

June 14, 2017

Secretary Ryan Zinke
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

Dear Secretary Zinke:

In Executive Order 13777, “Enforcing the Regulatory Reform Agenda,” 82 Fed. Reg. 12285 (March 1, 2017), the President directed federal agencies “to alleviate unnecessary regulatory burdens placed on the American people.” On behalf of the forest community, we would like to bring to your attention several policies and regulations adopted last year by the U.S. Fish and Wildlife Service (FWS) which we believe warrant adjustment to eliminate unnecessary obstacles to achieving conservation benefits from working forests. Revision of these regulations and policies would also contribute to the goals of Executive Order 13790, “Promoting Agriculture and Rural Prosperity in America,” 82 Fed. Reg. 20237 (April 27, 2017), to achieve a “reliable, safe, and affordable food, fiber, and forestry supply.”

There are 521,154,000 acres of timberland in the United States, with about 62% in private ownership. The forest products sector and society as a whole rely on the continued abundance of healthy and productive private and public forest resources for present and future generations. America’s privately-owned forests are one of the country’s greatest resources. When managed for long-term productivity, they offer a wide range of benefits to our nation’s economy, energy portfolio, environment, and society. Policies that restrict markets or impose burdensome regulations can stifle these benefits or even eliminate them entirely if the land is converted to other uses as a result. The forest products industry directly employs more than 900,000 people with an annual payroll of \$54,294,000,000. The sector ultimately supports a total of 2.4 million jobs nationwide.

A. Voluntary Conservation

Before identifying policies and regulations of concern to forest owners, we urge FWS to continue, and even increase, its support for voluntary conservation efforts to conserve listed species and species at risk of being listed under the ESA. Private lands provide a variety of habitats for listed species and species at risk. Private forest owners can manage their lands to enhance the availability of these habitats over the landscape. We strongly encourage FWS to continue its work on conservation projects with private forest owners, forest products manufacturers, and other stakeholders. We believe this is best achieved through the use of innovative partnerships negotiated directly with landowners. For listed species, the creative use of existing tools can encourage voluntary efforts by private forest owners. For example, rules under section 4(d) of the Endangered Species Act (ESA) that recognize forest management and harvest activities consistent with best management practices and sustainable forest management contribute to conservation of the listed threatened species. The cooperation of private forest owners can provide essential information on species status

and recovery. FWS should encourage these efforts through management support, grants and other incentives. Strong and active support from the Secretary and FWS headquarters for these collaborative efforts will help ensure the continuation and success of these efforts.

The forest community is a critical partner to FWS in the conservation of species, both listed and at risk of listing. FWS should encourage agency staff to engage with private forest owners and others in voluntary conservation efforts and should avoid the adoption of regulations that would discourage such efforts.

Recommendation: FWS must demonstrate its support for voluntary conservation efforts by eliminating regulations and policies that discourage private forest owners from participation by creating unnecessary distrust. We summarize the most recent such obstacles below. In addition, FWS should examine the processes for reviewing and approving candidate conservation agreements with assurances and habitat conservation plans to ensure the elimination of inefficiencies and other impediments to an efficient review.

B. Critical Habitat Regulations¹

- Final Rule on Critical Habitat Designation Procedures, 81 Fed. Reg. 7,414 (Feb. 11, 2016)
- Final Rule on Adverse Modification, 81 Fed. Reg. 7,214 (Feb. 11, 2016)

The clear thrust of these final rules is to make critical habitat the centerpiece of recovery for endangered and threatened species. Although the FWS seems to place considerable emphasis on analysis of the conservation needs of a species in order to designate critical habitat, this information is not generally well known at the time of listing and designation. This will increase the likelihood of pressure to expand the area designated as more information becomes available -- pressure that did not exist under prior regulations that lacked a similar emphasis on recovery.

While FWS acknowledged that Congress did not authorize designation of all habitat that could be occupied by the species, the definition of critical habitat included in the final rules allows designation of habitat that is not currently occupied but that has been determined to be essential for the conservation of the species. Furthermore, the agency may designate areas where the essential physical and biological features have been observed previously, but are no longer present if there is the reasonable potential that the features may occur again. This potential may exist even if it requires human intervention. FWS anticipated that critical habitat designations in the future will likely increasingly use the authority to designate specific areas outside the geographical area occupied by the species at the time of listing. As a result, the extent of critical habitat is likely to increase if determined using the procedures in the final rules, and areas outside

¹ These regulations were jointly adopted FWS and the National Marine Fisheries Service, a Commerce Department agency.

the current range of species are likely to be designated based on projected ecosystem responses to climate change.

FWS indicated that the amendments were intended to add clarity for the public, clarify expectations regarding critical habitat and provide for a credible, predictable, and simplified critical habitat-designation process. We believe that the regulations will have precisely the opposite effect.

Designation of critical habitat under the final rules will have a detrimental effect on the forested landscape due to the uncertainties and unpredictability regarding which land may be encumbered in the future. With the expansion of authority to designate unoccupied habitat, the uncertain and unpredictable reach of this provision has been multiplied. While designation of private forest land does not directly regulate private forest management on those lands, the secondary consequences can be substantial, such as diminishing the incentive and potential for voluntary conservation or influencing management to avoid development of essential habitat characteristics. Far-reaching critical habitat designations also may have implications under state forest practices regulations and third party forest certification standards. The potential for designation may well place a cloud on the value of the property as long as it remains forested, leading its owner to avoid further loss by converting the land to another use, even before a designation decision is made. Finally, the increased area of designated critical habitat will increase the likelihood of management delays due to federal nexus consultation.

Recommendation: If FWS desires to bring clarity, predictability, and simplicity to the critical habitat designation process, the agency should revise these regulations to an approach that focuses on habitat that is “critical” rather than speculative and restore specific identification of essential features. In the meantime, the secretary should issue appropriate guidance for the application of these regulations in a reasonable and balance manner.

The definition of “destruction or adverse modification” of critical habitat suggests that FWS will be making or using projections of future habitat conditions in some areas when determining whether actions preclude or delay development of future suitable habitat conditions. This process is likely to be influenced by assumptions about forest growth, future climate, responses of forests to management activities, future habitat suitability, and other factors, all of which will add uncertainty.

When the two rules are considered together, it appears that such determinations could occur for areas currently not occupied and where habitat conditions are currently not suitable. In such areas, the designation could trigger state requirements or expectations that forest managers must adjust their management to promote and facilitate progress toward projected future conditions. We believe that FWS has exceeded the intent of Congress.

Recommendation: Establish a consultation standard that is consistent with a more measured approach to the designation of critical habitat adopted under our first recommendation.

C. Mitigation Policies

- Final Revisions to Mitigation Policy, 81 Fed. Reg. 83,440 (Nov. 21, 2016)
- Final ESA Compensatory Mitigation Policy, 81 Fed. Reg. 95,316 (Dec. 27, 2016)
- Final Habitat Conservation Planning Handbook, 81 Fed. Reg. 93,702 (Dec. 21, 2016)

Mitigation policies should embrace a range of mitigation mechanisms. DOI should carefully evaluate the legality and policy benefits associated with the adoption of requirements for landscape scale mitigation, net conservation values, compensatory mitigation, and FWS examination of an applicant's current and projected profitability. These mitigation policies often exceed or at a minimum stretch the outer limit of the agency's statutory authority and will discourage rather than encourage voluntary participation. Mitigation is part of voluntary relief, not enforcement. In addition, these policies create an enormous process burden on the agency and the applicant. Resources devoted to excessive process detract from resources that could be applied for the benefit of species.

Section 10(a)(2)(B) requires that in order to approve a proposed habitat conservation plan (HCP) and issue the incidental take permit, the Secretary must find that the impacts of the incidental take are minimized and mitigated "to the maximum extent practicable." The final HCP handbook provides guidance on how to determine "maximum extent practicable" in section 9.5.2. The guidance requires that if impacts are less than fully mitigated, the applicant must demonstrate it has mitigated to the maximum extent practicable through an economic argument. However, section 9.5.3 specifies a process that was not included in the draft proposed for public comment: the applicant must submit financial statements and facilitate a Fish and Wildlife Service (agency) examination of current and projected profitability to demonstrate that the applicant can afford no more mitigation.

Businesses cannot just hand over financial statements to the agency and submit to a public utility commission-like examination of an acceptable level of profitability. There is no authority for this under the ESA, no specialized competence at the agency to review this financial information, and it creates huge FOIA and antitrust problems. Further, an applicant and the agency cannot know profitability of competitors to determine relative affordability. Finally, when this provision was litigated, the court found "maximum extent practicable" is not an "all you can afford" test. *Nat'l Wildlife Federation v. Norton*, 306 F. Supp. 2d 920, 927 n.12 (E.D. Cal. 2004). The same court also noted that the Fish and Wildlife Service should *not* become enmeshed in the applicant's "economic affairs and projections." 306 F. Supp. 2d at 928 (emphasis added).

Restrictive mitigation policies at a minimum will deter forest owners from realizing a compatible management regime, again leading to loss of value. This will also impact the certainty of raw material supplies that forest product manufacturers rely on. The cumulative effects of these consequences on the supply of logs and other forest

material may be localized or could be felt regionally, depending upon the scope of a particular listing(s).

Recommendation: All three policies should be withdrawn immediately.

D. Consultation

The consultation process under section 7(a)(2) and (b) of the ESA for agency actions is rife with delays and inequities. The deadlines of section 7(b)(1) are rarely if ever met without an extension forced on the action agency. All too often, the action agency must make substantial alterations to a proposed action to satisfy FWS' concept of "no adverse effect." Recognizing that the ESA establishes its own set of statutory responsibilities, FWS rarely recognizes that other agencies have statutory responsibilities of their own. For example, Congress has established the process for protection of the public and the environment for certain activities and products, yet FWS does not formally acknowledge the expertise of other federal agencies under such programs. Similarly, Congress requires multiple use and sustained yield of public lands, but FWS rarely factors these elements when reviewing actions proposed to allow these uses or to protect this yield.

Recommendation: The consultation process must be improved. FWS must establish policies that utilize the expertise of action agencies and recognize the statutory responsibilities of those agencies.

F. Reorganization

In Executive Order 13781, "Comprehensive Plan for Reorganizing the Executive Branch," 82 Fed. Reg. 13959 (March 16, 2017), the President called for recommendations on reorganizing the federal government "to improve efficiency, effectiveness, and accountability of the executive branch." ESA jurisdiction is divided between the Interior Department – terrestrial and freshwater species – and the Commerce Department – marine species. Having two agencies implement the same law is confusing enough but it becomes truly unworkable when addressing anadromous species, which spend an important portion of their life cycle in fresh water. This results in double consultations, double policy interpretations and double negotiations on agreements covering multiple species, causing unnecessary delays and confusion. It also creates a conflict of interest because the Department of Commerce also regulates fishing that directly affects listed species, in some cases the very salmon runs that are listed. Since the ESA gives the Secretary of the Interior primary jurisdiction, it only makes sense to merge all ESA implementation into the FWS.

Recommendation: Include combining all ESA jurisdiction in the FWS as part of your reorganization recommendations.

E. Conclusion

Cohesive ESA implementation is critical to gaining trust and support from the private sector. We look forward to providing our assistance as you develop

improvements for implementation of the ESA. Please contact Chip Murray at the National Alliance of Forest Owners, (202) 747-0742 or cmurray@nafoalliance.org, if we can provide additional information or provide assistance.

Sincerely,

Alabama Forestry Association
American Forest & Paper Association
Arkansas Forestry Association
American Wood Council
Association of Consulting Foresters
California Forestry Association
Empire State Forest Products Association
Florida Forestry Association
Forest Landowners Association
Forest Resources Association
Forestry Association of South Carolina
Georgia Forestry Association
Hardwood Federation
Louisiana Forestry Association
Maine Forest Products Council
Michigan Forest Products Council
Minnesota Forest Industries
Minnesota Timber Producers Association
Mississippi Forestry Association
Montana Wood Producers Association
National Alliance of Forest Owners
National Association of State Foresters
National Woodland Owners Association
New Hampshire Timberland Owners Association
North Carolina Forestry Association
Oregon Forest & Industries Council
Southeastern Lumber Manufacturers Association
Tennessee Forestry Association
Texas Forestry Association
Virginia Forestry Association
Washington Forest Protection Association