May 16, 2011

Forest Service Planning DEIS
c/o Bear West Company
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Bountiful, Utah 84010

RE: Comments on USDA Forest Service proposed rulemaking for NFS planning

The State of Alaska appreciates the opportunity to comment on the Draft Environmental Impact Statement and Proposed Rule for National Forest System Land Management Planning. The following pages contain the State's formal comments on the Proposed Rule as set forth in the Federal Register, Volume 76, Number 30, dated, February 14, 2011.

GENERAL COMMENTS

The State of Alaska (State) is concerned that certain aspects of the Proposed Rule are not grounded in federal law. This includes the overall approach to multiple use of National Forest System (NFS) lands, the requirement to "*maintain viable populations of species of conservation concern,*" and other matters that have system-wide application. It also includes Alaska-specific matters, such as requiring wilderness reviews in Alaska, which is prohibited by the Alaska National Interest Lands Conservation Act (ANILCA). The planning rule must not expand or alter the statutory authority and responsibility of the USDA Forest Service.

The Proposed Rule is inconsistent with Congressional direction

Legally, Congress alone sets the policies for management of federal lands, and administrative agencies must act within those legislative limits. Congress has absolute power over federal lands under the Property Clause of the U.S. Constitution and, with respect to the NFS, exercises its power through the statutes it enacts with respect to USDA Forest Service activities. *See Kleppe v. New Mexico*, 426 U.S. 529, 539-41 (1976); *United States v. City and County of San Francisco*, 310 U.S. 16, 29-30 (1940). In *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988), the court said, An "agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." As a result, the Forest Service only has authority to adopt regulations which conform to, and carry out, the Organic Administration Act of 1897 (OAA), the Multiple-Use Sustained-Yield Act of 1960 (MUSYA), the National Forest Management Act (NFMA), and other applicable laws including, in Alaska, ANILCA and the Tongass Timber Reform Act (TTRA).

Congress, in MUSYA, specified that "national forests...shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes" (16 U.S.C. 528), and directed the Secretary of Agriculture to "develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained there from" (*Id.* § 529). Consistent with these emphases on active forest management and utilitarian use of forest resources, MUSYA

defines “sustained yield” as the “achievement...of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land” (*Id.* § 531(b)). Thus, the Forest Service’s statutory mandate under MUSYA is to provide a high-level sustained yield of renewable forest resources (through timber sales and providing areas for recreation and for enjoyment of wildlife resources, for example) and a mix of other multiple use benefits that will “best meet the needs of the American people” (*Id.* § 531(a)). The sustained yield of multiple uses is to be provided “without impairment of the productivity of the land” (*Id.* § 531(a) and (b)).

In TTRA, Congress made specific provision for an on-going commercial timber sale program in the Tongass National Forest. This legislation required the agency to seek to provide a supply of timber from the Tongass that meets annual market demand and the market demand for each planning cycle to the extent consistent with providing for the multiple-use and sustained yield of all renewable resources. Moreover, the law exempted the Tongass from the NFMA’s requirement to consider economic factors in the identification of lands suitable for timber harvest. Congress thus recognized the critical importance of the economic benefits to the region of a perpetual commercial timber sale program.

Yet, the Proposed Rule’s focus on preserving forest ecology as the centerpiece of all forest planning activities seems to thwart this clear Congressional mandate. The Proposed Rule essentially redefines “multiple use” in such a way that it is reduced to being one of several activities that the Forest Service has to “consider” when deciding how to manage its units. Moreover, some activities like recreation are separated off for treatment as if they are not included in the term “multiple use.” The same thing applies to timber, even though timber production is identified in the OAA as one of the two principal reasons for the very existence of the NFS. There is a lot of discussion of “multiple uses” in the Proposed Rule with scant attention paid to “sustained yield of the several products and services” to be derived from the “surface resources” of the national forests. “Restoration,” so prominent in the Proposed Rule, is not listed as a multiple use objective in either MUSYA or the NFMA. The planning rule needs to more accurately reflect Congressionally imposed intent and the purposes for which national forest lands were designated. The intent of Congress and the purposes for which it created and now sustains NFS lands provide the justification for those lands being managed by a unit of the Department of Agriculture, rather than by a unit of the Department of the Interior, such as the Park Service.

The Proposed Rule is unnecessarily complex and prescriptive

The State of Alaska was represented at all but one of the national roundtable meetings conducted by the Forest Service both prior to and subsequent to the release of the Proposed Rule. The State also filed formal and informal comments with the Planning Rule Team. One theme we heard expressed by a wide range of interest groups at those meetings, and which the State included in its formal and informal comments to the agency, was that the Planning Rule should be simple, concise and as non-prescriptive as possible. This theme was premised on the need to be responsive to the myriad differences between various units of the National Forest System (NFS), including

general ecology matters, forest types and social and economic dependence. In addition, some units of the NFS, in Alaska particularly, operate under additional and different sets of Federal laws, including ANILCA and TTRA.

The Forest Service does not seem to have listened to this advice. The Proposed Rule is obtusely complex, far-reaching and quite prescriptive in many of its provisions. This avoidable mistake will result in a Final Rule that is difficult and expensive to implement and will expose the agency to litigation on many matters that will be difficult to defend or resolve. At the meetings we attended, the Forest Service repeatedly emphasized its desire to produce a rule that would be defensible in court and that would reduce the amount of litigation it has to deal with in administering its activities. Yet, it is proposing a rule that very likely will not produce such conditions. The Proposed Rule seems to resurrect the faulty complexity and prescriptive nature of the 2000 planning rule, with its proliferation of compulsory reviews, procedures and decision-making standards.

As a general observation, the State believes the Proposed Rule unnecessarily and inappropriately undermines the decision making authority of Forest Supervisors and Regional Foresters by standardizing too many aspects of the NFMA planning process. The NFMA specifically designates the Forest Supervisor as the party responsible for developing Forest Plans. The Regional Forester has appeal authority. We believe this was done because Congress appropriately recognized the importance of local decision making in developing successful forest plans for each of the diverse units within the NFS. The Proposed Rule reaffirms the role of the Forest Supervisor in §219.2(b). However, by removing a great portion of the local decision maker’s discretion, the Proposed Rule will have the effect of frustrating the clear intent of Congress and the corresponding provisions of the Rule itself.

Multiple use and historic patterns of use

The Proposed Rule does not sufficiently require Forest Plans to provide for the full range of multiple-use opportunities, as appropriate for each forest. One particular purpose (ecological “restoration” for example) must not be given strong preference over mandated multiple uses, especially in areas where such direction would prejudice historic patterns of use, transportation, and dependence by local communities. The following are examples of important historical uses that require attention:

- a. Water resources (OAA emphasis)
- b. Commercial timber harvest (OAA emphasis)
- c. Mineral extraction (1872 Mining Act, MUSYA)
- d. Recreation (MUSYA)
    - i. Backcountry hiking
    - ii. Hunting
    - iii. Fishing
    - iv. Road access for recreation
    - v. Off-road motorized access and use
    - vi. Aircraft and boat access

vii. Wildlife viewing

e. Personal use timber extraction (NFMA)

Coordination with state governments

The Proposed Rule does not make it clear that the Forest Supervisor must coordinate the planning process with relevant state governments. Instead, it uses qualifying language such as, "to the extent practicable and appropriate." It is always appropriate for the agency to coordinate land management planning activities with the government of the state in which a national forest resides. In Alaska, for example, the Governor's Office should be consulted and the Forest Service should coordinate carefully with the Alaska Department of Fish and Game and the State Forester in the Department of Natural Resources. The State of Alaska participated as a Cooperating Agency in the 2008 rewrite of the Tongass Land and Resource Management Plan. Providing the State is willing to participate, this should be the rule, rather than the exception, and the Planning Rule should make this clear. See our more detailed comments on this matter in this section and at §219.4.

State fish and wildlife agency authority and responsibility

The State of Alaska is troubled by the failure of the Proposed Rule to acknowledge state fish and wildlife agencies and their respective authorities and responsibilities. The State is concerned the Forest Service indirectly usurps state fish and wildlife management throughout the Proposed Rule. For example, all plans must address desired conditions, which are descriptions of specific ". . . *ecological characteristics of the plan area, or a portion of the plan area, toward which management of the land and resources should be directed*." (219.7(d)(1)(i)) Additionally, plans ". . . *guide sustainable, integrated resource management of the resources within the plan area*…." (219.1(b)) Since "resource" is not defined, it is unclear whether fish and wildlife resources are to be included in this context.

States are responsible for the sustainability of all fish and wildlife within their borders, regardless of land ownership or designation, and have the authority, jurisdiction, and responsibility to manage, control, and regulate fish and wildlife populations – including for subsistence purposes – unless specifically preempted by federal law. As such, in Alaska, the Alaska Department of Fish and Game has primary management responsibilities with regard to fish and wildlife resources, including but not limited to setting population objectives and determining harvestable surplus. Moreover, the Alaska Boards of Fisheries and Game have authorities that include establishing allocations and harvest limits, methods and means of take and access.

The Final Rule must acknowledge the state's primary role with regard to fish and wildlife management. The Forest Service must also recognize that the public comments received in support of certain required state management activities are outside the scope of the planning rule. The statement that "*plans and their amendments reflect public values*" may not be possible with regard to state fish and wildlife management.

State forest management coordination
Because of the interconnected nature of various threats to forests, and the substantial federal forest ownership in Alaska, it is important that the new planning rule require engagement between the Forest Service and the Alaska Division of Forestry. The ultimate measure of success for any planning rule will be on-the-ground accomplishments that improve forest health and support healthy and sustainable local forest communities and their economies. To be successful, a planning rule must afford enough flexibility for regions and forests to address the issues unique to them, while providing a solid framework for management activities that ensure the ecological, social and economic sustainability of forests and communities. We believe that state foresters can and should play a unique role in the planning process. As outlined in more detail in our comments on Section 219.4, we encourage revisions to the Proposed Rule to ensure that Statewide Forest Resource Assessments and Strategies (Forest Action Plans) are more effectively incorporated into planning efforts and that state foresters are tapped to provide local expertise as the USFS looks to advance its "all-lands" management approach.

Alaska-specific concerns
The State of Alaska is extremely concerned about the socio-economic situation in Southeast Alaska, where timber harvest and forest products manufacturing has historically provided the principal means of year-round employment and economic activity. We are particularly concerned about the Proposed Rule having a long-term impact on conditions that are unique to Alaska's two national forests, the Tongass and the Chugach. The Tongass especially must remain available as a source of materials upon which to base a viable industry. The Tongass is the largest forest in the National Forest System and is very largely an intact ecosystem. It contains vast tracts of old growth timber stands, most of which are off limits to timber production and other development activities. Of the nearly 17 million acres within the Forest, approximately 10 million acres are forested, including approximately 5.6 million acres of commercial forest land. Since industrial scale harvesting began in the mid-1950s, slightly less than 500,000 acres have been converted to second growth condition. More than 60% of this second growth acreage is, however, now off limits to further development under the current Tongass Land Management Plan (TLMP) and the provisions of Federal law.

According to the most recent TLMP FEIS, as of 2008, across all ownerships in SE Alaska (including the heavily harvested Native corporation lands), 87% of the original Productive Old Growth (POG) is still standing. If you break out the high-volume productive old growth, the percentage is still 82%. If the Forest Service were to fully implement the selected alternative for the 2008 TLMP (that is, achieve the maximum allowable harvest) *and* if all Native corporations perform maximum harvest levels on all their landholdings, after 100 years, there would still be 76% of the original POG in place. By that time, much of the early harvest second growth would be well beyond the stem exclusion stage and be contributing significant value to key wildlife species as well supplying merchantable volume to the commercial timber sale program.

Moreover, Native corporations have completed first rotation harvests on most of their timberlands, and nearly two decades have passed since industrial scale timber harvests peaked on the Tongass. While there are some issues of concern, there are no scientific data rejecting the assertion that ongoing harvests at the level envisioned in the 2008 TLMP cannot take place in a manner compatible with all other uses of the forest, including sustainable wildlife and fish populations. In fact, a very deliberative conservation strategy is part of the 2008 TLMP. It incorporates both implementation and effectiveness monitoring protocols for various standards and guidelines to ensure the continuance of sustainable populations.

Therefore, the new planning rule must avoid prescriptive instructions that would preclude a revised plan from addressing unique situations like those in the Tongass in a way that will benefit local communities and their people by providing a timber sale program adequate to sustain a healthy and vibrant economy. This can be accomplished while simultaneously employing a realistic and effective conservation strategy for fish and wildlife. Yet many of the provisions in the Proposed Rule, detailed below, are likely to hinder this important goal.

General Comments on the Draft Environmental Impact Statement (DEIS)
The range of alternatives presented in the DEIS is inadequate. The alternatives examined did not include the 2008 Rule that was promulgated in response to the legal demise of the 2002 Rule. The 2008 Rule was set aside by the court on procedural grounds alone; it was not deemed unacceptable on substantive grounds. Moreover, it was the Government's most recent effort at promulgating a rule to replace the 1982 Rule. It should therefore have been considered in detail as an alternative in the DEIS.

Among the range of alternatives set forth in the DEIS, the State clearly cannot support Alternative A, the Proposed Rule, in its present form. The reasons are set forth in detail in the following comments. As we stated in our previous comments during this rulemaking process, the State supports a planning rule that tracks closely with the requirements of the NFMA and other federal laws governing plans and activities on Forest Service lands. Therefore, we would be more comfortable with the selection of an alternative in line with Alternative C. Alternative C is much less complex and prescriptive than Alternative A, and generally limits itself to following the dictates of the NFMA. Alternative C would, therefore, reserve a level of flexibility to Forest Supervisors when developing forest plans for units under their authority that we believe is needed if forest plans are to be sensitive to the unique needs of the regions in which they exist. According to the fiscal analysis included in the DEIS, Alternative C is also much more cost effective, with an estimated cost of implementation running nearly $24 million less per year than the Proposed Rule.

The Proposed Rule will clearly have an economic impact greater than $100 million and is, therefore, a "major rule" subject to the provisions of 5 U.S.C. 801-808. The State does not believe the Forest Service has provided an adequate Regulatory Flexibility Act analysis of the Proposed Rule setting forth its potential impact on small businesses, as required by Federal law. The DEIS is, therefore, deficient.

SECTION-SPECIFIC COMMENTS ON THE PROPOSED RULE

Section 219.1(c).
The MUSYA specifies that "national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." Without a legal basis, the Proposed Rule adds "spiritual, educational, and cultural sustenance." While the SOA strongly supports the idea of protecting heritage lands and culturally significant sites, we are concerned section 219.1(c) proposes new protections for new uses, beyond those contemplated in the MUSYA. The Proposed Rule must follow Congressional direction. We request the Forest Service review the Proposed Rule and identify areas where Congressional direction is not followed, such as 219.10 where aesthetic values are mentioned, and remove those sections. It is inappropriate for the Planning Rule to establish requirements that conflict with Congressional direction or expand the management authority of the agency as established by Congress.

Section 219.1(g).
While we understand this is not intended as a complete list of laws and regulations with which plans must comply, we request that ANILCA be included, especially in recognition that the Wilderness Act (which is listed) is amended by ANILCA for all designated Forest Service Wilderness in Alaska (5.7 million acres), as well as the Nellie Juan Wilderness Study Area. In addition, there are other important provisions in ANILCA, such as Title VIII (subsistence) which apply to *all* federal public lands in Alaska. Furthermore, one section of ANILCA, Section 1323(a), applies to all NFS lands nationwide. This important and unique law, which provides specific direction on the management of federal lands in Alaska, deserves explicit recognition in the planning rule.

In addition, the State believes the Proposed Rule should include TTRA among the laws that must be followed in developing land management plans under NFMA. TTRA gives explicit direction to the Forest Service with respect to multiple use management on the Tongass National Forest in Alaska. Of particular interest to the State is the TTRA provision codified at 16 U.S.C. § 539(d), which says that the Forest Service must "seek to provide a supply of timber from the Tongass National Forest which (1) meets the annual market demand for timber from such forest and (2) meets the market demand from such forest for each planning cycle." This language is in keeping with the OAA which states that national forests shall furnish "a continuous supply of timber for the use and necessities of citizens of the United States" (16 U.S.C. §475). A major concern of the State regarding the Proposed Rule is that future management plans for the Tongass will hinder the agency's ability to satisfy the timber supply provisions of TTRA since the emphasis of the rule reflects a prejudice against commodity production. If the rule were to explicitly direct the Forest Service to conform future plans to TTRA, a step would be taken toward addressing this concern.

Section 219.3.
The Proposed Rule requires the "responsible official" to "take into account the best available scientific information . . ." The Proposed Rule further requires the responsible

official to document the process, sources and type of information considered in reaching a determination of what constitutes the “most accurate, reliable and relevant” scientific information used in “every assessment report . . . plan decision document . . . and monitoring evaluation report.”

While we understand the importance of science in land management planning and appreciate the emphasis the Forest Service places on science, we are concerned this requirement is overly burdensome and opens the Forest Service to possible litigation. It may prove difficult if not impossible to demonstrate that the scientific information used is the “most accurate, reliable, and relevant information available.” Ultimately, the Forest Service may be required to prove in court that it “identified and appropriately interpreted and applied” the “best available scientific information.” The deference historically accorded by the court to the agency in its discretionary use of information may be obviated by this provision of the Proposed Rule. Moreover, with regard to fish and wildlife resources, state fish and wildlife agencies have primary management responsibilities and the Forest Service should not put itself into the role of making independent judgments regarding any state’s scientific work and conclusions.

Section 219.4.
This subsection lists a variety of government bodies that should be consulted in the planning process. While States are generally listed, we request specific recognition of state fish and wildlife agencies, as these agencies have management authorities that apply across all land ownerships within the state, including National Forests and Grasslands.

In addition, §219.4(b)(1) of the proposed rule says the “responsible official shall coordinate land management planning with the equivalent and related planning efforts of federally recognized Indian Tribes, Alaska Native Corporations, other Federal Agencies, and State and local governments, **to the extent practicable and appropriate**” [emphasis added]. The caveat to the requirement emphasized above, is of concern to the State. It is always appropriate for the agency to coordinate land management planning activities with the government of the state in which a national forest resides, and this should not be an optional activity for the Forest Service during the formulation of management plans or revisions thereof.

Furthermore, the state forester should be consulted to ensure a coordinated approach to planning across land ownerships is considered. In June of 2010, state forestry agencies in every state and U.S. territory completed Statewide Forest Resource Assessments and Strategies (Forest Action Plans) that provide important localized data on the current state of forests across all management boundaries. While we strongly believe that these Forest Action Plans can and should be utilized by the USFS in forest planning efforts, there is no guarantee of such consideration or cooperation under the language of the proposed rule. Additionally, any decision by the responsible official to exercise the discretion afforded under the ambiguous language of the proposed rule to not coordinate with an otherwise qualifying entity could become the subject of costly

and time consuming litigation that would consume resources better utilized in on-the-ground management.

We are concerned that, as written, the Proposed Rule may not recognize the unique role and contribution to be made by state and local partners who have already undertaken targeted planning efforts, such as the Forest Action Plans. We urge the Forest Service to strengthen the language of §219.4 to ensure that coordination and collaboration will, at the very least, continue as envisioned under the 1982 rule. The coordination section of the Resource Management Planning regulations for the Bureau of Land Management (43 CFR §1610.3-1) provides an example of stronger language relative to coordination and collaboration with other federal, state and local governments and Indian tribes. Section 1610.3-1 provides flexibility to address inconsistencies between federal and non-federal government plans, and to develop management plans in collaboration with cooperating agencies. It further mandates that plan developers invite outside agencies to participate as cooperating agencies and that other federal, state and local and Indian tribes are provided "opportunity for review, advice, and suggestion on issues and topics which may affect or influence other agency or other government programs." We request that the Forest Service consider similar language in providing opportunities for other federal, state, local governments, tribal entities and Alaska Native Corporations to take a more active role in the planning process.

Section 219.6.
The Proposed Rule establishes an entirely new layer of planning and preparation for plan revisions, amendments and development in what it calls "assessments." While §219.6 presents instructions for the process and content of assessments, the working definition and purpose for the assessments is set forth in §219.5. It would appear that at least some of the assessments described in these two subsections could violate NEPA, given their scope and the degree to which they may affect present and future Forest Plans developed under NFMA and this planning rule, if adopted.

The assessment process creates a plethora of new obligations for the Forest Service to perform, including notifying and encouraging various parties to participate in the assessment. Moreover it requires extensive documentation associated with every assessment that is performed. It is difficult to determine what all this activity is expected to accomplish apart from generating a lot of new papers for both the government and the public to study and discuss. It is also difficult to see how this differs in purpose from the periodic plan reviews that are already required under NFMA and from evaluative work that is routinely performed in conjunction with project level NEPA documents.

The State recommends that these burdensome new requirements be deleted from the Proposed Rule and the "planning framework" described in §219.5 be revised accordingly.

Section 219.7(c)(iv).
This part of the Proposed Rule requires the agency to "*identify potential wilderness areas and consider whether to recommend any such areas for wilderness designation*."

However, ANILCA **prohibits** further wilderness studies on Forest Service lands in Alaska unless the agency is specifically instructed by Congress to conduct them.

> ANILCA Section 101(d) states:
> *This Act provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people… Congress believes that the need for future legislation designating new conservation system units… has been obviated thereby.*
>
> Specifically, Section 708(4) states:
> *Unless expressly authorized by Congress the Department of Agriculture **shall not** conduct any further statewide roadless area review and the evaluation of National Forest System Lands in the State of Alaska **for the purpose of determining their suitability for inclusion in the National Wilderness Preservation System**.* [emphasis added]

We request the rule reflect this prohibition of Federal law and suggest the following revision of the Proposed Rule:

> *<u>Except where preempted by law</u>, identify potential wilderness areas….*

<u>Section 219.7(c)(v)</u>.
This section generally directs the agency to identify eligible rivers for inclusion in the National Wild and Scenic Rivers System. ANILCA also prohibits new Wild and Scenic River reviews in Alaska.

> ANILCA Section 101(d) states:
> *This Act provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people… Congress believes that the need for future legislation designating new conservation system units… has been obviated thereby.*
>
> Specifically, Section 1326(b) states:
> ***No further studies** of Federal lands in the State of Alaska for the single purpose of considering the establishment of a **conservation system unit**, national recreation area, national conservation areas or for related or similar purposes **shall be conducted unless authorized by this Act or further Act of Congress**.* [emphasis added]

The definition of "*conservation system unit*" in Section 102(4) includes wild and scenic rivers. Congress designated numerous rivers with passage of ANILCA and provided no

direction to study additional rivers that would defeat the general applicability of Section 1326(b).

We recommend modifying this section of the Proposed Rule as follows:

> *Except where preempted by law, identify the eligibility of rivers…*

Section 219.7(d)(1)(i).
Desired conditions are "*. . . specific… ecological conditions of the plan area… toward which management of the land and resources should be directed*." The State maintains that the Forest Service should not be setting desired conditions for fish and wildlife species. States are responsible for setting fish and wildlife population objectives within their borders, and the desired condition process seems too closely related to population objectives. We request the Final Rule specifically state that desired conditions for fish and wildlife species are not to be implemented as that is a role of the States.

Section 219.8.
The explanation of the proposed rule states that the "*proposed rule considered the ecological, social, and economic systems as interdependent systems, which cannot be ranked in order of importance*." It then goes on to say, "*the agency has more influence over the factors that impact ecological sustainability on NFS lands (ecological diversity, forest health, road system management, etc.) than it does for social and economic sustainability (employment, income, community well-being, culture, etc.)*." This presumption is reflected throughout the Proposed Rule, and results in the Proposed Rule emphasizing environmental and ecological efforts and activities, to the detriment of social and economic matters. This unacceptable imbalance violates the clear intent of Congressional direction for management of NFS lands and will lead to continued hardships for communities whose economies are dependent upon the National Forests for raw materials, such as timber.

Furthermore, it may not be feasible in Alaska to implement §219.8(a) of the Proposed Rule, especially with respect to water resources. The available data for National Forest lands in Alaska are inadequate to satisfy the Proposed Rule's requirement for addressing water issues. There are very few stream gauges available in Alaska's National Forests to determine water discharges and availability. There are even fewer locations in these Forests where groundwater information is available, which means planners will be unable to delineate sole source aquifers used for public water supply. We recommend concentrating on collecting baseline hydrology data in order manage water resources. Alternatively, the requirements for water-related data should be waived for the Tongass and Chugach National Forests.

Section 219.9.
This subsection requires plans to "*include plan components to maintain the diversity of plant and animal communities . . .*" The definition given in §219.19 of "plant and animal communities" includes any "naturally occurring" assemblage of "plant and animal

species living within a defined area or habitat." This encompasses an unbelievably large universe of species. We have several concerns with this.

First, this definition does not limit the obligation of a plan to provide for diversity among vertebrate species, as the 1982 Rule did (36 CFR 219.19). It has been difficult enough for the agency to perform at that level of requirement, without taking on the vast amount of data-gathering and analysis that will be required if non-vertebrate species are included.

Second, the new requirements of §219.9 in the Proposed Rule do not link the diversity provisions to meeting multiple use objectives as required both in the 1982 Rule and in the underlying requirements of law as set forth in NFMA, §6(g)(3)(B).

The State of Alaska requests that the Proposed Rule require plans to "*provide the 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*," which is required under provisions of the National Forest Management Act (NFMA).

There is no requirement under the NFMA to maintain "viable populations" as required in Section 219.9(b) of the Proposed Rule. Furthermore, viability is a poor management threshold for most fish and wildlife populations including those that receive human use. Sustainable populations provide for both human use and biological integrity over time. Viability is a very low threshold and could arguably be maintained at a level slightly above what may prompt a petition for an Endangered Species Act (ESA) listing. Managing habitats for viability as a bottom level is poor resource management. The Proposed Rule should make provision for a standard of sustainability for appropriate species and should require the agency to cooperate with state fish and wildlife agencies in identifying that threshold and the habitats required to maintain it.

Third, §219.9(b)(3) of the Proposed Rule requires plans to "maintain viable populations of species of conservation concern within the plan area." This appears to go beyond the statutory requirement to maintain diversity of plant and animal communities. Under the new rule, the Forest Service would not only be obligated to provide for ecological conditions that support recovery of threatened and endangered species and to conserve candidate species, it would now be obligated to assume a major role in ensuring the "viability" of "species of conservation concern," an undisclosed and potentially ever-expanding number of species. Based on the Nature Serve list for Alaska for species ranked S1-S3 or G1-G3, this potentially adds hundreds of additional species to which the rule would apply in Alaska alone. This overly broad approach to managing habitat goes beyond what is contemplated under the NFMA and the ESA and could result in the implementation of unnecessary conservation actions to the detriment of multiple use management. The potential cost and the likelihood of exposure to litigation caused by taking on this responsibility are staggering. The State, therefore, recommends eliminating this category or making it clear that implementation is not mandatory.

Fourth, the fiscal limitations which are included in §§219.10 – 219.11 are absent from §219.9. This seems to run contrary to language in the "Section-by-Section Explanation of the Proposed Rule," found on page 8491 of the Federal Register notice. The relevant sentence reads, "The proposed rule considers the ecological, social, and economic systems as interdependent systems, which cannot be ranked in order of importance." Yet, by putting fiscal limitation caveats on "multiple use" and timber development responsibilities, but not putting a similar caveat on the agency's duty to provide for diversity of plant and animal communities, the Proposed Rule clearly makes a preferential choice in favor of ecological considerations. With respect to ESA requirements, this may be justifiable, (although duplicative and unnecessary to include in the Planning Rule), but with respect to §219.9(b)(3), we believe it is not.

Fifth, §219.9(b) specifies a requirement for components that "provide for the maintenance or restoration of ecological conditions in the plan area" that will contribute to recovery of threatened and endangered species (T&E species) and of candidate species. The State supports efforts to address recovery of T&E species. However, neither the NFMA nor the ESA place an obligation upon the Forest Service to recover or protect candidate species. Moreover, with respect to candidate species, the State has concerns because of language in the explanatory section of the Federal Register notification, found on page 8493 of the notice. The language says the "proposed rule would represent a higher level of protection for candidate species than currently exists in the planning process while still recognizing that candidate species may not have viable populations. Protection requirements for candidate species may at times contradict the protection requirements of other species or other management objectives."

The State urges the Forest Service to reconsider including requirements for forest plans to mandate added levels of protection for candidate species that go beyond the requirements of law, especially in circumstances where those protections would "contradict . . . other management objectives." Taking extraordinary measures on behalf of candidate species, above and beyond any actions required by ESA, that would hinder multiple use objectives that are required by law, should not be mandated by the planning rule.

Finally, states have primary management responsibilities for fish and wildlife within their borders and manage said fish and wildlife for sustainability. We have significant concerns, and strong objection to the statement on page 8495 of the Federal Register, which states the Proposed Rule "*is not intended to require that units support the population goals of state agencies*." **This intent must be removed in the Final Rule.** Maintaining habitats within the planning area consistent with state fish and wildlife population objectives would meet Forest Service requirements for maintaining diverse plant and animal communities. It would also be consistent with the Master Memorandum of Understanding between the Forest Service and the Alaska Department of Fish and Game.

> *The Forest Service shall: Recognize the Department as the agency with the authority, jurisdiction, and responsibility to manage, control, and regulate fish and wildlife populations on NFS lands except to the extent that such authority is superseded by federal law.*

<u>Section 219.10(a)(1)</u>.
We question the inclusion of "recreation values." While we recognize that individuals of the public may place high importance on the values they gather from a certain place, these values are subjective and nearly impossible to measure. We request the language, "*recreational values and settings*" be replaced with "*recreational opportunities*."

<u>Section 219.10(b)(1)(i)</u>.
We question the requirement to identify desired conditions for "*scenic landscape character*." While ANILCA does talk about "scenic values," we are unable to find Congressional direction for a "scenic landscape character" classification anywhere in the MUSYA, the NFMA or the WSRA, nor can we find such a reference in any other Federal law governing the management of Federal lands. Without a demonstrable nexus with Federal law, this provision, *as a requirement*, appears to overstep agency authority in a way that could frustrate the intent of Congress that NFS lands are to consist of working forests to the extent consistent with other multiple use objectives.

<u>Section 219.10(b)(1)(iv)</u>.
This portion of the Proposed Rule sets forth "requirements" for plan components when a new plan is developed or an existing plan is revised. The provisions of (b)(1)(iv) purport to be based upon provisions of the Wilderness Act. The Act, at Section 2(a), states that to protect these areas the administering agency shall preserve their wilderness character. However, the Proposed Rule truncates this Section, leaving out that ". . . *wilderness areas… shall be administered for the* ***use and enjoyment*** *of the American people in such manner as will leave them unimpaired for future* ***use and enjoyment as wilderness***" and ". . . *wilderness areas… shall be administered… for the gathering and dissemination of information regarding their* ***use and enjoyment*** *as wilderness*." [emphasis added]

Additionally, Section 4(b) of the Wilderness Act states:

> *Except as otherwise provided in this Act, each agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the area and shall so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character. Except as otherwise provided in this Act, wilderness areas* ***shall be devoted to the public purposes of recreational,*** *scenic, scientific, educational, conservation, and historical use.* [emphasis added]

By referring *only* to "protection" in sub-section (iv), the proposed rule inappropriately reduces the Wilderness Act provisions to a single protective purpose. In addition, in

stating that plans must "*protect the ecologic and social values and character*" (219.10(b)(iv)), the rule inserts new terminology and direction not found in the Wilderness Act. As such, it appears the Service is infusing agency *policy* that may differ in substance from the underlying law, into a rulemaking intended to establish a *procedural framework* for implementing that law. The State of Alaska objects to this inappropriate policy-making effort and believes that it must be addressed before the Final Rule is adopted. We request the Forest Service fully encapsulate in the Rule that these areas were set aside "*for the use and enjoyment of the American people*" and that "*wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use.*" We recommend direct quotation from the act.

Moreover, the Wilderness Act does not require protection of areas recommended as wilderness as stated in the Proposed Rule nor does it require protection of ecologic or social values. This is substantially different from maintaining the area in a manner that does not preclude it from future designation as wilderness, which is all that is necessary to maintain Congress' ability to designate wilderness in the future. We recommend separating the provisions relating to *designated* wilderness areas from the provisions relating to *proposed* wilderness areas.

Section 219.10(b)(1)(v).
Like the Wilderness subparagraph before it, this subparagraph of the Proposed Rule does not fully recognize Congressional direction. The Wild and Scenic Rivers Act protects and enhances the values which caused the river to be included in said system; however, the Act continues, "*without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with* ***public use and enjoyment*** *of these values.*" The intent of the Act is to cause minimal impact to the recreating public. This intent must be incorporated into this subsection.

Additionally, the State is unfamiliar with Congressional direction that requires protection of "*rivers eligible for inclusion in the national wild and scenic rivers system.*" We request that this portion of the subparagraph be removed.

Direction on how to implement the Wilderness Act and the Wild and Scenic River Act is established by separate policy, and decisions on implementation should be determined through the planning process on each distinct NFS unit. The State of Alaska suggests the following language be substituted for Section 219.10(b) to ensure the Planning Rule provides a framework for addressing the issues without contravening the clear intent of Congress:

> (b) *Requirements for plan components for a new plan or plan revision.* (1) The plan must address, including protection measures, as applicable under existing law:
>
> > (i) Sustainable recreation;
> > (ii) Cultural and historic resources;
> > (iii) Areas of tribal importance;

(iv) Wilderness character;
(v) Ecological values;
(vi) Social values;
(vii) River values; and
(viii) Other designated or recommended areas that exist in the plan area, including research natural areas.

<u>Section 219.11</u>.
The State has a number of concerns about this subsection. Paragraph (b), allows harvest of timber to take place on lands deemed not suitable for timber production "as a tool to assist in achieving or maintaining one or more applicable desired conditions or objectives of the plan." In the examples, timber salvage is not listed. Since the list is *inter alia*, this would seem to imply that salvage harvest could be allowed in non-suitable areas. That conclusion is consistent with paragraph (a), where harvest is "prohibited for a period of 10 years," **except** for "salvage sales or sales necessary to protect other multiple-use values." Yet, in paragraph (c), salvage harvest is specifically authorized along with harvest for "sanitation" and "public health or safety" reasons "where consistent with the plan." This final clause and the interplay between the various parts of §219.11 is confusing. We suggest the meaning would be greatly clarified if paragraph (c) were rewritten as follows:

> (c) *Harvest for salvage, sanitation, or public health or safety*. Timber harvest <u>*on lands suitable and not suitable for timber production*</u> may be approved for salvage, sanitation, or public health or safety, where consistent with the plan.

In §219.11(d)(3), the Proposed Rule sets forth prescriptive standards for regeneration harvest methods. This is one of those prescriptive aspects of the Proposed Rule that the State of Alaska finds problematic. Such matters really should lie in the province of Regional Foresters and should be determined by local conditions and the objectives of the plan for a particular forest. There is no scientific basis for the size limits imposed in this paragraph. The second half of this paragraph is strictly a policy call imposed at the national level without any silvicultural or other scientific support.

Moreover, the prescriptions are somewhat ambiguous. The prescription for Alaska reads, "100 acres for the hemlock-Sitka spruce forest type of coastal Alaska." Presumably, this implies the 100 acre limitation would apply across the Tongass landscape, regardless of particular stand composition. But a litigant, who desired to stop a particular timber sale project, could claim, under this prescription, that hemlock-redcedar stands or Sitka spruce-Alaska cedar stands (for example) in the Tongass are subject to the 40 acre limitation for "all other forest types" set forth in the same paragraph. The litigant might lose in court, but the expense and delay of litigation could do unmitigated harm to the timber sale program and to the purchaser. To avoid this difficulty, the State proposes that subparagraph (3) be amended by deleting all language following the sentence that reads, "Plan components must include standards limiting the maximum size limits for areas to be cut in one harvest operation, according to geographic areas, forest types, or other suitable classifications." The remainder of

§219.11(d)(3) and §219.11(d)(3)(i-iii) may appropriately be placed in the Forest Service Manual as direction to the Regions and NFS units, but should not be included in the Rule.

The State of Alaska is encouraged that §219.11 does not impose restrictions on harvest methods, other than imposing maximum opening sizes in harvest units (discussed above). Silviculture considerations must be what drive harvest system requirements. In some forest types and with some tree species, even-age, regeneration harvest systems are the most ecologically advantageous approaches to tree removal and replenishment. In Douglas fir stands in the Pacific Northwest or in Sitka spruce-western hemlock mixed stands in SE Alaska, regeneration can be a problem in uneven age systems such as diameter limit or shelterwood harvest systems because these species are shade intolerant. Moreover, both western hemlock and Sitka spruce are thin bark species and damage to the bark of leave trees during harvest operations can have a significant impact on forest health. Such damage is much more common in uneven age systems. The point is not that even-age regeneration harvests should be used exclusively, but this important option should not be taken out of the timber management toolbox by the planning rule. Regional and forest-level decision making on these types of topics is essential. The agency has an obligation under NFMA to "preserve the diversity of tree species similar to that existing in the region controlled by the plan." This requires that the harvest systems used (except under exigent situations when necessary to achieve a specific purpose and need) do not result in significant type conversions within a NFS unit, which is one predictable result if even age management is not used in some circumstances.

Section 219.12.
We find the monitoring process overly complex and unrealistic. The Biennial evaluation creates the scenario of perpetual agency planning. Also, since it is possible to ever search for more information, we are concerned that monitoring may unnecessarily delay management actions.

Monitoring remains time consuming and costly, and as such, may never be completed. We are concerned this will create a situation where groups opposed to certain activities, for example trapping, will use a lack of "required" monitoring in an attempt to foreclose these activities. We request the Final Rule be modified to make clear that monitoring goals are not preconditions to approve, continue, or renew special use permits or provide for public uses, or state fish and wildlife management activities.

Additionally, Forest Service planning documents should not compete with, or attempt to supersede, monitoring requirements as established by state fish and wildlife agencies. Forest Service monitoring requirements should be designed so as to not affect state fish and game management. To the extent feasible, the planning rule should require the Forest Service to consult and coordinate with state fish and wildlife agencies in all monitoring activities that affect fish and wildlife populations.

Section 219.14(b).
The State of Alaska strongly supports the intent to require on-line posting of planning record documents. Given Alaska's expansive size and limited, or in some cases nonexistent, road system, only those that live within close proximity to the applicable District Office would otherwise be able to obtain needed information. Posting all records on line will also save staff time and paper resources when responding to requests for such records.

Section 219.15.
Under §219.15(d)(1) of the Proposed Rule, a project or activity, to be deemed consistent, must:

- Contribute to the maintenance or attainment of one or more goals, desired conditions, or objectives; or
- Not foreclose the opportunity to maintain or achieve any goal, desired outcome or objective over the long term

The Proposed Rule provides only very general guidance for project consistency evaluation and uses the ambiguous phrase, "long term," to define the evaluation period. First, we recommend defining the evaluation period as either the intended life of the plan or a fixed number of years. Second, we recommend providing clearer guidance for determining consistency or eliminating this provision entirely.

Multiple-use planning (Section 219.10) includes a wide range of activities and uses that must be considered. From these considerations, numerous goals, objectives, and desired outcomes will be developed for a plan. The consistency review requires a project to only "contribute" to maintaining or attaining any of the dozens of goals, objectives, or desired outcomes. If the project does not meet this threshold, the project must then "not foreclose the opportunity to maintain or attain any goals, desired outcome or objective." In a case where a project cannot meet the second requirement for consistency, the inconsistency may be resolved through other means.

- Project modification
- Plan amendment
- Making a project-specific amendment in concert with the approval of the project or activity to be consistent with the plan

The State generally supports sustainable development projects, and the project-level consistency review set forth in the Proposed Rule appears ill defined and open to manipulation or inconsistent application. The ease of challenging projects under the proposed consistency review may result in delays in project authorization and may ultimately discourage investment in development projects on NFS lands. We recommend removing the consistency review language from the Proposed Rule.

Section 219.19.

Conservation

Hunting, fishing, and trapping are important tools utilized by state fish and wildlife agencies to conserve fish and wildlife resources. This definition should reference that importance.

Ecosystem Services

The term "*ecosystem services*" is defined as "*Benefits people obtain from ecosystems, including…provisioning services….regulating services….supporting services….cultural services…*" Applying the term "*services*" to something that is defined as a "*benefit*" is confusing by itself. Furthermore, linking "*ecosystem services"* (a benefit) to "*multiple uses*" is also confusing. The attempt to explain this inclusion in the definition of "*multiple use*" in terms of being part of the NFS' "renewable surface resources" is also unhelpful. Resources and uses are not synonymous. To ensure the rule is understandable and capable of implementation, it is essential that the governing terminology be clear and logical.

Multiple Use

The definition states that, "[e]cosystem services are included as part of all the various renewable surface resources of the NFS." This tends to define "services" as a "resource," which makes little sense. Services certainly are not "a resource" in the same sense as is timber or water. Yet, as mentioned above, the Proposed Rule also defines "ecosystem services" as one of many "uses" by including it within "multiple use." This implies that "ecosystem services" are a "multiple use" just like motorized recreation, hiking, hunting, mining or timber extraction. Moreover, the Proposed Rule sometimes treats "ecosystem services" as if they were the "use" that trumps all other uses. This is thoroughly confusing and seems to indicate that the Forest Service doesn't really know what it wants to do with "ecosystem services" other than use it as some kind of buzzword. This confusing set of definitions needs significant additional refinement, which will have an effect on the whole document.

Sustainable Recreation

The State of Alaska is aware of situations where anti-hunting activist groups have asserted that hunting is not socially sustainable because it is not tolerated by all people. Leaving this term in the definition opens the Forest Service to potential legal challenges. We therefore strongly suggest that the phrase "*socially sustainable*" be removed from this definition.

Subpart B – Pre-Decisional Administrative Review Process

We concur that a pre-decisional review process will likely reduce the administrative burden on the Forest Service. However, we recommend making the requirements for filing and participating in an objection as straightforward as possible so as to not alienate those who comment on the planning process.

The Proposed Rule proposes to replace the present appeal process with an objection process. We recommend retaining the appeal process, *in addition to* the objection process, as these two processes complement one another. The objection process is intended to facilitate earlier collaboration and the resolution of issues, while the appeal process is meant to elevate the decision by the responsible official to the next higher organizational level for reconsideration. We believe both are useful procedures. We further recommend the inclusion of a provision that only allows an appeal to be filed by organizations and individuals who participated in the objection process.