
Making Forest Planning Great Again? Early Implementation of the Forest Service's 2012 National Forest Planning Rule

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Our title notwithstanding, we admit from the outset that forest planning has perhaps never been “great.” Over the past four decades since the enactment of the National Forest Management Act (NFMA), which requires the U.S. Forest Service (Forest Service, USFS) to develop a set of regulatory requirements that guide the development of land and resource management plans or “forest plans,” hundreds of legal opinions from all levels of the federal judiciary have attempted to define the rights and responsibilities of forest users and managers. Often the results have been unsatisfying for all concerned. But today, the revision of forest plans using a new groundbreaking planning rule provides a rare opportunity to build agreement and shared stewardship of our national forests among diverse stakeholders. If used to their full potential, forest plans can help break the political impasse on national forest management and offer a more bottom-up, participatory, and science-informed alternative than some of the more ideological and deregulatory “forest reform” legislative proposals offered by Congress.

In 2012, the Obama Administration finalized a new set of regulations to guide forest plan revision and amendments, after several aborted attempts to create new forest planning requirements in 2000, 2005, and 2008. These new regulations, 77 Fed. Reg. 21,162 (Apr. 9, 2012) (codified at 36 C.F.R. Part 219 (2012)) (the Rule or 2012 Rule), are markedly different from prior iterations. In addition to traditional themes of multiple use and sustainability, the Rule boldly embraces the concepts of the use of the best available scientific information in planning, monitoring and adaptive management, collaboration and public engagement, and wildlife conservation.

Another hallmark of the Obama Administration's paradigm shift was the chartering of a 21-member Federal Advisory Committee representing all aspects of forest users and interests to assist the Forest Service with early implementation—troubleshooting—of the 2012 Rule. Committee members were appointed by the Secretary of Agriculture and served two-year

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terms beginning in 2012 and continuing until 2018 when the Trump Administration declined to extend the Committee's charter.

The Committee's informal motto was to “learn locally but advise nationally.” We heard from hundreds of land managers and forest users across the country over our tenure, and our mission was to spool up local lessons and trends into nationally applicable formal advice. During its tenure, the Committee produced several work products in an attempt to satisfy that motto, including providing formal recommendations on the Forest Service's Directives (field direction, contained in the USFS Handbook and Manual, on how to interpret and implement the Rule) and developing two guides for the general public and governments on the nuts and bolts of the planning process and how to participate. In February 2018, the Committee also submitted a final set of 66 formal recommendations to the secretary and chief of the Forest Service on issues such as adaptive management, youth engagement, agency turnover and transitions, the administrative objection process, and many other topics.

As two members of the Committee, the authors have a unique insight into the 2012 Rule itself as well as how the Rule has—or has not—been implemented in forest plans, based on our Committee service and review of draft and final plans revised under the 2012 Rule. We firmly believe that the 2012 Rule represents a paradigm shift in federal land planning and has extraordinary potential to navigate very difficult modern land management challenges successfully. Unfortunately, the potential of the 2012 Rule has yet to be realized for several organizational or institutional reasons. This is coupled with the fact that, in our view, forest management and its challenges are not fundamentally technical problems to be solved with a scientifically imbued formal rule set. Rather they are a social conundrum that must be addressed through robust and sustained collaboration with interested stakeholders. Until these organizational and social issues are addressed, the success of the 2012 Rule remains dubious.

Framework and Elements of the 2012 Rule

Under the 2012 Rule, each revised forest plan must include a set of *plan components* consisting of (1) desired conditions, (2) objectives, (3) standards, (4) guidelines, and (5) suitability of lands (required for timber production, optional for other multiple uses or activities). When properly integrated, these components establish the vision of a plan, set forth the strategy to achieve it, and provide the constraints of subsequent

management. Components can be applied across a national forest or to specific management or geographic areas designated in a plan, such as requiring riparian reserve buffer widths, grazing management standards, and guidelines for timber harvesting.

The 2012 Rule provides specific guidance on to how components shall be written: “clearly and concisely in a way that allows for monitoring to test their effectiveness and verify assumptions on which they are based” and “without ambiguity so that a project’s consistency with applicable plan components can be easily determined.” Forest Service Handbook 1909.12, ch. 20, sec. 22.1 (2015). Each plan revision should contain a combination of components that are restrictive, regulatory, flexible, and aspirational in nature.

A tension is evident in the plan revisions we have reviewed thus far. Much of the public expect components that are unambiguous, enforceable, and measurable, as a way to provide for monitoring and a degree of regulatory certainty and accountability. But the Forest Service tends to write components in a more ambiguous fashion, either to account for the scientific uncertainty and rapidly changing nature of forest management, or to preserve its administrative discretion.

For the adaptive approach to work, monitoring must not be an afterthought by the agency, but rather a “mission critical” element that is strategically employed at the earliest stages of plan development.

In the past, much of the debate centered on the use of “standards,” because they are generally viewed by the courts as nondiscretionary and enforceable. While this remains true, the 2012 Rule makes all components enforceable: “every project and activity must be consistent with the applicable plan components.” 36 C.F.R. § 219.15(d) (2012). In practice, however, enforceability will be difficult if a component is written in an unclear or vague manner. As discussed below, ambiguously written plan components will also make it difficult to measure and monitor them, thus impeding the Rule’s objective of adaptive planning.

The 2012 Rule provides a planning process that is to be more adaptive and science-based. The intent of the Rule’s “adaptive planning cycle”—assessment, revision/amendment, and monitoring—is to create a more “responsive planning process” allowing the USFS “to adapt to changing conditions and [to] improve management based on new information.” 36 C.F.R. 219.5(a) (2012). Important assumptions, areas of uncertainty, and risk are to be identified at the “assessment” stage of planning, and plan components are to be written in a way that allow for monitoring in order to test their effectiveness. Monitoring is the linchpin of the Rule’s adaptive framework,

as it provides the feedback “by testing assumptions, tracking relevant conditions over time, and measuring management effectiveness.” 36 C.F.R. 219.5(a)(3) (2012). Effective monitoring captures the data necessary to inform whether the forest plan needs to change in response to management actions, effects, and external stressors.

As discussed below, to date, forest plan revisions are not fully utilizing the Rule’s adaptive mechanisms to promote learning and improve decision-making. As noted in the Committee’s final recommendations, “[I]t appears as though there remains an entrenched adherence to the old way of developing forest plans under prior planning rules.” National Advisory Committee for Implementation of the National Forest System Land Management Planning Rule, Final Recommendations to the Secretary of Agriculture and the Chief of the Forest Service (Feb. 3, 2018) (Nat’l Advisory Committee Final Recommendations).

Monitoring is at the core of the problem. Most of the assessments prepared so far have not sufficiently identified areas of uncertainty and information needs that could be strategically addressed in the plan’s monitoring program. For the adaptive approach to work, monitoring must not be an afterthought by the agency, but rather a “mission critical” element that is strategically employed at the earliest stages of plan development. Monitoring questions must be decision-relevant so that plan components and management actions can be adjusted based on what is learned. If monitoring information is not made relevant to adjusting management actions, the public will increasingly view the agency’s use of adaptive management as specious and a way to maximize its discretion and flexibility.

Another key aspect of the 2012 Rule designed to address a shortcoming of the 1982 planning rule is the ease with which amendments to forest plans should occur based on monitoring. The amendment process is the culmination of adaptive management, in that managers and the public have learned new information based on monitoring, and that new information indicates that existing plan components or management direction should change in order to meet desired conditions on the forest. While the 2012 Rule included direction on the amendment process, the Committee soon realized that because most national forests would be required to wait years before sufficient funding and staffing were available to commence the revision process, older plans developed under prior planning rules would need to comply with the 2012 Rule—but that these plans were unlikely to be able to comply fully with the new rule.

As a result, the Committee worked closely with the Forest Service in 2016 to prepare and implement a revision of the 2012 Rule to provide more specific direction regarding the amendment process. The 2016 amendment clarifies that when a forest plan is amended to add, modify, or remove plan content, the Forest Service must determine the substantive requirements of the 2012 Planning Rule that are “directly related” to the changed plan content, and apply those substantive provisions of the 2012 Rule to the proposed plan change.

The 2016 amendment was developed specifically to avoid situations where land managers “amended” their forest plan to exempt a project from substantive forest plan requirements such as those related to soil and water protections. However, early application of the amendment process in high-profile cases—including the Mountain Valley Pipeline (MVP) on the Jefferson National Forest in Virginia, old growth management

on the Tongass National Forest in Alaska, and sage grouse management throughout the West—suggests that the process is perhaps not being used as envisioned by the Committee. Such amendments are likely to be met by legal challenges, as have the MVP amendments. *Sierra Club, Inc. v. United States Forest Serv.*, 897 F.3d 582 (4th Cir. 2018) (holding that the Forest Service violated the 2012 planning rule in amending the Jefferson National Forest land and resource management plan to exempt the MVP from plan components).

No issue was as hotly contested during the formation of the 2012 Rule than how it would meet NFMA's requirement to "provide for a 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. The diversity regulations in the 1982 Rule required that "fish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area." 36 C.F.R. § 219.19 (1982). This substantive provision was used with considerable success by conservation interests to challenge in court USFS decisions at the project-level and served as an important constraint on management activities.

The Bush Administration eliminated the provision altogether with the 2008 planning rule, which did not require plans "insure" viability or even provide a "high likelihood" of viability. Offered instead was a more discretionary framework emphasizing "appropriate ecological conditions." Predictably, this approach was opposed by conservation interests and the 2008 Rule was vacated by a federal court. *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 481 F. Supp. 2d 1059 (N.D. Cal. 2007).

The 2012 Rule approached diversity in a more inclusive fashion. The new diversity provision serves as a significant constraint on forest management, because other parts of the Rule—such as those focused on multiple use and timber—must meet the new diversity requirements. Forest plans are "to keep common native species common" and to "contribute to the recovery of threatened and endangered species." 36 C.F.R. § 219.9(b)(1). The Rule adopts an ecosystem and species-specific approach to providing diversity and the persistence of native species in the plan area: the "coarse-filter/fine-filter" approach. Framed in the context of ecological integrity, the Rule requires that plan components "maintain a viable population of each species of conservation concern in the plan area." *Id.* In practice, this means that a forest plan will include plan components for the ecosystem characteristics needed for diversity (coarse filter) and if those are insufficient, the plan will provide more specific plan components for individual species (fine filter).

We have seen substantial variation in how some of the language in this provision is being interpreted in the plan revisions now underway. Concepts such as "known to occur in the plan area," or what constitutes "substantial concern" or "capability to persist over the long-term," are often undefined, leading to differences of interpretation among forests and stakeholders. 36 C.F.R. § 219.9(c). Some tension is evident within and outside the agency regarding how much variation is acceptable across the different regions of the NFS and whether there should be more national-level direction provided by the agency. Without more consistency, one probable outcome is that the judiciary will determine what these terms mean and how they must be implemented.

New in the 2012 Rule is a provision requiring the Forest Service to "use the best available scientific information [BASI] to inform the planning process." 36 C.F.R. §219.3. The ultimate impact of this carefully parsed language is yet to be determined, as its application has yet to be tested in court. Facially, the provision appears to be more substantive than simply requiring that best available science be "taken into account," but it was not intended by the Forest Service to go beyond the "arbitrary and capricious" standard used in judicial review, nor is it as powerful as the Endangered Species Act's mandate that decisions be made "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b) (1)(A). This BASI provision will not likely change the typical discretion afforded to the agency by the courts nor will it preclude the Forest Service from making decisions based on values and factors going beyond science. What it will likely change, at the margins, is how the Forest Service documents the use and consideration of best available science at the planning level.

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The provision could possibly make a difference when outside interests challenge the Forest Service on some of the more nondiscretionary and technical parts of the 2012 Rule, such as managing for the diversity of plant and animal communities. As discussed above, the wildlife provision requires maintaining a viable population of a species of conservation concern, one that is "*known to occur* in the plan area and for which the regional forester has determined that the [BASI] indicates *substantial concern* about the species *capability to persist* over the long-term in the plan area." 36 C.F.R. 219.9(c) (emphasis added). These are particularly science-based determinations, and the BASI provision will require the USFS to explain more thoroughly to the public and substantiate how the science was applied to the issues considered. The BASI language could also make it more difficult for the USFS to reduce the conservation measures found in existing plans, unless the science clearly demonstrates that such measures are not effective and need to be removed or replaced in plan revisions.

Lessons Learned and Management Recommendations

The Committee believes that "one of the hallmarks of a 'good' forest plan is whether the Forest Service is able to efficiently and quickly implement projects that tier to the forest plan." Nat'l Advisory Committee Final Recommendations, *supra*. As members of the Committee, we often observed a problematic pattern by the Forest Service to postpone hard decisions that should be made in a forest plan and instead defer them to

project-level analysis. There is an affinity to plan now to plan again later, to punt to the project level. Some members of our Committee expressed fatigue in fighting the same battles over and over again at the project level and instead preferred to make the hard decisions and trade-offs at the plan level.

A “big picture” forest plan can expedite the projects tiering to it, thus providing a higher degree of regulatory certainty and clear expectations for the public and decision makers. 16 U.S.C. § 1604(i) (“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”); 36 C.F.R. § 219.15(b) (2012) (“Projects and activities authorized after approval of a plan, plan amendment, or plan revision must be consistent with the plan”). If the 2012 Rule is used to its full potential, a forest plan could create additional efficiencies for the agency such as guiding the use of wildland fire, identifying opportunities to restore fire-adapted ecosystems, establishing restoration and conservation priorities, and promoting the recovery of ESA-listed species. Because the Forest Service must plan, it should go all-in and use the process, and the tools provided in the 2012 Rule, in a more strategic and proactive fashion.

We remain concerned that the Forest Service’s prioritization of line officer discretion will undermine a purpose of forest planning, a process specifically designed to evaluate trade-offs and provide regulatory certainty for users.

The 2012 Rule provides a rare opportunity to bring the principles and practice of adaptive management to the national forest planning. Rather than using adaptive management at the project level, or as an ad hoc management response to a single conflict or issue, the 2012 Rule provides a more strategic adaptive framework. For it to work, a shift in organizational culture is necessary. The Forest Service must identify, at the assessment phase of planning, key assumptions, risks, and areas of uncertainty that are relevant to decision-making. It must then commit itself to finding the answers through a more purposeful system of monitoring that is tied back into decision-making. The best chance of success will be conducting this monitoring with the public and other stakeholders. The public must be provided clear expectations of what management actions will be taken in response to monitoring information and how this information will be used to make better decisions in the future.

We fear that forest plans will use adaptive management as a way to avoid making tough decisions and to maximize agency flexibility and discretion. Indeed, the Committee probably

discussed no issue more than the tension between “management flexibility” and “accountability.” On one hand, line officers desire maximum flexibility to allow them to make decisions based on ground-level conditions, variances in agency staffing and funding, political considerations, existing priorities, and myriad other factors. On the other hand, the public and forest users want to know what to expect when it comes to site-specific projects or management decisions affecting natural resources-based businesses such as ranching or permitted recreation. But the lack of specific, measurable, achievable, relevant, and time-bound plan components in most revised plans significantly frustrates this expectation. We remain concerned that the Forest Service’s prioritization of line officer discretion will undermine a purpose of forest planning, a process specifically designed to evaluate trade-offs and provide regulatory certainty for users.

Regarding certainty, over our terms as Committee members, we repeatedly heard from stakeholders engaged in forest planning that their biggest frustration was the high level of agency turnover and personnel transitions. Forest Service culture and practice encourages employees to undertake assignments away from their home forest—“move out to move up” (creating turnover)—which creates vacant positions that often either are not filled at all or are filled by other employees with other full-time duties. While this may be a good career strategy for agency employees, it is extremely disruptive for stakeholders and makes building relationships between users and managers nearly impossible because agency personnel are constantly changing and new personnel are unfamiliar with the “social ecology” of a new forest assignment. For an image-challenged agency, disruptive personnel changes undermine the planning process that was expressly intended to value and respect relationship in a new way.

Giving voice to what Committee members heard nationally from stakeholders across the spectrum, the Committee developed formal recommendations regarding how to manage the transition process that built on national guidance already in place. Unfortunately, most land managers are still unfamiliar with either the existing guidance or the Committee’s recommendations on transitions, and we have yet to see those recommendations embraced by the vast majority of forest plan revision teams or other line officers and staff who are in critical partnership or planning roles. Until the Forest Service is able to create a management structure that takes care to manage and protect relationships, we fear the planning process under the 2012 Rule will be no more successful than prior planning efforts.

A related complication stems from inadequate funding and training. Congressional appropriations for planning have been trending downward for decades, and, as an “unsexy” line item in the agency’s budget, this trend is unlikely to change. The 2012 Rule is a dramatic departure from prior planning rules, and is rather complex; consequently, line officers and planning staff often are unfamiliar with the Rule itself or the very lengthy directives that guide planners through the process. While the Forest Service has instituted some training modules and other learning opportunities, we have been surprised by the lack of basic understanding of the 2012 Rule exhibited by many who are directly and ultimately responsible for its implementation.

Funding for planning and training are essential to faithful execution of the Rule, without which projects (which are

what stakeholders, users, and congressional decision makers are really interested in) will not occur. Concerted education of and outreach to federal appropriators and legislators is therefore necessary. There are numerous partners, including former Committee members, who are well-positioned to advocate for adequate forest planning funding, staffing, and training.

Unanswered questions remain. The 2012 Rule was immediately challenged in court by several forest user groups, arguing that the new Rule exceeded statutory authority and failed to comply with NFMA and other laws. The district court eventually dismissed the industry plaintiffs' lawsuit, holding that the plaintiffs failed to demonstrate that they had standing to bring their suit because they could not demonstrate that the 2012 Rule caused the plaintiffs immediate and particularized harm that could be remedied by the court. *Fed. Forest Res. Coal. v. Vilsack*, 100 F. Supp. 3d 21 (D.D.C. 2015). Instead, the court indicated that the plaintiffs would have to wait until new forest plans were revised under the Rule to show how the Rule harmed their interests.

Now that the Forest Service is finalizing revised plans under the 2012 Rule, it is likely that many stakeholders across the interest spectrum will seek to challenge aspects of a particular National Forest plan and/or the 2012 Rule with which they disagree. Many concepts in the new Rule are themselves untested, technical, and subject to interpretation. While one of the stated "purpose and need[s]" of the 2012 Rule was to create a more certain regulatory and legal environment by revising the 1982 Rule, it remains to be seen whether the Forest Service is instead trading one problem child for another. In some cases, it may be true that the devil you know (the 1982 Rule and all its shortcomings) is better than the one you don't (the 2012 Rule and its uncertainties). We expect many of the issues highlighted in this article ultimately to be resolved by the courts.

The Legacy of the Omnipotent Forester

In 1966, Richard Behan published *The Myth of the Omnipotent Forester*, wherein he cautioned professional foresters

against believing that their technical training and expertise could override public desires for their public forestlands. Instead, Behan argued that a forester's job was to listen to the public and use his expertise (and it was "his" expertise) to meet society's objectives. More recent musings have expressed concern that modern foresters have not heeded Behan's warnings, to the detriment of not only society, but the forests we all love.

We agree with Behan and these critics. Forest management—and planning—is not a technical problem to be solved by expert foresters, wildlife habitat models, sustained yield calculations, or adaptive management. Instead, it is a social problem to be resolved in a transparent and participatory process—one informed by science and other values—with affected stakeholders. Stakeholders want to know that forest managers hear and understand their views and desired outcomes, and to see their views reflected in the resulting forest plan and the subsequent projects that implement it. The 2012 Rule provides a carefully crafted participatory framework, one that needs to be embraced more fully by the Forest Service, because the future of the National Forest System requires shared stewardship with the public, to whom these forests belong.

Many in the Forest Service understand their public role and responsibilities well, but too many still cling to the belief that agency personnel know best how to accomplish planning goals. This hubris is palpable to stakeholders, even if it is understandable at times, as forest users often do not fully grasp the ecology of an area, the agency's legal and budgetary constraints, or other limitations and considerations that forest managers confront every day. This ignorance is just as frustrating to line officers as the line officers' pretention is frustrating to public stakeholders.

Still, we believe that the 2012 Rule provides a framework and the tools necessary to overcome the impasse found so often regarding our national forests. In this effort, we hope the Forest Service remembers that its job is to promote unity by serving the public, in order to bring the greatest good to the greatest number of people for the longest time. 🌲