November 14, 2016

Via Public participation portal:
https://cara.ecosystem-management.org/Public/CommentInput?project=NP-1403

Thomas Tidwell
Chief, USDA Forest Service
Planning Rule Comments
2222 W. 2300 S.
Salt Lake City, UT 84119

Re: Natural Resource Users' comments
USDA Forest Service Planning Rule
36 CFR Part 29 RIN 0596-AD28 / 81 FR 70373 October 12, 2016

Dear Chief Tidwell:

This letter provides comments on the notice of proposed rulemaking in the October 12, 2016 Federal Register (36 CFR Part 219 RIN 0596-AD28) to change the procedures for amending forest plans developed under a prior planning rule that predated the current 2012 planning rule. These comments are submitted on behalf those associations and groups of natural resource users whose names appear on the last page of these comments. Collectively our groups are active participants in the forest planning process and have been involved in the development of the forest plans prepared under the 1982 planning rule ("the existing plans").[1] We have participated in the rulemaking process for the 2012 planning rule, and have submitted comments and engaged in the public participation activities for preparing forest plans under the 2012 planning rule. More importantly, we have participated in the process to implement forest plans through energy production, timber, range, recreation, watershed, and fish and wildlife habitat improvement projects. Participation in forest plan implementation has made us keenly aware of the need for flexibility to amend older forest plans to achieve on-the-ground results to maintain the health of forests and rangelands and benefit natural resources. Plan amendments are also the means for adaptive management as lessons are learned from forest plan implementation. In addition to project-specific forest plan amendments, there is also a need for forest-wide plan amendments over time as conditions change and new information arises.

[1] The reference to 1982 planning rule does not mean that all the existing plans were adopted in 1982. In fact, the forest plans for the Idaho Panhandle and Kootenai National Forests were adopted in 2015 using the 1982 planning rule and will remain in place at least until 2025 to 2030 before being revised under the 2012 planning rule. Additionally, the Colville National Forest and Blue Mountains National Forests are in the revision process under the 1982 rule.

We agree with the Forest Service's conclusion that the 2012 planning rule inadvertently constrains amendments to the existing plans and with the agency's intent to affirm the flexibility for amending the existing plans. Unfortunately, we believe the proposed rule could halt needed amendments to the existing plans because it is written in a way that could force an amendment of an existing plan to prematurely adopt the full revision requirements of the 2012 rule, a task that national forests have neither the staff nor the funding to accomplish. Thus, the Forest Service will be deterred from making needed forest plan amendments particularly at the site-specific project level. This is of great concern because many existing plans will not be revised under a new planning rule for a decade or more given the slow pace of plan revisions under the 2012 planning rule. Our major concerns are that (1) the proposed rule requires an amendment of an existing plan to adopt all of the substantive requirements of the 2012 rule, (2) the proposed rule imposes for plan amendments, the onerous Species of Conservation Concern (SCC) requirements for fish and wildlife viability to all species on the "regional forester sensitive species list," and (3) the proposed rule does nothing to correct the provision in the 2012 rule that forces a plan revision if the plan amendment happens to be made in conjunction with a project-level EIS. The proposed rule simply creates more litigation opportunities for plaintiffs to second-guess the requirements for an amendment of an existing plan.

A. Plan Amendments Were Supposed to Be Flexible Allowing for Adaptive Management.

According to the Forest Service, the 2012 planning rule was intended to provide for more timely and less cumbersome plan amendments. The Federal Register notice adopting the 2012 rule emphasized that the 2012 planning rule was designed to make amendments easier and quicker. In particular, as to site-specific amendments, the notice explained:

> "[T]he point of a project-specific amendment is to allow a project that would otherwise not be consistent with the plan to be authorized and carried out in a manner appropriate to the particular time and place of the project, without changing how the plan applies in other respects. Project specific amendments give a way to deal with exceptions. An exception is similar to a variance in the county zoning ordinance. [But] if the amendment change[s] plan components that would apply to future projects, the exception would not be applicable."

77 Fed. Reg. 21239 (April 9, 2012). The Forest Service further emphasized that it is "the Department's intent that the amendment process be efficient and used more frequently." 77 Fed. Reg. 21244. The 2012 rule states that "Existing plans will remain in effect until revised" so plan amendments are expected to be routine since a revision will not occur until years in the future. 36 C.F.R. § 219.17(c).

B. The Proposed Rule Complicates Plan Amendments and Undermines Adaptive Management.

The Forest Service's attempt to correct the shortcomings of the 2012 planning rule does not adequately address the problems. The proposed rule is ambiguous and not clearly drafted and will force individual forests to adopt provisions of the 2012 planning rule prematurely for existing plans before their revision under the 2012 planning rule--the very problem the proposed

rule is intended to remedy. All the forests do not have the capability to engage in a plan revision under the 2012 planning rule and will forgo needed amendments because of the strong likelihood that an amendment will trigger a plan revision or be subject to the same requirements as a full-blown plan revision. The plan amendment process will be costly and cumbersome and used less frequently, deterring adaptive management and collaboration.

1. The proposed rule could be interpreted to require that an amendment of an existing plan to adopt all of the substantive requirements of the 2012 rule.

Although the Forest Service intent was that existing plans do not have to be immediately revised to comply with all the requirements of the 2012 Rule, the practical effect of the proposed rule is to impose all the requirements of the 2012 rule through the amendment process.

> "(b) *Amendment requirements*. For all plan amendments, the responsible official shall:
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> * * *
>
> (6) Ensure that the amendment avoids effects that would be contrary to a specific substantive requirement of this part identified within §§ 219.8 through 219.11."

36 C.F.R. 219.13(b)(6) (emphasis added). The plain text applies to all plan amendments as there are no exceptions for amendment of plans adopted under prior planning rules. Sections 219.8 through 219.11 are the requirements involving ecological sustainability, diversity, and all the other substantive provisions of the 2012 planning rule. The phrase "avoids effects that would be contrary to a specific substantive requirement" means that all amendments must comply with the requirements of 219.8 to 219.11 in the 2012 rule. Certainly plaintiffs will argue that the Forest Service can only demonstrate that a plan amendment avoids effects contrary to a substantive requirement by complying with that substantive requirement.

Contrary to the directive that all amendments comply with the substantive requirements of sections 219.8 through 219.11, the very next section of the proposed rule states:

> "(c) *Amendment of a plan developed or revised under a prior planning rule.*
>
> (1) An amendment of a plan developed or revised under a prior planning rule is not required to bring the amended plan into compliance with all of the requirements of §§ 219.8 through 219.11."

36 C.F.R. 219.13(c).

So which is it? Does an amendment of an existing plan have to comply with the requirements of sections 219.8 through 219.11 of the 2012 Rule or not? The ambiguity created by the proposed rule will certainly lead to litigation and needs to be clarified. The immediately preceding section in 219.13(b)(6) requires that all plan amendments "avoid[] effects that would be contrary to a specific substantive requirement[s]" of 219.8 through 219.11. To provide clarification, 219.13(b) should be modified to read, "(b) *Amendment requirements*. For all plan amendments, except amendments to a plan developed or revised under a prior planning rule. . ."

2. The proposed rule presumes all sensitive species under a prior planning rule will be species of conservation concern under the 2012 planning rule and forces the Forest Service to apply the viability requirement of the 2012 rule to all species on the regional forester sensitive species list.

The 1982 planning rule has its own provisions regarding identifying management indicator species and maintaining the viability of species. The existing plans prepared pursuant to the 1982 rule likewise have specific provisions regarding species viability. The existing plans do not necessarily have provisions explicitly addressing viability for all species on the regional forester sensitive species list and not all sensitive species are management indicator species. The proposed rule apparently requires all species on the sensitive species list to meet the 2012 viability rule provision for species of conservation concern in 219.9(a). The proposed rule states that:

> "If species of conservation concern (SCC) have not been identified for the plan area, the responsible official must use the regional forester sensitive species list in lieu of SCC when applying the requirements of § 219.9(b) to a plan amendment for a plan developed or revised under a prior planning regulation."

36 C.F.R. §219.13(c)(3).

We strongly object to requiring the regional forester sensitive species list to become *de facto* species of conservation concern subject to the viability rule in 219.9(a). The sensitive species list does not necessarily reflect the best available science, was not prepared with the scientific rigor envisioned by the 2012 rule for classifying species of conservation concern, nor was there a public comment process to include sensitive species on the regional forester's sensitive species list. Furthermore, the regional forester sensitive species list was compiled at the regional level and may not apply specifically to the project or plan area. Please delete this provision of the proposed rule.

3. The proposed rule fails to address the problem that a plan amendment for a site-specific project accompanied by an EIS will trigger a plan revision.

The proposed rule does not correct a significant problem in which most site-specific project level amendments are a significant change to the plan when they really are not. Section 219.13(3) states "a proposed amendment that may create a significant environmental effect and thus require preparation of an environmental impact statement is considered a significant change in the plan for purposes of the NFMA." 36 C.F.R. § 219.13(b)(3). So any project-specific amendment that is accompanied by an EIS is now considered a "significant change" to the plan where it was not necessarily considered significant under the 1982 planning rule. Under NFMA a "significant change" in the plan requires a plan revision. *Wyo. Sawmills Inc. v. U.S. Forest Service*, 383 F.3d 1241, 1250 (10th Cir. 2004) (The NFMA "significant change" amendment procedure mirrors "the same complex planning process applicable to the promulgation of the original plan."). Site-specific projects are trending towards the landscape scale and thus being prepared with an EIS to fully comply with NEPA and avoid a NEPA "significance" lawsuit. Therefore, site-specific projects that formerly could be prepared using an EIS containing NFMA

nonsignificant site-specific amendments (such as a change in forest plan big game cover requirements), will now be considered a "significant change" to the forest plan just because the overall project uses an EIS to comply with NEPA. The Forest Service should rewrite and clarify 36 C.F.R. § 219.13(b)(3) so that an EIS for a project containing a plan amendment does not trigger a forest plan revision.

The proposed rule must be rewritten to facilitate, rather than discourage, plan amendments, adaptive management, and collaboration.

Sincerely,

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on behalf of the following:

Alabama Forestry Association
Alaska Forest Association
Allegheny Hardwood Utilization Group, Inc.
American Forest & Paper Association
American Forest Resource Council
American Loggers Council
Associated Oregon Loggers, Inc.
Black Hills Forest Resource Association
Blue Ribbon Coalition
Boise Cascade
California Cattlemen's Association
California Farm Bureau Federation
California Forestry Association
Colorado Timber Industry Association.
Federal Forest Resource Coalition
F. H. Stoltz Land and Timber Co.
Intermountain Forest Association
Kentucky Forest Industries Association
Maple Flooring Manufacturers Association
Montana Loggers Association
Montana Wood Products Association
National Alliance of Forest Owners
National Cattlemen's Beef Association

Oregon Cattlemen's Association
Oregon Women in Timber
Pennsylvania Forest Products Association
Public Lands Council
Resource Development Council for Alaska, Inc.
Tennessee Forestry Association
Washington Cattlemen's Association
Washington Contract Loggers Association
Western Energy Alliance