at the risk of losing the species that depend on unfragmented landscapes.

While these comments have approved of the increased ambiguity of the proposed 2003 rules with respect to process, increasing the ambiguity of a performance standard such as the species viability rules is another question. Such ambiguity can be justified only if incentives are changed to encourage national forest managers to manage for maximum net benefits and to protect non-market resources.

Adopting either option 1 (which is based on the 2000 rule) or option 2 could lead to years of litigation as the courts try to filter through the ambiguities in the rules and decide just what they require the Forest Service to do. In contrast, this litigation has already taken place with respect to the 1982 rule, and the Forest Service has a fairly good idea of its obligations under that rule. Given the need for a performance standard protecting viable populations of vertebrate species, the simplest thing to do is to return to the 1982 rule. Failing that, option 1 represents a much better standard because it is more easily defined.

V. Recommendations

The forest planning process has proven to be wasteful of time and resources, and the requirements for such planning should be kept to an absolute minimum. Yet the planning process was intended to solve real problems with national forest management; since planning doesn't work, other steps must be taken to find a solution.

The proposed rules come close to the goal of minimizing procedural requirements. The rules contain few procedural mandates and give planners and managers many options to choose from to fit their particular situations. However the rules could be improved by abandoning the vague “sustainability” goal written into the 2000 rules and returning

instead to the more concrete and meaningful “maximum net public benefits” goal in the 1982 rules.

As we recommended in our comments on the draft 2000 planning rules, the Forest Service should also implement more market-based reforms to deal with conflicts over national forests. These include allowing forests to charge fair market value for all resources, funding forests out of their receipts instead of appropriations, and dedicating a share of receipts to non-marketable resources.

Because not all resources are marketable, some method must be found of insuring that non-marketable resources can be protected by either the Forest Service today or a more market-oriented system. One way is to use performance standards. One such performance standard in the existing rules is a requirement that planners protect viable populations of vertebrate wildlife.

The proposed rules offer two options with respect to this requirement: wording similar to the 2000 rule or a substitute requirement to protect “biological diversity” instead of viable populations of individual species. Option 1 appears superior because it is (1) clearer, and (2) more likely to encourage the protection of populations of rare and endangered species. But it might be better simply to return to the standard in the 1982 rules, which is well understood by the Forest Service and so will require the least interpretation or litigation.

APPENDIX I

RSP CHECKLIST

FOREST SERVICE PLANNING RULE

Element	Agency Approach	RSP Comments
1. Has the agency identified a significant market failure?	<p>National forests were created because people believed private forest management would lead to a timber famine. No one believes this anymore. Instead, the current justification for national forests is that many non-market resources would not be protected by private owners, though this is only implicit in the planning proposal.</p> <p>Grade: C</p>	<p>The agency has not explicitly identified a market failure that justifies a central planning process. Moreover, the planning process fails to do anything about the perverse incentives currently built in to the legal and financial structure of the Forest Service. Fortunately, the agency's response is to remove any procedural mandates from the planning rules so that they at least do not hamper sound management of the national forests.</p>
2. Has the agency identified an appropriate federal role?	<p>Given federal ownership of forest lands--which the Forest Service would never question--some federal agency needs to manage them.</p> <p>Grade: C</p>	<p>The assumption inherent in the National Forest Management Act is that such management requires a central planning process, even though such centralized forest planning failed miserably during the 1980s. Since the Forest Service cannot repeal the law, its proposed rules at least minimize the procedural mandates.</p>
3. Has the agency examined alternative approaches?	<p>The agency considered two alternatives with respect to the one substantive requirement in the rules: a requirement to maintain viable populations of species.</p> <p>Grade: C</p>	<p>Option 1 appears more likely to encourage the protection of populations of rare and endangered species than Option 2. However, either option 1 or 2 could generate new litigation. The Forest Service should also consider a return to the wording in the 1982 rules on this subject, which has been clarified by the courts.</p>

Element	Agency Approach	RSP Comments
4. Does the agency attempt to maximize net benefits?	<p>The 1982 planning rules specifically state that the goal of national forest management is to "maximize net public benefit." A 2000 revision replaced this with a "sustainability" goal.</p> <p>Grade: D</p>	<p>Sustainability is vague and potentially costly. A return to the net public benefits goal would be preferred.</p>
5. Does the proposal have a strong scientific or technical basis?	<p>The proposed rule authorizes planners to use scientific peer review, scientific advisory boards, or other means to insure the best available science.</p> <p>Grade: C</p>	<p>The dynamic nature of ecosystems and public demand make a static planning process obsolete before plans are complete. The proposed simplification of the planning process may permit forest managers to be more responsive to changing science and public values.</p>
6. Are distributional effects clearly understood?	<p>No attempt is made to consider the distributional effects of forest planning.</p> <p>Grade: D</p>	<p>Forest planning in the 1980s cost taxpayers well over one billion dollars. The proposed rules could potentially lower this cost. Simplifying the process can allow forest managers to respond to the diverse needs of different national forests.</p>
7. Are individual choices and property impacts understood?	<p>The proposed rules inherently assume that national forests, and the taxpayer dollars which fund them, are a commons and that the job of the Forest Service is to allocate that commons among competing interest groups.</p> <p>Grade: F</p>	<p>The Forest Service should pursue policies that would make forest managers act more like owners. These policies include allowing managers to charge fair market value for more resources, funding management out of user fees rather than appropriations, and dedicating a share of user fees to non-marketable resources.</p>

