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Topline Concerns About the USFS February, 2011 Draft NFMA Regulations

1) Species Viability:

The single most important conservation provision in the 1982 regulations is probably the requirement that wildlife species be maintained "well distributed in the planning area." §219.19.[1] In practice, this has obliged the Forest Service to try to preserve the existing range of many species of concern. And it applies to projects as well as plans. §219.27(6).

The proposal allows actions that constrict range. Even designated "species of conservation concern" need only be maintained somewhere "within the plan area." P§ 219.9(3). Their distribution, as articulated in the proposed definition of "viable population," need only be "sufficient [for a population] to be resilient and adaptable." P§ 219.9. No guidance is provided on what makes a population resilient or adaptable, or how resilient and adaptable one needs to be. In practice, this will mean that many species of concern will have to be maintained only in part of their existing range. In short, the proposal sanctions local extirpation. As an extreme example, this could mean wolves on only one island of the 1,000 island Tongass National Forest.

Even this weak requirement attaches only to "species of conservation concern." P§ 219.9(3). There is no separate obligation to protect the viability of other species, as there is under the MIS system of the '82 regs (unless the species are ESA-listed or candidates).

Moreover, a "species of conservation concern" is defined as one "for which the responsible official has determined that there is evidence demonstrating significant concern about its capability to persist over the long-term [sic] in the plan area." P§ 219.19. That means the call on what species to plan for is largely left to the difficult-to-challenge expert judgment of the Forest Service about how sufficient the evidence of decline or threat is and how significant the concerns raised are. Worse, as drafted, the strongest grounds for challenging such a designation may be the industry/ORV argument that there was inadequate evidence "demonstrating" significant persistence concerns.

A further damaging feature of the replacement viability provision is its focus on whether an individual national forest has the "inherent capability" of maintaining a species of concern. If not – as for many low fecundity wide-ranging species – the plan need provide for its viability only "to the extent practicable." P§ 219.9(3).

2) Coarse Filter Protections:

The coarse filter protections for diversity at the ecosystem scale allow planners to perpetuate existing ecological degradation. They require only that the plan "maintain or restore" ecosystem functions and connectivity. P§ 219.8(a)(1) and 219.9(a). This is an either/or choice. Decisionmakers need only maintain the status quo under this language, not improve it. And like

[1] References to "§ 219.xx" are to the 1982 regulations, which are no longer codified in 36 C.F.R., but are online at: http://www.fs.fed.us/emc/nfma/includes/nfmareg.html. References to "P§ 219.xx" are to the rules in the pre-publication version of USDA's Federal Register notice, online at: http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5270250.pdf.

the viability requirement, it applies only "in the plan area." *Id*. There is no requirement to maintain ecosystems across national forest boundaries (though an argument would be possible that one is implied to the extent needed to stop further degradation within the plan area, and/or by the direction to take account of "landscape-scale integration." *See* P§ 219.8(a)(1)(i)).

In addition, the proposal applies literally only to existing "healthy and resilient ecosystems." It does not say, "maintain or restore the health and resilience of ecosystems." It reads instead: "maintain or restore ... healthy and resilient ... ecosystems." P§ 219.8(a)(1). And it does not even require that all such ecosystems be either maintained or restored. These features create the potential for triage decisions about which ecosystems to protect and the maintenance of small sample ecosystems.

The coarse filter protections are further weakened by the standardless qualification that ecosystem planning take system stressors and disturbance regimes into account, including climate change. P§ 219.8(a)(1)(ii). While the agency needs to consider those phenomena, leaving local decisionmakers to choose how to do so without guidance is likely to create serious problems, given the agency's abiding faith in the remedial powers of the chainsaw.

3) <u>Even-aged management:</u>

The proposal recites default sizes for even-aged logging. P§ 219.11(d)(3). However, those limits can be exceeded, without limit, without amending the forest plan, on 60 days' notice with review by the regional forester. P§ 219.11(d)(3)(ii). Similarly, all size limits are off for "fire, insect and disease attack, or windstorm." P§ 219.11(d)(3)(iii). No standards are included for exceptions. And the only process required is notice and a 60-day waiting period. In fairness, this was the approach of the 1982 regulations, but it was a gaping loophole and should not be perpetuated. To create a clearcut that could exceed default standards by an unlimited amount, line officers ought to have to do more than just wait 60 days after announcing their intent and then go ahead with no rationale or supporting analysis.

4) <u>Unsuitable Lands:</u>

The only prohibition on reasons for logging lands determined not suitable for timber production is that they not be "for the purpose of timber production." P§ 219.11(b)(1). The provision is phrased as a limitation on what kind of logging can take place in areas the plan identifies as unsuitable, so it operates at the timber sale level. Again, no standards are provided for taking advantage of this loophole in individual projects, and no process at all is specified. Individual forest plans do not, apparently, have to discuss when and where to allow such logging, since its authorized in the regulations on a blanket basis.

5) <u>Sound Science:</u>

Generally, the proposal only requires that planners "take into account" the best available scientific information. P§ 219.3; *see also* P§ 219.14(a)(4). This language, also used in some prior versions of the planning regulations, has been variably interpreted by the courts, sometimes helpfully.[2] However, it is weaker than alternative formulations, and does not on its face require that the agency give the best available scientific information any special weight, let alone be guided by it. The agency knows how to draft stronger requirements, even in this proposal requiring that riparian buffers be "based on best available scientific information." P§

[2] The '82 regulations similarly required the Forest Supervisor to "assure that the interdisciplinary team has access to the best available data." § 219.12(d).

219.8(a)(3). And stronger language is used in other regulations, like those for NEPA: "Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. 40 CFR § 1502.24.

6) Aquatic protections:

Some of the strongest language in NFMA relates to the protections that planning regulations must include for watersheds and water bodies. Regulations must "insure that timber will be harvested from National Forest System lands only where – (i) soil, slope, or other watershed conditions will not be irreversibly damaged; [and] (iii) protection is provided for streams, steambanks, shorlines, lakes, wetlands from detrimental changes in water temperatutres, blockages of water courses, and deposits of sediment, where harvest are likely to seriously and adversely affect water conditions or fish habitat." 16 U.S.C. § 1604(g)(3)(E).

The proposed regulations take a "kick-the-can-down-the-road" approach that does not insure anything. It repeatedly directs that plans "include components to maintain, protect, and restore" various watershed and water body features. P§ 219.8(a)(2) & (3). But it establishes no standards for how much these features must be protected. It requires that plans have "guidance to prevent or mitigate" harmful changes geophysical changes to water supplies. P§ 219.8(a)(2)(iv). But this just clearly contemplates harmful changes without even specifying how much they have to be mitigated. And it calls for default riparian buffers on many water bodies, but provides neither standards for such buffers not a process for developing them. P§ 219.8(a)(3). Indeed, while variances from the default buffers have to be "based on the best available scientific information," *id.*, the buffers themselves apparently do not.

7) Public Process:

The public process provisions are one-sided and create several serious obstacles to citizen and interest group participation.

Much of the trouble is caused or aggravated by the requirement that anything raised in the HFRA-like pre-decisional objection process be shown by the objector to be "based on previously submitted substantive formal comments unless the objection concerns an issue that arose after the opportunities for formal comment." P§ 219.53(a). This thrusts the burden on the public to put everything possible in front of the agency before seeing the final proposal or the draft decision document. It may be even more problematic for those plan amendments that get just an EA, because the regulations do not clearly require that a draft EA be available during the comment period (though arguably that is intended by the mandate to invite comments on plan amendments "and associated environmental analyses," P§ 219.16(a)(3)). Moreover, it creates a new set of controversies over whether an objection point, or piece of evidence, is "based on" prior comments, and if not whether the issue "arose" after the comment opportunity. And finally, it disqualifies objections and evidence, no matter how germane to prudent and lawful management, on issues timely brought to the agency's attention by others' comments but not the objector's.

Public participation is further constrained by two very short, 30 day, timeframes. One is the comment period for a proposed plan amendment, in cases where the agency decides to forgo an EIS. P§ 219.16(a)(3). This means that from the date such a proposed amendment is announced, the public has 30 days to show why an EIS is needed. Concerns that could have been uncovered in that time but weren't cannot be raised in the objection process. And again,

the regulations do not unequivocally require that the EA or a draft of it be available during those 30 days. *See id.*

Similarly, there are just 30 days to obtain, digest, analyze, gather evidence about, and file objections to any final proposal (and, if applicable, its EIS) and draft decision document. P§ 219.56(a). This period is no-extendable, regardless of whether, for instance, the agency timely provided access to record material (nor does this allow time for a FOIA request). In fact, as drafted, the proposal does not require that environmental or plan documents actually be available at the beginning of the objection period. The clock starts with the "publication date of the public notice for a plan, plan amendment, or plan revision" *Id.* The notice must "[i]nform the public of the availability of the plan ... the appropriate final environmental documents, [and] the draft plan decision document," and how to obtain copies. P§ 219.52(c)(1) & (2). But nowhere do the proposed regs require that the documents actually be available, let alone provided to those who requested them, before the 30 days commence. To put this in full perspective, the 30 days could include Christmas and New Years, or all of August, when even if a would-be protest-filer were available and free of other deadlines, the experts he or she would likely want to consult and get statements from may well not be.

There are also several provisions that create one-way burdens for objectors. While the public has 30 days to file objections, non-extendable, the agency can take 90 days, extendable. P§ 219.56(6). The agency can reference documents and count them as part of the record. P§ 219.54(b)(3). The public generally may not incorporate documents by reference in their objections (though they may for specific documents the agency incorporated by reference, and may get by with weblinks to documents). P§ 219.54(b). Even Forest Service documents must be included with objections, except for the Directives system and land management plans themselves. P§ 219.54(b)(2). And the public must address a moving target, a merely draft decision rather than the final. This means, among other things, that objectors will sometimes have to help the agency litigation-proof its decisions. If, for instance, the underlying rationale for part of a plan decision does not hold up under scrutiny, protesters must show how that's so and give the agency the opportunity to create another rationale – without changing the plan – in its final decision documents. *See* P§ 219.58(a).

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