



March 4, 2019

**Via Federal eRulemaking Portal: <http://www.regulations.gov>**

Attention: FWS–R8–ES–2018–0105  
United States Fish and Wildlife Service, Headquarters MS:BPHC  
5275 Leesburg Pike  
Falls Church, VA 22041-3803

**Re: Proposed Rule Listing West Coast Fisher as a Threatened Species;  
Docket No. FWS–R8–ES–2018–0105, 84 Fed. Reg. 644 (Jan. 31, 2019)**

To Whom It May Concern:

The American Forest Resource Council (AFRC) submits the following comments pursuant to the Fish & Wildlife Service's (Service) reopening of the 2014 proposal to proposed rule to list the West Coast distinct population segment (DPS) of fisher (*Pekania pennanti*) as a threatened species under the Endangered Species Act (ESA). AFRC previously commented on February 4, 2015; those comments are incorporated by reference.

The fisher presents an outstanding opportunity for collaborative conservation efforts between the government, private industry, and nongovernmental organizations to bear fruit. Since the Service's 2016 withdrawal decision, these stakeholders have worked together to reintroduce fishers, understand their habitat better, and create binding long-term commitments for fisher conservation. These measures should be the core of the Service's present evaluation.

AFRC is a regional trade association whose purpose is to advocate for sustained yield timber harvests on public timberlands throughout the West to enhance forest health and resistance to fire, insects, and disease. We do this by promoting active management to attain productive public forests, protect adjoining private forests, and assure community stability. We work to improve federal and state laws, regulations, policies and decisions regarding access to and management of public forest lands and protection of all forest lands. Because AFRC is interested in making species conservation efforts align with timber supply needs, we offer the following comments. AFRC has a strong interest in ensuring that decisions under the ESA are made considering all appropriate factors. AFRC also incorporates the comments of the National Council on Air & Stream Improvement, California Forestry Association, Washington Forest Protection Association, Oregon Forest & Industries Council, and Washington Department of Fish and Wildlife.

Along with several other associations, AFRC intervened as a defendant in the court challenge to the Service's 2016 withdrawal decision. That decision was vacated, due largely to the court's concerns about threats from anticoagulant rodenticides and the interplay between stressors and small and/or isolated populations. *Center for Biological Diversity v. U.S. Fish & Wildlife Serv.*, No. C 16-6040 WHA, Order on Cross-Motions for Summary Judgment, ECF No. 80, 342 F.Supp.3d 968 (N.D. Cal. Sept. 21, 2018) (SJ Order). At the Service's request, the court has allowed until September 21, 2019, to submit a revised determination on the 2014 proposed rule. *Id.*, Order on Motion to Alter or Amend Judgment, ECF 91 (Nov. 20, 2018).

The court was careful to note that its order "does not mandate that the Service *must* list the Pacific fisher as threatened. . . ." SJ Order at 15. Accordingly, it is imperative that the Service take a careful look at the five listing factors and ensure that, pursuant to the ESA's requirements, it is acting on the basis of the "best scientific and commercial data available," 16 U.S.C. § 1533(b)(1)(A), rather than speculation or surmise. *Cf. Bennett v. Spear*, 520 U.S. 154, 176 (1997) (holding that ESA section 7(a)(2)'s "best available data" requirement is designed to "ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise").

### **Population status and private conservation efforts**

Since 2016, massive cooperative conservation efforts have been undertaken for benefit of the fisher. These include private candidate conservation agreements with assurances (CCAAs) by private landowners such as Sierra Pacific Industries and Green Diamond, as well as "master" CCAAs developed in cooperation with the state wildlife agencies in Washington and Oregon. All told, these CCAAs ensure that several million acres will be covered by take avoidance measures and will be available for research and potential reintroduction. Reintroduction efforts in Washington have brought together disparate stakeholders including environmental groups. If the fisher were to be listed, these efforts would be devalued and the future of reintroduction becomes doubtful. The Service *must* fully consider state-associated efforts under ESA Section 4(b)(1)(A), which provides listing determinations may be made "after taking into account those efforts, if any, being made by any State . . . , or any political subdivision of a State . . . , to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction." 16 U.S.C. § 1533(b)(1)(A).

New data also indicates increasing robustness of existing fisher populations and increasing indications that active forest management and fisher conservation are complementary and even synergistic efforts. For example, fisher have been observed denning in timber harvest slash piles, and fishers have been observed seeking out areas with edges related to timber management, possibly due to prey availability. M.A. Parsons, *Effects of forest management, prey, and predators on the habitat selection of fishers in the South Cascades of Washington* (2018). In developing its Fisher Conservation Strategy in California, the Forest Service has identified the need to actively manage vigorous stands in light of potential threats from widespread tree mortality, and its view has been endorsed by the courts. *Sequoia ForestKeeper v. La Price*, 270 F.Supp.3d 1182, 1217-18 (E.D. Cal. 2017), *aff'd*, 723 F. App'x 481 (9th Cir. 2018). Additionally, recent data shows greater confidence that population growth rates in

California are at or above 1.0. K.C. Purcell et al., *Sugar Pine fisher project final report: a continuation of the Sierra Nevada Adaptive Management Project* (SNAMP) (2018). This satisfies the concern of Judge Alsup that the Service unduly extrapolated from confidence intervals spanning 1.0. SJ Order at 13.

Because the conservation efforts described have been implemented after the 2016 withdrawal (and after the 2014 proposal), they are—in themselves—sufficient basis for the Service to withdraw the proposed rule. The United States Court of Appeals for the District of Columbia Circuit upheld withdrawal of a proposal to list the dunes sagebrush lizard where “the Service received updated information about the conservation efforts in the two States and by the Bureau of Land Management in New Mexico.” *Def. of Wildlife & Ctr. for Biological Diversity v. Jewell*, 815 F.3d 1, 3 (D.C. Cir. 2016). The court affirmed that the Service “could rely on a state voluntary conservation agreement as a basis for withdrawing its proposed listing,” where the Service determined the agreement was sufficiently certain to be implemented under its Policy for Evaluation of Conservation Efforts. *Id.* at 5-6. Here, the CCAAs at issue are sufficiently certain to be implemented and in fact are being implemented. They cover substantial portions of the species’ range—several million acres—so they are game-changers for the fisher. They virtually compel the Service to withdraw the proposed listing rule.

In evaluating conservation and regulatory efforts for the fisher, the Service should make clear that measures not specifically developed for the fisher may still be significant so long as they have beneficial *effects* on fisher conservation. This issue has been a subject of confusion, particularly regarding the landscape-scope measures of the Northwest Forest Plan (NWFP). *Center for Biological Diversity v. U.S. Fish & Wildlife Service*, 246 F.Supp.3d 1272, 1283 (N.D. Cal. 2017) (discounting effects of NWFP because it did not contain “special protections for the coastal marten”).

### **Anticoagulant rodenticides are subject to more regulation**

Many of the concerns relating to anticoagulant rodenticides stem from illegal marijuana cultivation. However, all three west coast states have now legalized and regulated recreational marijuana possession and sale, with the Washington law effective in 2013, Oregon legislation becoming fully effective in 2016 and the California law at the beginning of 2018. RCW Chapter 69.50; ORS Chapter 475B; Cal. Health & Safety Code § 11362.1.

One of the purposes of the California law, passed by initiative, was to “create strict environmental regulations to ensure that the marijuana is grown efficiently and legally, *to regulate the use of pesticides*, to prevent wasting water, and to minimize water usage.” Control Regulate and Tax Adult Use of Marijuana Act, § 2.F, 2016 Cal. Legis. Serv. Prop. 64 (Proposition 64) (emphasis added). Under Proposition 64, the California Bureau of Licensing is required to develop regulations that “ensure compliance with state laws and regulations related to environmental impacts, natural resource protection, water quality, water supply, hazardous materials, and pesticide use in accordance with regulations” including the California ESA. Cal. Bus. & Prof. Code § 26056. The law also provides for provide “environmental cleanup and restoration of public lands damaged by illegal marijuana cultivation.” Prop. 64 § 2.C.

Similarly, Washington law provides for cleanup of hazardous materials found at a controlled substance production site. RCW 69.50.511. Washington also authorizes a broad spectrum of injunctions against drug nuisances in “any structure or any separate part or portion thereof, *whether permanent or not, or the ground itself.*” RCW 7.43.020(2) (emphasis added). Marijuana grow operations can thus be stopped by the state or private citizens. The Service must grapple with the implications of these laws.

**Consultation guidance is needed if the species is to be listed**

Permitting active management is the best way to build fire resilience in the forest and further the conservation of species like the fisher. A 4(d) rule for timber management may not be necessary if the CCAAs are broad enough to allow further enrollments. Otherwise, the Service should prepare a 4(d) rule to exclude ordinary timber practices from the take prohibition so long as the specified mitigation measures are followed.

It stands to reason that most, if not all, of the federal projects that would otherwise fit the description in the 4(d) rule would be found not likely to adversely affect fisher. A statement either in the rule itself or the final Federal Register notice that federal activities consonant with those in the 4(d) rule are exempt from formal section 7 consultation, as they are presumed not likely to adversely affect fisher, would go a long way toward easing the regulatory burden of a potential listing. Such provision is well within the Service’s authority under the ESA. 16 U.S.C. § 1540(f).

Thank you for the opportunity to provide these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Travis Joseph". The signature is written in a cursive, flowing style with a large initial "T".

Travis Joseph  
President