RE: Planning Rule- Comments on National Forest System Land Management Planning Notice of Proposed Rulemaking and Draft Programmatic EIS

Dear Planning Team:

A. INTRODUCTION

Please accept these comments to the National Forest System Land Management Planning Notice of proposed rulemaking (8480 Federal Register/ Vol. 76, No. 30/ February 14, 2011.) These comments are submitted on behalf of the BlueRibbon Coalition, Inc. and its participating individual and organizational members. Individual and/or organizational members of our organization may submit their own comments to this Notice and must be independently evaluated by the agency in compliance with any applicable procedures for such comments.

The BlueRibbon Coalition is an Idaho non-profit corporation with individual, business, and organizational members in all 50 states. As a national recreation group that champions responsible recreation and encourages individual environmental stewardship, BRC is focused on building enthusiast involvement with organizational efforts through membership, outreach, education, and collaboration among recreationists.

BlueRibbon coalition members use motorized and non-motorized means, including off-highway vehicles, snowmobiles, horses, mountain bikes, personal watercraft, hiking and other means to access state and federally-managed lands and waters throughout the United States, including those throughout the National Forest System. The BlueRibbon Coalition has a longstanding interest in the protection of the values and natural resources found on those lands and waters, which it advances (1) by regularly working with land managers to provide recreation opportunities, preserve resources, and promote cooperation between public land visitors; (2) by communicating with administrative officials, elected officials, policymakers, the media and the public, consistent with its non-profit status; and (3) by protecting and advancing its members’ interests in the courtroom on specific matters implicating public lands and waters access issues.
B. GENERAL CONCERNS WITH THE PROPOSED PLANNING RULE

1. The BlueRibbon Coalition is concerned that the proposed Planning Rule continues to stray far from the multiple-use mandates, including the mandate to provide a wide range of diverse recreation, which Congress laid out for the management of our National Forest System. Simply including references to recreation in the proposed Planning Rule is not sufficient to comply.

The Purpose and Need section clearly states “It [the rule] must be clear, efficient, and effective, while meeting NFMA, MUSYA, and other legal requirements” (emphasis added). However, with the promulgation of this proposed Rule, the Forest Service seems to be attempting to undergo a change from the multiple-use and sustained yield management principles, including managing for recreation, which are specifically set out in MUSYA and reaffirmed in NFMA. We would be remiss to not point out that this clear change is an issue that rests solely within the purview of Congress in legislation and not with the Forest Service in rulemaking. Irrespective of the lack of statutory authority, rather than focus on the process of developing, amending and revising forest plans, the proposed regulations seek to establish new policy, purpose and priorities for the National Forest System such as dealing with climate change, unattainable species viability requirements, providing “ecosystem services,” and managing for “ecosystem restoration.”

We again urge the Forest Service to steer this effort back to its necessary focus to (1) fill the current regulatory void; and (2) to redouble proper focus on the primary goals of efficiency and expediency in the forest planning process.

The new rule should focus less on inappropriately setting policy and more on developing, amending, and revising land management plans.

2. The draft Rule fails to meet the purpose and need. It fails to make the Forest Planning revision process less costly, burdensome and time consuming.

We find it sadly ironic that rather than borrow from the best ideas of prior efforts to develop a “clear, efficient, and effective” planning rule that “meets NFMA, MUSYA, and other legal requirements,” and a rule that “The rule should also be within the Agency’s capability to implement on NFS units,” the agency seems bent on repeating the failures of prior efforts and miring itself in ever deepening complexity, cost, and unattainable goals and criteria. In keeping with similar onerous themes found in the earlier Notice of Intent, the proposed Planning Rule will intensify, not resolve, the ongoing planning gridlock that has prevented effective management from getting to the ground and subsequently causing the degradation of the health of our nation’s Forest System.

It is imperative that the new planning regulations be efficient and yield timely results, yet, the proposed rule is just as complex, costly, lengthy, cumbersome, and procedurally burdensome as the rule it would replace. It also falls short of meeting the guidelines of President Obama’s Executive order 13563 of January 11, 2011, which calls for regulations to be cost effective, less burdensome, and more flexible. As written, this rule will find itself mired in the courts.
While claiming the cost of implementation of the preferred alternative to be a net savings, however slight, over the 1982 Rule, the Forest Service fails to demonstrate a realistic business model supportive of that assertion. Instead, we contend the Forest Service has taken liberty in its assumptions and evaluation of the associated costs and economic impacts.

There is, for example, the incorrect assumption that site-specific project costs will not be affected by the proposed Rule. There will be significantly increased costs in collaboration, in accounting for the increased requirements for species viability, and in justifying during appeals and objections that the “best available scientific information” was used in the planning and decision making process. Further, while costs are included for administrative project preparation, planning, appeals and objections, there is no accounting for the inevitable litigation to follow. Accounting for ongoing legal challenges regarding species viability alone would change the entire equation. This is to say nothing of the need to account for the level of increased costs for administrative effort to comply with and subsequent litigation challenging such concepts as “best available science,” managing to restore “candidate species” or “species of conservation concern,” and challenges to a given plan concerning whether the agency met the requirements to engage scientists or the enhanced obligations to affirmatively “encourage” public involvement and the participation of historically underrepresented youth, low-income, and minority populations, private landowners, and others.

Over all, the agency fails to demonstrate in the economic analysis how it arrived at the erroneous conclusion that the proposed rule will lead to planning efficiency and cost effectiveness over the 1982 Rule. This is especially relevant in light of the increased time and costs associated with and unaccounted for at both the plan and the project levels with regard to increased collaboration, procedural requirements of documenting “best available science”, increased monitoring requirements, increased frequency of reporting, species viability requirements, and other procedural requirements the draft imposes on the agency.

As most, if not all, of these increased costs for procedural requirements and litigation are predictable based on historical evidence, and we are compelled to encourage the agency to review and revise the economic analysis to account for these costs, and to rightfully disclose the economic impacts for public review and comment, including disclosure to and review of Congress, before proceeding to a final decision process.

3. We strongly encourage the agency to modify the final Rule to enhance the important priorities of creating and protecting jobs and providing a wide range of diverse recreational activities.

Nationally, recreation has a significant economic impact and the agency needs to emphasize the economic value of outdoor recreation on adjacent communities. Sales of recreation goods and services exceed $500 Billion annually and provide millions of jobs. Recreational access and use in the National Forests plays a vital element in this large, dynamic and growing portion of the US economy. While the data is often understated, even the Forest Service’s own information shows recreation as among the largest economic outputs of the forests.
Recreation on the National Forests is critical to the economic vitality of rural America, contributing substantially to the “sustainable use of public lands to support vibrant communities” as stated in the purpose and need section of the proposed rule. However, recreation, along with, the socio-economic and other multiple-use aspects in the proposed Rule, are heavily “trumped” by ecological concerns in the proposed rule, creating a gross imbalance in the direction of the Forest Planning process.

The final rule must stress the importance of providing a diverse range of recreation experience for the visiting American public.

4. The proposed rule inappropriately emphasizes preservation over multiple-use

The proposed rule defines a binding requirement for ecological sustainability, but only the requirement that Forest Plans “contribute” to social and economic sustainability. Equal consideration should be given to ecological, social and economic sustainability to “assure the forest is in full accord with the concepts for multiple use and sustain yield of products and services as set forth in the Multiple-Use Sustained-Yield Act.”

The explanation given for this inequity—that, due to factors outside their control, the management activities of the Forest Service only “contribute” to the social and economic aspects—is unacceptable. It is at least equally, and perhaps even more true that, due to factors outside its control such as fire, climate, insects, disease, and other factors, the Forest Service only “contributes” to ecological sustainability as well.

5. The “viable population” requirements should not be included in the final rule

The proposed rule reinstates the “viable population” standard that has proven unattainable in the current planning rule. Expanding the current viability standard beyond vertebrate species to encompass native plants and native invertebrates including “fungi, aquatic invertebrates, insects, plants and unspecified others” combined with the Agency’s aspiration to reach beyond its own borers to maintain a “viable” population only exacerbates the issue.

There is no requirement to “maintain viable populations of species of conservation concern” in any act of Congress from which the Forest Service only “contribute” to forest planning and management. There is no scientific standard or consensus on what constitutes a “viable” population for any “species of conservation concern.” There is no scientific consensus for how to achieve and maintain a “viable” population. The Forest Service admits it has “very minimal biological information” for the included native plants and invertebrate species. It is therefore an uninformed standard that is impossible to achieve, serves only as a litigation magnet preventing necessary habitat management planning from getting to the ground, and should be removed from the rule.

The Forest Service should focus on maintaining the diversity of habitat(s) rather than unnecessarily superimposing requirements on itself to identify, survey, and maintain “viable populations” that are not required by the NFMA and are more appropriately the purview of the Fish and Wildlife Service.
6. Requiring the use of “best available scientific information” and subsequent efforts to justify and prove what/whose “science” is “best” will delay planning and implementation progress

The repeated requirement in the proposed rule to rely on “best available science” in planning rather than depend on agency expertise and “relevant, peer-reviewed science” introduces an unknown into the planning process. The inevitable challenges to prove whose and/or what science is “best” will unnecessarily delay critical progress at the plan level and rob precious time and resources. The proposed rule also seems to give up much of the ground the agency gained in the 2008 Ninth Circuit en banc decision (Lands Council v. McNair) giving deference to the agency expertise.

7. New terms and concepts and the dilution of the definitions of existing terms found throughout the rule create fertile ground for increased litigation

The use of “buzz-terms and phrases” and the dilution of historic terms and phrases throughout the proposed rule circumvent the clear intent of MUSYA, NFMA, and other congressional mandates. For example: The broad definition of “ecosystem services” improperly elevates ecosystem services to the same level of importance as multiple uses as defined in the MUSYA. A second example: The language in the draft wrongfully gives equal status to “protection” of recommended wilderness areas as to “protection” of congressionally designated Wilderness.

Obscure terms and phrases in the proposed rule would also inevitably lead to litigation as advocacy groups seek clarification. For example, what does “sustainable recreation” mean, and who decides that and how?

8. “Public engagement” requirement distances the decision-making process from the local area and potentially further makes plans more vulnerable to litigation

Requiring that the agency “shall encourage” public input creates an obligation to affirmatively gather public comment—and begs the legal question as to how far from the plan area the threshold of “encouragement” extends. Unfortunately, even as the draft rule calls for greater “public input”, it weakens the existing requirement to “coordinate” forest planning with the plans of local representative governments.

9. Monitoring requirements are unrealistic and would eat up budgets for on-the-ground work, among other concerns.

A meaningful commitment to monitoring is an essential part of land management and related planning, however, the monitoring requirements in the draft are far too broad, complex, and time and resource consuming to be realistically achievable. For instance, effects of management on climate change or species are measured over decades, yet the regulation calls for biennial monitoring evaluation reports.
10. The Scientists’ Review of the Proposed Regulations is a violation of the Federal Advisory Committee Act (FACA)

The Forest Service convened a group of external scientists to review and provide advice to the Agency regarding the proposed planning rule, after the release of the proposed rule and DEIS, and neither the identity or findings of which were released for public review until less than two weeks prior to the close of the comment period.

In a response denying a formal request by several organizations, including the BlueRibbon Coalition, to extend the comment period in part to allow appropriate time to consider the findings of that committee, Chief Tidwell stated, “In order to ensure the integrity and independence of the review process, the identity of the reviewers and the content of their individual analysis were kept confidential, until the review was completed…. Neither requesting the review nor sharing the result of the review was legally required. The Forest Service will consider and use the information in the science review to prepare the final environmental impact statement and final rule…”

We stridently disagree with this reasoning and contend that the Forest Service has not followed the required FACA procedures regarding the appointment and work of the secret scientific committee in the review of the proposed planning regulations. While applicable statutes do provide/allow for the appointment of a committee of scientists "when considering revisions of the regulations," that committee is not exempted from the provisions of FACA. Further, NFMA requires that if the Secretary uses a committee of scientists, then “[t]he views of the committee shall be included in the public information supplied when the regulations are proposed for adoption.” 16 U.S.C. § 1604 (h)(1).

The committee was an advisory committee whose findings will be “considered and used” in the development of the revised regulation. In forming the committee the Forest Service failed to follow the requirements of FACA. The meetings were not open to the public, the documents to be “considered and used” were not made available in February 2011 “when the regulations were proposed for adoption,” but rather, were not available until early May 2011 and the information provided is defined as only a “summary” and not a full report, eg. the findings are still not available to the public. Nor is there any substantiating evidence the committee itself was balanced.

The Forest Service cannot bypass the legal and binding requirements of FACA and NFMA by simply defining the report of the science committee as comments for the DEIS. It is clear from summary provided this committee was formed for and primarily focused on the substance of the proposed planning rule and not the DEIS.

Potentially the Forest Service could at least attempt to remedy the violations of both NFMA and FACA by reissuing the proposed rule and DEIS, including the full committee report (not just a summary), demonstrate the balanced selection/appointment process, and reopen the public comment period with sufficient time for public review and comment on the findings.
C. SPECIFIC COMMENTS ON SECTIONS OF THE DRAFT RULE

1. Section 219.1 – Purpose and applicability

We agree that development of the rule must be governed by applicable laws as referenced in subsection (a). However, we object to the inappropriate addition and emphasis of the phrase “including ecosystem services” in the following subsection (b). The phrase “ecosystem services” is not consistent with the language of MUSYA and is not found in the aforementioned legislation in section (a) that governs the development of the rule. If anything, use of the phrase here can only be interpreted as deliberately designed to confuse or redefine the meaning of multiple uses in MUSYA.

Similarly, use of the phrase “in the context of the broader landscape” is inappropriate in the last sentence in (b). While the goal of coordinating “in the context of the broader landscape” may well be a worthwhile endeavor, it is notably a function of “coordination” with other governments and tribes and an unnecessary addition here that will create confusion. eg. How broad is broad?

In subsection (c) the Forest Service identifies the binding requirement for ecological sustainability and only requires a contribution to social and ecological sustainability. The Forest Service needs to give equal consideration to all three components—ecologic, social, and economic—which are rightfully described in the preamble as “…interdependent systems, which cannot be ranked in order of importance.” on each other for sustainability. See our comment 4. in the General Concern section above and additionally our comments under section 219.8 - Sustainability.

Additionally, while subsection (c) discussion includes three of the five multiple uses outlined in the MUSYA, it notably omits the other two, grazing and timber.

Finally, the FS must delete any mention of “spiritual sustenance” in this subsection as it calls forth the unanswerable questions of who decides this and what level is adequate.

2. Section 219.2 – Levels of planning and responsible officials

The concept found under subsection (b) that "A plan reflects the unit’s expected distinctive roles…” (found also in 219.6, 219.7, 219.8, 219.12 and elsewhere in the proposed rule) should be deleted completely from the rule. As with the general objection we have to the proposed plan as a whole seeking to usurp the mandates of managing for multiple-use, sustained-yield, this phrase also minimizes the importance and role of multiple-use management in planning. It wrongly opens the door to controversy and challenge in determining the unit’s “expected” role, and broadens the opportunity for the imposition of expectations from the regional or national desires in lieu of meeting local needs and contributions.

Additionally, regulatory language found in the 1982 rule required the Forest Service to coordinate with the State in eliminating “duplication” of activities on Forest land if that activity was permitted on adjacent, non-Forest land. This led to a decision in the Sixth Circuit court
which mandates the Forest Service to consider closing portions of the Huron-Manistee National Forest to hunting and snowmobiling because the recreational activities can be practiced on nearby state lands. By referring to the “distinctive roles and contributions of the unit within the broader landscape” and for which “the unit is best suited,” the proposed rule continues this direction with regard to providing recreational opportunities and other multiple use benefits. This poses a significant ongoing threat to historic uses of the Forest System and further justifies the removal of this language in the planning rule. The preamble should also be modified to reflect that the rule is designed to remove those concepts relied upon in the Meister decision.

There is no requirement to identify a forest’s “expected distinctive role” in either the NFMA or the MUSYA. Conversely, in light of the diversity of the nation’s forests and the multiple-use objectives that are defined, a forest plan should contain a different mix of multiple-use objectives and outputs rather than provide the opportunity to define favor to some uses over others. The concept is flawed in that it becomes little more than a subversive tool that will inevitably be used to create controversy and litigation slowing otherwise critical progress in getting a plan to the ground and working.

Finally, we appreciate and agree with defining the forest supervisor as the responsible official for forest plans in subsection (b)(3). However, the section is ambiguous in defining under what circumstances the “Regional Forester, Chief, Under-Secretary, or the Secretary” would act as the responsible official. This needs to be clarified in the rule.

3. Section 219.3 – Role of Science in Planning

We repeat here our concern previously listed in the General Concern section of our comments that:

Requiring the use of “best available scientific information” and subsequent efforts to justify and prove what/whose “science” is “best” will delay planning and implementation progress

The repeated requirement in the proposed rule to rely on “best available science” in planning rather than depend on agency expertise and “relevant, peer-reviewed science” introduces an unknown into the planning process. The inevitable challenges to prove whose and/or what science is “best” and whether or not it was properly considered will unnecessarily delay critical progress at the plan level and rob precious time and resources. The proposed rule also seems to give up much of the ground the agency gained in the 2008 Ninth Circuit en banc decision (Lands Council v. McNair) giving deference to the agency expertise.

We add that neither NFMA nor NEPA requires the use of the phrases "best available science" or "best available scientific information.” We cannot even begin to imagine the amount of effort and resource will be wasted in resolving disputes and legal claims in attempting to fulfill this self-imposed burden of documenting and proving whose science and why it was most informed and how it was properly applied in the development of the forest plan. It is fertile ground for litigation prone special interests seeking to impose their “brand” of advocacy science on Forest Planning.
As a perfect example of the challenges this imposes, just a cursory look at the conclusions of the Science Panel report demonstrate the disparity of opinion between what science is “best” from the supposed expert scientists who reviewed the planning rule documents vs. science in the draft. The same disparity was clearly demonstrated during the Science Forum and each of the subsequent National Round Tables during question and answer periods and breakout sessions.

4. Section 219.4 - Requirements for Public Participation

We repeat here our comments under General Concerns that:

The “Public engagement” requirement distances the decision-making process from the local area and potentially further makes plans more vulnerable to litigation.

Requiring that the agency “shall encourage” public input creates an obligation to affirmatively gather public comment—and begs the legal question as to how far from the plan area the threshold of “encouragement” extends. Unfortunately, even as the draft rule calls for greater “public input”, it weakens the existing requirement to “coordinate” forest planning with the plans of local representative governments.

The local communities who are most impacted by a forest plan and subsequent management should be given the greatest weight in the development of that management plan. Meaningful participation and coordination in the development of land and resource management plans in the “coordination” process is mandated under NFMA, wherein duly elected officials of local, state and tribal governments are to be afforded coordination status with the agency that is equal to the agency and over individual special interests. Wherever coordination has been properly followed, it has successfully resolved conflicts before final decisions are made and avoided costly appeals and litigation. It is vital that coordination is correctly provided for in the proposed rule in accordance with NFMA.

Defining that the responsible official “shall encourage” participation by youth, low-income populations, minority populations, private landowners, and Indian Tribes, exposes the entire process to the potential of legal challenges over what is enough to satisfy this requirement, who is the responsible party within the Forest Service to accomplish the task, and to whom is the outreach to be directed. The argument can also be easily made that this “extra” effort is discriminatory and favors one or more groups over another as it does not call for this “extra” effort from other segments of the American Public. Outreach to all segments of the public need to be fair and balanced.

Finally, the land use plans of local and state governments, as well as Indian Tribes should continue to hold special status in the forest planning process. Under the 1982 rule, “public planning efforts” and “public participation” occupied separate and clearly distinct roles. The proposed rule combines the two into one section, and thereby weakens the legal requirements to consider the plans of state and local government and Indian tribes in the process and to “attempt to achieve consistency between the proposed forest plan and similar local land management plans.” In addition, and in accord with our comments in the previous paragraph, while this section defines that the Forest Service “shall encourage” public participation, affirmatively
gathering input from all segments of the public, state and local government are notably not included.

Under subsection (b)(1) in the discussion of coordination with government and tribal entities, the phrase is added at the end that says, “to the extent practicable and appropriate.” This effectively reduces the legal obligation of coordination with those government and tribal entities to a discretionary decision of the forest supervisor or deciding official. The Forest Service needs to remove the phrase “to the extent practicable and appropriate” from 219.4(b)(1) and replace it with “attempt to achieve consistency between the proposed forest and local plans.” Further, the following requirement should be added to the rule: “Where the forest plan may not be made consistent with local plans, the responsible official should document how and why its plan is not consistent with local plans, as determined by local officials, and explain why its plan cannot be made consistent with local plans.”

Lastly, the language in 219.4(b)(3) states “Nothing in this section should be read to indicate that the responsible official will seek to direct or control management of lands outside of the planning area, nor will the responsible official conform management to non-Forest Service objectives or policies.” This language is potentially a contradiction of the earlier stated objective to coordinate with local governments under (b)(2). It may also create conflicts with other, established plans such as Community Wildfire Protection Plans which include planning on both Federal and non-Federal lands.

5. Section 219.5 – Planning Framework

This section imposes a requirement for "biennial monitoring evaluation reports" that we believe is unrealistic. When management prescriptions and climate conditions are measured in decades or even centuries and greater, this is an unnecessary time and resource drain that would better be applied to management efforts.

6. Section 219.6 - Assessments

We contend that the case law history is clear in consistently demonstrating assessments and analysis that are prepared apart from NEPA cannot be tiered to a NEPA document. Klamath-Siskiyou Wildlands Center v. Bureau of Land Management 387 F.3d 989, 998 (9th Cir. 2004); Citing Kern v. BLM, 284 F.3d 1062, 1073 (9th Cir. 2002); Muckleshoot Indian Tribe v. Forest Service, 177 F.3d 800, 811 (9th Cir. 1999); League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Service, 549 F.3d 1211, 1213 (9th Cir. 2008)

Similar to our comments on 219.4, the assessment process defined in this section imposes the obligation on the Forest Service “notify and encourage” . . . “appropriate”. . . “scientists to participate in the assessment process.” This is creates a legal nightmare for the Forest Service to be able to demonstrate that it has 1) done enough to “notify and encourage”; 2) the “appropriate scientists” (which is a subjective determination); to 3) be able to withstand challenge; and 4) comply with FACA if it includes independent non-federal scientists. Anything that a challenging entity can establish that falls short of the ambiguous and subjective criteria will put the associated plan or revision at risk (eg. What is sufficient for notification? Lising in a paper(s),
what paper(s), phone call, email, internet announcement? What is the threshold for encouragement? Which scientists? Etc.)

Additionally, in a given planning effort, any papers prepared by any given member of the planning staff that is part of the official record will become a target establish them as assessments. If the paper was not subject to the public comment or the regulation to “encourage” scientific participation, it will be a violation of the rule.

The Forest Service needs to remove the assessments section from the rule.

The Forest Service needs to also eliminate the reference to the “units distinctive roles and contributions per our comments on 219.2 above.

7. Section 219.7 – New Plan Development or Plan Revision

Future planning efforts should address reduction of Fire Regime Condition Class (FRCC) in considering of desired condition. 219.7(d)(1)(i). National forest lands should be actively managed to reduce the threat of wildfire and the release of greenhouse gases. Reduction of FRCC 3 to FRCC 2 and FRCC 1 will insure a sustainable economic and environmental legacy for future generations.

The last sentence Section 219.7(d)(1)(ii) stating that "Objectives shall be based on reasonably foreseeable budgets” should be deleted. It will overly restrict planning analysis and does not belong in the planning rule.

As indicated in our comments on section 219.2, the Forest Service needs to eliminate the reference(s) to "the unit's distinctive roles and contributions.:

Section 219.7(e)(iv) is an impossible requirement that directs that every plan must contain “the planned timber sale program" and should be deleted from the rule. As written, this would require a detailed list of timber sales for the next 10-15 years, and then, in the process of adapting to changing conditions, it will require amendments to the forest plan in order to change the list.

8. Section 219.8 - Sustainability

As stated in our General Concerns, the proposed rule inappropriately emphasizes preservation over multiple-use by defining a binding requirement for ecological sustainability, but only the requirement that Forest Plans “contribute” to social and economic sustainability.

Ironically, in the preamble the Forest Service makes three statements:
1) “The proposed rule considered the ecological, social, and economic systems as interdependent systems, which cannot be ranked in order of importance.” (pg. 8491)
2) “…the Agency has more influence of 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.” (pg. 8491)
3) “The proposed requirements of this section are limited to what can be accomplished within the Agency’s authority and the capability of the unit. This limitation arises from the fact the some influences on sustainability are outside the Agency’s control, for example, climate change, extreme disturbance events, and urbanization on lands outside of or adjacent to NFS lands.” (pg. 8490)

So, it follows that the explanation given for this inequity—that, due to factors outside their control, the management activities of the Forest Service only “contribute” to the social and economic aspects—is neither true nor unacceptable. It is at least equally, and perhaps even more true that, due to factors outside its control such as fire, climate, extreme disturbance events, urbanization on lands outside of or adjacent to NFS lands, insects, disease, the near constant threat of litigation, and other factors, the Forest Service only “contributes” to ecological sustainability as well.

We agree with the assertion the Forest Service makes in the first statement from the preamble above in that all three—ecological, social and economic—are interdependent systems and cannot be ranked in order of importance. For example, how the road and trail system is designed and managed is not only relative to ecological sustainability as stated by the Forest Service in the preamble statement 2 above, but also relative to both social and economic sustainability as it relates to recreational access for the visiting American Public and/or getting to and transporting goods and services… They are, interdependent systems and the Forest Service has equal influence over all aspects of all three.

Nowhere does nor can the agency assert that factors cannot be ranked in order of importance unless the agency has differing abilities to influence the factors. We urge the agency to modify the sustainability section to rightfully give equal consideration to maintain or restore all three elements of sustainability (being ecological, social and economic) in order to “assure the forest is in full accord with the concepts for multiple use and sustain yield of products and services as set forth in the Multiple-Use Sustained-Yield Act.”

The phrase requiring that forest plans must provide for sustainability “consistent with the inherent capability of the plan area" must be removed from the rule. “Inherent capability of the land” is directly related to the intensity of management applied or lack of management applied. This is a fundamental truth that is well demonstrated through the challenges of unmanaged recreation that brought about the need for and development of the Travel Management Rule. Left unmanaged, of course recreation is not sustainable—ecologically, socially, or economically. Likewise, left unmanaged and un-thinned, of course there are going to be unhealthy stands of trees with devastating potential for fire and insect pestilence. And, in either situation, the management applied has a direct affect on the capability of the land to sustain trails or produce timber or cover for wildlife. Depending on the type of management applied, the land may be more or less capable of sustaining one type of trail more than another or one resource more than another.

The executive summary of the science review of the proposed planning rule was also critical of the use of the terminology of "inherent capability” explaining, “Several reviewers discussed biological topics of concern, notably how to evaluate inherent capacity of the land, particularly in
complex, changing systems. This is particularly difficult when considering cumulative effects.”
Dr. Keeton stated: “Inherent capability of the land - The chapter is rife with overly broad
statements like: ‘Ecosystems are defined by interactions of biological and physical systems.’
This reads like a brief summary of the entire field of ecology rather than a distillation of science
specifically relevant to federal forest and grassland management.”

The phrase “inherent capability of the land” should be removed, and if the intent was to identify
that some land just cannot be capable of providing some service, producing a specific resource,
or supporting for some species, then the Forest Service should be explicit to that end rather than
through vague terminology that opens the door for challenge as to its meaning.

As indicated in our comments on section 219.2, the Forest Service needs to eliminate the
reference(s) to "the unit's distinctive roles and contributions.

9. Section 219.9 - Diversity of Plant and Animal Communities

Again, referring to our comments under General Concerns, the “viable population” requirements
should not be included in the final rule. The proposed rule reinstates the “viable population”
standard that has proven unattainable in the current planning rule. Expanding the current
viability standard beyond vertebrate species to encompass native plants and native invertebrates
including “fungi, aquatic invertebrates, insects, plants and unspecified others” combined with the
Agency’s aspiration to reach beyond its own borers to maintain a “viable” population only
exacerbates the issue.

There is no requirement to “maintain viable populations of species of conservation concern” in
any act of Congress from which the Forest Service garners its authority for forest planning and
management. There is no scientific standard or consensus on what constitutes a “viable”
population for any “species of conservation concern.” There is no requirement to provide special
management for “candidate species.” There is no scientific consensus for how to achieve and
maintain a “viable” population. The Forest Service admits it has “very minimal biological
information” for the included native plants and invertebrate species. It is therefore an
uninformed standard that is impossible to achieve, serves only as a litigation magnet preventing
necessary habitat management planning from getting to the ground, and should be removed from
the rule.

NFMA requires that the Forest Service “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 the land management plan.” 16 U.S.C.
1604 (a)(3)(b). In light of that, the Forest Service should focus on maintaining the diversity of
habitat(s) rather than unnecessarily superimposing requirements on itself to identify, survey, and
maintain “viable populations” that are not required by the NFMA and are more appropriately the
purview of the Fish and Wildlife Service. The Forest Service should take this opportunity to
build on legal victories, to rightfully and legally focus on habitat based management, reduce its
cost, and remove this impossible to achieve standard, instead of providing more legal fodder to
further exasperate an already exasperating situation.
Note also, as with our comments in the previous section the phrase “inherent capability of the land” should be removed.

10. Section 219.10 - Multiple Uses

The rule requires that any area recommended for wilderness must be "protected” in the same subsection, indeed in the same sentence with congressionally designated Wilderness areas. This inappropriately gives equal status to “protection” of recommended wilderness as to “protection” of congressionally designated Wilderness. In effect, this is an attempt on the part of the Agency to create and maintain “de facto” wilderness which only Congress has the authority to create. The rule should make a clear delineation between the two in separate subsections with separate definitions of the extent of what “protection” means, which is different as it relates to the RWA when compared to congressionally designated Wilderness.

The 2001 Roadless Rule already "protects" millions of acres of unroaded lands. The planning rule does nothing to provide that the millions of acres swept away from forest planning in the 2001 Roadless Rule are subject to management review and forest planning when plans are revised. Thus the planning rule violates NFMA because the act requires that its planning provisions apply to all lands, not just those that were not locked up in the 2001 Roadless Rule.

11. Section 219.11 - Timber Requirements Based on NFMA

The rule fails to explicitly acknowledge the importance of the “salvage or sanitation harvesting of timber which is substantially damaged by fire, wind-throw or other catastrophe, or which are in imminent danger from insect or disease attack” which is emphasized in the plain text of the NFMA statute numerous times. 16 U.S.C. 1604(g)(F)(iv), (k), (m), and 1611.

The rule is drafted so as to illegally abandon or dilute the consistent clear statutory direction that any standards for suitable lands, size of openings, culmination of mean annual increment, or annual limits on timber removal “shall not preclude the Secretary from salvage or sanitation harvesting of timber which are substantially damaged by fire windthrow or other catastrophe, or which are in imminent danger from insect or disease attack” 16 U.S.C. 1604(m)(emphasis added). The regulation should be rewritten to consistently and explicitly set forth the insect, disease, and wildfire exception contained in the NFMA statute.

219.11(c) – we recommend rewording this paragraph to – “Harvest for salvage, sanitation, or public health or safety. Plans shall include direction for timber harvest for salvage, sanitation, or public health or safety objectives.”

219.11(d)(4) – In requiring direction for limits on the quantity of timber that can be removed “annually”, the proposed rule imposes restrictions on timber harvest that go beyond the requirements of the NFMA. The NFMA limits the quantity of timber that can be removed over a decade, with no annual limitations. It could, for instance, preclude a Forest from re-offering no bid sales in a subsequent fiscal year.
12. Section 219.12 - Monitoring

In our comments to the NOI we pointed out that the agency’s own Climate change Consideration in Project Level NEPA Analysis (January 13, 2009) states that the effects of climate change are unknown, will vary regionally and will range the gamut from increased drought to increased flooding. That document states: “It is not currently feasible to quantify the indirect effects of individual or multiple projects on global climate change and therefore determining significant effects of those projects or project alternative on global climate change cannot be made at any scale.” It also states: “Complete quantifiable information about project effects on global climate change is not currently possible and is not essential to a reasoned choice among alternatives.” That only thing that is certain is the climate will change from its current and/or its historical condition.

In our comments to the NOI, we went on to agree and that Climate Change should not be included as a “Substantive Principle” in the rule. We further added that while climate science is too “young” to be effectively incorporated into the planning regulations at this time, that in the instance that the Agency chose to ignore the recommendation to not incorporate climate change as a “Substantive Principle”, that we recommended an alternative that directs an aggressive approach to carbon sequestration.

In this section (and elsewhere in the proposed Rule at 219.5, 219.8, 218.10, 219.11, 219.18) we see the Forest Service has indeed chosen to ignore our initial recommendations as well as the follow-up recommendation regarding aggressive approach to carbon sequestration.

The definition of “ecosystem services” at 218.18 includes “long term storage of carbon” and “climate regulation and, at 219.10, 219.11, the plan “must provide for multiple uses including ecosystem services.” In spite of its own documentation noted above, here in 219.12 the regulation identifies a monitoring program that addresses “… measurable changes on the unit related to climate change and other stressors on the unit and the carbon stored in above ground vegetation…”

Carbon storage and climate change are overemphasized in the proposed rule and the regulations are written in such a way as to favor retention of existing carbon stocks rather than to promote an aggressive approach to carbon sequestration through forest management (eg. planting new trees, improving forest health through thinning and prescribed burning, harvesting and regenerating forests, etc.) Favoring retention of existing carbon stocks (eg. leaving mature forests untouched for long term storage of carbon), combined with inevitable challenges over the validity of carbon accounting assumptions is an open invitation to litigation advocating that a given forest plan violates the regulation because it does not maintain all mature forest for long term carbon storage and climate regulation. We cannot imagine the staggering costs associated with the defense of this litigation. The consideration for carbon storage and climate change in the rule needs to be revisited and revised.

Also, the use of the term/phrase “best available science” needs to be removed per our previous comments on the issue. This is especially true as it relates to carbon storage and climate change, the science around which is young, controversial, and uncertain.
In addition, the monitoring requirements defined herein are unrealistic and would eat up budgets for on-the-ground work, among other concerns. A meaningful commitment to monitoring is an essential part of land management and related planning, however, the monitoring requirements in the draft are far too broad, complex, and time and resource consuming to be realistically achievable. For instance, effects of management on climate change or species are measured over decades and even centuries, yet the regulation calls for biennial monitoring evaluation reports.

Even as the rule purports that the responsible official will have the discretion to “set the scope and scale of the unit monitoring program”, the rule places limits on that discretion “subject to the requirements of…” the status of select watershed conditions; the status of select ecological conditions; the status of focal species; the status of visitor use and progress toward meeting recreational objectives; measurable changes on the unit related to climate change and other stressors on the unit; the carbon stored in above ground vegetation; the progress toward fulfilling the unit’s distinctive roles and contributions to ecologic, social, and economic conditions of the local area, region, and Nation; and the effects of management systems to determine that they do not substantially and permanently impair the productivity of the land.

We recommend amending the rule to actually give discretion to the responsible official in the rule, and we recommend deleting the specific requirements to monitor status of focal species, changes “related to climate change and other stressors”, carbon stored in vegetation, and the incomprehensible “progress toward fulfilling the unit’s distinctive roles and contributions to ecological, social, and economic conditions of the local area, region, and Nation” (please see previous comments.)

We recommend adding the legitimate requirements to monitor accomplishment of forest plan objectives, plus monitoring progress toward achieving forest plan “desired conditions” which are perhaps the main reasons for having a monitoring requirement in the first place… eg. Are you accomplishing what you set out to do with the plan?

We are further very concerned about the Forest Service’s capability to develop “a broader scale monitoring strategy for unit monitoring questions that can best be answered at a geographic scale broader than one unit” (219.12(b)(1)), notwithstanding 219.12(b)(3). We recommend changing “shall” to “may” in 219.12(b)(1).

13. Section 219.13 - Plan Amendment and Administrative Changes

This section, in addition to the reference in 219.15, should also include that plan amendments are also permissible through project level analysis.

We agree with the principles that monitoring methodology and protocol can be changed without a plan amendment.
14. Section 219.14 – Decision documents and planning records

Should remove the reference to the inclusion of a discussion of how the “best available scientific information” was taken into account and applied per our previous comments/discussion on the issue.

15. Section 219.15 - Project and Activity Consistency with the Plan

The proposed rule in this section wrongly removes the distinction between guidelines and standards. Courts have taken numerous opportunities to reject arguments that the Forest Service was under a legal obligation to follow a plan guideline and the Agency should not take this opportunity to throw away the precedence that guidelines are discretionary where standards are mandatory.

We recommend that the provision in 219.15(a) which presumes that all projects are inconsistent with the plan unless the plan expressly singles out the project and says it is consistent, should be reversed to identify that all projects are consistent with the plan unless the plan states a project is inconsistent. This would a more cost effective approach that allows for fewer disruptions of existing projects, contracts and contract claims which are valid existing rights under which NFMA states that plan approval is subject to.

The recreation community we represent has significant concerns regarding 219.15(e) regarding resolving consistency of resource plans with the forest plan components, specifically travel management plans. The way it is written, there is only one way identified in this subsection to resolve any inconsistencies that resource plans may have with the forest plan, that being to amend the resource plan. Yet, in section 219.5(c) there fully four different options presented to resolve inconsistencies with project or activity plans. Travel Management Plans have been developed at great expense in time and resource to both the Agency and private citizens across the system in accord with the Travel Management Rule of 2005. In many instances, there has been a great deal of time and resource expended in litigation to establish the validity of several of those travel management plans. The singular focused resolution to any inconsistencies between a new forest plan/revision vs. other resource plans as defined in 219.15(e) is little more than an open invitation to undermine the otherwise valid planning and implementation of those travel management resource plans, their overarching goals and objectives, and the very purpose and need for which they were established both nationally and locally to the unit.

At the very least, the proposed rule should clarify the additional options in 219.15(c) for resolving inconsistencies also apply to 219.15(e) as well.

16. Section 219.16 – Public notifications

Please refer to our comments on section 219.4 – Public Participation insofar as it relates to this section.
17. Section 219.17 - Effective Dates and Transition

There is nothing in the proposed regulation identifying that the Forest Service may continue to operate under existing plans until the new plans are completed and survive any legal challenges. The NFMA statute explicitly provides that “[u]ntil such time as a unit of the National Forest System is managed under plans developed in accordance with this Act, the management of such unit may continue under existing land and resource management plans.” 16 U.S.C. 1604(c). To avoid disruption of existing contracts, account for the inevitable legal challenges, and to be consistent with NFMA, the regulation should provide that the Forest Service make it to operate under existing plans until all challenges to the new plans are resolved.

18. Section 219.18 – Severability

No comments

19. Section 219.19 – Definitions

The definition of “ecosystem services” is too broad and improperly elevates “ecosystem services” to the same level of importance as multiple uses under MUSYA. The proposed rule pointedly includes the term/phrase “… multiple uses, including ecosystem services” in several locations and to the extent that at any time “ecosystem services” is elevated to the point of overriding the management for the multiple uses in the MUSYA, the Agency has defined policy overriding the purview of Congress.

Additionally, with the broad definition of “ecosystem services” if a developed plan doesn’t provide for one of the listed services it will ultimately be in violation of the rule and subject to unwanted and unnecessary legal challenge. For example, the inclusion of “spiritual… sustenance” under ecosystem services is one such example. Who decides the subjective definition of achieving “spiritual sustenance?” This is nothing short of a holy war over the management of our national forests and opens the door to other constitutional questions in the courts.

The concept of "inherent capability of the land" needs to be better defined in the definition of "Health." As explained in our comments to section 219.18, the concept of “inherent capability of the land” varies depending on the intensity of management and is a vague term. The term should be eliminated from the rule or better defined.

The definition of “Sustainable Recreation” is insufficient, puzzling and, to those of us in the recreation industry, nothing we have ever heard before. The term raises a serious concern of risk of measuring environmental, economic, and social consequences of recreational activities in all manner of ways subjective to one’s particular brand of advocacy, special interest, or excuse.

20. Subpart B – Pre-Decisional Administrative Review Process

We generally agree with the concept of the pre-decisional objection process particularly, because it allows the agency to take issues into account and make appropriate changes or adjustments
prior to the decision. We do, however, have concerns under subsection 219.57 with the time and opportunity for the other involved citizens to participate in meetings (especially in light of distances and the “national” scope that often is represented in forest planning) and actively address those issues brought up in the objection process in relation to how the resolution of those issues would then affect the balance of the plan and their interests and to what extent they will be able to be involved.

**D. COMMENTS ON THE EIS**

BRC is concerned that the DEIS is no more robust in its detail and content than the preceding 2008 EIS. As the Forest Service is well aware, that version of the planning rule was found deficient under NEPA in Citizens for Better Forestry v. U.S. Dept. of Agriculture, 632 F. Supp. 2d 968 (N.D. Cal. 2009). It is likely that if the criteria from that case were applied to this planning rule, it is highly probable this proposed rule and DEIS would be found equally deficient under NEPA if not more so. Implementing this proposed rule will have considerably more effect on the human environment than would have been realized from implementing the 2008 rule which was substantially shorter and less complex, and far reaching than this proposed rule. We are in earnest to continue working with the Forest Service in getting a planning rule in place that serves the needs of Americans, however, do no believe 1) this proposed rule accomplishes that; and 2) this proposed rule and accompanying DEIS would pass legal muster.

While the DEIS recognizes that a less cumbersome and expensive planning rule is needed, even with the insufficiently justified and favorable assumptions used in this analysis, the Forest Service confirms that the Proposed Rule will be only slightly less costly than the 1982 Planning Rule. And, as discussed in our previous comments under General Concerns that by adding back in historic and predictable costs not included in the analysis, we believe the proposed rule will prove more costly.

It is discouraging to us to recognize that in spite of foreseeable budget challenges this country faces, the urgency of developing a rule that is cost effective and meets the mandates of MUSYA and NFMA, and in spite the Forest Service’s confirmation in the DEIS and accompanying analysis for the Proposed Rule confirm that there are readily available alternatives that are far less costly and burdensome, and which still meet NFMA requirements and the agency's stated purpose and need, the Agency has none-the-less proffered a preferred alternative that will create even worse gridlock in management of the National Forests.

As one example, the cost to implement Alternative C in the draft EIS would cost nearly $24 million (24%) less per year than the Proposed Rule (Alternative A) to implement and still meet the purpose and need as well as the mandates of MUSYA and NFMA. Alternative C would be more flexible and less prescriptive and should increase efficiency. As stated in the DEIS, "The consequence of planning cost has an inversely proportional effect on the number of plans that could be revised or amended at one time and possibly the length of time to complete revision. For example, a 25 percent increase in cost might mean 25 percent fewer plans would be revised over a given time period." Thus, when compared to Alternative C, the Proposed Rule would likely result in more backlog and less “on-the-ground” results than Alternative C.
Building on past efforts, the Forest Service should have also analyzed the 2008 Planning Rule or a reasonable adaptation of that rule as another alternative that would appear to meet most or all of the stated purpose and need for an updated Rule. Containing most of the same basic concepts as the Proposed Rule, it was only half the length of the proposed rule and enjoined only for procedural shortcomings, not on the criteria of NFMA or MUSYA.

Either of the above discussed, Alternative C and the 2008 Rule, or even a version of the proposed Rule can be further modified to include the changes that we have recommended and still meet the necessary elements of the stated purpose and need in the DEIS, and provide substantial further net savings and benefits compared to the proposed Rule or any of the other alternatives displayed in the DEIS. This modified alternative should be the preferred and selected alternative for the final EIS.

Sincerely,

Greg Mumm
Executive Director
BlueRibbon Coalition