

**NFMA PLANNING RULE REVIEW**  
**A Report Requested by USDA**  
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**BACKGROUND:** The National Forest System (NFS) consists of 192 million acres of National Forests and Grasslands under the jurisdiction of the Secretary of Agriculture. Statutory procedural guidance for planning on these lands is set forth in the National Forest Management Act of 1976 (NFMA). Existing management plans for these lands were developed under regulations adopted in 1982. Currently 39 Forest plan revisions and numerous amendments are underway pursuant to the 1982 regulations.

In December 1997, using his own discretion, the Secretary of Agriculture convened a 13-member Committee of Scientists (COS) to provide scientific and technical advice to improve the Forest Service's planning process pursuant to the NFMA and offer recommendations on how best to accomplish sound resource planning within the statutory mission of the Forest Service (Committee of Scientists 1997). The COS provided a report with their recommendations to the Secretary in 1999. The COS is to be commended for their professional approach and thoroughness of study on this issue.

Building on many of the concepts in the COS report, a draft planning Rule was published on October 5, 1999 (64 FR 54074). Following publication, a series of public meetings was held and more than 10,000 written and oral comments on the draft Rule were received and analyzed. Revised planning regulations (36 CFR Parts 217 and 219) (hereafter referred to as Rule) directing Forest Service implementation of the NFMA were issued (65 FR 67514) on November 9, 2000 (Federal Register 2000). The Rule states it will "... enable the Forest Service to make better decisions about the National Forest System and guide the Forest Service planning and management clearly and effectively well into the 21<sup>st</sup> Century." (ibid.) The COS was not asked to review the draft Rule prior to publication nor did they provide comments on it. However, members did submit personal comments.

Following publication, a coalition of 12 environmental groups from seven states filed a lawsuit challenging promulgation of the Rule. One of the allegations is violation of NFMA (Toffenetti 2001). And, a number of groups and organizations wrote the Secretary of Agriculture identifying major areas of concern regarding implementation of the final Rule. Several lawsuits filed challenging the Roadless Rule also referenced the revised planning regulations.

In February 2001, Regional Planning Directors agreed that:

- The intent of the new Rule is good.
- The Rule is probably closer to what the public wants than the 1982 Rule.
- The Rule does not require “zero-based” planning.

However, their ability to successfully implement these regulations in the short term raised many concerns.

Review by other experienced professional managers, scientists, and lawyers identified potential problems in decision-making and legal defensibility of decisions if the Rule is implemented. Some of the potential problems arise from concerns about the policy decisions and some arise from concerns about the feasibility of implementing the analysis and monitoring requirements of the Rule.

As a result, the Acting Deputy Under Secretary, Natural Resources & Environment initiated a review of the Rule, with focus on improving process, decision-making, and legal defensibility. The Department outlined a 3-phased work plan and requested assistance from the Forest Service. In phase one, Forest Service people having significant experience in forest planning, and other aspects of Forest Service natural resource management and research, would review and synthesize information to identify major concerns and develop options to address those concerns. The Department identified sources of information in their work plan. It was anticipated that Phase 1 would take 3 weeks. This report concludes phase one.

Documents from credible sources detailing problems or concerns in five major topic areas were assembled and reviewed (Appendix D); specifically: sustainability, viability, contribution of science, monitoring, and organizational capability. This report is not a comprehensive review of the Rule. Rather, it focuses on findings specific to policy, legal, science, and operational challenges for the agency in implementation concerning these five major topic areas.

**FINDINGS:** At a December 19, 1997 meeting with the COS, former Under Secretary Lyons and former Chief Dombeck addressed Forest planning, “1) we need to streamline; 2) there’s a need for accountability; 3) we must communicate land health issues in non-technical terms so people can understand it; 4) planning should not be an exercise to itself; not an end but rather a means; 5) we must simplify; 6) the process has become too cumbersome; and 7) the plan must be meaningful to a high school biology student” (Gippert 1999). The debate continues on how well the final Rule achieved these results.

During Senate testimony after the draft Rule was published, a representative from the American Forest and Paper Association stated, “If the Forest Service proposes a planning system so complex it cannot be funded, adoption of a roadless area protection policy and any

Congressional enactment of wilderness legislation would be redundant. NFMA allows only those management activities on national forests that are consistent with resource management plans. No plans — or plans lost in a processing limbo — means no activities other than, perhaps, primitive recreation. Even if the agency tries to manage national forests on outdated plans, challenges will soon follow and injunctions may soon issue. We fear that these proposed Rules are a self-inflicted unfunded mandate” (Quarles 2000).

Implementation problems are increased by the failure to recognize structural deficiencies in the revised Rule. Following publication of the final Rule, the Forest Service’s Inventory and Monitoring Institute in cooperation with the Rapid-e Corporation conducted a business process analysis on the new Rule. Independent analysts required a chart 107 feet long to display activities, processes, and procedures. They concluded, “The planning regulations do not appear to have been written with the objective of being implemented without considerable additional guidance in the form of handbooks and manuals. While business requirements for this section of the Rule (§219.21) have been drafted, they identify a level of detail, analysis techniques and documentation far more comprehensive, costly, and time consuming than anything previously achieved by any Forest Plan or Plan Revision (Hoekstra 2001). Note, during the week of April 2, a national team of Forest Service practitioners validated the 107-foot chart. Rapid-e summarized their findings by showing that even if the agency could acquire the skills and expertise needed for collaboration, social and economic and program management, it is unlikely that the budget or resources necessary to provide the policy and guidelines would exist. In addition, information management, landscape ecologists and geographic information systems skills necessary for implementation are not yet within the agency (Rapid-e 2001).

## **TOPICS OF MAJOR CONCERN**

Sustainability (§219.19-§219.21) - National commitment to sustainable forestry was originally made through Presidential Decision in 1993, the Santiago Declaration in 1995 and by the Chief of the Forest Service in 1997. In this context, sustainability means meeting ecological, economic and community aspirations simultaneously. It requires the development and protection of natural resources at a rate, and in a manner that enables people to meet their needs while providing future generations with the means to do the same (Lewis 2000).

The new Rule at §219.19 creates new terminology and standards for forest planning. It adds new requirements for ecological, social, and economic sustainability, and stipulates that the “first priority” of the Rule is “maintenance and restoration of ecological sustainability.” There is a strong implication in the standards set forth in the Rule that plan decisions can identify and establish a “threshold” for sustainability despite widespread international understanding that sustainability is a general aspiration that requires locally adjusted balance among potentially competing social, economic and environmental goals. It is not a hard and fast standard based only on ecological considerations applied at a national scale.

Three problems come to the forefront with regard to implementing the sustainability provisions. First, the interconnection between ecological, social, and economic sustainability; second, the legality of the policy decision that places ecological sustainability first, especially given how ecological sustainability is described in the Rule; and third, is the feasibility of achieving the sustainability standards as set forth in the Rule.

First, “ecological sustainability first” is at odds with the reality that the three components of sustainability (ecological, economic, and social) are inextricably linked and cannot be separated as the Rule proposes. As pointed out by the Society of American Foresters, “The Forest Service’s planning regulations place ecological values above social and economic values of sustainability. This is inherently unsustainable, inconsistent with the profession’s concepts of sustainability, and inconsistent with internationally agreed upon principles of sustainability” (Banzhaf 2001). Others also recognized this when they said, “Ecological sustainability is not separable from economic and social aspects of sustainability” (Leisz 2001).

The sustainability direction in the Rule is contrary to the 1997 commitment of the Chief and Under Secretary to embrace the total concept of sustainability. As they stated in their letter of direction to the team that was preparing the final Rule, “The writing team should clarify the connections between ecological sustainability and social and economic sustainability – all three being essential elements to the achievement of sustainability” (Dombeck & Lyons 2000).

The ecological standards provide numerous requirements for the ecological conditions that the plan must achieve e.g., “... provide for maintenance or restoration of the characteristics of ecosystem composition, and structure within the range of viability that would be expected to occur under natural disturbance regimes of the current climatic period...” (§219.20(b)(1)). Other terms in the Rule such as “range of variability,” “natural disturbance regimes,” and “current climatic period” are interesting concepts for science to pursue but they are also vague, immeasurable concepts that will cause endless debate and litigation when used as benchmarks or standards for success. Plan decisions on the other hand, only “...contribute to social and economic sustainability by providing a range of uses, values, products and services, consistent with ecological sustainability (§219.21(b)), which arguably is no standard at all” (Mills 2000).

Second, the policy balance of “ecological sustainability first” is a significant departure from the agency’s historic interpretation of its mission for the National Forests and Grasslands, and one for which there may be no legal authority. The Multiple Use Sustained Yield Act (MUSYA) requires that National Forests be administered for “multiple use and sustained yield of the several products and services obtained there from (16 USC 531).” There is no justification or legal analysis in the preamble of the Rule explaining this substantial administrative change that conflicts with Congressional direction (Perry 2000). As stated in Congressional testimony before the final Rule was published, “The Forest Service lacks the

administrative discretion to adopt ecological sustainability as a new management standard. From the 1897 Organic Act establishing the Forest Reserves for timber and watershed purposes, Congress enlarged the purposes for which the Forests were managed by adding outdoor recreation, range and wildlife and fish and in codifying and defining multiple use and sustained yield management in the Multiple Use Sustained Yield Act in 1960. In the National Forest Management Act of 1976, Congress provided detailed direction for the land management planning process with the statutory admonition that the Forest Service ‘promulgate regulations under the principles of the Multiple Use Sustained Yield Act of 1960 . . .’ (16 U.S.C. 1604(g)). By decades of endorsement of MUSYA principles, Congress has provided the Forest Service no administrative discretion to adopt a new management standard which contravenes multiple use and sustained yield” (Perry 2000).

The Committee of Scientists (COS) summed up the ecological sustainability situation in two statements:

- 1) “This finding does not mean that the Forest Service is expected to maximize the protection of plant and animal species and environmental protection to the exclusion of other human values and uses.”
- 2) “Given the complexity of this concept, it will be difficult to assess with a single indicator, but rather will require a set of indicators measured at different spatial, temporal, and hierarchical levels . . .” (1999).

While the COS did not provide comments on the draft Rule, individual members did and did not support the “ecological sustainability first” policy in the Rule. Chairman Johnson wrote, “I am though, deeply troubled by one aspect of the proposed planning Rule – the seeming overemphasis on the ecological aspects of sustainability. This is demonstrated, in general, by the much more detailed treatment of ecological sustainability in the text . . .” (2000).

Third, while a useful concept, the application of the sustainability concept as it is contained in the Rule, requires a level of scientifically sound measurements that exceed the agency, or perhaps any agency’s, ability to perform. As one reviewer stated about the ecological sustainability requirements of the Rule, “Setting it above the other essential aspects of sustainability . . . it also establishes the key requirement for forest planning, a criterion that is impossible to measure with clarity and any degree of scientific consensus” (Leisz 2001).

A much more precise definition is required if the concept of ecological sustainability is to move from simple statements of conviction to operational resource management. Basic principles upon which to base operational definitions of sustainability are not articulated. In the absence of an agreed upon set of basic constructs, definitions to guide implementation will continue to be vague, elusive and untested (Working Papers 2001 (2)). Reviewers of the draft Rule also expressed concern about the analysis requirements implied in the ecological sustainability section (Mills 2000).

In summary, sustainability is a laudable and appropriate goal of planning. Nonetheless, implementation of the sustainability sections of the Rule require a huge amount of new work that has not been thought through carefully enough nor subjected to sufficient peer and public review. It is clear that the analysis requirements to evaluate ecological sustainability to demonstrate that the standards had been achieved would be very substantial, even if it is determined that the policy decisions are legally defensible. These are human constructs based upon implicit and explicit assumptions that are impossible to measure with clarity and any degree of scientific consensus. Given the current state of the scientific literature and the practical ability to apply current scientific concepts and information, implementation of the sustainability requirements in the Rule means that the courts would most likely make the ultimate interpretations.

**Viability (§219.20(b)(2))** - Since its enactment in 1976, NFMA's requirement to "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives and within the multiple-use objectives of a land management plan" (16 USC 1604 (g)(3)(B)) has been the subject of intense debate. The 1982 implementing regulation requirement to manage fish and wildlife habitat "to maintain viable populations of existing native and desired non-native vertebrate species in the planning area" (36 CFR §219.19) expanded beyond the statutory requirement.

The new Rule places viability under the umbrella of ecological sustainability (§219.20). Ecological sustainability, in part, is defined to include "ecosystem diversity and species diversity" as components (§219.20(a)).

Characteristics of ecosystem diversity must include (§219.20 (a)(1)(i)):

- 1) the composition, distribution and abundance of the major vegetation types;
- 2) the diversity, abundance, and distribution of aquatic and riparian systems;
- 3) soil productivity;
- 4) air quality;
- 5) focal species that provide insights to the larger ecological systems with which they are associated.

Characteristics of species diversity must include but are not limited to the number, distribution, and geographic ranges of plant and animal species including focal species and species-at-risk. Species-at-risk and focal species must be identified for the plan area (§219.20 (a)(1)(ii)).

Evaluation of ecosystem diversity must include information about the focal species that provide insights into the integrity of the larger ecological system to which they belong. This is within the context of, in part, the principal ecological processes occurring at spatial and

temporal scales, the affects of human activities on ecosystem diversity, and the range of variability of the characteristics of ecosystem diversity described above (§219.20 (a)(2)(i)).

Evaluation of species diversity must include assessments of the risk to species viability and the identification of ecological conditions needed to maintain species viability over time (§219.20 (a)(2)(ii)). The Rule requires individual species assessments for all threatened, endangered, candidate and proposed species (§219.20 (a)(2)(ii)(A)). For all other species, including the identified species-at-risk, the Rule requires individual species assessments or focal species assessments, or other indicators used as surrogates (§219.20 (a)(2)(ii)(B)). The Rule requires that information about species, their habitats, the dynamic nature of ecosystems and the ecological conditions needed to support them must be identified (§219.20 (a)(2)(ii)(D)).

In making Plan decisions, the Rule, in part, requires providing ecological conditions that the responsible official determines provide a high likelihood of supporting, over time, the viability of native and desired non-native species well distributed throughout their ranges within the plan area (§219.20(b)(2)).

There are three problems identified with regard to the viability provisions. First is the level of precision implied for measurement of viability; second is that the viability requirement in the Rule extends beyond what is required in statute; and third, there is an alternative to the direction in the Rule that is available and is considered by some to be more appropriate as an ecosystem approach rather than a species-by-species approach.

First, planners and scientists have been at work for over 2 decades trying to assess biological diversity and species viability. In fact, the agency currently has a process underway looking for a logical option under the existing 1982 regulations and in response to current case law (Schwalbach & Barone 2000). This work has always been fraught with inconsistency and lack of consensus on what is sufficient to comply with laws such as ESA and NFMA. Salwasser points out that the very nature of biodiversity itself creates some of the difficulty because 1) biodiversity is inherently complex, 2) we have incomplete knowledge of most species let alone all the processes through which they function together, 3) inventories are incomplete and inconsistent, 4) models are unrealistic and, 5) population futures are dynamic, uncertain and influenced by more than just the habitats that national forest and grassland managers affect. He concludes that after 2 decades of experience, the problem of addressing biodiversity conservation in a comprehensive and quantitative analytical way may not be technical or analytical in nature but it “may be a foundational problem that rests on our incomplete and inconsistent knowledge about the degree to which habitat conditions affect population conditions of any native plants or animals” (2001).

Relevant ecological requirements and population dynamics are largely unknown for many species and will remain so for some time. Animals and plants of commercial value, or those

that have pest potential, receive primary attention and research focus rather than the range of biological species in natural areas. Knowledge is “non-existent for the majority of biological diversity” (Salwasser 2001). Holthausen points out broadly distributed species should be coordinated at the bioregional or Forest Service regional level so that approaches and documentation is consistent. Many plan revisions will precede regional coordination; therefore, many forests will be in the immediate position of revision with out of date information whenever regional level coordination catches up (Working Papers 2001 (2)).

Second, the goal of maintaining viable populations as a primary purpose is consistent with ESA requirements for species and ecosystem conservation where listed species are an issue. Such is not the case with MUSYA and NFMA. Requiring that plan decisions “must provide for ecological conditions such that there will be a high likelihood of maintaining viability of native and desired non-native species over time within the plan area” (§219.20(b)(8)) “would effectively preclude the Forest Service from following MUSYA direction of giving ‘due consideration to the relative values of the various resources in particular areas’ (16 USC 529) and the NFMA direction of “providing for the diversity...in order to meet overall multiple use objectives” (Perry 2000). In Congressional testimony, Perry went on to say, “... the preeminence given species viability over multiple use values under the ambit of ecological sustainability is completely misplaced” (2000). Species viability is not a preeminent goal for all species or focal species, but rather it could be a consideration within the context of overall multiple use objectives except in the case of listed species where ESA makes it a preeminent goal.

Further, a high likelihood of a persistence standard has “profound implications” (Flather, et al. 2000). Ecosystems are dynamic and habitat conditions vary over time and influence the likelihood of persistence. A basic tenet of conservation biology is “saving all the pieces.” However, factors outside the control of the national forests and grasslands such as uses on private lands and potential climatic changes reduce the likelihood of meeting this standard. Additionally, some species with sparsely represented habitats will have a low likelihood under the best of circumstances independent of management actions. The practical effect is that a responsible official may be required to consider hundreds of individual species. Conducting assessments on hundreds of species is simply impractical (ibid.). Finally, providing for high likelihood for one species could conflict with the requirements for other species. Consequently, the potential to achieve the “high likelihood” standard for all species is problematic (ibid.). The Ruffed Grouse Society does not believe that the Rule is clear regarding the level of certainty that is expected and what is meant by “high likelihood” (Dessecker 2001). And, since there are no partially viable species, there are no species with high or low likelihood of persistence over any time period – they either exist or they don’t. Since species either exist or don’t exist as viable, the modified “high likelihood” is highly confusing (Lewis 2000).

Third, a “coarse filter” approach has been offered as being more consistent with scientific feasibility and more consistent with management of ecosystems than hundreds of individual species assessments (Flather, et al. 2000). This approach generally involves:

- 1) identifying types of ecosystems present in the plan area through remote sensing technology or an ecosystem classification system;
- 2) identifying changes in these ecosystems over time to estimate what is characterized as a range of historic variation;
- 3) developing models as predictors of how key elements of current ecosystems might change in the future; and
- 4) drawing reasonable conclusions regarding the relative risk of what any given level of management activities might have (USDA 2001).

The coarse filter approach to ecosystem diversity is not specifically evaluated in the new Rule. Section 219.20(b)(1) links evaluating ecosystem diversity with the “range of variability that would be expected to occur under natural disturbance processes of the current climatic period.” Given that the range of successional stages will be quite large, it could increase risk to ecosystem diversity (and species) if certain successional stages are managed for the upper or lower value of their respective ranges (Flather, et al. 2000). It would be more consistent with scientific feasibility and more consistent with management of ecosystems to establish the successional stage distribution objective in comparison to current conditions and how they relate to the range of variability (ibid.).

In summary, the 1982 Rule used “management indicator species” to assess viability and was subject to the same problems identified here. Moving to “focal species” and “species-at-risk” has not removed the difficulties. “The new Rule has set up an impossible standard for success by requiring unattainable levels of confidence and requiring quantitative analyses that cannot be supported by the kind of data and technologies likely to be available to forest planners” (Lewis 2000). According to Holthausen, in most situations, information is simply not available but would be needed to assess effects on species viability as described in this Rule (Working Papers 2001 (2)). These changes will require interpretation by the agency and most likely will be challenged in court as plans are amended or revised, and projects authorized (Poling 2001).

The Contribution of Science (§219.22 -§219.25) - A key element in the Rule is greater emphasis on the role of science in planning. It “requires the use of the best available science to give the Forest Service and the people, communities, and organizations involved in the planning process sound information on which to make recommendations about the resource conditions and outcomes they desire” (Federal Register 2000). Specifically, it requires that the responsible official provide for independent, scientific peer reviews, and assign scientists as team leaders for assessments, local analyses and monitoring. Further, Science Advisory

Boards that may be used at the local level, are required at the national level, and should be considered at the regional level.

While the consideration of the best available science information in planning decisions is desirable, several issues in the rule have surface: (1) the role of scientists vs. science information, (2) the relative organizational roles of different sources of science information, (3) the feasibility of performing the science jobs included in the Rule, and (4) establishment of Science Advisory Boards.

First, the role of science and scientists in development of federal policy has been explored, questioned, and debated for decades. Currently there is no consensus by either policy makers or scientists regarding the “proper role” in natural resource planning (Working Papers 2001 (6)). The Rule injects scientists directly into the planning process. While it might be appropriate to consider the best available science, it is the science that is relevant, not the person that brings it. The Rule requirement to consult scientists could lead to confusion over what role the scientist plays in the decision (Lewis 2000).

Second, successful collaboration between managers and research scientists exists in the agency. Sometimes it has been difficult and costly. Increasing dependence on Research and Development scientists alone would effectively overwhelm the research mission of the Forest Service. (Mills, Smythe, Diaz-Sotero 2001). It also would imply that NFS professional staff is neither capable nor credible to play that role when in fact there is considerably more professional staff with graduate degrees in the NFS than there are in Forest Service Research (FSR). Most of them should be capable of synthesizing and utilizing the available science information relevant to a decision. Such capability needs to be increased rather than eroded.

Third, the Rule is ambiguous about when a science consistency evaluation should be performed and provides no direction on who should do it (Working Papers 2001 (6)). Individual forests cannot afford independent scientific peer reviews, science advisory boards and science consistency evaluations. In addition, the workload of documentation and logic path tracking would be substantial (ibid). The Rule requires considerable analysis of ecological, economic, and social components of sustainability, all of which must be accomplished using the best available science. Those analysis requirements are substantially greater than has yet to be accomplished in even the most intense planning efforts and are likely beyond the agency’s capability.

Fourth, the Rule calls for a Science Advisory Board to provide scientific advice on issues identified by the Chief, and FACA-compliant Regional Advisory Boards to advise Regional Foresters regarding application of science. The processes to establish FACA-compliant Science Advisory Boards are difficult (Working Papers 2001 (6)). Their costs could be substantial. Their role relative to the decision-maker’s would have to be clarified. If national science advice is needed at the national level, Research led by the Deputy Chief should be

held accountable to provide it. Designation of a national science advisory board for the NFS dilutes the responsibilities of Research. Forest Service scientists are those best equipped for the long-term nature of the research and science advice and collaboration needed for forest planning. Therefore, Research should determine when to consult with other science groups as needed. Private and university scientists will most likely only make material contributions to NFS planning if funding is provided by the Forest Service (Lewis 2000).

In summary, the Rule establishes many requirements related to the integration of science in decision processes that raise further questions: “1) how to ensure science-based national forest management decisions are the agency norm; and 2) how to protect the capability and credibility of the Research and Development program to advance the body of scientific knowledge and serve as a credible source of science information for decision making?” (Mills, Smythe, and Diaz-Soltero, 2001). Their conclusion is that “[S]everal essential actions must be taken promptly to ensure that the National Forest System decisions are appropriately informed by science without jeopardizing the capability of the Research and Development program. But the resulting benefits cannot be realized if the Research and Development program is focused solely on assembling science information for National Forest System decisions.” Along with clear identification of roles, expectations, and mechanisms to transfer and assimilate scientific knowledge, increases in staff capability in both Research and NFS are necessary (ibid.). Definitive answers to these questions and resolution of the four problems identified above are currently unavailable.

Monitoring (§219.12, §219.23) - Monitoring is a fundamental component of any planning and decision-making process. Its need/value is well established. To properly manage resources over vast acreages, managers must incorporate the concepts of adaptive management and although monitoring is only one source of new information that contributes to adaptive management, it is an important source. Three major issues surfaced about the monitoring provision of the Rule: 1) lack of discretion to decide how much information is needed; 2) monitoring requirements should not be required in the plan; and 3) the tie between monitoring and future funding.

First, requirements for information, analysis and monitoring must be bounded by their completion at a reasonable cost and in a timely manner. While the direction concerning information development and interpretation at §219.5 is appropriately clear in its direction about how to decide what information and analysis is necessary for making decisions on issues, the analysis requirements in the separate sustainability sections do not repeat the same direction. The consequences will be requirements to collect information that might not be needed for a reasoned decision, information that might be more costly than warranted, and information that might take so long to develop that it would unnecessarily delay decisions (Mills 2000).

Second, §219.7(e) should “only require decisions on the monitoring strategy in the plan” and that “the details of the monitoring program should not be required in the plan.” While it is reasonable to require a plan monitoring strategy within the plan, it is not reasonable to require the entire monitoring plan and procedures in all of its detail. Such a requirement would not only unnecessarily delay the plan decision while those detailed analytical decisions are being made, it would also require preparation of plan amendments when those analytical details are changed and would subject detailed analytical procedures to the same objection processes that are reserved for plan decisions. The detailed monitoring requirements should also be reserved for the plan monitoring, and not be required for monitoring individual projects (ibid.).

Third, the inability to reasonably predict future funding for monitoring could lead to significant reductions in resource projects. This problem first surfaced in testimony before Congress, “[I]ncredibly the proposed Rules contain a prohibition against authorizing any activity for which there is not a reasonable expectation that adequate funding will be available to complete any required monitoring and evaluation (36 CFR 219.11(c)). This provision is a fertility drug for litigators ... as long as the funding of multi-year projects and monitoring is dependent on annual appropriations – a reasonable expectation of funding does not exist. What’s a district ranger to do?” (Quarles 2000). And, as Dessecker points out, “[M]onitoring is essential to assess progress towards resource goals and to facilitate adaptive management. However, effective monitoring may require years or decades and it is impractical to expect any Forest Service official to predict future funding availability for even a single multi-year monitoring program, let alone for those additional programs associated with subsequent project” (2001).

In summary, the Rule describes a level and specificity of monitoring that may not be feasible. The Rule includes requirements establishing monitoring methodologies, methods frequency of sampling and sampling protocols, i.e., population monitoring, in the plan, resulting in unnecessary delay of decisions and investments in information that are not warranted or necessary to make a reasoned decision. The specificity and depth of the monitoring requirements allow little discretion for managers to assess and prioritize information needs. Not securing sufficient funding to implement monitoring requirements across 155 national forests and 20 grasslands could have substantial impact on NFS and Research programs. If the body of scientific knowledge is unavailable to support the analysis that must precede the planning decision and to support the monitoring plan that must be included in the plan, plans will be seriously delayed, especially given the lack of consensus in both the land management and scientific community on the meaning of some of the planning direction. Unless the monitoring requirements are reduced in scope, better defined, and made increasingly reliant on volunteer data collection or other currently available data, the practical effect will be that many plans and projects will have extensive and unnecessary delays or in some cases significant projects will be dropped.

Transition/Organizational Capability - Some of the concerns that have surfaced include, but are not limited to: 1) immediate implementation of the Rule without detailed direction available; 2) little flexibility provided those forest plans currently in the revision or amendment process; 3) funding and skills necessary to implement the Rule are lacking; and 4) numerous problematic areas identified during implementation of the 1982 Rule still are not addressed in the new Rule.

Implementation of the Rule began November 9, 2000 (§219.35). Immediate implementation did not provide for development of internal direction including revised manual and handbook direction, training and skill development, or guidance on how to proceed. The Regional Planning Directors' process of "Working Papers" highlights this confusion and lack of agreement within the agency to the meaning of these regulations. Some of their specific concerns include, "[H]ow can forests well into revision meet the requirements of collaboratively developed landscape goals? Does this constitute a fatal flaw for those forests" (2000)?

In their review of the Rule, the Rapid-e Corporation identified 22 "executive level" activities critical to its implementation (Rapid-e 2001). Of these 22 items:

- 16 require greater clarification/explanation
- 18 are issues due to expected program budgets
- 17 have a skill/expertise deficiencies in the agency
- 15 have potential length of time impacts
- 11 depend upon information not yet available
- 12 depend upon cooperation from others that may be in question.

All plan amendments not initiated prior to November 9, 2000, and not completed thru draft by May 9, 2001 (§219.35 (a)(b)) must comply with these regulations. The only flexibility is one sentence in §219.20(a) that allows, "to the extent the responsible official considers appropriate for plan amendments." This stated flexibility is essentially compromised by the many "must" requirements in other sections of the regulations. Plans completed under the 1982 Rule will be amended by the 2000 Rule that has a different level of expectation. Currently 39 forests (Appendix C) are revising forest plans that were completed under the 1982 Rule. Many of these on-going revisions represent work with a variety of publics on plan revision processes that are very adaptive and respond to the agency's changing role of applying more attention to ecosystem management at multi scales. This approach has been evolving over the last 10-12 years. The COS' report referenced many of these successful examples. However, the new Rule's transition language does not contain the flexibility allowing the agency to complete these efforts unless published in draft by May 9, 2001. As a result, our investment in dollars, time in process, and commitment and trust from these publics will be lost. Many of the plan revisions now in process will have to start over and will likely find it impossible to address these elevated requirements with the skills and

budgets available to them. The plans that need revision are at a standstill while the agency seeks to understand the implementation requirements of its new Rule.

Numerous problematic areas identified during implementation of the 1982 Rule were not addressed in the 2000 Rule. The following list is based on 78 decided lawsuits challenging Forest Plans and over 70 pending cases (OGC 1999). Some of these include, but are not limited to:

- 1) The Rule is unclear regarding the role of private and other nonfederal lands in the evaluation and enhancement of ecological sustainability (§219.20). This is then further problematic on the potential effect regarding implementation, validation, and effectiveness monitoring of items that include significant private and nonfederal lands regarding cumulative effects.
- 2) The notion of staged decision making is referred to but not clear. As a result, some courts will still think forest plans are making decisions that fund, authorize or carry out surface-disturbing activities. Further, despite the 1998 Supreme Court Wayne Decision, there continues to be confusion as to decision points and the proper time of judicial review of those decision points. The decision-making steps, including administrative appeal, for resources other than timber are not integrated by the regulation with Forest Plans.
- 3) An abbreviated and adaptive process is needed for linking with ESA and other environmental laws and is not addressed in the Rule. The Rule does not specifically address the relationship with the regulatory agencies and integration of ESA, NEPA, NFMA and CWA. As former Chief Jack Ward Thomas points out, "When a species, or even a subspecies, of a plant or vertebrate is determined by a regulatory agency... and that species is found in a national forest, that national forest attains a co-manager. The FS [Forest Service] proposes and the regulatory agency disposes. In other words, the regulatory agency can trump the land management agency..." (2000). In effect, land management decisions are made by biological opinion of other agencies without peer review for appropriateness under the applicable science base. The Rule does not address such relationship issues.
- 4) The Rule does not provide interpretation whether the consistency section of NFMA, 16 U.S.C. 1604(i) requires retroactive application of new standards and guidelines from Plan amendments and revisions. A clear regulatory statement making such a determination discretionary, but required for each amendment and revision, would be helpful.

In summary, many reviewers parallel the observations of the Rapid-e Corporation. They point out that the new rule has unclear definitions and analytical requirements, e.g., viability, population monitoring, range of variation within current climatic period, and policy direction, e.g., ecological sustainability, science consistency checks, that are impossible to meet. The agency's organizational capability, in terms of Forest and Regional planners and

scientists, and their knowledge, skills, and funding, are not sufficient to successfully implement the Rule. Program management requirements and timeframes expected for implementation are unrealistic. Any new process requires new skills in the workforce, which only comes from new training and new experience. As a result, it is reasonable to expect that completed plans would end up in court where judges will be asked to hold the agency accountable for not meeting impossible requirements and to adjudicate the confusing direction. With the 1982 Rule, it took 6 years to develop internal manuals and handbooks. Currently, there is no internal guidance, training, manual, handbooks or agreed-to processes for the new Rule.

The analysis and science considerations in the Rule will require that organizational roles, organizational expectations and mechanisms to transfer information be clarified. As decisions in the planning process are made, the type of scientific input changes depending upon issues, management options and risk. No protocols have been developed nor does an organizational structure currently exist for its delivery. Even if organizational mechanisms were in place, funding must expand considerably in order to build the capability of Forest Service Research and Development (R&D) and the NFS professional staff commensurate with the expanded magnitude and complexity of the job of making science-based decisions (Mills, Smythe, and Diaz-Soltero 2001). If Forest Service Research is given a major science role in planning without that funding increment, the planning requirements will likely overwhelm their research mission, even given the experience that Forest Service R&D has had with providing some of the previous science information for planning. Such a mission change has not been recognized or funded by Congress (Lewis 2000).

Procedures, which provide adaptability in light of new information, are absent from the Rule. There is every indication that the 2000 Rule has more process and procedures than the 1982 Rule. Experience with the 1982 Rule showed that in several cases it took 10 years or more to produce what was to be a 10-15 year plan. Therefore, it is reasonable to conclude that the new Rule would lead to more rather than less procedure and process that would in turn be more costly and time-consuming than what has been experienced with the 1982 Rule.

#### **CONCLUSIONS:**

- The identified problems, summarized in the report, are so serious that it appears impossible for the Forest Service to successfully implement the final Rule.
- The transition framework (§219.35) requires immediate attention. While several problems exist with the framework and schedule, the most urgent problem is the May 9 deadline that will cause many on-going Forest Plan revision and amendment efforts, started under the 1982 Rule, to be halted.
- Numerous problematic areas identified during the implementation of the 1982 Rule are not addressed in the 2000 Rule. Serious attention must be given to the need for an abbreviated and adaptive process for responding to the Endangered Species Act (ESA)

while meeting the requirements of the National Forest Management Act (NFMA) and National Environmental Policy Act (NEPA).

**OPTIONS:** The following options are offered for consideration:

1. Implement the November 9, 2000 regulations. Accelerate actions needed to increase the likelihood of successful implementation. While this is a legitimate option, it does not address the major concerns discussed above.
2. Withdraw the November 9, regulations and reinstate the 1982 regulations. Would require notice and comment in the Federal Register. Public comments could be adverse and may precipitate litigation.
3. Withdraw the November 9 regulations, reinstate the 1982 regulations, and immediately begin the development of new land and resource management planning regulations. Since the regulation was published November 9, 2000 with an immediate effective date, there are procedural difficulties with simply “withdrawing” a Rule. Notice and Comment would be required even for a withdrawal and litigation may be expected over the question of whether the old Rule went back into effect automatically. Efforts to tweak the old Rule would require more extensive Rulemaking procedures.
4. Allow the November 9 regulations to stand, but immediately begin development of new regulations. While this option would provide an opportunity to correct the major concerns discussed above, it would not effectively address transition.
5. Allow the November 9 regulations to stand and:
  - Immediately post notice in the Federal Register to establish an interim rule, effective immediately, amending §219.35 to extend indefinitely the transition schedule. This provision would allow any Forest Plan revision or amendment started under the 1982 Rule to continue under that Rule. Amendments initiated after November 9 could continue under the 1982 Rule.
  - Post a notice of new Rulemaking.
  - To effectively utilize current year funds and staffs, issue internal direction to the Regions immediately to focus their efforts on readying themselves to initiate plan revision by gathering and organizing data, conducting broad-scale analysis, and summarizing results of monitoring. New revision starts would be curtailed. Implementation of this option may require Congress’ assistance to relieve the agency of the 15-year revision requirement.

**Evaluation/Conclusion:** A critical evaluation of options 3 and 5 seems to center around the following questions: Is there less total risk in reverting to the 82 Rule while the Forest Service drafts a new planning Rule, rather than having the 2000 Rule appear in 36 CFR while the process is on-going? Second, does having the 2000 Rule as the “default” result in more risks

than we can now identify and encourage those who would oppose change to mount every type of legal challenge to maintain the status quo?

Option 5 is not without legal risks. An open-ended revision process could be challenged. We believe this is a low risk, but the risks increase as time increases to put a revised rule in place. Having allowed the 2000 Rule to become operative, failure to carry the new rulemaking to completion due to any unforeseen circumstances, including litigation delays, leaves the Forest Service with a product which we have described as impossible to implement. If Option 5 is selected, we must move aggressively (6 months-1 year max) to publish a final revised rule.

## APPENDICES

- A. References (documents reviewed and used in this report)
- B. Matrix Table for Papers Referenced
- C. Forest Plan Revision Efforts
- D. Documents Reviewed
- E. Analysis Team

## APPENDIX A

### References

- 36 CFR §219 (1982 planning Rule). 36 pgs.
- Banzhaf, William H. 2001. Letter from Society of American Foresters to Secretary of Agriculture Veneman requesting review of USDA Forest Service's National Forest System Land and Resource Management Planning Final Rule. February 8. 3 pgs.
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- Johnson, K. Norman. 2000. Comments on NFMA "proposed Rule". January 4. 2 pgs.
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  - Response to Mills memo. 2000. Statements agreed and not agreed to, and adopted and not adopted, from "Revisions of the 6-14-00 Draft Planning Rule needed to Correct Flawed Analysis Requirements - June 17, 2000". 7/12. 5 pgs.

Mills, Thomas J., Richard V. Smythe, and Hilda Diaz-Soltero. 2001. Draft of "Achieving Science-Based National Forest Management Decisions While Maintaining the Capability of the Research and Development Program." 1/1. 17 pgs.

National Forest Management Act of 1976. 12 pgs

Office of General Counsel. 1999. "Possible Additions and Deletions to the Existing (1982) Planning Regulations Based on Forest Plan Litigation" June 4. 11 pgs.

Perry, James P. 2000. Testimony of James Perry before the Subcommittee on Forest and Public Land Management, U.S. Senate. May 10. 14 pgs.

Poling, Jan. 2001. Memorandum (**Privileged & Confidential**) from Office of General Counsel for David Tenny, Subject: 2001 Planning Rule Analysis of Legal Issues. March 9. 5 pgs.

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- Hoekstra. 2001. E-mail message to Larry Larson, Subject: planning regs business process description for Larry et al's report w/attached document "NFMA Planning Regulations Business Requirements paragraph." 03/28. 2 pgs.

Regional Planning Directors. 2000. "Transition Period Issues by Region." 11/28. 3 pgs.

Salwasser, Hal. 2001. "Some Questions on Planning for Conservation of Biological Diversity and Species Viability." 3/26. 4 pgs.

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- (1) "Implementing the New 219 Planning Rule - Broad-Scale and Local Assessments. March. 27 pgs.
- (2) "Ecological Sustainability." 2/14. 35 pgs.
- (3) "Collaboration." 2/14. 31 pgs.
- (4) "Monitoring & Evaluation." 2/15. 34 pgs.
- (5) "Objections and Appeals." 3/8. 17 pgs.
- (6) "Science Integration." 2/14. 50 pgs.
- (7) "Social & Economic Sustainability." 2/15. 39 pgs.
- (8) "Unroaded Areas." 2/14. 27 pgs.

## APPENDIX B

### LOCATION MATRIX FOR PAPERS REFERENCED

TOPICS OF CONCERN	OGC	NFS	RESEARCH	RETIREES	PROFESSIONAL GROUPS	LAWSUITS
Sustainability	X	x	X	X	X	X
Viability	X	X	X	X	X	X
Contribution of Science		X	X			
Monitoring		X	X		X	X
Organizational Capability to Implement	X	X	X	X	X	
Transition	X	X			X	

## Sustainability

- [OGC] Document 20, 3/9/01 memo from Jan Poling, OGC -> David Tenny, USDA, pg. 3
- [NFS] Document 34, 6/7/2000 paper, Bob Davis, R4, pgs. 1, 6-7
- [NFS] Document 22, 11/28/00 Regional Planning Directors, pg. 5
- [Research] Document 31, 2/7/00 memo from Robert Lewis, R -> Chief, pgs. 1, 3-4, 6-7
- [Research] Document 17, 6/17/00 memo from Tom Mills, PNW -> Chief, pgs. 1, 4,
- [Retirees] Document 16, 2/5/01 ltr from NAFSE -> USDA, pg. 1
- [Retirees] Document 15, Testimony of James P. Perry, pgs. 4-9
- [Professional Groups] Document 9, 2/8/01 ltr from SAF -> USDA , pg. 1
- [Professional Groups] Document 32, 3/6/01 analysis paper by Ruffed Grouse Society, pg. 2-3
- [Lawsuits] Document 28, Citizens for Better Forestry v. USDA, ?;; {related to NFMA} Montana Coalition of Forest Counties v. USDA, p. 15?, Boise Cascade v. USDA, p. 30?

## Viability

- [OGC] Document 20, 3/9/01 memo from Jan Poling, OGC -> David Tenny, USDA, pg. 3-4
- [OGC] Document 26, 5/00 paper by Joe Stringer, pgs. 2-3
- [NFS] Document 34, 6/7/2000 paper, Bob Davis, R4, pg. 7
- [Research] Document 31, 2/7/00 memo from Robert Lewis, R -> Chief, pgs. 5, 12-16
- [Retirees] Document 16, 2/5/01 ltr from NAFSE -> USDA, pg. 2
- [Retirees] Document 15, Testimony of James P. Perry, pgs. 4, 5
- [Retirees] Document 33, 3/26/01 draft paper by Hal Salwasser, pgs. 1-4
- [Professional Groups] Document 32, 3/6/01 analysis paper Ruffed Grouse Society, pg. 4
- [Lawsuits] Document 28, Citizens for Better Forestry v. USDA, pgs. 22-23

## Contribution of Science

- [NFS] Document 34, 6/7/2000 paper, Bob Davis, R4, pgs. 2, 7-8
- [NFS] Document 22, 11/28/00 Regional Planning Directors, pg. 4
- [Research] Document 31, 2/7/00 memo from Robert Lewis, R -> Chief, pgs. 2, 16-19
- [Research] Document 17, 6/17/00 memo from Tom Mills, PNW -> Chief, pgs. 1, 5
- [Research] Document 18, 1/1/01 paper, Tom Mills, Richard Smythe, Hilda Diaz-Soltero, pgs. 5, 7-14

## Monitoring

- [NFS] Document 34, 6/7/2000 paper, Bob Davis, R4, pg. 5
- [NFS] Document 22, 11/28/00 Regional Planning Directors, pgs. 1-3
- [Research] Document 17, 6/17/00 memo from Tom Mills, PNW -> Chief, pgs. 1, 3-4
- [Research] Document 31, 2/17/00 memo from Robert Lewis, R -> Chief, pgs. 11-12
- [Retirees] Document 16, 2/5/01 ltr from NAFSE -> USDA, pg. 1

- [Professional Groups] Document 32, 3/6/01 analysis paper Ruffed Grouse Society, pg. 2-3

#### Organizational Capability to Implement

- [OGC] Document 20, 3/9/01 memo from Jan Poling, OGC -> David Tenny, USDA, pg. 4
- [NFS] Document 34, 6/7/2000 paper, Bob Davis, R4, pgs. 1-2
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- [Retirees] Document 16, 2/5/01 ltr from NAFSE -> USDA, pg. 2

#### Transition

- [OGC] Document 20, 3/9/01 memo from Jan Poling, OGC -> David Tenny, USDA, pg. 4-5
- [NFS] Document 22, 11/28/00 Regional Planning Directors, pgs. 1-4
- (Professional Groups) Document 38, Testimony of James P. Perry, pgs. 4-9

## APPENDIX C

### Forest Plan Revision Efforts

#### On-going Forest Plan Revisions Funded

##### Region 1

- Kootenai

##### Region 2

- Medicine Bow
- Pike-San Isabel
- GMUG
- San Juan
- Bighorn

##### Region 3

- Tonto
- Cibola

##### Region 4

- Uinta
- Wasatch-Cache
- Caribou
- Sawtooth
- Payette
- Boise

##### Region 8

- Mississippi
- Alabama
- Chattahoochie/Oconee
- Cherokee
- Daniel Boone
- Sumter
- Jefferson

##### Region 9

- Hoosier
- Shawanee
- White Mountain
- Chippewa
- Superior
- Chequamegon/Nicolet

##### Region 10

- Chugach

Midewin Tallgrass Prairie

#### Forest Plans Revision Funded for 01

##### Region 1

- Flathead
- Idaho Panhandle
- Beaverhead-Deerlodge

##### Region 3

- Coronado

##### Region 5

- Angeles
- Cleveland
- Los Padres
- San Bernardino

##### Region 9

- Green Mtn./Finger Lakes

## APPENDIX D

### DOCUMENTS REVIEWED FOR NFMA PLANNING RULE REVIEW

- 36 CFR §219 (1982 Planning Rule.) 36 pgs.
- Banzhaf, William H. 2001. Letter from Society of American Foresters to Secretary of Agriculture Veneman requesting review of USDA Forest Service's National Forest System Land and Resource Management Planning Final Rule. February 8. 3 pgs.
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  - Memo from Lyons and Dombeck to Raphael, Marty et al., Subject: Forest Planning Rule Review. 2 pgs
- FONSI for the National Forest System Land and Resource Management Planning Rule. 11/7/2000. 72 pgs.
- Gippert, Mike. 1999. "Some Considerations for Reviewing National Forest System Land Use Planning and Management." 2/23. 51 pgs.
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(2) "Ecological Sustainability." 2/14. 35 pgs.

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(6) "Science Integration." 2/14. 50 pgs.

(7) "Social & Economic Sustainability." 2/15. 39 pgs.

(8) "Unroaded Areas." 2/14. 27 pgs.

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## APPENDIX E

### REVIEW TEAM

#### **Larry Larson – Team Leader**

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