

OT	S	RT	DT	EA	F	RI	CE

Attributes

Response Type: 1 - Letter

Delivery Type: W - Web-based submission

IP Address: 97.116.98.111

Form Letter:

Comments

Thank you for the opportunity to comment on the proposed rule. Please see the attached document for my full comment.

Sincerely,

Sean Skibbie

Individual(s)

Organization Type	Individual
Organization	
Email Address	sean.skibbie@wmitchell.edu
Title	
Name	SEAN SKIBBIE
Address 1	1818 NEWTON AVE N
Address 2	
City	MINNEAPOLIS
State	MINNESOTA
Zip	55411
Country	UNITED STATES
Created On	4/28/2011 1:12:00 AM

Thank you for the opportunity to comment on proposed rule and draft programmatic environmental impact statement regarding the proposed changes to planning regulations for the National Forest System, as mandated by the National Forest Management Act of 1976 (“NFMA”). Upon review of the record and the language of the rule, significant opportunities exist for the improvement of the proposed regulations.

This assessment will focus on the proposed rule’s erosion of safeguards that will allow the Forest Service (“Service”) to approach the limits of what is legally acceptable under NFMA and other laws under the proposed rule, especially in regards to diversity requirements. Also considered will be the changes in the regulations regarding monitoring efforts undertaken in compliance with NFMA.

This assessment recommends improvements to the proposed rule. These improvements will result in several changes to ensure that the proposed rule will adhere to NFMA, specifically its unambiguous language regarding the Service’s diversity mandate and the Service’s monitoring obligations.

Legal Acceptability of Service Management Plans Under Proposed Regulations

One example of the threat that these proposed rules will violate NFMA can be illustrated in an analysis of *Sierra Club v. U.S. Forest Service*, 259 F.3rd 1281 (10th Cir. 2001), in which the court sided with the Service in management of the Black Hills Forest Reserve. In this case, the Sierra Club brought a NFMA challenge to the Service’s management plans authorizing two commercial timber sales in the Norbeck Wildlife Preserve in the Black Hills. *Id.* at 1284. Specifically, the Sierra Club challenged the Service’s determination that management plans contributing to overall diversity were acceptable, even if species already jeopardized might be compromised further. *Id.* at 1285-1286. In holding that the Norbeck Organic Act demanded the challenged management plan to demonstrate protections for game animals and bird, the court specifically articulated that “the harvest plan fulfilled the NFMA goal of overall diversity.” The court noted that it “might eventually confront the question of whether it is acceptable management practice to favor overall vegetative and animal diversity even at the expense of rare species of plants or animals,” but it declined to do so here. *Id.* at 1285.

It is worth putting into context of just how damaging an “overall diversity” application of species preservation can be to endangered or threatened species. One critique notes that many of the protected species the Sierra Club sought to protect in the above case “are in danger of global extinction.” Christine Klein, Federico Cheever, Bret Birdsong, *Natural Resources Law: A Placed-Based Book of Problems and Cases*, 314 (2d ed. 2009). It further observes that “[a] badly maintained suburban backyard may contain an extraordinary array of plant and animal species. An undisturbed forest... may contain relatively few species.” This “overall diversity” application upheld in the above case holds garter snakes and grasshoppers on equal footing with Canada lynx and polar bears for the purposes of meeting diversity requirements in management plans.

The “overall diversity” approach was constructed under the 1982 rules. The requirement of these rules, however, to “manage habitat to ‘maintain viable populations of native and desired non-native vertebrate species in the planning area,’” (47 FR 43048; September 30, 1982, section 219.19, obtained from current proposed rule overview, 36 C.F.R. part 219, 8494), is eliminated in the proposed rule because, among other reasons, it is unattainable. *Id.* As a result, nothing in the proposed rule will prevent the “overall diversity” approach from being implemented by the Service under the new standards. While the court did not address the issue in the case mentioned above, courts have not endorsed this approach and there is likely to be a challenge to any construction of overall species diversity that allows the loss of population of a threatened species to be offset by an increase in the population of garter snakes.

While the legality of this approach is yet to be determined under NFMA, it presents even larger problems when facing compliance with other procedural and substantive environmental laws. Forest activities are required to comply with *all* federal environmental laws. Michael Gippert, Vincent DeWitte, *The Nature of Land and Resource Management Planning Under The National Forest Management Act*, 3 Environmental Lawyer 149, 169 (1996). Yet the result of eliminating the Service's obligation to maintain viable populations may inadvertently reduce the habitat or prey available to endangered or threatened species.

Additionally, following the "overall diversity" approach means that while the number of species may not change, the species that cannot survive in areas other than those within the National Forest system may be significantly reduced. While this may not result in direct violations of the Endangered Species Act, it removes a safeguard these species badly need to ensure their habitat is protected.

With specific consideration to the Endangered Species Act, it should also be noted that under the current rules, a wide diversity of species of plants and animals have flourished in America's National Forests. Despite making up just 10 percent of America's total land, the National Forests are home to over 10,000 plant species, 3,000 vertebrates, and over 400 endangered species. *Saving Our National Forests: An Analysis of the Proposed Revisions to the National Forestry Management Act*, available at: <http://kanat.jsc.vsc.edu/student/zannelli/mframe.htm>. The National Forests also constitute habitat for 50 percent of America's total plant species, 73 percent of America's old growth forest, 50 percent of the trout and salmon streams, and 80 percent of the elk, mountain goat, and bighorn sheep in the U.S. *Id.*

The importance of maintaining the diversity in the National Forest System is heightened by urban sprawl and population growth, which is altering the landscape in many rural areas that many of these species have traditionally relied upon. This makes the relationship to the proposed regulations and the "overall diversity" of species in the United States and on the planet of paramount importance.

The Service notes that it is planning to include invertebrates in its diversity regulations, which are not covered under the 1982 regulations. This is laudable and should be preserved. This should not, however, result in a decrease in vertebrate species. The current proposed rule does not prohibit such activity.

Monitoring

The proposed rule significantly alters the current monitoring system requirements. NFMA requires that regulations provide for specific guidelines for land management plans "based on continuous monitoring and assessment in the field." 16 U.S.C. § 1604 (g)(3)(c) (1976). This continuous monitoring requirement provides the foundation by which many of the standards of NFMA are measured.

What is unclear in the proposed rules is how the Service is planning to meet the continuous monitoring and assessment requirement. The proposed rules do not require the monitoring based on management indicator species, and there is no clarity over what monitoring the Service is planning to do in the place of this standard. The plain language of NFMA is unambiguous in its requirement that the Service perform continuous monitoring and assessment.

Recommendations

In light of these observations, it is recommended several steps be taken to improve the rule and ensure the diversity of species within the borders of the United States.

First, the proposed rule demands a definition of the word "diversity." Throughout the proposal, diversity is mentioned as being of paramount importance. Yet the definition has been removed from the regulations. Without a definition, the Service cannot promulgate a consistent standard. Diversity should

not be regarded as a concept that is adjustable to an individual forest management plan. It is the foundation of many of the Service's obligations under NFMA. Absent a definition, there will be no standard with which the Service's adherence to NFMA can be measured.

The 1982 regulations define diversity as “[t]he distribution and abundance of different plant and animal communities and species within the area covered by a land and resource management plan.” 36 CFR § 219.3 (1982). According to a description of this definition from the Service, this definition helps the service “guide land and resource management planning.” USDA Forest Service, Marc Bosch, *Some Statutory, Regulatory and Policy Authorities on Selected Topics: Diversity, Viability, Management Indicator Species, and Information and Data* (December 2002); available at: www.fs.fed.us/r6/sfpnw/issssp/documents/ag-policy/20021200-fs-bosch-authorities1.doc.

Next, the proposed rule should specify that in creating management plans to meet the diversity requirements mandated by NFMA, the Service will not resort to the “overall diversity” method challenged in *Sierra Club v. U.S. Forest Service*, 259 F.3rd 1281. Such a method turns the diversity requirement on its face, eliminating any obligation by the Service to protect the habitat of species that need it most. This method, enacted on a wide scale, could have disastrous consequences on the ecosystems of the United States. It also could be successfully challenged in court. Instead, the proposed rule should specify that any calculations of species diversity will encompass factors prioritizing the protection of the most endangered or threatened species that inhabit a given area.

Finally, the proposed rules should adopt the monitoring regulations of the former rule. These regulations provide the management indicator species methodology, which has proven effective at supervising the species in America's National Forests, has met the obligations of NFMA's unambiguous language, and has demonstrated a practical value in the Service's success in implementing this method.

Conclusion

The United States National Forest System, as a whole, is one of the most diverse land preservation systems in the world in regard to species diversity. This is an attribute to its management by the Forest Service under the 1982 regulations. While no set of regulations are perfect and the 1982 regulations prevent modern challenges in adherence and implementation, their successes should be carefully preserved when any changes are considered.

Implementing these suggested changes will result in a stronger proposed rule and allow for the diversity of the National Forest System to continue to flourish. They will also assist the Service in best management practices and protect the Service from court challenges. Plainly stated, they will result in a rule that is more effective at maintaining and creating diversity, as well as guiding the Service to uphold the requirements clearly articulated by NFMA.

Thank you for your consideration of these issues.

Sincerely,

Sean Skibbie
Juris Doctor Candidate