Statement of

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On Behalf of

American Forest Resource Council and Federal Forest Resource Coalition

Before the

House Resources Committee

Subcommittee on National Forests, Parks, and Public Lands

United States House of Representatives

November 15, 2011

Regarding the Forest Service Proposed Forest Planning Rule

Chairman Bishop and members of the Subcommittee, thank you for the opportunity to testify. I am Scott Horngren, and I am testifying on behalf of the American Forest Resource Council (AFRC) and the Federal Forest Resource Coalition (FFRC).

AFRC is a nonprofit corporation and trade association headquartered in Portland, Oregon. AFRC represents lumber and plywood manufacturing companies throughout the west that obtain their raw material for their mills from private and federal forest lands. AFRC and its predecessor associations have actively participated through association staff and its members in the rulemaking, forest planning process, and forest plan implementation and monitoring on individual national forests since the National Forest Management Act (NFMA) was passed in 1976. AFRC has also been involved as a codefendant with the Forest Service in many lawsuits challenging forest plan decisions through individual timber sale projects.

FFRC is a national coalition of small and large companies and regional trade associations across the country whose members manufacture wood products, paper, and renewable energy from federal timber resources. Coalition members employ over 350,000 workers in over 650 mills, with payroll in excess of $19 billion. FFRC wants to ensure timely and effective access to federal lands to sustainably

produce timber, pulpwood, and biomass and for prompt management to protect federal forests from insects, disease, and wildfire.

I am an attorney with over two decades of litigation experience involving national forest management. I also have a forest management degree and the lawsuits halting sound forest management in the early 1980s motivated me to go to law school. Before joining AFRC as a staff attorney last year, I was in private practice representing local governments, resource users, and landowners who have intervened in lawsuits to support the Forest Service. I have represented Mineral County Montana, Apache County Arizona, and Boundary County Idaho defending the Forest Service in cases challenging both forest plans and forest management projects.

We have many concerns with the Forest Planning rule. Along with my testimony, I would like to submit for the record the official comments filed on the proposed rule by the AFRC. While the rule is long and complex and our concerns many, I will focus my comments to six points. First, the proposed planning rule will increase the complexity, cost, and time for the Forest Service to complete forest plans. Second, of greater concern, is that the planning rule will make the projects that implement the plans more vulnerable to lawsuits than they are today. Third, the proposed planning rule nullifies, rather than builds upon, the hard fought court victories the Forest Service achieved in the last decade to allow them to implement badly needed forest management projects. Fourth, the viability section of the planning rule is the prime example of the first three problems. Fifth, the proposed forest planning process allows local planners to establish unworkable, defacto regulations shielded from the view of Congress and the Secretary. Finally, the proposed planning rule will have the planning team tied in knots chasing the mythical "best available science."

1. <u>The planning rule will make forest planning even more complex, costly, and time consuming.</u>

Budgets are tight and planning should not take forever. The combined forest plan revision process for the three Northeast Oregon National Forests began in 2004. Seven years later, a draft forest plan has not even been produced for public comment. There is a need for a far less complex and costly planning process which can be completed in a time frame which allows meaningful public input. Instead the proposed rule will increase the Forest Service's analytical burden and expense. The Forest Service's own analysis of the rule concludes it will not save much time and money. The rule has a multitude of "shalls" and "musts," with the word "shall" used 55 times and "must" used 98 times. Based on my

litigation experience, the commitments that the Forest Service makes in the proposed rule will vastly increase the expense and time to complete an acceptable forest plan.

A perfect example is the new requirement to conduct multiple "Assessments." 36 C.F.R. 219.6. The Assessment process creates a new legally enforceable obligation to "Identify and evaluate information needed to understand and assess existing and potential future conditions and stressors in order to inform and develop required plan components and other content in the plan" and "the responsible official shall notify and encourage" . . . "the public" and "appropriate" . . . Federal agencies" and "scientists to participate in the assessment process." 219.6(a). The Assessments will presumably include non-federal scientists to help "inform" planning which will require compliance with the Federal Advisory Committee Act increasing delay and expense. The Forest Service is placing the subsequently developed Forest Plans at risk by requiring a process to develop Assessments with public participation and non-federal scientists that "inform" decisions in the plan without going through the NEPA process or complying with FACA. One alternative is to make the Assessments subject to NEPA and FACA but this will make the forest planning process even more unworkable. A better approach is to eliminate the Assessments section from the planning rule entirely.

The Assessments will overwhelm the planning team in interpreting how to comply with the new requirements. If the Forest Service does not "notify" and "encourage" plaintiffs' preferred scientists to participate, then does it violate the law? Does "notify" mean just publish a notice in the newspaper? Which newspaper – The Washington Post, the Washington Times, or the Stanford Daily? Does the Responsible Official have to write the scientist to "encourage" her to participate? Is a letter and a follow-up phone call enough "encouragement"? And who are the "appropriate" agencies and scientists? Certainly EPA would have to be notified and encouraged to participate in the Assessment given the proposed planning rule's emphasis on climate change and carbon sequestration. If a plaintiff can show that the Forest Service failed to do enough to "encourage" the participation of the so called "appropriate scientists" the agency will have violated the proposed rule.

The Assessment section will also create a powerful new tool for plaintiffs to attack any Forest Service analysis that looks and smells like an Assessment. For example, the proposed rule says an Assessment may be "a one-page report" and any resource analysis in the planning file arguably related to "ecological, economic, or social conditions, trends, and sustainability within the context of the broader landscape" qualifies as an Assessment and will violate the regulation if it was not prepared with

public participation and appropriate scientists were not involved in its preparation. 36 C.F.R. 219.6, 219.19.

The great burden, complexity, and cost of the proposed rule is also illustrated by its treatment of wildlife. The rule and its Federal Register preamble (which is used by courts to interpret the rule) include multiple categories of species. The Federal Register explains: "There are several categories of species that could be used to inform the selection of focal species for the unit. These include indicator species, keystone species, ecological engineers, umbrella species, link species, species of concern, and others." 76 Fed. Reg. at 8498 (Feb, 14, 2011). Some of the species are probably mutually exclusive but other species overlap creating a planning nightmare. The forest planning rule should instead focus on habitat, a factor over which the managing agency has some control.

Finally, the proposed rule expands the Forest Service obligations not only during the heart of the planning process but also at the beginning and the end of the planning process. At the beginning of the process, the Responsible Official "shall" encourage participation by a long list of groups under 36 C.F.R. 219.4. At the end of the process the Responsible Official "must" monitor the "status of focal species" . . . "measurable changes on the unit related to climate change and other stressors" and "the carbon stored in above ground vegetation." 36 C.F.R. 219.12.

Under President Obama's Executive Order 13579 signed January 11, 2011, rules are supposed to be made more cost effective, less burdensome, and more flexible. The proposed planning rule does just the opposite and creates new mandatory obligations on Forest Supervisors and Regional Foresters for which the Forest Service has no means of compliance.

2. The planning rule will impede, rather than ease, the implementation of forest restoration projects with more costly, time consuming procedure for projects.

The proposed planning rule is supposedly designed to avoid long delays, excessive costs, and litigation. Unfortunately, the proposed planning rule strikes out in all three areas because the rule will increase the complexity and the analytic burden, not just of preparing the forest plan itself but of the projects that implement the plan. Approximately 75% of project preparation cost is for analysis to comply with the National Environmental Policy Act, the forest plan, and the planning rules such as viability and management indicator species. The Forest Service seems to have forgotten that it is not the plans sitting on the shelf that treat the diseased and fire prone forests, but the projects that implement

those plans. The proposed rule fails to take the steps needed to aid and support the projects that implement the plans.

Projects are greatly constrained by the proposed forest planning rule. First, each and every project must comply with every substantive standard in the forest plan. The proposed rule requires that "every project" must comply with "plan components." 36 C.F.R. 219.7(d). And the "plan components" are extensive. Plan components are mentioned 45 times in the rule. In the Sustainability Section 219.8, alone, forest plans "must include plan components" to "maintain, protect, and restore" aquatic elements, soils, and rare plant and animal communities."

Second, the proposed planning rule does nothing to ease the procedural and analytical burden for projects. For example each and every project must repeat the analysis of how the project will maintain "a viable population of a species" and provide "sustainable recreation opportunities" because these are analytical "plan components" of the rule. 36 C.F.R. 219.8(b)(2), 219.9(b)(3). These are forest level questions best answered at a larger scale that should not have to be answered again and again in the analysis for each project.

The Forest Service needs to carefully reconsider how the proposed rule will substantively limit management flexibility for projects and will weigh down an already overburdened project preparation process. The Forest Service, for instance, is currently embarking on a NEPA analysis of a large-scale bark beetle infestation in the Black Hills. We understand that this analysis will consume 12 to 14 months. Imposing project specific analysis on such a scale will only delay badly needed forest health treatments that can help check the spread of infestation and make the forest more resilient in the future, the very goals the proposed planning rule claims to promote.

3. The planning rule would cast aside significant Forest Service court victories.

One of the most disheartening flaws of the proposed rule is the abandonment of favorable legal precedents that the Forest Service has established after nearly 30 years of litigation over NEPA and the provisions of the 1982 forest planning rule. This is particularly frustrating for AFRC which has worked hard to defend Forest Service decisions and establish that they have discretion in implementing the existing planning regulations and is not bound by costly data collection and scientific proof requirements. Instead of building on these legal victories and streamlining and narrowing the existing

planning rule, the proposed planning rule concedes precious legal ground and builds a strong foundation for future legal defeats.

The examples below are only a few of the areas where the planning rule will make the Forest Supervisor's job much harder by eliminating or undermining Forest Service legal victories.

- The proposed rule abandons the major victory in Lands Council v. McNair, 537 F.3d 981 (9th Cir. 2008)(en banc) that affirmed that the Forest Service has discretion in it management decisions. The proposed rule adopts many non-discretionary requirements where the responsible official "must" or "shall" adopt a specific management approach. For example, under Section 219.8 "the plan must provide for . . . ecological sustainability," whatever that means.

- The proposed rule abandons the victory in Seattle Audubon Society v. Moseley, 830 F.3d 1401, 1404 (9th Cir. 1996) which upheld selection of an alternative in the Northwest Forest Plan that provided an 80% rather than 100% probability of maintaining the viability of the spotted owl because "the selection of an alternative with a higher likelihood of viability would preclude any multiple use compromises contrary to the overall mandate of the NFMA." The proposed rule does not even mention the term "multiple-use objectives" in Section 219.9 which covers diversity and viability. The rule completely ignores the clear language of NFMA that says diversity is a goal to be provided "in order to meet overall multiple-use objectives." 16 U.S.C. 1604(g)(3)(B).

- The proposed rule abandons the victory in Lands Council v. McNair, 537 F.3d 981 (9th Cir. 2008)(en banc) that builds on the Mosely case that viability is not the only factor the Forest Service must address in developing forest plans. "NFMA. . . requires that plans developed for units of the National Forest System 'provide for multiple use and sustained yield of the products and services obtained there from.' . . . the NFMA is explicit that wildlife viability is not the Forest Service's only consideration when developing site-specific plans for National Forest System lands." Id. at 990 (emphasis added).

- The proposed rule abandons the victory in Lands Council v. McNair, 537 F.3d 981, 991-92, (9th Cir. 2008)(en banc) that the Forest Service doesn't have to consider any and every scientific study or alternative methodology when it evaluates its land management options. The proposed rule in the Section 219.3 requires the Forest Service to verify "what information is the most accurate, reliable, and relevant" and Section 219.12 governing monitoring requires that "the responsible official . . . shall ensure that scientists are involved in the design and evaluation of unit and broad scale monitoring."

219.12 (c)(4). While the Forest Service should base its decision on sound scientific knowledge, as well as legal mandates and the experience of local officials and stakeholders, the proposed rule elevates an ideal conception of science to a legally controlling, and unattainable, requirement.

- The proposed rule abandons the victory in Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1359 (9th Cir. 1994) that "NEPA does not require [that we] decide whether an [environmental impact statement] is based on the best scientific methodology available, nor does NEPA require us to resolve disagreements among various scientists as to methodology." The propose rule imposes in Section 219.3 an independent requirement beyond NEPA that the responsible official for the forest plan "determine" and justify what is the "best available scientific information."

- The proposed rule abandons the victory in Greater Yellowstone Coalition, Inc. v. Servheen, 672 F.Supp.2d 1105, 1114 (D.Mont. 2009) that held "[w]hen Forest Plans contain standards, the standards are 'mandatory requirements,' in contrast to guidelines, 'which are discretionary.' The proposed rule throws this victory away because Section 219.15 defines both standards and guidelines as mandatory.

- The proposed rule abandons the victory in Norton v. Southern Utah Wilderness Alliance, 124 S.Ct. 2372, 2382 (2004) that land use plan monitoring is not a "binding commitment in terms of the plan." Although the Norton case involved the monitoring provisions of a BLM management plan, it is a helpful victory that recognized the agency has flexibility if the agency itself has not created a binding commitment. Unfortunately, in Section 219.12, Monitoring, the longest and most detailed section of the planning rule, the Forest Service sets forth extensive and detailed monitoring requirements replete with the word "shall" that will be undermine the Norton victory.

4. The proposed rule's changes to the "viability rule" make it worse, not better.

The term "species viability" in not found in the National Forest Management Act. The Act itself only refers to developing "guidelines" which "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 U.S.C. 1604 (g)(3)(B). The term "viability" was added to the planning regulation in 1982. Since then, the so-called "species viability rule" has been the centerpiece of two decades of litigation by environmental groups who were generally successful in persuading courts to second guess Forest Service decisions and impose delays for costly, time consuming species surveys. The high water mark was a decision in Ecology Center v. Austin, 430 F.3d 1057 (9th Cir. 2005) on the Lolo National Forest

which held that the Forest Service had to prove with "clinical trials" similar to drug companies seeking approval of a new drug, that any harvest would have no adverse effect on wildlife.

It is critical to note that this legal fiction, created entirely from regulation and subsequent litigation, has not actually led to improved habitat conditions on large portions of the National Forest System. Rather, it has created a judicially enforced presumption that less management, on fewer acres, with mind-bogglingly complex selection criteria to identify lands available for management, will lead to greater species diversity and more healthy, vibrant forests. The reality on the ground has been continued declines for a number of species, less healthy and vigorous forests, and decreased ability to react to obvious threats to forest health.

Thankfully, in 2008 in Lands Council v. McNair, an en banc panel of 11 judges representing the entire Ninth Circuit unanimously reversed this line of cases for the Mission Brush Restoration Project in Idaho.

The good news is the Mission Brush decision established several important principles that help the Forest Service that apply to addressing species viability:

- The court held that judges "must defer to the Forest Service as to what evidence is, or is not, necessary to support wildlife viability analysis." McNair, 573 F.3d at 992.

- The court emphasized that "[g]ranting the Forest Service the latitude to decide how best to demonstrate that its plans will provide for wildlife viability comports with our reluctance to require an agency to show us, by any particular means, that it has met the requirements of the NFMA every time it proposes action." Id.

- The court emphasized that the National Forests are to be managed for multiple uses and that "the NFMA is explicit that wildlife viability is not the Forest Service's only consideration when developing site-specific plans for National Forest System lands." McNair, 573 F.3d at 990.

- The court concluded the Forest Service has flexibility in providing for wildlife viability and it is not the court's role to second guess how the Forest Service chooses to provide for wildlife viability. The court concluded "Thus, as non-scientists, we decline to impose bright-line rules on the Forest Service regarding particular means that it must take in every case to show us that it has met the NFMA's requirements." McNair, 573 F.3d at 994-95.

- The court endorsed the use of a habitat analysis to assess wildlife viability and did not require a population based analysis. So long as the analysis uses the best available information and confirms the type of habitat a species uses, a discussion of habitat changes is sufficient to demonstrate species viability. McNair, 573 F.3d at 992.

The bad news is, that the species viability section of the proposed planning rule does not build on the principles from this victory, rather it throws several of them under the bus, and moves in a direction that will make it even more burdensome than the current viability rule.

The proposed rule states:

> *§ 219.9 Diversity of plant and animal communities.*
> *Within Forest Service authority and consistent with the inherent capability of the plan area, the plan must include plan components to maintain the diversity of plant and animal communities, as follows:*
> * * *
> *(b) Species Conservation. The plan components must provide for the maintenance or restoration of ecological conditions in the plan area to:*
> * * *
> *(3) Maintain viable populations of species of conservation concern within the plan area. Where it is beyond the authority of the Forest Service or the inherent capability of the plan area to do so, the plan components must provide for the maintenance or restoration of ecological conditions to contribute to the extent practicable to maintaining a viable population of a species within its range. When developing such plan components, the responsible official shall coordinate to the extent practicable with other Federal, State, tribal, and private land managers having management authority over lands where the population exists.*

-- The proposed rule expands the viability requirement beyond vertebrate species to include "native plants and native invertebrates (fungi, aquatic invertebrates, insects, plants, and others)" which will make the cost of compliance soar and establish a regulatory standard that cannot be achieved.

-- The proposed viability rule does not include the limiting phrase "to meet overall multiple-use objectives" (which explicitly modifies the "provide for diversity" language in NFMA) to make it clear that the Forest Service must provide for diversity of plant and animal communities to meet overall multiple use objectives and not the other way around. The proposed rule will undercut Forest Service victories where courts recognized that viability is not the engine that drives planning decisions. McNair, 537 F.3d at 990 ("the NFMA is explicit that wildlife viability is not the Forest Service's only consideration when developing site specific plans for National Forest System lands."). Id.

-- The viability rule will require the Forest Service to demonstrate that every project will maintain viability since viability is a "plan component."

> *219.7 (d) Plan components. Plan components guide future project and activity decision making. The plan must indicate where in the plan area specific plan components apply. Plan components may apply to the entire plan area, to specific management or geographic areas, or to other areas as identified in the plan. Every project and activity must be consistent with the applicable plan components* (§ 219.15) (emphasis added).

This requirement will mean each and every localized project will have to demonstrate over and over again how the Forest Service will maintain viable populations of species of conservation concern across the forest.

-- The definition of "species of conservation concern" is potentially limitless. The Responsible Official that approves a forest plan should have authority to determine a manageable list of species. Also, requiring a forest plan to provide a guarantee of viability for a species over which there is significant concern about viability requires the agency to guarantee something that it cannot. It puts the burden on the Forest Service to prove it will maintain a viable population and invites litigation over the adequacy of the substantive requirements in the plan, survey obligations, and population monitoring. The approach of the rule essentially requires species specific plans like the lengthy and expensive lynx plan amendments prepared for Regions 1 and Region 2. NFMA requires the Forest Service to develop plans which "form one integrated plan for each unit of the National Forest System" 16 USC 1604 (f)(1) - not separate wolverine, fisher, goshawk, and black-backed woodpecker plans.

-- The proposed rule requires conservation of Fish and Wildlife Service "candidate species" which require no protection under the ESA. The Forest Service has higher planning priorities than to devote its scarce resources to providing a conservation strategy in the forest plan to conserve every species for which the listing agency has not even decided whether to propose listing or made a determination to list.

-- The proposed viability rule requires that the "The plan components must provide for the maintenance or restoration of ecological conditions to contribute to the extent practicable to maintaining a viable population of a species within its range. . ." This is an unattainable anti-degradation standard. The Ninth Circuit has emphasized in McNair that "[o]f course, neither the NFMA nor the . . . Forest Plan require the Forest Service to improve a species' habitat to prove that it is maintaining wildlife viability." McNair, 537 F.3d at 995. However, the proposed viability rule is written so that all

"plan components" "must provide for maintenance and restoration," which creates a legal "non-degradation standard" for wildlife throwing away the victory in McNair.

-- The reference to "population" in the proposed viability rule will require costly population inventories and lead to litigation to establish a population survey requirement which will be impossible to meet for species such as the wolverine which are difficult to detect. Instead, maintenance of habitat for the species should be the focus of the new viability rule.

5. The Proposed Rule establishes defacto regulations hidden from view of Congress and the Secretary.

By creating Forest Plan "standards," a planning team is able to impose significant, costly, and unsupported restrictions on resource management that have the effect of regulations (i.e. – the force of law). However, because forest plan standards are not formal regulations, Congress does not have the opportunity to reject them under the Congressional Review Act of 1996. 5 U.S.C. 801-808. And because forest plans are typically approved by the Regional Forester, the Secretary also has no oversight of these standards. Compliance with forest plan standards is the centerpiece of many lawsuits challenging projects that implement a forest plan. That is because the NFMA requires that "resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans." 16 U.S.C. 1604(i). So if there is a dispute over whether a particular project complies with a forest plan standard such as providing for "ecological sustainability" then it ends up in the courts where the judges decide what the standard means and whether a project violates the standard.

The courts have had several occasions to review the distinction between forest plan standards and guidelines as they are currently defined under the existing regulations. The courts have ruled in favor of the Forest Service and repeatedly rejected plaintiffs' arguments that the agency was legally compelled to follow a forest plan guideline. For example, in Wilderness Soc. v. Bosworth, 118 F.Supp.2d 1082, 1096 (D.Mont. 2000), the Ninth Circuit rejected plaintiffs argument that all old growth stands had to be a minimum of 25 acres. The court concluded that "the 25 acre minimum size requirement in the Forest Plan is a guideline and is therefore discretionary rather than mandatory." Id. at 1096. Similarly, in Greater Yellowstone Coalition, Inc. v. Servheen, 672 F.Supp.2d 1105, 1114 (D.Mont. 2009) the court noted that "[w]hen Forest Plans contain standards, the standards are 'mandatory requirements,' in

contrast to guidelines, 'which are discretionary.' " The Forest Service should not toss aside these legal victories.

The proposed rule effectively eliminates the distinction between forest plan guidelines and standards making guidelines legally enforceable standards that all projects must "comply with." This change destroys the Forest Service hard fought legal victories establishing that guidelines are discretionary -- not mandatory, and provide management flexibility.

> *§ 219.15 Project and activity consistency with the plan.*
>
> * * *
>
> *(d) Determining consistency. A project or activity approval document must describe how the project or activity is consistent with applicable plan components developed or revised in conformance with this part by meeting the following criteria:*
>
> *(1) Goals, desired conditions, and objectives. The project or activity contributes to the maintenance or attainment of one or more goals, desired conditions, or objectives or does not foreclose the opportunity to maintain or achieve any goals, desired conditions, or objectives, over the long term.*
>
> *(2) **Standards**. The project or activity **complies with** applicable standards.*
>
> *(3) **Guidelines**. The project or activity:*
>
> *(i) Is designed to **comply with** applicable guidelines as set out in the plan; or*
>
> *(ii) Is designed in a way that is as effective in carrying out the intent of the applicable guidelines in contributing to the maintenance or attainment of relevant desired conditions and objectives, avoiding or mitigating undesirable effects, or meeting applicable legal requirements (§ 219.7(d)(1)(iv)).*

The proposed rule must not further constrain agency discretion and provide more litigation vehicles to challenge agency decisions. This would be the result of the proposed rule's elimination of the distinction between standards and guidelines and eviscerate the discretionary nature of guidelines by requiring that all projects "comply with" guidelines. The results will be an even more hide-bound decision making process, which sacrifices improved forest management on the altar of extensive process and analysis.

6. The planning rule must recognize that science is constantly changing and that no scientist can lay claim to the mythical "best" science.

The final significant problem with the proposed planning rule is that it imposes a legal duty that requires the planning team to decipher what qualifies as the "best available science" as if there was such a thing. Sound science has an important role in Forest Service planning and management.

However, the proposed rule establishes costly, time consuming procedural requirements that the Forest Service "take into account" the best available science and demonstrate that the "most accurate, reliable, and relevant information" was considered and how it "informed" the development of the forest plan. 36 C.F.R. 219.3. This will slow the planning process to a crawl and create a new legal burden on the Forest Service to prove that it has "taken into account" the best available science in both the forest plan and implementing projects. Each project will have to repeat the analysis of the best available science.

The NFMA statute neither refers to, nor requires the use of, "best available science" or "best available scientific information." Neither does NEPA. The Ninth Circuit Court of Appeals has affirmed that these statutes do not require a determination of whether national forest planning or project-level NEPA documents are based on "best" available science or methodology, that disagreements among scientists are routine, and that requiring the Forest Service to resolve or present every such disagreement could impose an unworkable burden that would prevent the needed or beneficial management. Lands Council v. McNair, 537 F.3d 981, 991 (9th Cir. 2008)(en banc); Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1359 (9th Cir. 1994).

In Lands Council, a unanimous en banc panel of the Ninth Circuit gave the Forest Service more leeway and flexibility regarding scientific analysis. The Court emphasized that, "[t]o require the Forest Service to affirmatively present every uncertainty in its EIS would be an onerous requirement, given that experts in every scientific field routinely disagree; such a requirement might inadvertently prevent the Forest Service from acting due to the burden it would impose." McNair, 537 F.3d at 1001. The Forest Service should recognize, as the Ninth Circuit finally has, that there is no holy grail of the "best" or "most accurate" science. Even NEPA does not require such impossible divining of the "best" science. The Ninth Circuit held that "NEPA does not require [that we] decide whether an [environmental impact statement] is based on the best scientific methodology available, nor does NEPA require us to resolve disagreements among various scientists as to methodology." Salmon River Concerned Citizens, 32 F.3d at 1359.

The proposed rule ignores these legal victories that establish that there is no such thing as the "best" or "most accurate" science and will relieve plaintiffs of the burden to prove why the Forest Service decision is flawed. The Forest Service will now be forced to labor under the burden to prove why its decision "is informed by" the best science. The burden to prove that the Forest Service was

arbitrary and capricious in its decision-making should remain with plaintiff and the regulations must strive to avoid placing the heavy burden of proof on the agency. The proposed rule states:

> *§ 219.3 Role of science in planning.*
>
> *The responsible official shall take into account the best available scientific information throughout the planning process identified in this subpart. In doing so, the responsible official shall determine what information is the most accurate, reliable, and relevant to a particular decision or action. The responsible official shall document this consideration in every assessment report (§ 219.6), plan decision document (§ 219.14), and monitoring evaluation report (§ 219.12). Such documentation must:*
>
> *(a) Identify sources of data, peer reviewed articles, scientific assessments, or other scientific information relevant to the issues being considered;*
>
> *(b) Describe how the social, economic, and ecological sciences were identified and appropriately interpreted and applied; and*
>
> *(c) For the plan decision document, describe how scientific information was determined to be the most accurate, reliable, and relevant information available and how scientific findings or conclusions informed or were used to develop plan components and other content in the plan.*

The proposed rule undermines the principle that the Forest Service can make natural resource management decisions based on its discretion in weighing various multiple-use objectives rather than elevating science to the primary decision making factor. For example, the Ninth Circuit in Seattle Audubon Society v. Moseley, 830 F.3d 1401, 1404 (9th Cir. 1996) upheld selection of an alternative in the Northwest Forest Plan that the science indicated would provide an 80% rather than 100% probability of maintaining the viability of the spotted owl because "the selection of an alternative with a higher likelihood of viability would preclude any multiple use compromises contrary to the overall mandate of the NFMA." That Ninth Circuit in the Mission Brush case finally recognized that, "[c]ongress has consistently acknowledged that the Forest Service must balance competing demands in managing National Forest System lands. Indeed, since Congress' early regulation of the national forests, it has never been the case that 'the national forests were . . . to be set aside for non-use'." McNair, 537 F.3d at 990.

Finally, the use and dissemination of scientific information by federal agencies is addressed by the Federal Data Quality Act (P.L. 106-554 §515) and subsequent guidelines from the Office of Management and Budget (http://www.whitehouse.gov/omb/fedreg_reproducible). We believe that the protections and assurances of the quality of scientific information used and distributed by federal agencies under the Federal Data Quality Act is sufficient to ensure that quality of scientific information

being used by the USFS in the planning process and a requirement to identify the “most accurate” scientific information should not be a legal requirement in the planning rule itself.

The planning rule must not require the Forest Service to do more than take into account available, relevant scientific information along with other factors in the development, amendment, or revision of national forest plans, without reference to which information is "best." Proposed Section 219.3 should be deleted or greatly abbreviated, along with any other references in the proposed rule to "best available scientific information."

Thank you for permitting me to testify.