

May 16, 2011

Forest Service Planning DEIS  
c/o Bear West Company  
132 E 500 S  
Bountiful, UT 84010

RE: Comment on the Notice of Proposed Rulemaking for a new National Forest System Land Management Planning Rule

The Council of Western State Foresters (CWSF) respectfully submits the following comments in response to the USDA Forest Service (USFS) publication of the Notice of Proposed Rulemaking for a new National Forest System Land Management Planning Rule (proposed rule) published in the Federal Register on February 14, 2011 (Fed. Reg. Vol. 76, No. 30). The CWSF membership includes the directors of the state forestry agencies in the western United States and Pacific Islands. We work to promote science-based forest management that serves the values of society and ensures the health and sustainability of western forests. We appreciate the opportunity to provide comment on the proposed rule and request that you carefully consider our comments in revising the proposed rule.

### **I. General Comments**

Because of the interconnected nature of the threats to western forests and the substantial federal ownership in the West, the CWSF has a strong interest in the management of National Forest System (NFS) lands, and therefore a strong interest in efforts to create a new planning rule. The ultimate measure of success of any planning rule will be on-the-ground accomplishments that improve forest health and the health and sustainability of local communities and economies. To be successful, a planning rule must afford enough flexibility for regions and forests to address their unique set of issues while providing a solid framework for management activities needed to ensure the ecological, social and economic sustainability of western forests. We believe that state foresters can and should play a unique role in the planning process. As outlined below, we encourage revisions to the proposed rule to ensure that Statewide Forest Resource Assessments and Strategies are more effectively incorporated into planning efforts and that state foresters are tapped to provide local expertise as the USFS looks to advance “all-lands” management.

### **II. Comments on Proposed Rule**

#### **§219.3 Role of science in planning**

The proposed rule mandates that “[t]he responsible official shall take into account the best available scientific information ....” Fed. Reg. Vol. 76, No. 30 at 8515. In addition to introducing a standard of “best available science” the proposed rule goes further to require the responsible official to document the process, sources and type of information considered in reaching the determination as to what constitutes the most accurate, reliable and relevant scientific information. *Id.* While the acknowledgment of the important role of science in preparing forest plans is laudable, we have concerns over the practical impact of the language of the proposed rule in this section as it is currently written.

First, it is important to recognize that scientific studies are generally conducted on discrete parcels of land and typically provide answers to a very narrow set of questions, the development and answers to which are highly influenced by specific conditions within the original study area. Of course, the true value of scientific studies comes from utilizing these findings outside of the original study area to inform management decisions for similar forest or habitat types. However there is a level of uncertainty in extrapolating scientific findings from one site to another and this uncertainty grows as the scientific findings are moved further away from the original study. This uncertainty is compounded by the scope of forest plans which oftentimes cover a staggeringly diverse set of forest types within one plan, and by the growing focus of the USFS on “all-lands” management, which has and will continue to broaden the scope and variety of landscapes included in planning scenarios.

In addition to the considerations outlined above, it is also important to acknowledge that scientific knowledge is constantly improving and changing. While it is important that the best and most up-to-date information be used in making management decisions, requiring ongoing documentation of each and every study used in making a decision presents the responsible official with a sizeable task. As written, the best available science standard puts the responsible official in a difficult position of having to marshal a large number of discrete studies into a planning document to support management decisions and meet the new burden established under §219.3. At best, this standard creates a new and substantial workload for the responsible official to document each and every scientific study considered at least every two years when compiling the monitoring and evaluation report and during any forest plan revision, amendment or assessment process. At worst, this section could subject the USFS to an entirely new standard of review relative to the scientific information used in forest planning documents.

In *Lands Council v. McNair*, 537 F.3d 981 (9<sup>th</sup> Cir. 2008) (*en banc*) the U.S. Court of Appeals for the Ninth Circuit addressed the role of courts in reviewing decisions involving matters within the scientific expertise of an agency. The Ninth Circuit concluded that under the Administrative Procedures Act (APA) the courts owe the greatest deference to agency decisions involving scientific determinations within the agencies area of expertise, affirming that the appropriate standard of review under the APA for such decisions is the arbitrary and capricious standard. *Id.* Nonetheless, as written and discussed by USFS personnel at proposed rule public forums, the proposed rule would place a duty on the responsible official to demonstrate that the most accurate, reliable and relevant information for any given decision was appropriately considered in reaching planning decisions. This duty to demonstrate that the best available science was considered in planning decisions is likely to prove costly and could result in the agency having plans challenged in court because of a new duty placed on the agency through its own rulemaking process.

Given the complications with best available science as outlined above and the creation of a new duty that is likely to alter the traditional deference afforded to agency decisions concerning matters of science, we are concerned that this standard may ultimately cause additional expense in both agency time to meet the documentation standards, in defending against possible attacks to the sufficiency of the documentation itself, and in meeting a new burden of proof in court established by this section relative to proving appropriate consideration of the best available science.

The use and dissemination of scientific information by federal agencies is addressed by the Federal Data Quality Act (P.L. 106-554 §515) and subsequent guidelines from the Office of Management and Budget ([http://www.whitehouse.gov/omb/fedreg\\_reproducible](http://www.whitehouse.gov/omb/fedreg_reproducible)). Because the Federal Data Quality Act provides protections and assurances for the quality of scientific information used and distributed by federal agencies, we request that §219.3 be revised to remove language creating a new legal duty on the responsible official to document how each and every piece of scientific information used was determined to be among the most accurate, reliable and relevant as this duty would likely prove both time consuming and costly for the agency, as outlined above, and is duplicative with the assurances provided under the Federal Data Quality Act.

#### **§219.4 Requirements for public participation**

We are concerned that the role of tribes, states and local governments may be weakened under the proposed rule language included at §219.4(b)(1) pertaining to “[c]oordination with other public planning efforts.” Section §219.7(a) of the 1982 planning rule states that “[t]he responsible line officer shall coordinate regional and forest planning with the equivalent and related planning efforts of other Federal agencies, State and local governments, and Indian tribes.” However, §219.4(b)(1) of the proposed rule states that “[t]he responsible official shall coordinate land management planning with the equivalent and related planning efforts of federally recognized Indian Tribes, Alaska Native Corporations, other Federal Agencies, and State and local governments, **to the extent practicable and appropriate.**” (emphasis added). Our concern stems from the inclusion of the final clause providing the ambiguous caveat to the requirement to coordinate with other tribal and governmental efforts.

Any decision by the responsible official to exercise the discretion afforded under the ambiguous language of the proposed rule to not coordinate with an otherwise qualifying entity could become the subject of costly and time consuming litigation that could usurp resources that would be better utilized through on-the-ground management. We would like to see the language of §219.4 strengthened to ensure that this coordination and collaboration will, at the very least, continue as envisioned under the 1982 rule. The coordination section of the Resource Management Planning regulations for the Bureau of Land Management (43 CFR §1610.3-1) provides an example of stronger language relative to coordination and collaboration with other federal, state and local governments and Indian tribes. Section 1610.3-1 provides flexibility to address inconsistencies between federal and non-federal government plans, to develop management plans in collaboration with cooperating agencies, and further mandates that plan developers invite outside agencies to participate as cooperating agencies and that other federal, state and local and Indian tribes are provided “opportunity for review, advice, and suggestion on issues and topics which may affect or influence other agency or other government programs.” We request that the agency consider similar language in providing opportunities for other federal, state and local governments and Indian tribes to take more active role in the planning process.

#### **§219.6 Assessments**

As outlined in prior informal comments shared with the USFS on the planning rule blog, the CWSF continues to advocate for the explicit inclusion of Statewide Forest Resource Assessments and Strategies in the development of forest plans. In June of 2010 state forestry agencies in every state and U.S.

territory completed Statewide Forest Resource Assessments and Strategies that provide important localized data on the current state of forests across all management boundaries within a state. These documents were an important outcome of the 2008 Farm Bill and have been reviewed and approved by the Secretary of Agriculture. Statewide Forest Resource Assessments and Strategies are living “all-lands” assessments that will be updated periodically and are uniquely situated to inform the USFS planning process.

While the reference to Statewide Forest Resource Assessments and Strategies under §219.6(b)(2) covering Assessments is a solid start, we are concerned that, as written, the proposed rule does not recognize the unique role and contribution to planning efforts that can come from continued collaboration with state and local partners who have already undertaken targeted planning efforts; such as State Foresters and Statewide Forest Resource Assessments and Strategies. In §219.6(b)(2) considering the content of the required assessment under the proposed rule language, the responsible official is required to “[i]dentify and consider relevant information contained in governmental or non-governmental assessments ....” The proposed rule continues stating that “[s]uch documents **may** include State forest assessments and strategies ....” (emphasis added). While we are encouraged by the reference to the Statewide Forest Resource Assessments and Strategies included in the proposed rule, we believe that the reference should be strengthened to ensure that they are included in the content of assessments for each and every forest plan.

We strongly believe that these Statewide Forest Resource Assessments and Strategies can and should be utilized by the USFS in forest planning efforts; however, under the proposed rule there is no guarantee of such consideration of the Statewide Forest Resource Assessments and Strategies. As such, we request that an additional subsection be included under §219.6(b) to require the responsible official to consider information contained in the applicable Statewide Forest Resource Assessments and Strategies in conducting the required assessment under the planning rule.

#### **§219.7 New plan development or plan revision**

Under the 1982 planning rule, only standards are legally enforceable. The creation of a new planning rule may be the appropriate time for the agency to consider providing additional force to both goals and desired future conditions as laid out in this section. These pro-active plan components could be important tools for the agency to use in developing and defending management decisions by looking at the long term trends of the forest and undertaking actions that may result in short-term impacts but are important in achieving the goals or desired future conditions stated in the forest plan.

#### **§219.8 Sustainability**

In the explanation of the proposed rule, the USFS states that “[t]he proposed rule considered the ecological, social, and economic systems as interdependent systems, which cannot be ranked in order of importance.” Fed. Reg. Vol. 76, No. 30 at 8491. However, in the same section of the proposed rule explanation, the USFS goes on to state that “the agency has more influence over the factors that impact ecological sustainability on NFS lands (ecological diversity, forest health, road system management, etc.) than it does for social and economic sustainability (employment, income, community well-being, culture,

etc.).” *Id.* It is this position that leads to the disparate treatment of social and economic systems versus ecological systems in the proposed rule.

In reference to ecological sustainability in §219.8(a) the proposed rule requires plan components to “**maintain or restore** the structure, function, composition, and connectivity of healthy and resilient terrestrial and aquatic ecosystems and watersheds in the plan area ....” (emphasis added). However in §219.8(b) in reference to social and economic sustainability, the rule requires only that “[t]he plan must include plan components **to guide the unit’s contribution** to social and economic sustainability ....” (emphasis added). The CWSF continues to support the initial assertion of the agency that social, ecological and economic considerations are not competing values; rather they are truly interdependent and all play an important role in effectively implementing landscape scale restoration.

Even if the assertion that the agency has more influence over factors influencing ecological sustainability than those influencing social or economic sustainability is true, this does not support the language in the proposed rule which elevates ecological considerations above social and economic considerations. The agency asserts that the proposed rule treats the three elements of sustainability as interdependent and further, that none of the elements can be ranked in order of priority. Nowhere does the agency say that factors cannot be ranked in order of importance unless the agency has differing abilities to influence the factors.

Further, we find the assertion that the agency has more influence over factors influencing ecological sustainability suspect. In the explanation of this section in the proposed rule, the agency lists a host of factors influencing ecological sustainability that are outside the control of the agency including “climate change, extreme disturbance events, and urbanization on lands outside of or adjacent to NFS lands.” Fed. Reg. Vol. 76, No. 30 at 8490. This is not an insubstantial list of factors outside of the agencies control, and says nothing of the agency’s ability to actively manage NFS lands in light of the near constant threat of litigation facing management activities on federal lands. The decline in the forest industry throughout the west and the corresponding social and economic benefits closely coincides with the increase in the threats to ecological sustainability stemming from the lack of management on federal lands. These ecological threats include fires outside the historical range of variability and spread of native and invasive pest species at historic levels (extreme disturbance events) and are some of the primary factors currently influencing the ecological health and sustainability of western forests. The agency’s ability to impact factors influencing social and economic sustainability is clear from the impact on these systems following the decline in management on federal lands. What is not clear is that the agency is in a better position to impact factors influencing ecological sustainability than those influencing economic or social sustainability.

Because the USFS is in a position to have a substantial impact on all of the factors influencing ecological, social and economic sustainability, we request that the proposed rule recognize this and include language for plan components that maintain or restore all three elements of sustainability, being ecological, social and economic.

### **§219.9 Diversity of plant and animal communities**

The proposed rule language on maintenance of viable populations in §219.9(b)(3) significantly expands the realm of species that may be considered under the proposed rule by not limiting species of conservation concern to vertebrate species as the current rule does. As this is a contentious and litigious issue under the current planning rule, we are concerned that the proposed rule has done little to reduce the likelihood of future conflicts. Specifically, the proposed rule contains no reference to meeting overall multiple use objectives in light of providing for species viability. This reference to overall multiple use objectives from the 1982 rule has been relied upon in court decisions to uphold agency decisions related to management indicator species and should be included in this proposed rule.

Both §219.8 (sustainability) and §219.9 (diversity of plant and animal communities) contain the same language at the opening of the sections that “[w]ithin Forest Service authority and consistent with the inherent capability of the plan area, the plan must include plan components to ...” either provide for sustainability or plant and animal diversity. However, the two subsequent sections, §219.10 (multiple use) and §219.11 (timber requirements based on the [National Forest Management Act] NFMA) contain very similar language with one notable addition to the language of the “fiscal capability of the unit...” This language sets up a disparity whereby the provision of multiple uses and timber requirements under the NFMA are subject to the additional caveat of the fiscal capability of the unit while efforts to provide for sustainability and species viability are not. We are concerned that the language of the proposed rule in this section goes even further than the flaws discussed above relative to the disparate treatment of ecological, social and economic sustainability to, in practice, subjugate social and economic sustainability to ecological sustainability, despite the agency’s statement that the three are interrelated and should not be ranked in order of importance. As such, we recommend that the additional limiting language in §219.10 and §219.11 be eliminated. Alternatively, the fiscal capability language could be added to §219.8 and §219.9 to ensure that all elements of sustainability are truly recognized as equal and interdependent factors in the rule.

### **§219.12 Monitoring**

Adequate monitoring is absolutely necessary to support the adaptive management framework chosen in the proposed rule. Unfortunately, we are concerned that the monitoring framework included in the proposed rule will ultimately become a costly burden on the agency as we all face shrinking budgets. We have already seen proposed cuts in the President’s fiscal year (FY) 2012 budget proposal for the Forest Inventory and Analysis (FIA) program, which acts as the nation’s forest census. At the funding levels proposed in the President’s budget, several states in the West will continue to go without FIA data, and others are likely to be impacted by longer cycles between inventories and cessation of higher resolution sensing projects. With these cuts in mind, we believe it is important to continue forward with “all-lands” monitoring efforts (as envisioned under the proposed rule’s course lens approach) to make sure we can build upon our current knowledge of all forest ecosystems, regardless of ownership.

We were encouraged to both read in the proposed rule and to hear from members of the USFS planning rule team at national and regional forums that they intend to leverage outside monitoring efforts being conducted by other government and non-governmental parties. We believe this is another opportunity for State Foresters and Statewide Forest Resource Assessments and Strategies to play an important role in



forest planning efforts. With this in mind, we believe that the language of §219.12(c)(5) should be strengthened to require the responsible official to look to State Foresters and Statewide Forest Resource Assessments and Strategies by including specific reference to State Foresters in §219.12(b)(2). Collaboration is an important part of continuing to improve the efficient and effective use of limited monitoring resources.

### **Subpart B – Pre-Decisional Administrative Review Process**

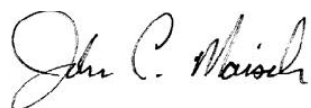
#### **§219.50-62**

We support the use of the pre-decisional administrative review process for land management plan proposals as set forth in the proposed rule. We are hopeful that this review process would lead to more collaborative decisions and ultimately save litigation costs and allow the agency to more efficiently implement management on the ground.

### **III. Conclusion**

The CWSF appreciates the efforts of the planning rule team at the USFS to develop a rule that will provide a solid framework to implement on-the-ground management and address the pressing threats to western forests. As the USFS moves forward in considering comments and revising the proposed rule, we ask that you consider our comments. Again, thank you for the opportunity to provide comment on the proposed rule, we look forward to continuing to work with the agency to ensure that all western forests are managed to serve the values of society and ensure the health and sustainability of western forests.

Sincerely,



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Chair, Council of Western State Foresters