Society for Conservation Biology
A global community of conservation professionals

May 16, 2011

The Honorable Thomas Vilsack
Secretary of Agriculture

Via email to the Forest Service Planning Website:
http://www.govcomments.com/ProjectInformation.aspx?a=25&b=20800

Re: Comments of the Society for Conservation Biology on the proposed Forest Planning Rule supplementing those of our peer reviewers submitted in April under separate cover by Dr. Gary Meffe and resubmitted as an attachment to these comments.

Dear Mr. Secretary:

Please enter into the record of decision the following of the Society for Conservation Biology on the proposed Forest Planning Rule and EIS.

These comments are based on several relevant statements of SCB including, among others, our 2010 comments on the Forest Planning Process, our 2008 Recommendations for actions by the Obama Administration, our 2009 testimony before the House Natural Resources Committee on Federal Land Management and Climate Change, our 2010 comments to CEQ and EPA on NEPA and Clean Air Act regulations and our statements to the Copenhagen and Cancun Conferences of the Parties on the UNFCCC.[1] For your ease of reference, we are resubmitting our comments from 2010 as an attachment to this document.

Introducing our comments in 2010 we noted fundamental legal and scientific requirements that apply to the proposed rule. We repeat these principles today as they apply to your proposed rule as much now as then:

> Our comments underscore the merits of a scientifically credible rule change that integrates ecological sustainability with well-accepted approaches in climate change planning. As such, we urge the Forest Service to use the best available science in meeting its stated objectives with respect to restoration, watershed protection, climate change resilience, and wildlife conservation.
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> The agency also can best meet its stated goal of enhancing ecosystem services if ecological sustainability and climate change preparation become the overarching principles in planning across the National Forest system. Our comments reflect four core planning principles that should be included in all

[1] These are available upon request from our Executive Office, though most are also on our website at www.conbio.org/resources/policy.

planning alternatives:

(1) population viability assessments (PVA) for focal species and other target species in order to help meet the agencies' obligation to sustain diversity and reduce impacts from forest management and climate change;

(2) plan for ecological sustainability using a broad suite of measurable biological indicators such as ecological integrity;

(3) prepare for climate change by protecting intact ecosystems (e.g., roadless areas) to facilitate climate-forced wildlife migrations and carbon dense ecosystems (e.g., mature forests) for long-term carbon storage while reducing existing stressors to enable adaptation of species (and, in the aggregate, ecosystems); and

(4) conduct effectiveness monitoring using a rigorous approach.

Population Viability Assessments of Focal Species and Planning for Uncertainty

The statutory language of the National Forest Management Act (NFMA) requires the Forest Service to "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives" (16 US Code 1604[g][3][B]). Consequently, since 1982, the regulations governing implementation of NFMA have addressed this provision by requiring that lands and waters be managed to *maintain viable populations* (emphasis added) of existing native and desired non-native vertebrate species in the planning area. The proposed rule change should clarify and extend the viability concept in forest planning using well-recognized concepts in population viability assessments (PVAs) such as focal species planning (see Noon et al. 2003, Sjögren-Gulve and Ebenhard 2000, Beissinger and McCullough 2002). As an example, a given area within which a focal species could, with appropriate management, persist should be recognized explicitly in any viability determination. Viability in a previously managed landscape also may require re-establishment of historic range. When reliable data on population dynamics (e.g., rates of birth, death, emigration, and immigration) are unavailable, viability assessments should be extended to include those based on analyses of geographic distribution as a proxy for viability under the well-established relationship between a species' abundance and its distribution. This would allow PVA to be based on well-designed monitoring programs (as also noted below).

The 2000 planning rule clarified that focal species used in the evaluation of viability do not directly represent the population dynamics of another species. This distinguishes the focal species concept from management indicator species (MIS) in the 1982 regulations. Unambiguous criteria for acceptable levels of reduction in viability have yet to be articulated by the Forest Service. The agency should make use of "high likelihood" functions that express a level of belief that viability will be maintained within a planning area and within the extent of the agency's authority to affect the ecological conditions needed by the species. An

example of such a process was used by FEMAT (1993) in assessing planning alternatives under the Northwest Forest Plan.

PVAs have matured dramatically in the last decade. The scientific community has developed cost effective approaches (e.g., genetic monitoring along with modeling occupancy on the basis of presence/non-detection data) in this regard. While it is impossible to assess the population viability of all species, the majority of conservation scientists acknowledge that some sort of surrogate-based approach is effective, particularly when it is integrated with broader metrics of ecological sustainability (see below). As such, there are statistical and sampling methods for estimating viability parameters (e.g., survival and birth rates, population size and distribution, habitat condition) of various focal species and how these species co-occur with other species of concern. PVAs can now be directly integrated into forest management models and the effects of different management options on focal species can be ordinally ranked. Such assessments also satisfy the criteria for credible science: they are based on sound theory, are testable, can be peer reviewed, have an estimable rate of error and methods for calculating error terms, and have general acceptance in the scientific community. Rigorous methods to identify focal species have been published in the scientific literature, including species with distinct taxonomy (e.g., endemics, unique subspecies), those associated with particular vegetation communities, those that perform important ecological functions (e.g., Zavaleta et al. 2010), those considered keystone or umbrella species (Roberge and Angelstam 2004), and those sensitive to climate change.

We also recognize that while it is impossible to plan for all species, the Forest Service should adopt the "precautionary principle" as a means for planning for uncertainty.[2] For instance, in 1992, the global conservation community, including the United States, expressed agreement on this principle through the Rio Declaration on Environment and Development**,** a short document produced at the United Nations Conference on Environment and Development ("UNCED").3[1] The Precautionary Principle provides as follows:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

[2] Subsequent to the UNCED, a number of scientific authors elaborated on the subject, including: C. Raffensberger & J. Tickner, *Protecting Public Health and the Environment: Implementing the Precautionary Principle* (1999), and R.B. Stewart, *Environmental Regulatory Decision Making Under Uncertainty*, Research in Law and Economics, Vol. 20 at p.76 (2002).

That introduction, quoted at length directly above, that we provided last year explains the core legal requirements that you must meet in any new planning rule. Our peer review submitted in April and the following supplemental comments provide analyses of the proposed rule and alternatives along with suggestions for integrating the best of each into a final rule.

One overarching point we would make is that each of the values to be protected and enhanced must be met with objective, measurable standards in order to be enforceable and not arbitrary and vague and thus in violation of standard administrative law and the specific laws undergirding the National Forest System. This applies to the following supplemental points as well as to those values considered in detail by our peer reviewers, from water to climate change mitigation and adaptation.

We number the following supplemental points for ease of reference:

1) **Consulting with the Secretaries of Interior and Commerce as required by the ESA Section 7a1:** The introduction to the proposed rule contains admirable descriptions of interagency and intergovernmental coordination and correctly notes that the Federal conservation requirements set at least a minimum standard of care that may exceed that adopted by state authorities. This should be built into the process in an enforceable manner so that the greater the effective protection of other authorities for shared protected resources, the greater the flexibility of the Forest Service to provide harvestable surpluses, to use an older term, or levels of multiple uses. The rule should require that each revision or significant amendment of a forest plan or project include and describe a formal or informal consultation with the FWS and as appropriate the NMFS on both the opportunities for enhancing the recovery of listed species for the ESA, in **Section 7 (a)(1),** specifies that all other "Federal agencies **shall, in consultation with and with the assistance of the Secretary,** utilize their authorities…by carrying out programs for the conservation [the definition of which includes recovery] of … species listed…" and candidate species as well as other protected species.

   The introduction to the proposed rule omitted the interagency consultation portion of the 7(a)(1) duty. Consultations under the ESA are based upon the Secretaries' informing the action agency about species that may be affected, using "the best available scientific and commercial data" and all agencies are to use "all methods and procedures which are necessary to bring any endangered or threatened species to the point [of recovery]". Before this planning rule is made final, the Secretary of Agriculture should consult with the Secretaries of the Interior and Commerce to ensure that the rule itself includes practical steps to ensure optimal consultation at each level in its implementation.

2) **Include all relevant agencies in collaborative planning, using the 7(a)(1) and NEPA processes:** To be most effective, the Secretary of Agriculture should require that Forest Service officers work with the Secretaries of the Interior and Commerce to involve the full suite of agencies in consultations on the higher level plans so that the actions of the BLM, soil conservation and animal damage control agencies, for example, and state and international offices, are all coordinated to conserve viable populations of all native species throughout all significant portions of their ranges. Relevant agencies of other countries should also be invited to participate in regard to transboundary species, management effects, and migratory species. In this process the Forest Service planning process should demonstrate the manner in and extent to which lands under its jurisdiction form a core of "a connected system of lands and waters … to be managed for conservation of biological diversity…" as SCB recommended on page 9 of its Recommendations to the Obama Administration presented to the transition team in late 2008.[i]

3) **Include as "species of conservation concern" those specifically covered by treaties to which the US is party and work with counterpart agencies in developing forest plans.** The duty to conserve many of the affected species and to minimize transboundary harm to the environment is a legal duty of the United States with regard to the numerous species and groups of species covered by the several treaties to which we are party and the appendices thereto. The duty not to harm the environment of other countries is also a bedrock principle established in arbitration between Canada and the US in the late 1940's. The relevant treaties include the migratory bird treaties with Canada, Mexico, and Japan, and the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere and the appendices to that convention listing species and families of wildlife such as owls in general.

   It would also make sense for the species of conservation concern to include those listed on appendices I, II and III of CITES and those noted in the higher levels of concern under the IUCN Red List process.

   Article V of the Western Hemisphere Convention addresses the conservation of both flora and fauna beyond wildlife reserves or parks. Article VII and VIII address the prevention of extinction and special protections for those species already added to the appendix of the Convention, which the Service plans should include in their species of concern.

> Article V
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> 1. The Contracting Governments agree to adopt, or to propose such adoption to their respective appropriate law-making bodies, suitable laws and regulations for

the protection and preservation of flora and fauna within their national boundaries but not included in the national parks, national reserves, nature monuments, or strict wilderness reserves referred to in Article II hereof. Such regulations shall contain proper provisions for the taking of the specimens of flora and fauna for scientific study and investigation by properly accredited individuals and agencies.

…

Article VII

The Contracting Governments shall adopt appropriate measures for the protection of migratory birds of economic or aesthetic value or to prevent the threatened extinction of any given species. Adequate measures shall be adopted which will permit, in so far as the respective governments may see fit, a rational utilization of migratory birds for the purpose of sports as well as for food, commerce, and industry, and for scientific study and investigation.

Article VIII

The protection of the species mentioned in the Annex to the present Convention is declared to be of special urgency and importance. Species included therein shall be protected as completely as possible, and their hunting, killing, capturing, or taking, shall be allowed only with the permission of the appropriate government authorities in the country. Such permission shall be granted only under special circumstances, in order to further scientific purposes, or when essential for the administration of the area in which the animal or plant is found.

As specifically required by the Section 8(e) of the ESA, the Secretaries of Interior and State must consult with the Secretaries of Agriculture and Commerce and the heads of other agencies, and cooperate with the parties to the Western Hemisphere Convention and State agencies to prevent the endangerment of covered birds and to take appropriate measures to implement the provisions of the Convention on the protection of wild plants. Thus, the rule should require such species to be considered species of conservation concern.

Furthermore, in addition to these steps and coordinating migratory bird harvest levels under the migratory bird treaties, Federal agencies, including the Forest Service expressly in its planning process, should work with their counterparts as they develop their other plans, which include, for

all of the countries sharing species with our own, the strategic plans adopted under the Convention on Biological Diversity and the national biodiversity strategies or plans under article 6 in particular. Article 5 commits each party to cooperate with others in regard to transboundary and internationally shared resources so the U.S. can help Canada work with Mexico and others in the America's to conserve migratory and other shared species that may be affected by forest and grassland management decisions. In this way the conservation system described in point two above will be extended throughout the hemisphere and even laterally, with regard to species shared with others.

In addition to the dispute resolution systems in these conservation treaties, recent trade agreements require that parties adequately enforce their environmental laws and a failure to do so can result in challenges or trade disruptions for affected products such as timber.

4) **Ensure viable populations of all native species** – In the absence of new enforceable standards this rule should make the biodiversity viability standards no less rigorous and measurable than those of the 1982 rule, which has withstood legal challenges and has served to protect ecosystems that would otherwise have been degraded further. While the 1982 version literally applied only to vertebrate species, the courts have recognized that NFMA "requires planning for the entire biological community." *Seattle Audubon Soc. v. Lyons*, 871 F.Supp. 1291, 1310 (W.D.Wash. 1994); *affirmed Seattle Audubon Soc. v. Moseley*, 80 F.3d 1401 (9th Cir. 1996). And because local extirpation of species impoverishes and jeopardizes the functioning of biological communities (and the ecological services they provide), it is vital that Forest Service management, at a minimum, not decrease native species' distribution across their existing ranges.

5) **Use the best available science as the standard for meeting the basic viability and other standards and objectives** of the plans and the statutory standards they must satisfy, and not just as one of the factors to be weighed. Once the basic standards have been met and a margin for error is assured, then provide that plans can balance the levels of multiple use according to a variety of values and demands.

6) **Ensure Connectivity** -- Require that at each level of planning the effective connectivity of lands, waters and flyways (or parts thereof, such as ephemeral wetlands) is enhanced whenever possible. Specifically, the definition of connectivity set out in proposed section 219.19 in Alternative A should be modified as follows, adding the terms in red:

> Connectivity. Pertaining to the extent to which conditions exist or should be provided within, between, and effecting separate

national forest or grassland areas to ensure habitat for plants and for the breeding, feeding, or movement of wildlife, fish and desired insects within their home range or migration areas.

6) **Require Consultation with other agencies affecting System Lands:** Require that in formulating each plan, and as other agencies such as the EPA and states with delegated authority, formulate their national and state rules, and other actions affecting system lands that the responsible forest service official(s) and the Chief Forester, if necessary, formally engage these agencies to ensure that the relevant standards and permits that are adopted enhance rather than degrade system lands, waters and wildlife. Secondary standards under the Clean Air Act, for example, for each regulated pollutant are to be set to protect wildlife and ecosystems and in the current process of setting ground level ozone standards, the forests and grasslands must be considered in the way the ozone inhibits plant growth, for example, and in the way that it affects the pulmonary health of most animals, and on the other hand, they way that forests can, within limits, help reduce air and water pollutants of different kinds. Also, climate change driven heat and drought, and climate change driven increases in the activity and presence of insects, both native and invasive, and their effects upon forest and grassland ecosystems must be addressed in the regulations of EPA and in the plans of the Forest Service.

We look forward to working with you to ensure that the final rule fulfills purpose of the statutes on which it is based and ensures that your work will incorporate in practice the best available conservation science.

Sincerely,

John M. Fitzgerald, J.D.

Policy Director

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[i]http://www.conbio.org/Activities/Policy/docs/SCB2008TransitionTeamRecommendations.pdf