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Public Comments Processing

Attn: FWS-HQ-ES-2019-0115

U.S. Fish and Wildlife Service

MS: JAO/1N

5275 Leesburg Pike, Falls Church, VA 22041-3803

**Docket: FWS-HQ-ES-2019-0115; Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Designating Critical Habitat**

The National Association of State Foresters (NASF) represents the directors of forestry agencies in all 50 states, eight U.S. territories, and the District of Columbia. These agencies protect and help manage over 500 million acres of forest across the U.S., hand-in-hand with local governments, individuals, and families. They also regularly contribute to the management and protection of federally owned lands.

How the Endangered Species Act (ESA) is interpreted and enforced can significantly affect how, and if, forests nationwide are appropriately managed. This is because many of the ecosystems conserved with ESA protections depend on forested landscapes.

NASF has a substantial interest in how ESA provisions are applied and what consequences they have on the ground. NASF ardently supports ESA's goal of protecting threatened and endangered species. It also supports an updated ESA that encourages greater cooperation, more efficient regulatory processes, and a renewed emphasis on sound science in the management of threatened or endangered species.

Over the decades since ESA was enacted, NASF has observed how ESA provisions affect approaches to forest management, the costs of forest management, and the overall health of forests and forest-dependent species. The association is confident that ESA implementation can be improved without curtailing the conservation of threatened and endangered species.

We appreciate the opportunity to provide comments in response to the U.S. Fish and Wildlife Service's (FWS) Proposed Rule to revise the regulations for designating critical habitat. NASF's membership recently approved a policy statement, "Improving the Effectiveness of the Endangered Species Act," which has been submitted along with these comments.

Executive Director  
Jay Farrell

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Recent regulatory changes have clarified under what circumstances critical habitat designations may not be necessary, but there have been recent instances in which critical habitat has been designated, despite the designated site or landscape needing significant modification. NASF believes it is inappropriate for federal agencies to designate “habitat” or “critical habitat” in areas that would have to be substantially altered from their current condition to meet the habitat needs of a species.

The association also believes that FWS should:

- More closely evaluate the need for a critical habitat designation when loss of habitat is not the prevailing reason for decline.
- Require lands designated as critical habitat to have habitat attributes suitable for the listed species. Designated lands should not have to undergo significant change in order to provide suitable habitat.
- Only designate critical habitat in areas that are *necessary* to a threatened or endangered species’ recovery.

### **Recommendations on the Proposed Rule**

The association supports the rule changes FWS proposes in paragraphs (c)(1), which reiterates the Interior Secretary’s discretion in entering into an exclusion analysis, and in paragraph (c)(2), which describes the two circumstances in which FWS will conduct an exclusion analysis for a particular area.

The association also supports FWS exercising its authority provided under ESA to evaluate potential areas for exclusion from critical habitat designations, particularly when requests for such exclusions are science-based and made by those with relevant expertise. Although ESA allows for the consideration of economic impacts in the review of critical habitat designations, these impacts are not weighed heavily enough. We are pleased to see the FWS take steps to weigh the benefits of inclusion and exclusion based on input from those with relevant expertise, as described in proposed paragraph (d).

The association supports proposed paragraph (d)(1)(iii), which recognizes state and local governments may have credible information regarding potential economic or employment losses from a proposed critical habitat designation. We agree FWS information should be consistent with state and local government information regarding the benefits of designating or excluding specific areas and FWS should consider such information as part of any proposed critical habitat exclusion.

The association supports proposed paragraph (d)(1)(iv), which allows for consideration of an exclusion analysis on lands managed by the federal government. Additional administrative or transactional costs are incurred during consultation with a federal agency. Through litigation, special interests are able to use the Section 7 consultation process to marginalize the goals and authorities of other federal natural resource policies, including: (1) the Federal Insecticide,

Rodenticide and Fungicide Act of 1972, (2) the National Forest Management Act of 1976, (3) the Federal Land Policy and Management Act of 1976, and (4) the Healthy Forest Restoration Act of 2003. Even with recent changes, Section 7 consultations on federal projects can take substantial amounts of time, add considerably to project costs, and unduly constrain the active management necessary to improve forest health.

NASF recommends FWS provide guidance on and strengthen the provision that allows FWS to consider land use conversion as an adverse economic impact of critical habitat designations. The threat of forestland conversion to other uses should be considered alongside other threats to a species. As such, we propose that FWS include “threat of forestland conversion” in the list of economic, national security, and other relevant impacts within proposed paragraph (b) and in the list of economic and other relevant impacts in proposed paragraph (d)(2).

Specific to proposed paragraph (d)(3), NASF would stress that ESA requirements can make managing forests more expensive and/or more difficult and can accelerate the conversion of forests to other land types and uses. In at least one instance, state-owned public trust lands with a constitutional mandate to generate revenue were subject to ESA-related lawsuits that curtailed revenues to such an extent that the state was forced to sell the land and invest the proceeds elsewhere.

The same can happen with respect to privately owned forests, where ESA is feared instead of seen as an opportunity to partner for species conservation. If provisions of ESA inhibit a landowner’s ability to sustainably manage their forests, it increases the likelihood that the landowner will convert their land’s use to one less beneficial to the listed species. Private landowners often fear the repercussions a species listing may have on the use of their property. This fear often disincentivizes (1) monitoring for and reporting listed populations and (2) managing their land in ways that help protect listed species. The more landowners are at odds with ESA, the less access biologists and land managers have to listed species on private lands.

Proposed paragraph (d)(3) addresses particular areas covered by conservation plans, agreements, or partnerships that have been permitted under section 10 of ESA, including habitat conservation plans (HCP), safe harbor agreements (SHA), and candidate conservation agreements with assurances (CCAA). We appreciate the recognition by FWS that in most cases, HCP permittees commit to do more for the conservation of the species and their habitats on their non-federal lands than designation of critical habitat would provide alone. Cooperative agreements allowing state-level management and issuance of incidental take permits are very difficult to achieve. We recommend FWS place greater emphasis on allowing states to manage endangered and threatened species through cooperative agreements.

The association supports the intent of FWS to always consider whether to exclude areas covered by a permitted CCAA/SHA/HCP, and anticipating consistently excluding such areas from a designation of critical habitat if incidental take caused by the activities in those areas is covered by the permit under section 10 of the Act and the CCAA/SHA/HCP meets all of the conditions laid out in proposed paragraph (d)(3). However, item 1 under the list of conditions in proposed paragraph (d)(3) – “*The permittee is properly implementing the conservation plan or agreement*” – is vague language and does not offer clear direction. Either an applicant is in compliance with

the plan/permit or they are not. Whether an applicant is 'properly implementing' a plan is very subjective and not a clear way to measure whether or not to exclude the area from a critical habitat designation.

By and large, NASF has been supportive of ESA rule changes over the years; however, it still maintains there are issues left to be resolved. We appreciate the efforts of FWS to provide greater transparency and certainty for the public and stakeholders regarding ESA implementation and thank you for considering our comments.

Sincerely,



Joe Fox  
President, The National Association of State Foresters  
Arkansas State Forester

Executive Director  
Jay Farrell

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